BY THE RULES

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Written by:

Fatma Elif Koru and Noam Hofstadter

With the contribution of:

Bana Shoughry-Badarne, Kerem Altıparmak, Rachel Stroumsa, Omri Grinberg, Yuval Ginbar (Special consultant on torture in Israel)

Edited by: Tal Rogoff

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Introduction

This research began by questioning the root causes of impunity for torture and other forms of ill treatment[1] in Turkey and Israel. Our main focus was the means by which states construct the regime of impunity. Yet in examining this question, we have been motivated not only by an academic curiosity regarding the nature of impunity, but also by the hope of finding common tools in the fight against torture.

There are several glaring differences between Israel and Turkey, in terms of their respective size, history, and ethnic and religious make up. Yet the two countries do share significant similarities, not only by virtue of their relative geo-political closeness, but also — and mostly — in terms of the challenges encountered by the state's sovereignty. These include significant ethnic tensions, increasing protests by citizens over economic and political issues, political factions debating the state's democratic character, and continuous violence and unrest in neighboring countries.

The two countries also share a harrowing history of widespread and systematic torture in the 1980s and 1990s. Since then, the frequency and nature of torture have changed in different ways, which will be examined in the research.

This comparative study sets out to provide a portrait of the legal and procedural frameworks relating to torture in both Israel and Turkey, and the realities they take part in shaping. In particular, the study will address the definition and regulation of torture and ill-treatment in criminal law; the effectiveness of these in practice; whether criminal procedural law enables effective prosecutions in cases of torture and ill-treatment; and the implementation of procedural law.

The concepts of 'state security', 'public order' and 'emergency situation' are widely used to allow, justify, and protect torture through various state institutions.[2] The current study aims to show that, in the Israeli case, explicit mentions of state and public security function as an organizing principle for the State's treatment torture and abuse- from substantive legislation, through the procedural rights of detainees, to investigation and punishment of torture. In the case of Turkey, these concepts, with particular focus on public order, are essential in understanding the practice of torture and the weakening of procedural safeguards.

We have throughout attempted to assess the practice of torture and its investigation by referring to internationally accepted principles and standards. The study first assesses the domestic provisions in both countries' laws which enable impunity after acts of torture and other forms of ill-treatment, according to international standards. The second variable in this research are the procedural safeguards which are meant to ensure the efficacy of the measures to prevent torture and other forms of ill treatment. We, therefore, also evaluate here the legislation which ensures procedural safe guards and their implementation.

[1] Other forms of ill-treatment is predicating cruel, inhuman or degrading treatment or punishment throughout the research

[2] This makes the current research a case study in a well-established, multi-disciplinary field that addresses the political use of security measures, in general and specifically after 9/11, and its effect on state authorities and specifically the authorities granted to security forces vs. civilians' human rights; and on the definition of 'enemy' and its application towards ethnic and political groups. Our eyes, however, are on the cases of Israel and Turkey and their nuances, while theory serves in the background.

Chapters 1 presents the picture in detail: we discuss the practice of torture law: what type of offenses, if at all, are used to prosecute state officials for acts that amount to torture or other forms of cruel, inhuman or degrading treatment; and what are their consequences in terms of indictments, punishments, deterrence, and vis-à-vis demands of international law.

Chapter 2 then presents the authority, structure and practice of official investigation and prosecution bodies that handle complaints of torture. Relevant monitoring authorities are similarly examined. In light of these, derogations of detainees', and specifically torture victims' procedural rights is scrutinized, in law and in practice.

The question posed is whether one can identify similar patterns in the two countries, which allow them to avoid taking responsibility for their current and ongoing use of torture, and resist complying with international treaties they are party to. Our research suggests that such similarities in pattern do indeed exist, despite the differences in application; and that this leads to particular practical recommendations in the struggle against torture and impunity.

Admittedly, there is much more work to be done in each country and in drawing specific comparisons between them, especially by gathering empirical data on how laws and regulations come into play and analyzing them critically. In addition, a historical analysis specific to the two countries is not included, focusing instead on current conditions. This study should therefore be viewed as a preliminary case-study in highlighting key issues. Our hope is that it will serve as the basis for further analysis, both in the specific cases of Turkey and Israel and in other regions and states.

CHAPTER I

SUBSTANTIVE LAW REGARDING TORTURE AND OTHER FORMS OF ILL-TREATMENT

I. INTERNATIONAL FRAMEWORK

This section will set forth elements of the crime of torture and States' obligations to prevent ill treatment, identified by examining the prohibition of torture under international law and various legal instruments Accordingly, elements of the crime under domestic laws of Israel and Turkey will be introduced in order to show whether they comply with their standing obligations to international standards which they ratified and to which they committed.

A. Prohibition of Torture in International Treaties

The prohibition of torture as a general principle of law is found in a number of international human rights and humanitarian instruments, such as the Universal Declaration of Human Rights [3] (hereinafter referred to as "UDHR"). The pivotal role of treaties in standard-setting and enforcement necessitates a discussion on international treaties regarding torture. this study addresses the UN treaties to which both Israel and Turkey are parties, such as the UN Convention Against Torture (UNCAT); and also discusses the European Convention on Human Rights for its principal influence on Turkish legislationThe two treaties operate on different scopes, and some

[3] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res.. 217 A (III)

states, including Israel, are party to UNCAT but not ECHR. Yet these instruments are mutually relevant and [reference each other within their jurisdictional statements] …

The prohibition of torture is absolutely and fundamentally embedded within international law.It is deemed a peremptory norm or *jus cogens*, and therefore cannot be abrogated by treaty law or other rules of international law, pursuant to the Vienna Convention on the Law of Treaties.[4]

As international law has developed, other instruments that affirm the express and unwavering proscription of torture have emerged. Article 5 of UDHR states, *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;"*[5] and this declaration has been echoed and expanded in subsequent treaties. Article 7 of the International Covenant on Civil and Political Rights (CCPR) reiterates this declaration and adds that*"no one shall be subjected without his free consent to medical or scientific experimentation*[6]."

The UN Convention on the Rights of the Child[7] (CRC) recognizes that freedom from torture is also applicable to children: *"No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."* Further, regional agreements such as the ECHR have also incorporated this on the absolute ban of torture and other forms of ill-treatment[8].

A number of torture-specific treaties have also come into effect. The most notable of these, which are also relevant to the present discussion, are the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (UNCAT) andthe European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

B. Definition of Torture and Other Forms of Ill-Treatment

This section will analyzes the definition of torture with reference to the UNCAT, which provides the most comprehensive definition, and the jurisprudence of monitoring mechniams, such as the Committee Against Torture (CAT) and European Court of Human Rights (ECtHR). This [aids] in understanding the scope of what is legally considered torture, and thus what is prohibited.

The UNCAT was the first international treaty to embody the definition of torture.[9] Article 1 of the Convention states:

"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or

[4] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 53.
[5] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res.. 217 A (III), Article 5
[6] International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 7.
[7] United Nations Convention on the Rights of the Child(adopted 20 November 1989) UNGA Res. 44/25
[8] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), Article 3
[9] Chris Ingelse (2001), *The UN Committee Against Torture: An Assessment*, The Hague: Kluwer Law International, p. 206

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."

1. Elements of Torture

According to Article 1 of the UNCAT, the elements of torture include: nature of the act, intention of the perpetrator, purpose, and involvement of public officials or other persons acting in official capacity.

a. The Nature of the Act

Under Article 1 of the UNCAT, the nature of the act is depicted as "*any act by which severe pain or suffering, whether physical or mental ....inflicted*". "Acts" in this sense include both affirmative acts and omissions.[10] Article 16 characterizes other forms of ill-treatment, commonly referred to as "cruel, inhuman or degrading," as a forbidden *" acts... which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."* Many elements of torture and other ill-treatment overlap, except for the additional element of severity required for torture under Article 1. Even though it may be claimed that the word "severe" was chosen to make a distinction between torture and other forms of ill-treatment, the CAT has itself recognized that "in practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear"[11]. The UN Special Rapporteur on Torture has further expounded on this ambiguous delineation between torture and other forms of ill-treatment, reasoning that *"a thorough analysis of the travaux préparatoires of articles 1 and 16 of UNCAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted."*[12]

The authorities above suggest that pain intensity is not determinative in distinguishing between torture and other forms of ill-treatment; but intensity of force is still a substantial factor in certain situations. In a case where the force is used legally for a lawful purpose, and it is not excessive and is proportional, the force used will generally not amount to cruel, inhuman or degrading treatment (CIDT).[13] The threshold for acceptable force is much lower in situations of powerlessness, as

[10] United Nations Voluntary Fund for Victims of Torture, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies, p.3, available at http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf

[11] CAT, GC 2, "Implementation of article 2 by State Parties", UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), para.3

[12] Reporter of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), para.39

[13] Manfred Nowak and Elizaveth McArthur, "The distinction between torture and cruel, inhuman or degrading treatment", *Torture*, Vol. 16, No.3, 2006, pp. 147-151

mentioned above. In detention, or other situations of direct control that similarly amount to deprivation of liberty, it is accepted that any form of physical or mental pressure or coercion constitute at least CIDT, regardless of the proportionality test.[14]

Despite the sometimes blurry yet persistent distinction between torture and other forms of ill treatment, it is clear that the UN Committee Against Torture (CAT) aims to guarantee the same safeguards and protection for both categories of ill-treatment: *"Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment."*[15] This proclamation by the CAT, excerpted from General Comment 2, represents a clear shift in the torture/CIDT distinction. States are now obligated to prevent torture and other forms of ill-treatment by applying the same UNCAT measures to all forms of ill-treatment, irrespective of varying levels of severity. Originally, the only safeguards against CIDT that were mandated by the UNCAT included education (Article 10), review of interrogation rules and other arrangements for persons in custody (Article 11)), prompt and impartial investigations (Article 12) () and victims' right to submit a complaint to competent authorities for investigation (Article 13). . Ultimately, General Comment 2 of the CAT illustrates a favorable change in CAT's approach to effectively preventing all forms of ill-treatment, so that it is closer to the approach of the ECtHR[16].

Given this development and interpretation in international law, the choice of the word 'severe' must not be apprehended in a way that allows a dichotomous justification for ill-treatment in certain circumstances, while the prohibition of torture is absolute. In the context of the safeguards, which will be discussed further in the procedural section of this study, there is no distinction between torture and other forms of ill-treatmentHowever, severity is not irrelevant. Punishment of actors who are responsible for torture or other forms of ill-treatment will differ according to the severity of the act, as well as the circumstances in which it was perpetrated.

In contrast to UNCAT's structural delineation of torture and other forms of ill-treatment, the ECHR encompasses states' obligations regarding both categories within Article 3, However, severity is still a fundamental threshold, as the Court must find a "minimum level of severity" present in order to decide to examine a case under Article 3. As briefly mentioned above, the minimum level of severity depends on the circumstances of the case, such as the duration of the mistreatment, its physical and mental effects, and sometimes the sex, age and state of health of the victim.[17] This list of circumstantial factors is not exhaustive, and more considerations have emerged with jurisprudential development. The Court has stated that the severity *"depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution"*[18] in addition to the factors mentioned above. When considered all together, these factors are also decisive in making a distinction between torture and other forms of ill-treatment. One should bear in mind, though, that the distinction will never be clear-cut or definitive. The Court has recognized that standards change as law evolves: "*[C]ertain acts which*

[14] Ibid.
[15] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para. 3
[16] The approach of ECtHR will be mentioned below.
[17] *supra* Note 28, *Ireland v. UK*
[18] *Soering v. UK*, judgment of 7 July 1989, Series A no. 161, para.100

were classified in the past as "inhuman and degrading' as opposed to 'torture' could be classified differently in future. The increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[19]

b. The Intention of the Perpetrator

As articulated under Article 1 of UNCAT, the pain and suffering must intentionally be inflicted to the victim in order to qualify as torture. The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has clarified this requirement of intent:

"A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food for the purpose of extracting certain information, that ordeal, in accordance with Article 1, would qualify as torture"[20]

Therefore, even though negligence has been regarded as *"a well-established subjective component of criminal liability"*[21], negligence is not sufficient to qualify an act as torture under international law. On the other hand, in the circumstances where the pain is inflicted by omission with intent as mentioned in the report of Special Rapporteur[22], thenit amounts to torture.

c. The Purpose

According to Article 1 of the CAT, the act of torture can be committed "*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".* In that regard, the purpose of torture can be categorized as such: as a means of criminal procedure, as a means of punishment and as a means of deterrence.

Means of criminal procedure refer to forbidden techniques of interrogation, such as use of force for obtaining information or extracting a confession. Torture is used as a means of punishment occurs when the victim has committed an act that contradicts the political ideology of the state. Similarly, means of deterrence refer to the illicit use of force to intimidate persons into refraining from acts that are considered a threat to the very existence of States. In all three categories, the crime of torture is related to the State's economic, political and social goals in maintaining power preventing opposition.[23]

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[19] Selmouni v. France, Application No: 25803/84, 28 July 1999, para. 101

[20] UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak : Addendum*, 5 February 2010, A/HRC/13/39/Add.5, para. 34

[21] Discussion of Denmark, Committee against Torture, Summary record of the 757th meeting, UN Doc. CAT/C/SR/SR.757 (8 May 2007), para 35

[22] *supra* Note 33

[23] For detailed information: George Ryley Scott(2001), *The History of Torture,* Dost Publishing, Ankara, pp. 23-29. (trans. by the author)

Even though the purpose of torture can be categorized under three headings, the content of these three categories are not exhaustive, and they can be interpreted in a flexible manner. [24] For example, an act that is inflicted on a person for the purpose of punishment can appear in various forms, such as beating, violent shaking, prolonged isolation, rape and sexual assault. UN Special Rapporteur Juan E. Mendez has determined that *"purposes which have something in common with the purposes expressly listed" under Article 1"* are sufficient.[25]

The purposiveness criterion must be satsfied in order for an act to be qualified as torture in the within the realm ECtHR's jurisprudence.[26] However, purpose is not necessarily required for other forms of ill-treatment. The Court has stated that ill-treatment that reaches the "minimum level of severity" threshold stipulated by Article 3 will be prohibited as inhuman or degrading treatment, even where it is not sufficiently purposive to be prohibited as torture. In the case of *Labzov v. Russia*, the Court stressed *that "although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Article 3."*[27]

Although the scopes of the three purpose categories are different, it is not possible to say that they exclude each other in practice. For example, if police throw gas bombs during a peaceful demonstration where theyare not authorized to use force by law, the purpose could be to deter participation or to punish the demonstrators for their political stance. Ultimately, these three purposes have a common ground: a connection between the act of torture and state interests, even if the connection is weak. [28]. This connection between the act and purpose is woven into the UNCAT itself. The wording 'for *any reason based on discrimination of any kind'* demonstrates this connection, as discrimination attributed to any organ of States must be considered in the context of States' political agendas.

d. The Status of the Perpetrator

Article 1 of the UNCAT defines the perpetrator as being a '*public official or other person acting in an official capacity*'. While the question of the involvement of a public official is usually straightforward, the recognition of other persons acting in an official capacity may be more problematic, as is the notion of an act inflicted '*with the consent or acquiescence*' of the public official.

Under international law, States are responsible for acts of torture committed by private actors, as indicated by the ECtHR[29] and the Human Rights Council (HRC)[30]. However, the discussion on

[24] M. Nowak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law, Oxford University Press, p.75

[25] UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez : 1 February 2013, A/HRC/22/53, para.2; see also* UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak : Addendum*, 5 February 2010, A/HRC/13/39/Add.5, para. 35

[26] Cestaro v. Italy, App. No:6884/11, 7 April 2015, para.176

[27] *Labzov v. Russia*, Application No. 62208/00, 16 September 2005, para.48; For more cases: *Kalashnikov v. Russia*, Application No. 47095/99, 15 July 2002, para.101; *Peers v. Greece*, Application No. 28524/95, 19 April 2001, para. 74

[28] Burgers and Danelius, *The United Nations Convention Against Torture*, p.119

[29] European Court of Human Rights, *A v United Kingdom*, 23 September 1998; European Court of Human Rights, *Z and others v. United Kingdom*, 10 May 2001 – European Court of Human Rights, *DP et JC v. United Kingdom,* 10 October 2002 – European Court of Human Rights, P*antea v. Romania*, 3 June 2003 (ill-treatment by co-detainees)

perpetrator status in this section is constrained by the limits of this study, specifically within the context of ECHR Article 3, CCPR Article 1 and UNCAT Article 1.

The Committee Against Torture states that States "bears international responsibility" for the acts and omissions of individuals *"acting in official capacity or acting on behalf of the State"*[31] and States *are "obligated to adopt effective measures to prevent ... other persons acting in official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participate or being complicit in acts of torture as defined in the Convention."*[32]

C. STATE OBLIGATIONS UNDER the UNCAT and ECtHR JURISPRUDENCE

States' international obligations regarding substantive law are framed by provisions of the UNCAT, General Comments of CAT, UN General Assembly resolutions and ECtHR jurisprudence. These instruments and their interrelationship must be examined in order to build a framework for assessing compliance of domestic law with international obligations, which will be introduced below.

1. Obligations under Article 2 of UNCAT and ECHR

Article 2 of UNCAT states: "*Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture."*

a. Content of the Obligation to Take Effective Measures to prevent Torture

Regarding the obligation to take effective measures within the limit of substantive law, first of all, the *"State Parties must make the offence of torture punishable as an offence under its criminal law, in accordance at a minimum, with the elements of torture as defined in Article of Convention, and the requirements of Article 4."*[33] The elements of torture identified by UNCAT are the only minimum requirement for States, not the exact prescription. States may broaden the definition of torture by legislation, as long as the domestic definitions are applied in accordance with UNCAT[34] This Article, along with CAT General Comment 2, strive to eradicate serious discrepancies between the UNCAT and domestic law, because these create loopholes that allow impunity. These loopholes must be closed in order for measures to be considered "effective." Thus, "taking effective measures" entailsappropriate legislation that criminally recognizes CIDT in a way that does not overlap with the scope of torture as an offence, so that instances of torture are not prosecuted as lesser crimes even when the elements of torture are present. A failure to make such a careful distinction violates the Convention, as cited by the CAT's General Comment 2.[35]

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[30] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992
[31] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para. 15
[32] Ibid., para.17
[33] *supra* Note 29, para. 8
[34] Ibid., para. 9
[35] Ibid., para.10

b. Absolute Prohibition

Article 2/2 of UNCAT affirms the principle that the prohibition against torture is absolute and non-derogable by stating that "*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."*

This non-derogability is reaffirmed in CAT's General Comment 2: *"... amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment for perpetrators of torture or ill-treatment violate the principle of non-derogability."*[36]

It is clear that the Convention against Torture also recognized that the non-derogable principle of torture prohibition applies to all circumstances. Further, the use of the word 'whatsoever' forecloses the possibility of any potential justifications for derogation,indicating that the drafters aimed "*to close the door to a construction of the article which could lead to an interpretation that the exceptional circumstances referred to ... are exhaustive.*" [37] The non-derogability of torture prohibition is universal and absolute, like the prohibition itself.

As will be discussed below, the offence of torture cannot be subject to defences[38] such asa statutes of limitations, oramnesty. The prohibition of torture and other forms of ill-treatment remains absolute in all circumstances.

The unyielding stance on nonderogability is evidenced by international reactions to State policies that try to justify ill-treatment. Following the events of 11 September 2001, States invoked public safety and emergencies to justify their use of torture and CIDT. CAT responded by adopting a statement[39] [what did statement say] and [addressing/confronting] States' policies in its Concluding Obervations, Likewise, the ECtHR emphasised that "the Convention's protections are absolute, even in the context of national security concerns."[40]

c. Superior Orders

Related to the non-derogable nature of the prohibition of torture Article 2/3 of UNCAT embodies the principle that following orders from a superior or public authority is never a justification for torture. In accordance with this principle, those exercising superior authority cannot avoid criminal responsibility for torture or ill-treatment committed by subordinates *"where they knew or should have known that such impermissible conduct was, or was likely, to occur, and they took no reasonable and necessary preventive measures."*[41] To facilitate the recognition of this principle, States must take all effective measures to protect persons who resist unlawful orders of superiors, against retaliation.

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[36] Ibid., para.5

[37] Ahcene Boulesbaa (1999), *The UN Convention on Torture and the Prospects for Enforcement*, The Hague: Martinus Nijhoff Publishers, p.79. For more information: Farrell , *The Prohibition of Torture in Exceptional Circumstances*, p. 52

[38] See, further, CAT, Concluding Observations on the UK, UN Doc. CAT/C/CR/33/3, 2004, para.4(a)(ii) and 5(a)

[39] UN Doc. A/57/44, 17 May 2002, paras. 17-18

[41] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para.26

d. Duty to Investigate

State Parties have a procedural obligation to conduct an effective investigation into allegations of torture and other forms of ill-treatment under Article 3 of the ECHR. In the case *Ribitsch v. Austria,*[42] involving an individual who was taken into custody in good health but found to be injured at the time of release, the Court held that the State had to provide a plausible explanation? of how injuries had occurred.[43] This requires the State to conduct an effective investigation into the allegations of torture and other forms of ill-treatment. Failing to do so would be a violation under Article 3 of the ECHR.

In the context of evidential difficulties regarding allegations of torture and other forms of ill-treatment, in particular when the victims face difficulties in obtaining supporting evidence, the Court noted that *"Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."*[44] Therefore, it is said that the burden of proof is reversed where the State has the exclusive knowledge of the facts.

Furthermore, in the case of *Assenov and Others v. Bulgaria*[45], the Court stressed that an effective investigation should *"be capable of leading to the identification and punishment of those responsible."*[46] Otherwise, the Court noted that *"the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."*[47]

The duty to investigate may arise even without a submission of a complaint. The Court has stipulated that*"in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred."*[48]

2. Obligations under Article 4 of UNCAT and ECHR

Article 4 of UNCAT states that: "*Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."*

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[42] *Ribitsch v Austria*, no. 18896/91, ECHR (Series A) No. 336, judgement of 4 December 1995, para. 108–111. See also *Salman v Turkey* (2000), *op. cit*.; *Aksoy v Turkey* (1996), *op. cit*., para. 61; *Assenov and Others v Bulgaria*, no. 24760/94, Rep. 1998-VIII, judgement of 28 October 1998; *Labita v Italy*, no. 26772/95, ECHR 2000-IV, judgement of 6 April 2000; *Stefan Iliev v Bulgaria*, no. 53121/99, judgement of 10 May 2007.
[43] *Ribitsch v Austria*, no. 18896/91, ECHR (Series A) No. 336, judgement of 4 December 1995, para. 108–111
[44] *Mammadov (Jalaloglu) v Azerbaijan*, no. 34445/04, judgement of 11 January 2007, para. 62.
[45] *Assenov and Others v Bulgaria* (1998), *op. cit.* See also *Indelicato v Italy*, no. 31143/96, judgement of 18 October 2001.
[46] *Assenov and Others v Bulgaria* (1998), *op. cit*., para. 102. See also *Labita v Italy* (2000), *op. cit*., para. 64.
[47] *Assenov and Others v Bulgaria* (1998), *op. cit*., para. 102. See also *Selmouni v France* (1999), *op. cit*., para. 79–80,
[48] *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*, *op. cit*., para. 97

States are thus obligated to regulate the offence of torture as a crime under its criminal law, in accordance with the elements of torture mentioned in Article 1 of the Convention. Aligning domestic definitions with the UNCAT's standards is one of the most important factors in preventing torture by curtailing impunity. When the definition of torture under domestic law does not meet the requirements set forth in the Convention, there appears to be a problem of ambiguity regarding the distinction between torture and ill-treatment, as well as other related crimes such as excessive use of power since Article 4 is limited in its application to torture, and is not among those listed in Article 16 as applying also to other forms of ill-treatment. Unless the elements of torture are well-established under criminal law, perpetrators of the crime are advantageously prosecuted for lesser crimes, such ill-treatment or excessive use of power, which do not have appropriate punishment. As stated by the CAT, *"naming and defining this crime will promote the Convention's aim , inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime."*[49] However, as CAT has also stated in its concluding observations, even where such a law compatible with the definition in Article 1, has been adopted, the Committee will also consider how it is enforced in practice.[50] Therefore, as explicitly indicated by the CAT, it is not sufficient to enact a domestic law which is compatible with the definition in the UNCAT. The State in question should also implement the law effectively to prevent acts of torture and protect persons from torture. The ECtHR reaffirmed he duty to enact and enforce legislation by stating that *"States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."*[51]

Additionally, the punishment must be regulated by taking into account of the gravity of the torture crime, and the necessity for deterrence.[52] The UN General Assembly also points out that all the persons who encourage, instigate, order, tolerate, acquiesce in, consent to or perpetrate torture or other forms of ill-treatment must be punished in a manner commensurate with the severity of the offence.[53] Although a minimum penalty which would reflect the gravity of the torture crime has not been specified by the CAT, individual CAT members have deemed that a custodial sentence lasting between six and twenty years will generally be appropriate.[54] Accordingly, in *Urra Guridi v. Spain*, the CAT concluded that the imposition of lighter penalties on three Civil Guards who had been found guilty of torture constituted a violation of Article 4(2) of the UNCAT.[55]

In order to implement punishment that accords with the grave nature of the crime, the criminalizing legislation must be constructed in a manner that would not allow amnesties or other impediments to

[49] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para 11

[50] CAT, Concluding Observations on Uzbekistan, UN Doc. A/55/44, 1999, para.80. See also HRC, COncluding Observations on Uzbekistan, U.N . Doc. CCPR/CO/71/UZB/Add. 2, 2004, para. 2(1)

[51] *M.C. v Bulgaria*, *op. cit.*, para. 153

[52] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para. 11

[53] UN General Assembly, Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, 68th Session Third Committee, A/C.3/68/L.33/Rev.1, para. 7

[54] Chris Ingelse, *The UN Committee against Torture: An Assessment*, Kluwer Law International, 2001, p. 342.

[55] *Urra Guridi v Spain*, CAT Communication No. 212/2002, 17 May 2005, para. 6.7.

accountability,[56] such as statutes of limitations,[57] which contradict the absoluteness of torture prohibition. Furthermore, the Committee has stated that *"in order to ensure that perpetrators of torture do not enjoy impunity, States parties must ensure the investigation and, where appropriate, the prosecution of those accused having committed the crime of torture, and ensure that amnesty laws exclude from their reach"*[58].

3. Obligations under Article 14 and ECHR

Article 14 states that *" Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."*

Asthe UNCAT's obligates States to compensate victims, , so do the judgments of the ECtHR. The Court requires respondent States to not only pay compensation to the applicant, but also to take general measures, including legislative changes at the domestic level, to prevent similar violations in the future.

The term 'redress' encompasses the concepts of 'effective remedy' and 'reparation'. In this section on the substantive obligations of States, we will only analyse the concept of 'reparation.' The concept of 'effective remedy' is related to procedural obligations of States, and will therefore be examined in the procedural obligations section.

As indicated by the CAT, reparation under Article 14 embodies restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[59]

a. Restitution

Restitution (*Restitutio in integrum)* is a form of redress which aims to re-establish the victim's situation how it was prior to the violation of the Convention; and it works by taking into account the specific issues of each case.[60]

Restitution includes release of the persons whose liberty is restricted, payment for the harm or loss suffered, reimbursement of the expenses caused by the victimization process, restoration of rights and re-examination of the case.[61]

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[56] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para. 5

[57] UN Committee Against Torture (CAT), *UN Committee against Torture: Conclusions and Recommendations, Denmark*, 16 July 2007, CAT/C/DNK/CO/5, para.11

[58] CAT, Concluding Observations on Azerbaijan, UN Doc. A/55/44, 1999, para. 69(c). See also CAT, Concluding Observations on Senegal, UN Doc. A/51/44, 1996, para. 117; CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, para. 7b; CAT, Concluding Observations on Bahrain, UN Doc. CAT/CO/34/BHR, 2005, para. 6d; CAT, Concluding Observations on Cambodia, UN Doc. CAT/C/CR/31/7, 2005, para. 6.

[59] UN Committee Against Torture (CAT), *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3, para.2

[60] Ibid., para. 8

[61] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly*, 29 November 1985, A/RES/40/34, para. 8

b. Compensation

According to General Comment 3 of the CAT, the compensation must include "reimbursement of medical expenses paid and provisions of funds to cover medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as employment and education"[62] in order to be considered as fair and adequate. Further, adequate compensation must also cover expenses made for legal or specialist assistance, and other costs associated with bringing a claim for redress.[63] Thus, it is clear that solely monetary compensation that does not cover all of the above issues cannot be considered sufficient.[64]

c. Rehabilitation

Article 21 of the UN Guidelines on the Right to a Remedy states that *"rehabilitation should include medical and psychological care as well as legal and social services."*[65]

The obligation to provide 'rehabilitation as full as possible' refers to restoration of the victim and reparation of harms suffered, as well as acquisition of new skills that are required for the victim to adapt to changed circumstances. These skills are developed throughadoption of a long-term, integrated approach.[66] This obligation of rehabilitation may not be postponed, regardless of State resources.[67] Furthermore, States must ensure that the victim participates in the selection of services including private legal, medical or other facilities as well as non-governmental organizations.[68]

d. Satisfaction and the Right to Truth

The CAT stipulates that satisfaction should include "verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification, and reburial of victims' bodies in accordance with the expressed or presumed wish of the victims or affected families; an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; judicial and administrative sanctions against persons liable for the

[62] UN Committee Against Torture (CAT), *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3, para. 10
[63] *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3, para. 10
[64] *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3, para.9
[65] 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 UN General Assembly Resolution 60/147 of 16 December 2005, Article 21
[66] *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3,., para. 11-13
[67] *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3,., para.12
[68] *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3,., para.15

violations; public apologies, including acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims."[69]

e. Guarantees of non-repetition

The obligation to provide guarantees of non-repetition requires taking measures such as: "civilian oversight of military and security forces; ensuring that all judicial proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting human rights defenders and legal, health and other professionals who assist torture victims; establishing systems for regular and independent monitoring of all places of detention; providing, on a priority and continued basis, training for law enforcement officials as well as military and security forces on human rights law that includes the specific needs of marginalized and vulnerable populations and specific training on the Istanbul Protocol for health and legal professionals and law enforcement officials; promoting the observance of international standards and codes of conduct by public servants, including law enforcement, correctional, medical, psychological, social service and military personnel; reviewing and reforming laws contributing to or allowing torture and ill-treatment; ensuring compliance with article 3 of the Convention prohibiting refoulement; ensuring the availability of temporary services for individuals or groups of individuals, such as shelters for victims of gender-related or other torture or ill-treatment."[70]

CHAPTER II.A

I. DOMESTIC LEGAL FRAMEWORK

In this part, the crime of torture under domestic law and its compatibility with international standards will be examined in both countries. Aggravating grounds and mitigating factors will also be examined to see whether there are loopholes in the law leading to the disproportional sanctioning of the crime. The same analysis, especially focusing on the compatibility of the national law with international law, will be followed for the related crimes which might lead to impunity of public officials or other persons acting in official capacity. Finally, the investigative bodies regarding torture and ill-treatment claims will be introduced.

A. THE LEGISLATION UNDER ISRAEL LAW

As stated in Chapter 1, Israeli law contains no specific criminalization of torture. Rather, it claims that existing legal arrangements ("other offenses") are sufficient to properly handle cases of torture. The relevant "other offenses" are detailed in annex and their legal and operational effects are discussed here below.

B. THE LEGISLATION UNDER TURKEY LAW

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[69] *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3,., para.16; see also: 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 UN General Assembly Resolution 60/147 of 16 December 2005, Article 22

[70] Ibid., para.18; see also: 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 UN General Assembly Resolution 60/147 of 16 December 2005, Article 23

1. The Place of International Law Under the Constitution

Article 90/5 of the Constitution stipulates: *"In the case of a conflict between international treaties, duly put into effect, concerning fundamental rights and freedoms and domestic legislation, the provisions of international treaties shall prevail.*"[71]

Considering that international conventions concerning human rights have a priority over domestic law in terms of hierarchy of valid norms, it is without doubt that domestic legislation must be in compliance with related international human rights conventions. Furthermore, even in the case that the necessary amendments are not made, the judiciary must apply the provisions of international law regardless of the domestic legislation in conflict as long as they are put into effect and they can be directly applied. This view has become absolute since decision of the General Assembly of Criminal Chambers of the Supreme Court of Appeals:

"Reflections of the rule of the last paragraph of the Article 90 of the Constitution which stipulates "International conventions duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional" on the domestic law were discussed in the doctrine and various judicial judgments, and considerations are asserted that international conventions may be effective on the domestic law only through legal regulations to be made, and on the other hand it is also asserted that it will be an integral part of the domestic law without requiring any further legal regulations, and finally the latter opinion adopted in the judgment no. 2/33 of the General Assembly of Criminal Chambers of the Supreme Court of Appeals held on 12.3.1996 and it is agreed that the international conventions duly put into effect bear the force of law, so they are directly applicable."[72]

On the other hand, there is still a question regarding whether the decisions or judgments of international monitoring bodies are directly applicable in Turkey. As to the treaties in which a judicial body is designated for rendering binding judgments, it could be argued that judicial body's authoritative decision not only binds the State in international law but it also requires local authorities to implement the judgment, including the judiciary. The ECHR's Article 46 is illustrative in this regard.[73]

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[71] Paragraph 5 of Article 90 of the Constitution of Turkey, Law Nr: 2709, 9 November 1982

[72] General Assembly of Criminal Chambers of the Supreme Court of Appeals, E. 2005/7-24, K. 2005/56, kt. 24.5.2005.

[73] Article 46 of the ECHR as follows:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfill its obligation under paragraph1.

However, the status of treaties in which the monitoring body is not empowered to render judicial decisions is controversial under Turkish law. As known, treaty bodies in the UN have different powers, including making final observations to the General Assembly on State Reports and deciding individual applications. It is debatable, whether domestic authorities should take different statements of monitoring bodies produced under different procedures. Neither the UN treaties nor the Turkish domestic law include specific rules clarifying these points.

However, relying on Article 2 of UNCAT which obliges all State Parties to *"take all effective legislative, administrative, judicial or other measures to prevent acts of torture"*, it may be claimed that Turkey as a State Party to UNCAT and OPCAT[74], is under the obligation to implement the decisions of CAT in order to fulfill its obligations under Article 2 of UNCAT since it has also recognised the jurisprudence of CAT by ratifying UNCAT[75]. In other words, even though the decisions of CAT do not seem to be legally binding on Turkey in a direct way, Turkey should make necessary amendments mentioned in the decisions since the implementation of UNCAT is considerably related to CAT decisions. Otherwise, Turkey may be accounted as in violation of Article 2 which obliges the State Parties to take all effective measures to prevent torture.

Indeed, the HRC includes a standard final paragraph in its decisions to show State Parties duty to obey the decision given under complaints mechanism:

"Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views."[76]

Moreover, UN General Assembly also emphasized *"the importance of States ensuring proper follow-up to the recommendations and conclusions of the relevant treaty bodies and mechanisms, including the Committee Against Torture, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,... in preventing torture and other cruel, inhuman or degrading treatment or punishment."*[77]

2. Definition of Torture Under Domestic Law

a. The Constitutional Framework

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5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of 26 27 paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

[74] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006

[75] Turkey has ratified UNCAT on 2 August 1988.

[76] Amongst many authorities, see X v, Denmark, no. 2007/2010, CCPR/C/110/D/2007/2010, para. 9.7.

[77] UN General Assembly, Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, 68th Session Third Committee, A/C.3/68/L.33/Rev.1, para. 4

Article 17/3 of the Constitution states that: *"No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity."*[78]

With regards to the restriction of fundamental rights and freedoms, Article 13 of the Constitution states that: *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence.*

These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

Article 15 of the Constitution, under the title of *"Suspension of the exercise of fundamental rights and freedoms"* states that *"In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.*

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."

By having been articulated in the Constitution, the prohibition of torture has also been provided a constitutional guarantee which does not allow any derogation from the prohibition of torture and other forms ill-treatment. By having regard to Articles of the Constitution mentioned above, it can be claimed that the prohibition of torture and ill-treatment has a priority over the values of the Constitution [79] which is in conformity with the obligations of the States under Article 2 of the UNCAT.

b. The Criminal Code

Under the title of 'Torture', Article 94 of the Turkish Criminal Code[80] states as follows:

" (1) A public officer who performs any act towards a person that is incompatible with human dignity, and which causes that person to suffer physically or mentally, or affects the person's capacity to perceive or his ability to act of his own will or insults them shall be sentenced to a penalty of imprisonment for a term of three to twelve years.

(2) If the offence is committed against:

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[78] *supra* Note 115, Article 17/3

[79] Zafer Gören, *Temel Hak Teorisi*, Ankara 1995, no:128; Oğuz Şimşek, *Anayasa Hukukunda İnsan Onuru Kavramı ve Korunması* (Yayınlanmamış Doktora Tezi), Dokuz Eylül Üni. Sos. Bil. Enstitüsü, İzmir, 1999, p. 251; Mustafa Ruhan Erdem, *Ceza Muhakemesinde Organize Suçlulukla Mücadelede Gizli Soruşturma Tedbirleri*, Ankara 2001, p.240; Veli Özer Özbek, *Yeni Türk Ceza Kanununun Anlamı* (Açıklamalı-Gerekçeli-İçtihatlı), Cilt 1, 2. Baskı, Ankara 2005, p.65

[80] Turkish Criminal Code, Law Nr.5237, 26.09.2004

a) a child, a person who is physically or mentally incapable of defending himself or a pregnant women; or

b) a public officer or a lawyer on account of the performance of his duty,

a penalty of imprisonment for a term of eight to fifteen years shall be imposed.

(3) If the act is conducted in the manner of sexual harassment, the offender shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years,

(4) Any other person who participates in the commission of this offence shall be sentenced in a manner equivalent to the public officer,

(5) If the offence is committed by way of omission there shall be no reduction in the sentence,

(6) The crime of torture shall not be subjected to statute of limitations.

1) Elements of the Crime/ Compliance with the UNCAT

In this section, the elements of the crime of torture under domestic law will be discussed. Aggravating factors under Article 94 and aggravating factors based on the consequences under Article 95 will be discussed in relation to proportionality of the punishment to the gravity of the crime separately below.

i. The Nature of The Act

According to Article 94 of Turkish Criminal Code, in order to be qualified as torture, an act inflicted must have two components[81] as such:

- Incompatibility with human dignity
- An act

which causes that person to suffer physically or mentally or

affects the person's capacity to perceive or his ability to act of his own will

- Insult

The Constitutional Court defined the concept of human dignity *"No matter of the conditions, the concept of human dignity entails the recognition of the values associated with being human. Any act or treatment which lead to lose someone's feeling of being human is in contradiction with human dignity."*[82]

"Sexual assault with police baton, sexual harassment, leaving persons into starvation, insult and intimidation"[83] are considered as acts not compliant with human dignity.

[81] Önok, *Uluslarası Boyutuyla İşkence*, Seçkin Yayıncılık, Ankara 2006, p. 382; Artuk/Gökçen/Yenidünya, *Ceza Hukuku Özel Hükümler*, Ankara 2007, p.112; Tezcan/Erdem/Önok, *Teorik ve Pratik Ceza Özel Hukuku*, 6th edition, Ankara 2008, p. 242

[82] The Constitutional Court, 28.06.1966, E. 1963/132, K.1966/29

[83] CGK, 15.06.1999, 109/164

Due to the abstractness and broadness of the concept "human dignity" which does not allow to reduce its meaning into a certain kind of human experience of living, it does not seem very likely to define "human dignity" in an absolute manner.[84] However, it is proposed that the most useful criterion to define the concept of "human dignity" is the "*object formula*" which refers to the values intrinsic to just being a human whose subjectivity cannot be ignored and whose existence cannot be reduced into a mere object of public seizures.[85] According to doctrine, human dignity also refers to the moral strength of a person that lead to self-conscious, self-determination and ability to shape her/his own environment.[86]

On the other hand, the Constitutional Court held that there had been a violation of Article 17 due to the arbitrary detention of the applicant.[87]

Since Article 94 makes no distinction between torture and other forms of ill -treatment, it may be claimed that Article 94 broadened the scope of the prohibition of torture. Therefore, the severity of the pain and suffering inflicted on the victim should not be interpreted in a way that a less severe pain or suffering would result in falling out of the scope of Article 94. Rather, it should be taken into account while determining the period of penalty of imprisonment. As stipulated by Article 94, the legal interest that is needed to be protected is the human dignity and respect for the capacity of one to act upon her/his own will. Accordingly, any act leading to a suffering of a person mentally and physically in contradiction with human dignity by public officials will fall within the scope of Article 94.[88] At this point, it is important to remark that the need for the distinction between torture and other forms of ill-treatment is highlighted, below, for the reason that it is required to clarify the scope of the crime to prevent investigations/prosecutions on the basis of related crimes rather than the crime of torture.

Having regard to the view of the doctrine that every case of alleged torture must be evaluated in its own circumstances in order to determine whether "human dignity" is infringed[89], it can be said that the definition of torture under Article 94 is in compliance with the definition under Article of UNCAT since it paves a way to broaden the applicability of the prohibition of torture by not defining the concept of human dignity in an elaborative manner which would have the risk of narrowing down the application of the prohibition of torture.

Another issue regarding the nature of the act under Article 94 is whether the act must be inflicted in a systematic way to be qualified as torture. The legal reasoning of Article 94 states that the acts

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[84] J. Pedro Montano, La Dignidad Humana Como Bien Juridico Tuteladopor El Derocho Penal (http://www.unifr.ch/derechopenal/articulos/pdf/Montano2.pdf) p. 1; Yener Ünver, *Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer*, Ankara 2003, p. 941

[85] Oğuz Şimşek, *Anayasa Hukukunda İnsan Onuru Kavramı ve Korunması* (Yayınlanmamış Doktora Tezi), Dokuz Eylül Üni. Sos. Bil. Enstitüsü, İzmir, 1999, p.

[86] Öztürk/Erdem, *Uygulamalı Ceza Muhakemesi Hukuku*, 9th edition, Ankara 2006, p.160; Şahin, *Sanığın Kolluk tarafından Sorgulanması,* Ankara 1994, p.70; Öztürk, *Yeni Yargıtay Kararları Işığında Delil Yasakları, Hukuka Aykırı Olarak Elde Edilen Deliller, Yasak Kanıtlar*, Ankara 1995, p. 22; Demirbaş, *Sanığın Hazırlık Soruşturmasında İfadesinin Alınması*, DEÜHF Yayınları No.71, İzmir 1996, p.62; Artuk/Gökçen/Yenidünya, *5237 sayılı Kanuna göre hazırlanmış Ceza Hukuku Özel Hükümler*, 6th edition, Ankara 2005, p. 21

[87] The Constitutional Court, *Yazıcı,* App. No: 2013/6359, 10.12.2014

[88] Üzülmez, *Türk Ceza Hukukunda İşkence Suçu*, Ankara 2003, p. 112

[89] Şahin, *Sanığın Kolluk tarafından Sorgulanması,* Ankara 1994, p.71; Üzülmez, Yeni Türk Ceza Kanunu'nda İşkence ve Eziyet Suçu, *Hukuk ve Adalet*, 2:5, Spring 2005, p. 235

must be inflicted on a person in a systematic and permanent way.[90] However, the definition, itself, does not require such a ground to qualify an act as torture. Many acts such as Palestinian hanging or *falanga*, have the nature of being systematic even though they are not inflicted in a repetitive manner. On the other hand, the acts that are not inflicted systematically can amount to torture such as rape. As a matter of fact, during the drafting process of the UNCAT, it is refused to have the element of being systematic in the definition of the torture on the account that an act inflicted on the victim just for once can also amount to torture.[91] Considering that UNCAT 1 does not entail such an element, it would be in contradiction with international obligations of Turkey if perpetrators are only prosecuted if the acts are considered to be systematic. As a matter of fact, very recently, in the case where the victim who was subjected to severe beating while his eyes were blind-folded in unofficial detention place, lost his kidney and milt, the Court of Cassation ruled that the acts concerned do not amount to torture since they were not perpetrated in a systematic manner. [92]

ii. The Intention of The Perpetrator

Under Article 94, general intent of the perpetrator is considered to be sufficient to commit the crime of torture.[93] Even though it is mentioned that the crime of torture can be committed by negligence under Article 94/5, this should be understood in terms that showing recklessness by intent may suffice for committing the crime of torture such as causing starvation of persons by not giving food or preventing persons from medication

iii. Purpose

The element of purpose is not articulated under Article 94. However, while interpreting the former Criminal Code's provision on torture, General Assembly of Criminal Chambers of the Supreme Court of Appeals stated that the crime of torture can only be committed to extract a confession.[94] This approach, unlike the definition under Article 1 of UNCAT, might lead to a conclusion that torture under domestic law merely applies into the cases where the purpose is only related to criminal investigation process. However, it is still not completely clear whether the new provisions are understood in a similar way. In its recent judgment, 8th Criminal Chamber found that blowing the head of the victim and kicking his body during the custody had amounted to torture without giving any reference to the element of purpose such as extracting confession.[95]

At first glance, in comparison with Article 1 of UNCAT, Article 94 of the Turkish Criminal Code creates such an expression that it provides an opportunity for wider application of the prohibition of torture. The reason for such impression is the lack of purpose. In other words, the crime of torture is

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[90] For definitions that emphasise the systematic nature of the torture See: Öztürk/Erdem, *Uygulamalı Ceza Muhakemesi Hukuku*, 9th edition, Ankara 2006, p.441; Demirbaş, *Sanığın Hazırlık Soruşturmasında İfadesinin Alınması*, DEÜHF Yayınları No.71, İzmir 1996, p.284; Şahin, *Türk Ceza Yargılaması Hukukunda Yakalama ve Gözaltına Alma*, Ankara 2003, pp. 350-351

[91] Burgers/Danelius, The *United Nations Convention Against Torture-A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrect/Boston/London, 1988

[92] 8th Criminal Chamber, the Court of Cassation,http://www.radikal.com.tr/turkiye/baloncuyu_dovup_yuzde_50_sakat_birakmak_iskence_sayilmadi-1215046

[93] Artuk/Gökçen/Yenidünya, p.121; Özbek/Kambur/Doğan/Bacaksız/Tepe, Türk Ceza Hukuku Özel Hükümler, Ankara 2010, p.327; Önok, p. 469; Hakeri, Türk Ceza Kanununda İşkence Suçu, İşkencenin Önlenmesi ve İstanbul Protokolü, 2009, p. 355

[94] CGK, 04.04.1983, 8-64/156; CGK, 15.06.1999, 8-109/164

[95] 8th Criminal Chamber of the Cassation Court, 2014/1233E., 2014/15738 K., 8-2013/117562 T.

articulated in a way that it can be perpetrated for any kind of purpose. It does not need to be committed for purposes such as a means of criminal investigation, punishment or deterrence. However, the lack of purpose, in fact, might lead to the impunity of perpetrators by making the distinction between torture and other related crimes ambiguous.[96]

Besides the issue of impunity, disregarding the purpose of the crime points out to the negligence of the political role of torture. However, the specific element of torture which differs the crime of torture from any ordinary violent act is that this crime could only be committed by participation of 'State' and the crime carries out a political intention/goal. As a matter of fact, the punishment cannot be reduced even in the case that the act of torture is committed by negligence as mentioned under Article 94/5 of Turkish Criminal Code. This is due to the fact that the crime of torture has its own political characteristics leading to the responsibility of State rather than individual responsibility.

iv. The Status of The Perpetrator

Different from the wording of Article 1 of UNCAT which mentions that perpetrators of torture can be either public officials or other persons acting in official capacity, Article 94/4 admits participation in the perpetration of torture as sufficient without requiring the criterion of 'acting in official capacity.' On the other hand, Article 94/4 only considers a person as a perpetrator of torture crime when this person participate in the perpetration of torture. Taken in conjunction with Article 40/2 of the Turkish Criminal Code, this wording of Article 94/4 leads to the conclusion that persons who are not public official may not be regarded as main perpetrators of torture even though they act in official capacity, unless they participate in the crime perpetrated by public officials. Since only the persons who have the particular status of being public officials, can be the perpetrator of the torture crime under Article 94[97], other persons participating in the crime can only be held responsible as contributor or abettor. Although prima facie this kind of wording cannot be regarded in compliance with Article 1 of UNCAT which remarks that anyone who act in official capacity, with the consent or acquiescence of a public official, can be the perpetrator of torture crime as paragraph 4 of the Article states that any other person who participates in the commission of this offence shall be sentenced in a manner equivalent to the public officer, it is considered that the provision meets the CAT standards in this regard.

Furthermore, paragraph 5 of the Article stipulates that "If the offence is committed by way of omission there shall be no reduction in the sentence". Omission is a conduct which includes the failure of the public officials in their duty to prevent attacks arising from unofficial actors. Thus, other persons acting in official capacity fall within the scope of Article 94.

II. THE USE OF "OTHER OFFENSES" AND THEIR EFFECT ON JUDGMENT AND ENFORCEMENT

A. ISRAEL

[96] ANNEX
[97] Artuk/Gökçen/Yenidünya, Ceza Hukuku Genel Hükümler I, 2nd edition, Ankara 2006, p. 453

As already mentioned, and as the Human Rights Committee and the Committee Against Torture have repeatedly noted, Israel is in breach of its duty to criminalize torture.[98] The other crimes considered by Israel to substitute for a crime of torture are detailed in the table labeled "substantive law – "other offenses" vis-à-vis the torture offense in UNCAT (art. 1(1))", which also notes the specific elements of the UNCAT crime of torture addressed (or not) by each.

Most of these "other" offenses are found in Israel's Penal Code, which applies also to the state's security forces in their activities in the Occupied Territories. Others reside in the Military Justice Act. In what follows, we address the legal effect of the substitute, "other" offenses approach.

As PCATI's 2008 list of concerns to UNCAT notes,

"[T]he existing ["other"] offenses of cruel treatment, by physical or mental abuse, apply only if the victim is in custody or helpless and do not include several elements of the definition of torture. The crime of a public servant extorting a confession, or information concerning an offense, prohibits the use of force or violence or threat of injury, but does not criminalize causing mental suffering. Nor does it prohibit acts for purposes such as punishment or for any reasons based on discrimination. The maximum sentence of three years' imprisonment for this offense is not proportionate to the gravity of the crime of torture."[99]

There is no doubt that officials prosecuted for torture should be able to defend themselves in court, among other things through some of the available criminal defenses in national law. Nevertheless, the replacement of a crime of torture with other offenses subordinates any special demands made in international law regarding torture or torturers to regular national – in this case, Israeli – legal standards. This may result with derogation of the crime and limitation of judgement and enforcement against torture, as elaborated hereby:

1. GENERALITY OF "OTHER OFFENSES" AND SUBSEQUENT DISPROPORTIONALITY OF PUNISHMENTS

While any act of torture under the UNCAT definition may be also an offense under the Israeli law, no single torture related crime includes all the elements of the UNCAT definition of torture. The table of alternate offenses presents a more nuanced picture of this principle problem: thus we see that all of the "other" offenses include between two to none of the UNCAT "torture" elements – well removed from the legal essence of torture, and covering a wide array of much less serious offenses as well. In accordance, those offenses usually carry light punishments.

The "other" Israeli offenses that most directly address the responsibility of public officials[100] do not require the element of pain or suffering or the intent to cause such as in the UNCAT crime of

[98] E.g., United Nations CCPR/C/ISR/CO/4, 21.11.2014, Par. 14. Online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FISR%2FCO%2F4&Lang=en.

[99] See in the Public Committee Against Torture in Israel, **Israel – List of concerns for UN Committee Against Torture**, Jerusalem, September 2008, p. 1. See also an interesting review of use of "other crimes" instead of war crimes is in: Lior Yavne, **Lacuna –** War Crimes in Israeli Law and Court-Martial Rulings, Yesh Din, Tel-Aviv, 2013 (hereafter: Lacuna). **Lacuna** also details the crimes of abuse in military justice.

[100] Namely, Pressure by a public official – Articles 277(1) and (2) in the Penal Code, and Use of impermissible methods for the purpose of interrogation in Military justice, Art. 119. These offenses are also the only ones to include the element of 'purpose', demanded by UNCAT.

torture, and their maximum punishment is three years imprisonment. Conversely, most other "other crimes" do address the infliction of pain or suffering, but not always by a public authority, and they never include the element of purpose.[101] It should be added that while the crime of a public servant extorting a confession, or information concerning an offense, prohibits the use of force or violence or threat of injury, it does not criminalize causing mental suffering.

"Other crimes" which do carry severe punishments typically involve aggravated circumstances[102], and their punishment may amount to 7 to 10 years' imprisonment, and up to 16 or 20 in the case of rape, and 20 years for manslaughter. Of these, only the offense of rape includes the 'purpose' or the 'authority' elements of the UNCAT crime of Torture. Moreover, the aggravated circumstances demanded in the more heavily punished offenses are more specific, and lie *beyond* the demands of the UNCAT crime of torture, which narrows their possible application, while the proper elements of the torture crime are still missing. As the nextsection shows, aggravated circumstances are indeed hardly ever applied in (the rare) convictions of security personnel violence towards prisoners. Penalties disproportionality follows.

2. SUPERIORS' RESPONSIBILITY

Under UNCAT and international criminal law, superior officers and civilian officials whose subordinates are accused of torture may also be charged with torture. In the Israeli case, however, superiors' responsibility may be considered under the derivative (inchoate) offenses of "persuasion" to commit alternate offenses (Art. 30 of the penal code), which often *lessen*s the expected punishment.

As Yesh Din's shadow report to the fourth periodic report of Israel to HRC mentions,

> "Israeli law does not establish 'command responsibility' on account of action liable to be considered war crimes. A commander – or a civilian – in Israel cannot be prosecuted on account of war crimes committed by their subordinates unless he personally ordered the execution of the crimes."[103]

The Turkel Commission Report recommends that special criminal offenses be set in the law regarding commanders' responsibility and that those giving orders amounting to violations of the injunctions of international humanitarian law be examined and investigated (Turkel Report, pp. 368-9). Like the other Turkel recommendation, this, too, has not been fulfilled.

3. UNJUST PROVOCATION ON BEHALF OF THE PERPETRATOR

The issue of provocation is read in the Israel penal code with regards to (a) the element of intent in the offense murder, as a necessary element to prove intent to perform a "deliberate murder" – one of four alternative circumstantial routes within the offense of murder in Israeli law (Arts. 300(a), 301(a)); and (b) as a criminal defense embedded in the circumstances that may be used to determine the appropriate punishment of any offense, in as much as it influences the (freely translated) "ability

[101] Specifically, the crime of a public servant extorting a confession, or information concerning an offence, prohibits the use of force or violence or threat of injury, but does not criminalize causing mental suffering.
[102] Commonly include: the usage of severe violence, infliction of serious damage on another person, violence against helpless people, endangering someone's life, or the presence of weapon or multiple attackers in an assault.
[103] Yesh Din, Shadow report to the fourth periodic report of Israel to HRC mentions, October 2014.

of the defendant to refrain from the act at point and the level of defendant's control over his/her actions" (art. 40I.(7)).

Such defense cannot reasonably serve a defendant in any case of abuse of detainees. Still more liminal circumstances, however, may produce claims of provocation as perpetrators' line of defence. Thus, for example, we know of many instances in which Israel police officers press charges against civilians who claim they were handled violently by the police (whether during arrests, civil protest, or otherwise).

In recent years, several such counter-charges were denounced by Israeli courts, which from time to time also rebuked the police for its reckless use of authority and sometimes groundless accusations. Nevertheless, while cases of this sort that regard political resistance may receive special media and court attention from time to time, it is reasonable to assume that most false, retributive accusations remain under the public / judiciary radar. Relevant norms are discussed further.

4. DELAYING THE PRONOUNCEMENT OF JUDGMENT

As clear from this and other studies quoted here, immunity from punishment in cases of torture in Israel is achieved through the absence of a crime of torture and policies of no-investigations and low punishments for the very few cases of abuse that do reach the stage of trial. Hence delaying the pronouncement of judgement is a hypothetical obstacle that cannot be tested for cases of torture.

Having said that, it may be noted that as a rule, Israeli (civilian) law allows the court 30 days between the submission or hearing of the sides' conclusions, and the pronouncement of judgement. This term may be prolonged by the President or Vice-President of the Court (who must notify the delay to the President of the ISC; Israel criminal procedure law, art. 181a.)

In practice, however, criminal cases see the 30 days limit exceeded very often, many times by a few months, regardless of the nature of the offenses discussed. This is mostly due to an extremely heavy workload, and especially so with regards to the Israel Supreme Court. Though since 2007, the workload has been on a very gradual decrease, delayed pronouncement of judgement will preside for at least another decade. The presence of such a norm even for non-torture judgements makes it a probable obstacle that may therefore be addressed at the stage of lawmaking rather than *ex post facto*.

5. SUSPENSION OF THE SENTENCE

In Israeli law, the authority to suspend the sentence may rely on Art. 43 of the Penal Code, which orders that imprisonment be counted from the day of the verdict – "unless the court ordered otherwise"; on article 44, which explicitly allows the court to set the beginning of the sentence at its discretion; and on article 87, which allows the court to postpone serving a punishment that was already set. The president of the Military Court of Appeals may order the suspension of sentence when an appeal is served in the case of an indicted soldier (MJA, art. 441 (a2)); MJA Art. 541 imports penal code art. 87 and puts that authority in the hands of the head of a Military Court.

Guidelines for the consideration of the court in the decision to suspend a sentence when an appeal on conviction is served were set in Criminal Appeal 111a/99 before 9 judges of the Israel Supreme

Court.[104] Those include (Par. 18): (a) the severity and circumstances of the crime; (b) the length of the imprisonment term set; (c) the nature of the appeal and the odds that it be accepted by the court; (d) the defendants' criminal history and his/her behavior during the trial; (e) defendant's personal circumstances; (f) whether the appeal attacks the severity of the crime rather than the conviction.

In practice (as detailed throughout the study), convictions of violence against Palestinians detainees are so rare and punishments are so low that the authority to suspend the sentence in abuse cases was not really put to the test. Regarding the guidelines above, it may be noted that while the severity of the act of abuse may downplay the possibility of suspension, Israeli courts' tendency to regard security service as positive contribution may support requests of suspension of punishment, and in the case of IDF abusers – also their young age. In this case, too, as long as torture is not criminalized as a separate offense, regular "other offenses" considerations cannot reflect its unique nature.

6. AMNESTY

Since torture is not criminalized as such in Israel, the prosecution of torture acts under "other offences" as addressed in this study may certainly result with amnesty to the perpetrators, and no legislation that excludes a crime of torture from amnesty can exist.

The lack of criminal investigations into torture in interrogations keeps the possibility of amnesty to "other offenses" in cases of torture mostly in the hypothetical realm. Yet it is instructive to recall the Israeli experience in the rare cases which exposed torture and harm to prisoners, where the state fully supported and actively protected interrogators – whether by refraining from criminal prosecution (as in the cases of Yossi Ginossar and his team who violently interrogated Izat Nafsu, and that of Doron Zahavi who tortured and was claimed to have raped Mustafah Dirrani), or by giving amnesty to torturers /killers (as in the line 300 affair, in which amnesty was granted before indictments were even served).

7. STATUTE OF LIMITATIONS

The Israeli criminal procedure law (Art. 9(a)) sets statutes of limitations periods for criminal offenses according to the severity of the crime: for a crime the maximum punishment sentence of which is death or life in prison – 20 years; for offenses the maximum punishment of which is between 3 years and life sentence – 10 years; for offenses the punishments of which are between 3 months and 3 years – 5 years; and for lesser offenses – one year. Almost all "other offenses" (detailed in annex) therefore fall under the 5 or 10 years categories. This contradicts the absolute nature of the crime of torture as declared in international law.[105]

It may be also noted that one documented habit of the OCGIC was to claim late submission of complaint on torture in ISA interrogations as a reason for a more superficial inquiry and "a contributory factor in the decision to close complaints of torture and abuse." This rationale has no legal foundation. Moreover, torture survivors "… often require a protracted period to gather the

[104] CE 111a/99, Arnold Schwartz **Vs.** the State of Israel.

[105] E.g., 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. The only exception to the Israeli statutes of limitations rule quoted above is (art. 9(b)) the offense of prevention and punishment of Genocide.

courage and psychological strength required in order to face the trauma they experienced and to submit a complaint", and all the more so when the complaint is served to the same authorities that torture. Thus any claim of late submission of that sort is not only baseless but also amounts to cynicism.[106]

8. INADEQUACY OF ADMINISTRATIVE INVESTIGATION AGAINST PERPETRATORS

Does the status or authority of Israeli security personnel change during examination and investigation of complaints into torture and abused they allegedly performed?

The disciplinary rules of the ISA set by the head of the Agency as authorized in Art. 14 of the ISA law are confidential. Still, some information about their application has become available over the years, mainly through the action of human rights organizations. The disciplinary authority of the OCGIC (elaborated below) is used very seldom to punish ISA personnel for torture of detainees. The examination of detainees' complaints is slow and usually performed long after the event, and despite repeated questions and constant follow-up, there is evidence of only 4 cases of disciplinary punishment of violent interrogators, based on ISA reporting only, with no details as for the punishment or the events that lead to it.

In the Israel Police – according to the police order, which sets the basic authorities and responsibilities of IP, the Chief of Police may suspend any policeman who comes under investigation for committing an offense. Such suspension demands periodical review, and in the case of senior police officers also the approval of the Minister in charge (art. 77J).

IPS procedure (order) 06.01.021 allows the firing of any police officer who confesses in writing of committing a "disgraceful" offense or an offense that amounts to a severe breach of police duties; or any police against whom unequivocal evidence exist to have committed such an offense (art. B); and the suspension of any officer suspected of such offences, through either forced vacation or a change of role or unit so that the new duties become irrelevant to the offense at point.[107] While torture is surely "disgraceful", the application of this category is a matter of judicial discretion. Given the wide variety of "other offenses" used to replace the crime of torture, there is no guarantee that abuse will lead to suspension.

The authority to suspend / move from duty a soldier or an officer in the IDF is probably the most obvious among Israeli security organizations, as the vast majority of soldiers are performing obligatory service, they are very young, and their rights and duties are subordinate to a separate set of rules under a special Israeli law. They, too, however, are not automatically suspended in the presence of a complaint, or even an investigation of torture. No obligation to suspend in such instances exists in the Military Justice Act; and while suspension from duty or transfer between units of soldier who are suspects of violence against Palestinians is sometimes reported in the media or being pursued as part of a punishment, this only testifies to the rule; any combat military service in the Occupied Territories is replete with incidents of violence, some of which lead to complaints

[106] See quote and more details in: Att. Irit Ballas et al., **Accountability Denied**, The Public Committee Against Torture in Israel, Jerusalem, December 2009, pp. 53-56.
[107] The procedure is quoted from HCJ 8225/07, Sedic **vs**. Chief of Police and others, par. 11.

that only a very small portion of which leads to investigations or punishments of any sort. This, too, is elaborated below.

To conclude, while all Israeli security bodies have the authority to suspend from duty suspects of torture and abuse, and while disciplinary action many times applies suspension, it is neither a duty nor a habit. Thus here, too, the absence of a clear crime of torture makes international demands a matter of choice and administrative discretion rather than a clear duty.

B. TURKEY

On the other hand, even though in Turkey it is explicitly mentioned that there is a crime of torture addressed by the law, it is seen that the perpetrators are prosecuted on torture related crimes such as torment (Art. 96), excessive use of force (Art. 256), intentional injury (Art. 86) and Misuse of Public Duty (Art. 257) in a way that render the existence of the crime of torture under domestic law non-effective.[108]

With regards to Israel and Turkey, in both cases, torture related crimes are used as a means of providing impunity for the perpetrators. Specifically, in Turkey, prosecution on the ground of torture related crimes lead to the punishment with lighter penalties and even suspension of the sentence[109] or delaying the pronouncement of the judgment.[110] Besides, the crime of torture is subject to statute of limitations whereas other torture related crimes are not.For instant, the Court of Cassation ruled that the acts of beatings and exposure to cold water by prison guards amount to torment without even discussing whether the acts may amount to torture.[111] In another case, as a matter of fact, in the case where the torture survivor who is a conscientious objector, was subjected to severe beatings in the military prison, the perpetrator was merely charged with the crime of intentional injury.[112]

Most recently, 6 police officers who beat Ahmet Koca severely in the street were found guilty of torment, and their imprisonment sentences were suspended due to the Article 51 of Turkish Criminal Code.[113] Furthermore, in 2012, among 705 cases against law enforcement officials, only 105 of the cases concern with the crime of torture whereas 600 of them concern the crime of excessive use of force. Besides that, only 45 of the cases were resulted in conviction of the law enforcement officers and the conviction for the crime of torture only constituted 9 of the cases.[114]

All these issues mentioned above indicates that the implementation of torture related crimes lead to the incompatibility with international standards since it gives rise to the impunity of the perpetrators

[108] ANNEX
[109] Article 51 of Turkish Criminal Code: " *(1) Execution of the punishment imposed to a person who is sentenced to two years or less imprisonment due to committed offense may be suspended. "*
[110] Article 231/5 of Turkish Procedural Criminal Code: *"In cases where at the end of the adjudication conducted related tothe crime charged to the accused, if he shall be punished with imprisonment of two years or less or a judicial fine, the court may decide t o delay the pronouncement of the judgment."*
[111] 14th Criminal Chamber, The Court of Cassation, 2012/13107 E., 2012/658 K., 28.02.2013 T.
[112] The indictment of the Navy Military Prosecutor, 2013/55 E., 2013/51 K., 11.03.2013 T.
[113] İstanbul 5th Assize Court
[114] The Response of the Ministry of Justice to the parliamentary question no.56020453-610.01-297/2880/5529, issued on 12.09.2013

in contrast with General Comment 2 to Article 2 of the Convention, mentioning that " *amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability*".[115]

1. GENERALITY OF "OTHER OFFENSES" AND SUBSEQUENT DISPROPORTIONALITY OF PUNISHMENTS

Aggravating factors of the crime of torture are mentioned separately in three different paragraphs as such*:" If the offence is committed against:*

- *a child, a person who is physically or mentally incapable of defending himself or pregnant women;*
- *a public officer or a lawyer on account of the performance of his duty*

a penalty of imprisonment for a term of eight to fifteen years shall be imposed.

- *If the act is conducted in the manner of sexual harassment, the offender shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years."*[116]

Aggravating factors based on the consequences, are also enumerated under Article 95 of the Turkish Criminal Code which is titles as '*Aggravated Torture on Account of its Consequence* '. Article 95 provides:

"(1) Where the act of torture causes (of the victim);

a) a permanent impairment of the functioning of any one of the senses or an organ,

b) a permanent speech defect,

c) a distinct and permanent scar on the face,

d) a situation which endangers a person's life, or

e) the premature birth of a child, where the victim is a pregnant woman

the penalty determined in accordance with the above article shall be increased by one half.

(2) Where the act of torture causes (of the victim);

a) an incurable illness or if it has caused the victim to enter a vegetative sense,

[115] UNCAT, " General Comment 2" (2007) CAT/C/GC/2/CRP.1/Rev.4, para.5.; see also; *Keppa Urra Guridi* v. *Spain*, Communication No. 212/2002, UN Doc. CAT/C/34/D/212/2012 (2005), para. 2.3, 2.5, 2.6

[116] Turkish Criminal Code, Article 94/2-2

b) the complete loss of functioning of one of the senses or organs,

c) the loss of the ability to speak or loss of fertility,

d) a permanent disfigurement of the face, or

e) the loss of an unborn child, where the victim is a pregnant woman

The penalty determined in accordance with above article shall be doubled.

(3) Where an act of torture results in the breaking of a bone, the offender shall be sentenced to a penalty of imprisonment for a term of one to six years according to the effect of the broken bone on his ability to function in life.

(4) Where an act of torture causes the death of the victim, the penalty to be imposed shall be aggravated life imprisonment."[117]

As it is obviously seen from both of the articles stipulating torture, aggravating factors are mentioned particularly in separate paragraphs which can be regarded as in accordance with Article 2 and Article 4 of UNCAT as well General Comments of CAT[118] and Resolution of UN General Assembly which mentions that perpetrators must be *"punished in a manner commensurate with the severity of the offence".*[119]

2. SUPERIORS' RESPONSIBILITY

Article 24 of Turkish Criminal Code states that: "*(1) A person who carries out the provisions of a statute shall not be subject to a penalty. (2) A person who carries out an order given by an authorized body as a part of his duty, and the execution of this duty is compulsory he shall not be held culpable for such act. (3) An order constituting an offence should never be executed in any circumstances. Otherwise, the person who carried out the order and the person who gave the order shall be culpable. (4) Where the examination of the lawfulness of*

the order is prohibited by law, the person giving the order shall be culpable for its execution."

According to this Article, a public officer and its superior would be held responsible for acts of torture and other forms of ill-treatment in accordance with Article 2/2 of UNCAT embodying the principle that an order of a superior or public authority can never be invoked as a justification of torture. This principle also remarks that those exercising superior authority cannot avoid criminal responsibility for torture or ill-treatment committed by subordinates *"where they knew or should have known that such impermissible conduct was, or was likely, to occur, and they took no reasonable and necessary preventive measures."*[120]

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[117] Article 95 of Turkish Criminal Code

[118] UNCAT, " General Comment 2" (2007) CAT/C/GC/2/CRP.1/Rev.4, para.11

[119] UN Resolution adopted by the General Assembly on 18 December 2013 on the report of the Third Committee (A/68/456/Add.1), A/RES/68/156, para.7

[120] UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para.26

3. UNJUST PROVOCATION ON BEHALF OF THE PERPETRATOR

Article 29 of Turkish Criminal Code states that: *"Any person who commits an offence in a state of anger or severe distress caused by an unjust act shall be sentenced to a penalty of imprisonment for a term of eighteen to twenty four years where the offence committed requires a penalty of aggravated life imprisonment and to a penalty of imprisonment for a term of twelve to eighteen years where the offence committed requires a penalty of life imprisonment. Otherwise the penalty to be imposed shall be reduced by one-quarter to three-quarters"*

In the context of the crime of torture, there is no exception of unjust provocation and this may be regarded as a mitigating factor which is in contradiction with non-derogability nature of torture prohibition.

4. DELAYING THE PRONOUNCEMENT OF THE JUDGMENT

Article 231/5-6 of Turkish Criminal Procedural Law states: *(5) In cases where at the end of the adjudication conducted related to the crime charged to the accused, if he shall be punished with imprisonment of two years or less or a judicial fine, the court may decide to delay the pronouncement of the judgment. The provisions related to mediation are preserved. Delaying the pronouncement of the judgment means that the judgment that has been produced shall not have legal effect for the accused. (6) In order to be able to render"the decision on delaying the pronouncement of the judgment", the following requirements must have been fulfilled:*

a) The accused must not have been convicted for an intented crime priorly,

b) Considering the characteristics of the personality of the accused

and his behavior during the main trial, the court has to reach the belief that the accused shall not commit further crimes,

c) The damage to the victim or the public, due to the committed

crime has been recovered to the full extent by giving back the same object, by restoring the circumstances as they were before the crime had been committed, or by paying the damages.

As this procedure can only apply to crimes that *shall be punished with imprisonment of two years or less or a judicial fine*, most probably it won't cause any problem as long as the prosecution is carried out under Article 94-95 of the Criminal Code. However, when the accused is subjected to less than two years imprisonment either because of mitigating factors or because of the application of different provisions of the Criminal Code, incompatibility with the CAT standards might occur.

In the case *Kasap v. Turkey*[121], ECtHR ruled that the States must *"intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed"*.[122] Therefore, the Court has found a violation Article 2 of the ECHR by stating that the application of the provision

[121] Kasap v. Turkey, App. No. 8656/10, 14 January 2014
[122] Ibid., para. 59

'suspension of the pronouncement of the judgement' in a case regarding the killing of a person by police officers, leads to impunity of the perpetrators as a result of depriving the judgement of all its legal consequences.[123]

5. SUSPENSION OF THE SENTENCES

Suspension of the execution of the sentence is articulated under Article 51 of Turkish Criminal Code and there is no exception of suspension of the sentence and this may be regarded as a factor leading to impunity which is in contradiction with non-derogability nature of torture prohibition.

Similar to the Articles mentioned above that lead to the impunity of torture perpetrators, Article 51 does not make any distinction between the types of the offences committed, neither. The suspension of a sentence is subject to the discretion of the court and the sentences of up to 2 years' imprisonment can be suspended. Only if the perpetrator is under the age of 18 or above the age of 65 when the crime is committed, the sentences of up to 3 years' imprisonment can also be suspended.

As this procedure can only apply to crimes that *shall be punished with imprisonment of two years or less or a judicial fine*, most probably it won't cause any problem as long as the prosecution is carried out under Article 94-95 of the Criminal Code. However, when the accused is subjected to less than two years imprisonment either because of mitigating factors or because of the application of different provisions of the Criminal Code, incompatibility with the CAT standards might occur. Considering that the minimum sentence for the crime of torture is 3 years' imprisonment under Article 94 of Turkish Criminal Code, failure to make any exception for the crime of torture under Article 51, lead us to the conclusion that absolute nature of torture prohibition is disregarded under Turkish Criminal Code by rendering its essence ineffective.

As a matter of fact, in the case where the victim had been subjected to severe beatings for five days while he was in custody at the police station, under the former Turkish Criminal Code, the perpetrators were found guilty of ill-treatment instead of torture and their sentence was suspended within the margin of appreciation of the first instance court.[124]

6. AMNESTY

According to Article 87 of the Constitution, the Grand National Assembly of Turkey has the right to announce special or general amnesties. The only exception to amnesty is identified as the offences under Article 14 of the Constitution which do not include the crime of torture. Only the crimes against the State such as " destruction of inseparable unity of the State within its land and nation" and " endangering the existence of the Republic." are excluded from the crimes that are liable to amnesty.

[123] Ibid., paras. 60-62

[124] General Assembly of Criminal Chambers of the Supreme Court of Appeals, 2003/8-36 E., 2003/775 K., 25.03.2003 T.

As stated by the CAT, granting amnesty to the perpetrators of the crime of torture and ill-treatment has been regarded as an obstacle that prevents the enjoyment of the right to redress.[125] In addition, failure to make appropriate legislation that excludes the crime of torture from amnesty, also leads to impunity of the perpetrators in contradiction with non-derogable nature of torture prohibition. The jurisdiction of ECtHR also follows the same reasoning.[126]

7. STATUTE OF LIMITATIONS

According to Article 94/6 of Turkish Criminal Code, torture is not subject to statute of limitations. . However, amendment which proscribes the statute of limitation for torture was made in April 2013. Article 7/1 of Turkish Criminal Code states that any person can not be subjected to any punishment for an act which does not constitute an offense according to the law in force at the time of commitment of the crime. Pursuant to Article 38 (2) of he Constitution rules relating to legality of crimes and punishments also apply to statute of limitation. That means, amendment made in April 2013 shall not apply for crimes committed before that time. Regarding the crime of torture, the problem occurs since there is no exception to the prohibition against *ex post facto* laws known as the *nessun poena sine lege* principle.

Thus, prosecutions for crimes committed before April 2013 might drop due to statute of limitation.

Despite the lack of appropriate legislation which excludes the crime of torture from the prohibition against *ex post facto* laws, under international human rights law, it is permissible for a State to prosecute an individual for a crime violating a *jus cogens* norm such as torture. Article 15/2 of CCPR states *"Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."*

However, it is yet to be seen whether a prosecution which is based on international law but in conflict with Article 38 (2) of the Constitution has any chance before domestic authorities.

Due to the its international obligations and absolute nature of torture prohibition, the lack of appropriate legislation in Turkey bears its responsibility under international law since it does not comply with its obligations by leading to impunity of the perpetrators.

8. INADEQUACY OF ADMINISTRATIVE INVESTIGATION AGAINST PERPETRATORS

In order to provide effective prevention and protection against torture, it is significant that perpetrators of the crime of torture are suspended from the duty during the investigation and prosecution.

[125] UN Committee Against Torture (CAT), *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3, para. 38
[126] *Abdülsamet Yaman v. Turkey*, App. No: 32446/96, 02.11.2004, para. 55

In its resolution, UN General Assembly pointed out the importance of suspension from duty of alleged perpetrators of torture as such: *" The General Assembly… encourages all States to ensure that persons convicted of torture or other cruel, inhuman or degrading treatment or punishment have no subsequent involvement in the custody, interrogation or treatment of any person under arrest, detention, imprisonment or other deprivation of liberty and that persons charged with torture or other cruel, inhuman or degrading treatment or punishment have no involvement in the custody, interrogation or treatment of any person under arrest, detention, imprisonment or other deprivation of liberty while such charges are pending."*[127]

Accordingly, with regards to the failure to suspend the alleged perpetrators of torture and ill-treatment from duty during investigation and prosecution, ECtHR found a violation of Article 3 of ECHR.[128]

To conclude, the case of Turkey shows that the presence of a crime of torture cannot in itself guarantee to eliminate wide-scale torture; the case of Israel, on the other hand, shows how lack of a single legal norm against torture and the alternate offenses approach allow for a serious derogation and eventual dissolve of the concept. Between law and torture stand procedural safeguards (to detainees) and investigation and prosecution bodies (of torturers).

IV.REDRESS

A. TURKEY

1. Restitution

As mentioned above, restitution includes release of the persons whose liberty is restricted, payment for the harm or loss suffered, reimbursement of the expenses caused by the victimization process, restoration of the rights and re-examination of the case.[129]

First of all, it is significant to remark that there is no specific provision regulating restitution mechanism with regards to torture and other forms of ill-treatment under domestic law.

According to general provisions under Turkish Criminal Procedural Code, the suspect or accused can appeal to the judge to be released at any stage of investigation and prosecution.[130] In a case that the judge denies the request of release, the suspect/ accused has the right to appeal to the decision of the judge.[131] In addition, the judge is also entitled to evaluate whether the circumstances that lead to the arrest of the person concerned, have changed or not, in a time limit of 30 days, by the request made by the prosecutor.[132]

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[127] UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment : resolution / adopted by the General Assembly* , 14 February 2014, A/RES/68/156, para.15

[128] See: *Getiren v. Turkey*, No. 10301/02, 22 July 2008, para.92; *Hüseyin Şimşek v. Turkey*, No. 68881/01, 20 May 2008, para.67; *Ali& Ayşe Duran v. Turkey*, No. 42942/02, 8 April, para. 64; *Zeynep Özcan v. Turkey*, No. 45906/99, 20 February 2007, para. 44; *Abdülsamet Yaman v. Turkey*, No. 32446/96, 2 November 2004, para.55

[129] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly*, 29 November 1985, A/RES/40/34, para. 8

[130] Article 104 of Law No. 5271

[131] Ibid.

[132] Article 108 of Law No.5271

Regarding the payment for the harm or loss suffered and reimbursement of the expenses caused by the victimization process, it is only dealt within compensation mechanism and individual application to the Constitutional Court which has been recently introduced into the domestic legal framework under Article 40 of the Constitution.[133]

Under Article 311/1 of Law No. 5271, the re-examination of the case is possible depending on the following circumstances:

- If any document used as an evidence appeared to be counterfeit
- If it appears that any witness or expert gave any statement contrary to the facts
- If it is understood that any judge participating in the prosecution process, misused her/his duty in a manner which would require a criminal prosecution.
- If new facts or evidence that might lead to the acquittal of the accused or conviction of the accused with a lighter punishment, appeared.
- If ECtHR found that the judgment given by domestic courts violate the Convention

2. Rehabilitation

Regarding the rehabilitation of victims of torture and other forms of ill-treatment, there is no provision under domestic law. There are non-governmental organizations(NGOs) supporting torture victims in Turkey. However, those like Human Rights Foundation of Turkey (HRFT), may be subjected to threats from the government. For example, very recently, the HRFT was subjected to an administrative fine amounted to 85,200 liras and the premium debt amounted to 41,000 liras imposed by a public body, the Social Security Institution due to its activities during anti-government Gezi Park protests in summer 2013.[134]

3. Guarantee of Non-repetition

Regarding the guarantee for prevention of recurrence, there is not any legislation, neither.

4. Compensation

Under domestic law in Turkey, no specific regulation exists for the compensation regarding the effects of torture. Therefore, request of compensation is handled according to the general rules for compensation.

In Turkey, there are two ways to claim compensation. Cases filed under the Law on Debts are treated at Judicial Courts and cases filed under the Law on Administrative Proceedings are treated at Administrative Courts.

The Civil Procedural Law[135] in connection with the Law on Debts and the Law on Administrative Proceedings[136] include provisions concerning compensation ordered through judgments of ECtHR

[133] See also the section under the title "Compensation" below

[134] For detailed information, see also;http://tihv.org.tr/tihvnin-iskence-gorenlerin-tedavi-sureclerine-iliskin-calismalarinin-engellenmesine-yonelik-basin-aciklamasi/

[135] Article 375/1(i) of The Civil Procedural Law, No. 6100, 12.01.2011

[136] Article 53 1(ı) of The Law on Administrative Proceedings, No.2577, 06.01.1982

embracing the cases regarding torture victims even though none of the legislation concerned includes specific provisions for compensation in cases of torture.

The problem regarding the torture cases requiring compensation is that the burden of proof still rests on the victim since there is no specific provision regarding torture and other forms of ill-treatment. Accordingly, claims for compensation are also subject to the statute of limitations which requires the claims to be raised within a year,[137] due to the lack of specific provision. In addition, since claiming compensation is subject to high fees, many torture victims tend to refrain from launching cases at judicial courts for this reason.

Similar to the claims made under Civil Law, the burden of proof rests upon the plaintiff. The time limit to raise a claim of torture is one year from the time of offence under both civil and administrative law. Cases at administrative courts are also subject to high fees that deter victims from filing claims. Even though the plaintiff has the right to be exempted from the fees by applying to legal aid, it is in contrast with the purpose of the compensation procedure in the context of the prohibition of torture since the granting of legal aid is subjected to the conditions set out in the Article 433 of Law no. 6100 which does not specifically refers to the victims of torture.[138]

However, in the case of Veli Saçılık who lost his arm as a result of the attack by using a bulldozer inside the prison during a demonstration, the State refused to pay the compensation even though the ECtHR ruled that there had been a violation of Article 3. Furthermore, the State filed a claim for recourse of compensation against Veli Saçılık for the damages occurred in the prison.[139] Regarding his case, the ECHR held that the Government should renounce any claim for reimbursement of the sum paid to Mr Saçılık in respect of his non-pecuniary damage and any claim for any additional amounts which may have been incurred by the Ministries in respect of the costs and expenses in defending themselves in the administrative proceedings brought by Mr Saçılık.[140]

Article 141 of Law 5271 also provides for compensation in case of unlawful detention and arrest.

B. ISRAEL

1. Rehabilitation

Prisoners have practically no access to rehabilitation services for torture-related injuries, physical or psychological. In extreme cases, a prisoner may receive some physical physiotherapy; likewise, prisoners will be seen as needed by psychiatrists and receive medication. These exceptions refer only to rare and acute cases. “Security” prisoners do not as a rule have access to social rehabilitation in prison, and the system itself is problematic.

Outside prison, Palestinians of course not entitled to rehabilitation services as non-residents. We are not aware of any instance in which the government covered the cost of rehabilitation for a Palestinian victim of torture, as that would amount to an admission of responsibility.

[137] Article 399/3 of the Civil Procedural Law
[138] Law No. 6100, January 2011 on Civil Procedure
[139] Veli Saçılık
[140] Saçılık and others v. Turkey, App. No: 43044/05, 45001/05, 14 April 2015

In the detention centers for asylum seekers, social workers are responsible for overseeing detainee's social and mental needs. At the time of writing, the State assigned merely seven social workers[141] to about 3,000 detainees of which a significant number arrived through the Sinai desert and / or from war zones, where torture is an imminent risk. NGOs and some Members of Knessset are currently advocating for **social residency** for asylum seekers and other "illegal immigrants", which would give them health insurance and access to treatment, prevention and rehabilitation. This is still not the case. [142]

2. Financial Compensation

We are not aware of any instance in which the government agreed to formal financial compensation for a Palestinian victim of torture *per se*, as that would amount to an admission of responsibility. There have been isolated incidents where victims of torture from the 1980's and 1990's reached a settlement with the State, resulting in payment to the victims or the victim's family (e.g. 1278/05). These settlements were reached in civil tort cases, not criminal, and included a clause absolving the State from declaring the plaintiff a victim of torture.

It should also be noted that military courts in the Occupied Territories have no jurisdiction to discuss damages / compensation lawsuits, therefore procedures have to be conducted in Hebrew, in Israeli courts. Access of Palestinians to justice (discussed at length below) is further compromised by the especially high costs of expert opinions to prove damage and causality which are necessary in such cases. In addition, a recent HCJ ruling states that enemy combatants have no standing in civil tort cases.

V. SPECIFIC ISSUES CONCERNING TORTURE AND OTHER FORMS OF ILL-TREATMENT

A. TURKEY

1. THE USE OF FORCE AMOUNTING TO TORTURE DURING DEMONSTRATIONS

Due to the fact that security officers in Turkey resort to the use of force in many public demonstrations[143], in this section, we will try to analyze on which grounds security officer can resort to use of force and whether use of force, in specific circumstances, may amount to torture and other forms of ill-treatment.

International human rights law recognizes that torture and other forms of ill-treatment do not only occur in formal detention centers.[144] In this context, the jurisprudence of ECtHR also indicates that

[141] In: Maya Kovaliyov-Livi, Sigal Rozen and Elisheva Milikovsky, **Managing the Despair**, Physicians for Human Rights – Israel and Hotline for Refugees and Migrants, Tel-Aviv Jaffa, 2014, p. 34.
[142] See the position paper by Physicians for Human Rights – Israel on "Social Residency" in Israel: http://www.phr.org.il/default.asp?PageID=99&ItemID=1006
[143] For example: Fact sheet on Gezi Park Protests as of July 16th 2013, accessible at: http://www.fidh.org/en/europe/turkey/hrft-fact-sheet-on-gezi-park-protests-as-of-july-16th-13688
[144] See, UN Committee Against Torture ("CAT"), *VL v Switzerland* (2006) Comm. No. 262/2005, 20 November 2006, CAT/C/37/D/262/2005 at para.8.10; ECtHR, *A v United Kingdom* (1998), 23 September 1998, 1998-VI, p. 2699, § 22; UN Human Rights Committee ("HRCtee"), General Comment No.20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para.2

violations of Article 3 of the ECHR can occur during demonstrations.[145] However, such cases are mainly decided on whether the force used by security officials was "necessary" and "proportionate" to pursue a legitimate aim in a democratic society.[146]

However, this stance might not always be sufficient to explain the nature of the conduct, as the intensity of the force used exceeds what can be called "necessary" or "disproportionate". Occasionally, security forces invoke force with a clear to punish protest movements, to humiliate particular social and political groups, and to intimidate individuals from exercising their rights to freedom of assembly, association and expression.[147] Each of these might contain distinctive features of the prohibited purposes found in definition of torture depicted above.[148]

Very recently, the UN General Assembly also pointed out the significance of this issue by stating that it is *"deeply concerned about all acts which can amount to torture and other cruel, inhuman or degrading treatment or punishment committed against persons exercising their rights of peaceful assembly and freedom of expression in all regions of the world."*[149]

These concerns have also been manifested through resolutions at the UN Human Rights Council on the "Promotion and Protection of Human Rights in the Context of Peaceful Protests" adopted in 2013 and 2014.[150] The preamble of the latest of those resolutions affirms that Council is:

Deeply concerned about extrajudicial, summary or arbitrary executions, torture and other cruel, inhuman or degrading treatment or punishment of persons exercising their rights to freedom of peaceful assembly of expression and of association in all regions of the world,

Expressing its concern about the number of attacks targeting human rights defenders and journalists in the context of peaceful protests,

Expressing its concern also at the increasing criminalization, in all parts of the world, of individuals and groups organizing or taking part in peaceful protests.[151]

Very recently, the ECtHR also ruled that the use of force during a demonstration amounts to a violation of Article 3.[152]

a. The Discourse of Public Order As a legitimizing Tool for Use of Force

[145] See, Oya Ataman v. Turkey, No.74552/01, 5 December 2006

[146] *Yaşa and Ors. v Turkey* (2013), No. 44827/08, 16 July 2013, para. 49. Or in alternative terminology, is "indispensible" and "not excessive": see, *Izci v Turkey* (2013),. No. 42606/05, 23 July 2013, para. 54. See also *Gamarra v Paraguay*, Comm. No 1829/2008, 30 May 2012 (where the force used was held to have been disproportionate)

[147] See, African CmHR, *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011), Comm. No. 323/06, 16 December 2011, in particular para. 192, discussed further in Part B.

[148] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Art. 1; *Ilhan v Turkey* (2000) 26 June 2000, ECHR 2000-VII, para. 85; *El Masri* [GC] (2012) App. No. 39630/09, 13 December 2012, para. 197. The UN Human Rights Committee has explained that it draws the distinction between torture and other ill-treatment on "the presence or otherwise of a relevant purposive element": HRCtee, *Giri v Nepal* (2011), Comm. No. 28 April 2011, 1761/2008, para. 7.5

[149] UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment : resolution / adopted by the General Assembly* , 14 February 2014, A/RES/68/156, available at: http://www.refworld.org/docid/5321b7894.html [accessed 16 June 2014]

[150] UN HRC, Res. 25/38, 24 March 2014; UN HRC, Res. 22/10, 9 April 2013.

[151] UN HRC, Res. 25/38, 24 March 2014, preamble.

[152] Cestaro v. Italy, App. No. 6884/11, 07.04.2015

As a starting point, first of all, it is significant to discuss the reasoning/motivations behind the use of force by security officers against persons who are not armed. As it will be mentioned below, domestic law in Turkey legitimizes the use of force against its citizens, mainly for the purposes of public order and safety during the meetings and demonstrations.[153]

Under the Turkish Constitution, freedom of expression and freedom of assembly can be restricted by law on the grounds of public order and safety, amongst other reasons[154] Article 17 of Law on Meetings and Demonstration states that the governor of the city or district can postpone the meeting or demonstration up to one month on the grounds of national security, public order and prevention of the crime or ban the meeting and demonstration in case of an imminent threat showing that commitment of a crime will occur. In addition, Article 22 of Law No.2911[155] prohibits demonstrations and meetings on public streets, in parks, places of worship and buildings in which public services are based. Demonstrations organised in public squares have to comply with security institutions and not to disrupt individuals' movements or public transport. In a case that a demonstration and a meeting do not comply with the provisions of this Law, Article 24 of Law No.2911 stipulates that the crowd will be dispersed by force on the order of the governor's office.

b. Torture and Other Forms of Ill-Treatment During the Exercise of the Right To Assembly

In this section, it will be examined what exactly amounts to torture and ill-treatment during meetings and demonstrations in the context of international human rights law with regards to the sample cases mentioned below.

i. Principles on the use of force by state agents: necessity and proportionality

As mentioned above, in the context of international human rights law, the security officials may only use force against persons in certain circumstances where use of force if both "necessary" and "proportionate" to achieve a legitimate aim.[156]

For the use of force to be regarded as "proportionate", *"the benefits attached to the objective should outweigh the damage that would be caused through the violence".* For such force to be regarded as "necessary", *"the lowest possible level of force necessary to achieve a legitimate objective"* was used.[157]

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[153] Article 6, 17, 24 of the Law on Meetings and Demonstrations, Law Nr:2911, 6 October 1983
[154] Article 26&34 of The Constitution of Turkey
[155] *supra* Note 91
[156] UN General Assembly, Code of Conduct for Law Enforcement Officials, Res. 34/169, 17 December 1979, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/34/169, (**"UN Code of Conduct for Law Enforcement Officials"**), Art. 3. See also UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (**"UN Basic Principles on the Use of Force and Firearms"**), Principle 9. These provisions are considered to reflect customary international law: see Report of the Special Rapporteur extrajudicial, summary or arbitrary executions, submitted by Philip Alston, 5 September 2006, A/61/311, (**"Alston 2006 Report"**), para. 35.
[157] Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, submitted by Christof Heyns, 23 May 2011, A/HRC/17/28, (**"Heyns 2011 Report"**), para. 49, citing UN HRCtee, *Suárez de Guerrero v. Colombia* (1982) No. R.11/45, A/37/40, 31 March 1982; ECtHR, *Gül v. Turkey*, ECHR 2267/931 (4 December 2000); IACtHR, *Zambrano-Vélez and others v Ecuador* (2007) Merits, Reparations and Costs, Series C, No.166 (4 July 2007),

With regards to the standards providing guidance for security officials on the use of force, there is a number of international and regional instruments such as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the UN Basic Principles Code of Conduct for Law Enforcement Officials, the European Code of Police Ethics, and the OSCE Guidelines on Freedom of Peaceful Assembly.[158]

ii. Unnecessary or disproportionate use of force by a state agent amounting to a violation of prohibition on torture and other forms of ill-treatment

In regards to ECtHR's approach on cases where force used by state agents during a demonstration, it is significant to remark that any use of force that is not necessary and proportionate will amount to a violation of Article 3. In many cases under Article 3, the ECtHR established *that "when a person is confronted by police or other agents of the State, recourse to physical force which has not been made strictly necessary by the person's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention."*[159]

Considering the specific circumstances of a demonstration where a person is not under custody or control, the main question as to whether use of force amounts to a violation of Article 3, appears if it was necessary to achieve a legitimate aim and was proportionate in those circumstances. In parallel line with the reasoning of the ECtHR, it must be accepted that a violation of prohibition on torture and other forms of ill treatment will occur where the criteria of necessity and proportionality are not met. As a matter of fact, the ECtHR emphasized that *"the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals."* [160] As it will be mentioned more in detail below, other international and regional human rights bodies have taken the same approach.

As a result, in demonstrations where the use of force leads to the infliction of severe physical or mental pain or suffering, particularly for a prohibited purpose such as intimidation, punishment or discrimination, it may amount to torture or other forms of ill-treatment depending upon the existence of other elements.[161]

iii. Necessity and proportionality of the use of force to achieve a legitimate aim

Before applying "necessity" and "proportionality" test on cases where use of force directed against individuals participating in a demonstration, it should be first determined whether any force should

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[158] UN Code of Conduct for Law Enforcement Officials,; UN Basic Principles on the Use of Force and Firearms, above n. 115; European Code of Police Ethics, Recommendation Rec(2001), adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum (**"European Code of Police Ethics"**), para. 35 and 37; OSCE Guidelines on Freedom of Peaceful Assembly, above n. 22, Guideline 5.5 and paras. 171-178.

[159] *Tahirova v Azerbaijan* (2013), No. 47137/07, 3 January 2014, para.43 (protestor hit on head and back, and kicked in chest and abdomen); *Kop v Turkey*, No. 12728/05, 20 October 2009, para.27 (victim hit in the eye with a baton); *Izci v Turkey* (2013), No. 42606/05, 23 July 2013, para. 55 (victim beaten and kicked and sprayed with tear gas); *Timtik v Turkey* (2010) No. 12503/06, 9 November 2010, para 47 (victim hit in the face and subjected to pepper spray)

[160] *Izci v Turkey* (2013), No. 42606/05, 23 July 2013, para. 55.

[161] Cf. Nowak & McArthur, above n.19, pp. 150-151. For an argument that the alleged deliberate and repeated targeting of tear gas into homes of Shi'a community members as part of policing protests may amount to torture, see further Physicians for Human Rights, 'Weaponizing Tear Gas: Bahrain's Unprecedented Use of Toxic Chemical Agents Against Civilians', August 2012, https://s3.amazonaws.com/PHR_Reports/Bahrain-TearGas-Aug2012-small.pdf, p. 31.

have been used at all. At this point, it must be taken into account that even in the circumstances in which the demonstration is unlawful under domestic law, the ECtHR states that " where demonstrators do not engage in acts of violence, it is important for public authorities to show a certain degree of tolerance" towards the demonstrators.[162]

In parallel with international standards and the jurisprudence of other international human rights bodies,[163] the ECtHR stressed that the ECHR does not *" allow for a balancing exercise to be performed between the physical integrity of an individual and the aim of maintaining public order."*[164] Accordingly the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has embraced the view that *"the right to life... and the right to be free from torture or cruel, inhuman or degrading treatment or punishment...should be the overarching principles governing the policies of public assemblies."*[165]

Any force that is used must still meet the requirements of necessity and proportionality even in the cases where demonstrators engage in acts of violence, also brings up the question whether level of force can be justified in relation to the approach of ECtHR saying that *" a balance must be struck between the aim pursued and the means employed to achieve it."*[166]

Aside from the use of lethal weapons such as firearms which is strictly regulated,[167] it must be noted that use of less-lethal weapons[168] can also cause serious concerns in respect of prohibition on torture and other forms of ill-treatment. The UNCAT has displayed concern on a number of occasions about United Kingdom's use of plastic bullet rounds as a means of riot control by mainly asserting that the use of plastic bullets should be abolished.[169]

Another significant issue about the use of force is the way in which certain less-lethal weapons are used may also render their use as disproportionate. Even though, it may be found that the use of tear gas to disperse a crowd can be justified on the grounds that the demonstration is not peaceful, the way in which it was fired can lead to a violation of Article 2 and/or 3. Regarding such a case, the ECtHR held that *"firing a tear-gas grenade along a direct, flat trajectory by means of a launcher cannot be regarded as an appropriate police action as it could potentially cause serious, or indeed fatal injuries, whereas a high angle shot would generally constitute the appropriate approach, since*

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[162] *Oya Ataman v Turkey* (2006), App. No. 74552/01, 5 December 2006, paras. 41-42.
[163] See, eg. UN Basic Principles on the Use of Force and Firearms, , Principles 4 and 13. IACtHR, *Velez Restrepo v Colombia*, Merits, Reparations and Costs, Series C, No. 248 (3 September 2012); HR Ctee, *Gamarra v Paraguay*, Communication No 1829/2008, 30 May 2012. See also UN HRC, Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests: Report of the United Nations High Commissioner for Human Rights, A/HRC/22/28, 21 January 2013, (**"UNHCHR 2013 Report"**), para. 13 ("The dispersal of assemblies should only be a measure of last resort. Law enforcement authorities should not resort to force during peaceful assemblies, and they should ensure that force is only used on an exceptional basis").
[164] *Pekaslan v Turkey* (2012), Nos. 4572/06 and 5684/06, 20 March 2012, para. 58.
[165] Kiai 2012 Report, A/HRC/20/27, above n.9, para. 35
[166] *Güleç v Turkey* (1998) No. 21593/93, 27 July 1998, para.71 (in relation to article 2).
[167] Alston 2006 Report, above n.115, para. 35. See also UN Code of Conduct for Law Enforcement Officials, above n.115, Article 3(c).
[168] The less-lethal weapons as a term is used for the reason that it is preferred by some legal texts even though there is no difference between lethal and less-lethal weapons within the context of this study.
[169] UNCAT, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, A/51/44 (1996) paras. 58-65, at para. 64; United Kingdom of Great Britain and Northern Ireland, A/54/44 (1999) paras. 72-77, at paras. 76-7.

it prevents people from being injured or killed in the event of an impact."[170] Accordingly, a boy shot by a tear gas canister in this manner was held to have been a violation of Article 3.[171]

Similarly, in the case of *Gamarra v. Paraguay*, the complainant claimed that at the time of his arrest a group of policemen surrounded him and one of them fired a shot, rubber bullet, which knocked him to the ground and after that he was beaten and kicked by police officers.[172] The Committee stated that *"the use of force by the police was disproportionate and... the treatment to which the author was subjected constituted a violation of Article 7 of the Covenant."*[173]

In accordance with the jurisprudence of ECtHR and other international human rights bodies, the OSCE Guidelines established the following principles that must be pursued in all occasions when force is used in public assemblies: (a) where pepper spray or other irritant chemicals may be used, decontamination must be set out; (b) the use of attenuated energy projectiles (AEPs), baton rounds or plastic/rubber bullets, water cannon and other forceful methods of crowd control must strictly regulated; (c) under no circumstances should force be used against peaceful demonstrators who are unable to leave the scene; and (d) the use of force should trigger an automatic and prompt review process after the event.[174] Furthermore, the Guidelines remark that *"standards concerning the use of firearms are equally applicable to the use of other potentially harmful techniques of crowd management, such as batons, horses, tear gas or other chemical agents, and water cannon."*[175]

Despite the international standards, in a case concerning the prosecution of a police officer who used pressurized water against a photographer during a demonstration, was charged with intentional injury with a penalty up to 3 years.[176]

On the other hand, concerning a case which involves severe beatings by police officers during Gezi demonstrations, the Criminal Court of first Instance sent the file to the higher court due to the lack of jurisdiction based on a reasoning that the acts of the police officers may amount to torture. However, the Assize Court rejected the objection and sent the file back to the the Criminal Court of First Instance.[177]

2. TORTURE AND OTHER FORMS OF ILL-TREATMENT REGARDING THE RIGHT OF SICK PRISONERS TO BE RELEASED

In this section, we will examine the situation of sick prisoners who are denied to be evacuated on the grounds of public order and safety.

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[170] *Yaşa and Ors. v Turkey* (2013), App. No. 44827/08, 16 July 2013, para. 47.
[171] Ibid., para.49, For similar cases: Güler ve Öngel/Türkiye no. 29612/05 ve 30668/05 4 Ekim 2011, Nisbet Özdemir/Türkiye no. 23143/04 19 Ocak 2010
[172] HR Ctee, *Gamarra v Paraguay*, Communication No 1829/2008, 30 May 2012, para. 2.8
[173] Ibid. para. 7.4
[174] Section 15(2), Act XXXIV on the Police (2008), cited in OSCE/ODIHR, "Guidelines on Freedom of Peaceful Assembly", Second Edition, 25 October 2010, http://www.osce.org/odihr/73405 (**"OSCE Guidelines on Freedom of Peaceful Assembly"**), p.176
[175] Ibid., para. 177
[176] Istanbul 66th Criminal Court of First Instance,http://www.hukukihaber.net/kamu-hukuku/toma-suyu-icin-ilk-dava-h49014.html
[177]Case of Doğukan Bilir, Eskişehir 9th Criminal Court of First Instance, http://www.evrensel.net/haber/93078/agir-ceza-iskenceyi-kabul-etmedi; For detailed information see also: Ataman v. Turkey, App. No: 74552/ 01, 05.12.2006; Ataman Grubu/Türkiye Kararlarının Uygulanması İzleme Raporu available at: http://aihmiz.org.tr/files/AtamanGrubuRapor.pdf (only in Turkish)

In this regard, before examining the situation of sick prisoners in Turkey, international standards concerning the right to health in connection with the conditions of prisons, will be introduced in order to see the present situation as a whole.

a. International Standards Regarding the Right of Sick Prisoners to be Released

Regarding the right to health of sick prisoners in connection with the right to be released, the most important instruments are the Standard Minimum Rules for the Treatment of Prisoners[178], the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[179], the Principles of Medical Ethics Relevant to the Role of Health Personnel Particularly Physicians in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principle of Medical Ethics)[180], the ECHR, the UNCAT, the Basic Principles for the Treatment of Prisoners[181], Recommendation No. (98) 7 of the Committee of Ministers concerning the ethical and organizational aspects of health care in prison [182] , Recommendation 1418 (1999) of the Parliamentary Assembly concerning the Protection of the human rights and dignity of the terminally ill and the dying[183], Recommendation No. (2000)22 of the Committee of Ministers on improving the implementation of the European rules on community sanctions and measures [184] , Recommendation No. (2006) 2 of the Committee of Ministers on the European Rules[185].

With regards to the prisoners unsuited for continued detention, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stated that *" typical examples of this kind prisoner are those who are the subject of a short-term fatal prognosis, who are suffering from a serious disease which cannot be properly treated in prison conditions, who are severely handicapped or of advanced age. The continued detention of such persons in a prison environment can create an intolerable situation. In cases of this type, it lies with the prison doctor to draw up a report for the responsible authority, with a view to suitable alternative arrangements being made. "*[186]

Similarly, in its recommendation No. (98) 7 concerning the ethical and organizational aspects of health care in prison, the Committee of Ministers stated that *" prisoners with serious physical*

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[178] Adopted on 30 August 1955 by the First United Nations COngress on the Prevention of Crime and Treatment of Offenders

[179] General Assembly resolution 3452 (XXX) of 9 December 1975, annex, arts. 2 and 4; see *Official Record of the General Assembly, Thirtieth Session, Supplement No. 34* (A/10034), p. 91

[180] General Assembly resolution 37/194 of 18 Decemeber 1982, annex principles 2-5; see *Official records of the General Assembly , Thirthy-seventh Session*, Supplement no. 51 (A/37/51), p. 211

[181] General Assembly resolution 45/111 of 14 December 1990, annex, principle 1; See Official records of the General Assembly, Forty-fifth Session, Supplement No. 49 (A/45/49) p. 298

[182] Recommendation No. (98) 7 of the Committee of Ministers to Member States concerning the ethical and organisational aspects of health care in prison (Adopted by the Committee of Ministers on 8 April 1998 at the 627th meeting of the Ministers' Deputies)

[183] Recommendation 1418 (1999) of the Parliamentary Assembly concerning the Protection of the human rights and dignity of the terminally ill and the dying (text adopted by the Assembly on 25 June 1999)

[184] Recommendation No. (2000)22 of the Committee of Ministers to Member States on improving the implementation of the European rules on community sanctions and measures(adopted by the Committee of Ministers on 29 November 2000 at the 731st meeting of the Ministers Deputies)

[185] Recommendation No. (2006) 2 of the Committee of Ministers to member States on the European Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies)

[186] CPT/Inf/E (2002) 1 - Rev. 2006, para III-70, 72

handicaps and those of advanced age should be accommodated in such a way to allow as normal life as possible and should not be segregated from the general prison population... The decision as to when patients subject to short term fatal prognosis should be transferred to outside hospital units should be taken on medical grounds. While awaiting such transfer, these patients should receive optimum nursing care during the terminal phase of their illness within the prison health care centre. In such cases provision should be made for periodic respite care in an outside hospice. The possibility of a pardon for medical reasons or early release should be examined."[187]

In its recommendation 1418 (1999) on the Protection of the human rights and dignity of the terminally ill and the dying, the Parliamentary Assembly of the CoE also recommended that the States should make the necessary legal and social arrangements including, specifically, recognition of palliative care as a legal entitlement of a terminally ill or dying person and procurement of ambulant hospice teams and networks, ensuring that palliative care available at home or wherever ambulant care for the terminally ill or dying person may be feasible.[188]

In the context that the detention of seriously ill persons would raise an issue under Article 3 of the ECHR, the ECtHR established a test in order to decide whether the continuous detention of seriously ill persons is justified. According to this test, the Court examines the elements as such: *(a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention and (c) the advisability of maintaining the detention measure in the view of the state of health of the applicant.*[189] By analysing all these elements separately, the Court decides that Article 3 of the ECHR has been violated if one of these conditions is met. For example, in the case of *Mouisel v. France,* the Court found that the continued detention of a prisoner suffering from cancer, had undermined his dignity and accordingly, there had been a violation of Article 3 of the ECHR.[190] Furthermore, in the case of *Tekin Yıldız v. Turkey*, the Court held that there had been a violation of Article 3 by relying on the fact that the applicant had been put into detention again after his release even though there had been no change in his state of health.[191] In the context of advanced age of the seriously ill detainees/ prisoners, the ECtHR also decided that there had been a violation of Article 3 by taking into consideration that the state of health of the person in relation with medical facilities of the prison would lead to the feeling of degradation.[192]

After setting out all the relevant international standards concerning the situation of seriously sick prisoners, it can be concluded that the continued detention of such persons would be in contradiction with the prohibition on torture and other forms of ill-treatment and accordingly, they

[187] Recommendation No. (98) 7 of the Committee of Ministers to Member States concerning the ethical and organisational aspects of health care in prison (Adopted by the Committee of Ministers on 8 April 1998 at the 627th meeting of the Ministers' Deputies), para 50-51

[188] Recommendation 1418 (1999) of the Parliamentary Assembly concerning the Protection of the human rights and dignity of the terminally ill and the dying (text adopted by the Assembly on 25 June 1999), para. 8-9

[189] Aleksanyan v. Russia, (App. No 46468/06), 05 June 2009, para 137; Gülay Çetin v. Turkey, (App. No 44084/10), 05 March2013, para 105

[190] Mouisel v. France (App. No. 67263/01), 21 May 2003, para 48

[191] Tekin Yıldız v. Turkey (App. No 22913/04), 10 November 2005, para 83

[192] Farbtuhs v. Latvia, (App. No 4672/02), 02 December 2004, para 58; Contrado (no 2) v. Italy, (App. No. 7509/08), 11February 2014, paras. 84-85

must be given the possibility of early release for medical reasons depending upon the expert medical report.

b. Domestic Law Regarding the Release of Sick Prisoners

Under the title "Duties and Powers" of the President, Article 104 of the Constitution states that the President has the power *"to remit or commute the sentences imposed on certain individuals on the grounds of chronic illness, disability or advanced age."* This special procedure of pardoning the sentences is not subjected to any kind of limitations as well as judicial supervision.

Article 16 of the Law 5275 on the Execution of Sentences and Security Measures (hereinafter " Law no. 5275") sets out the rules for conditional release of sick prisoners. Regarding Article 16/3 of the Law no.5275 stipulates that the decision of postponement will be made by the Chief of Public Prosecutor, upon a report issued by the Forensic Medicine Institution or issued by the health committee of a fully equipped hospital designated by the Ministry of Justice and approved by the Forensic Medicine Institution. At first hand, this legislation seems to be in accordance with international standards that require a report of medical experts in order to evaluate the situation of the detainee and the prisoner. However, Article 16/6 states that the postponement of the execution of the sentences of the persons who are seriously ill or handicapped, and accordingly are not able to go on living on their own, would only be possible if they do not pose any security risks to the public in addition to the medical report issued in accordance with Article 16/3. This additional requirement of "not posing any security risk to the public" render the purpose of the right to early release of seriously ill persons ineffective and is incompatible with the international standards mentioned above since the evaluation of "security risk" would depend on the decision of the Chief public prosecutor. In fact, in its decision regarding the release of terminally ill and dying person, the Chief Prosecutor of Bakırköy District denied the release of the prisoner on the ground that "he might be used as a tool of propaganda by political persons and accordingly he poses a threat to the public security" despite the medical report stating that he needs to be released due to the his situation of health.[193]

As it can be obviously seen from the example mentioned above, the margin of appreciation granted to the public prosecutors is in contradiction with international standards and lead to the breach of the prohibition of torture and other forms of ill-treatment in the context of sick prisoners.

3. SUMMARY

In this section, it is shown how the other offenses related to torture fail to prevent public officers from perpetrating torture and other forms of ill-treatment and lead to impunity of the perpetrators accordingly. Even though the maximum punishment of torture crime is proportional to the gravity of the crime, invoking other offenses related to torture lead to disproportional punishments to the gravity of the crime, especially with regards to suspension of the sentence , delaying pronouncement of the judgment, amnesty and statute of limitations which may be regarded as a result of ineffective investigation and prosecution. Accordingly, in the next part, the deficiencies of investigation and prosecution process will be touched upon.

[193] The decision of the Chief Public Prosecutor of Bakırköy, No: 2013/233, 19.08.2013

Furthermore, it is important to take into consideration that the discourse of public order and security in Turkey which may lead to legitimization of of acts of torture and other forms of ill-treatment in specific circumstances as mentioned above.

B. ISRAEL

1. THE EFFECTS OF "OTHER CRIMES" ON JUDGMENT AND ENFORCEMENT-IN PRACTICE

The lack of one specific crime of torture has yet another important consequence: the laws, authorities, and procedures of launching, investigating, and prosecuting complaints of torture, change according to the organizational affiliation of the perpetrators and the relevant parts of the Israeli legal system under which the alleged assault was committed.

Still, perhaps the other crimes are effective despite their evident shortcomings? To learn that, we need to check the application of alternate offenses in cases that amount to torture and other forms of cruel, inhuman or degrading treatment. We now turn to examine such data with regards to each of the authorities under which torture may occur: Israel Defense Forces, Israel Police, Israel Prison Service, and the Israel Security Agency.

a. In the IDF:

Our information about indictments, convictions and punishments of Israeli soldiers in cases of abuse relies on the project of "Criminal Accountability of Israeli Security Forces" (in the Occupied Territories) run by the Israeli human rights organization "Yesh Din". The project's data was methodically collected from the IDF spokesperson, and carefully analyzed. Here, we present some bottom lines of that research.[194]

Army investigations are ran by the Military Police Criminal Investigating Division (MPCID), under the Military Justice Act. Thus we learn that on average, only 5.2% of MPCID's investigations opened between the years 2000-2013 ended with indictments. Moreover, since 2009 those numbers significantly dropped to 1%-3.4%.

More specifically, we learn that between the years 2000-2012, a total of 39 soldiers were convicted in court martial following harming bound detainees.[195] Of those, "… in only two cases were defendants convicted of charges that include 'aggravated circumstances' and carry relatively severe penalties" In one case, four defendants were convicted of battery under aggravated circumstances (maximum penalty of 4 years in prison) and of abuse under aggravated circumstances (max. 7 years). They were sentenced to 4.5-9 months in prison – that is, always less than third of the

[194] See the project home page in Yesh-Din website, here: http://www.yesh-din.org/cat.asp?catid=2. The main publications we rely on here are: **Shadow Report to the Fourth Periodic Report of Israel**, 112th Session of the Human Rights Committee, Yesh Din, Tel-Aviv, 2014 (also: "the shadow report"); **Law Enforcement upon IDF Soldiers in the Occupied Palestinian Territory** – Figures for 2013, Yesh Din, Tel-Aviv, 2014 (also: "2013 data sheet"); **Lacuna**, 2013; and Lior Yavne, **Exceptions** – Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007 ("Exceptions").

[195] We find this category of cases – originally used to demonstrate an evident war crime – close enough (and the closet available) to (though not congruent with) the crime of torture so as to serve as useful proxy in the current investigation.

maximum set in Israeli law for offenses of a "misdemeanor" type, far from punishment of "crimes" (3 years or more), and certainly disproportional in the context of torture.[196]

Of the 39 convicted, 12 were not sentenced to active prison terms. The others were charged with offenses the maximum punishment for which ranges between 1-3 years in prison. Their average active prison sentence was 2.7 months. We also learn that "vast majority of the defendants had made plea bargains with the prosecution, in which charges were reduced to lesser offenses… [and] only four of the 39 defendants… stood full evidentiary trials."[197] The extremely low punishments for soldiers' violence against Palestinians resulting from plea bargains highlight the partnership of all sides to the MJ system in lowering the standards of accountability and punishment.

Data obtained by PCATI from the IDF regarding indictments, convictions, and punishment of soldiers in cases of abuse of Palestinians between 2000-2007 also indicates low rates of indictments and punishment, and lack of enforcement upon commanders for abuse by their subordinates.[198]

Commanders' responsibility is, too, neglected in the practice of IDF prosecution. Thus, a study of indictments issued between 2000 and 2011 found that "… no criminal indictments were made against senior officers with the ranks of Colonel or higher, and that the highest ranking officers indicted for criminal offenses by the MAGC were three Lieutenant-Colonels… MPCID investigators, as a rule, refrained from questioning senior officers under warning… Even in those incidents when an investigation raised suspicions that procedures or policy appeared to be illegal, the investigators refrained from investigating the issue in depth in order to evaluate the responsibility of senior officers."[199]

In evident disproportion to the crime of torture, then, the vast majority of soldiers who are indicted for abuse of Palestinians are charged with "other offences" of maximum 3 years imprisonment. The actual verdicts, way below any maximum punishments, convey a forgiving message to perpetrators, way off proportional punishment not only of torture but also of any type of abuse.[200]

Another aspect of punishment is the criminal record. Here, we learn that a 2011 amendment to the Military Justice Act provides a "reduced criminal record that reduces the number of public bodies who may be given information about the criminal record… and drastically shortens the period of the criminal record of some of the defendants convicted in Courts-Martial." Thus, of the 39 convicted (aforementioned), "… 22 will enjoy the erasure of their criminal records after five years." While one crucial goal of enforcement is deterrence, the explanatory note to the amendment "… describes at length the law's purpose of sparing young soldiers the criminal stain that could interfere with their employment options after being discharged from military service."[201]

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[196] "In another case the Court-Martial of Appeals stiffened the sentence of two military police officers who were convicted of abuse under aggravated circumstances and set their sentences at seven and ten months in prison, respectively" – see in: **Lacuna**, p. 51.

[197] **Lacuna**, p. 52. A detailed report of incidents and related indictments is found in appendix I, there.

[198] Noam Hofstadter, **No Defense**, The Public Committee Against Torture in Israel, Jerusalem, June 2008. Online: http://www.stoptorture.org.il/files/No_Defense_Eng.pdf.

[199] Lior Yavne, Alleged Investigation, Yesh Din, Tel-Aviv, 2011, pp. 81-82.

[200] This reasoning and assessment of dis-proportionality is applied in following sections that present similarly (un)punished abuse/torture by non-IDF personnel.

[201] Lacuna, pp. 53-54.

In light of the accumulative data, we may determine that the Military Justice system is forgiving when it comes to abuse and ill-treatment by its own personnel; the forgiving norm is all-encompassing: MJ verdicts fail to address "the grave nature" (UNCAT, Art. 1(2)) of the acts that amount to torture or other forms of cruel, inhumane – testifying that a 'torture'-like standard is lacking, and perhaps cannot exist, within the MJ 'torture'-less code. It also becomes clear that in cases of abuse by IDF soldiers, Israel fails to "take such measures as may be necessary to establish its jurisdiction over the offenses" that are used to punish torture (UNCAT, Art. 5(1)).

Also note that since IDF's primary focus is on OT Palestinians, soldiers' *de-facto* haven of Military Justice also functions as a criterion that divides Palestinians from Israelis in treatment of their complaints of torture and other forms of cruel, inhuman or degrading treatment or punishment. Here, too, Israel's proclaimed most evident threat to security, namely: "The Palestinians", come to have the lower hand.

b. In the Israel Police:

Precise data of indictments and punishments in cases of abuse by Israel Police personnel is scarce. Some examples may, however, demonstrate the current situation[202]:

- A 2010 research by Haaretz newspaper showed (in a review of 20 cases) how policemen who lie in investigations of police violence regularly go unpunished, sometimes are also promoted, and are not criminally indicted for perjury by the Police Investigation Department.

- On 2012, an Israel Police officer was found guilty of spraying (in 2010) pepper spray on Jewish WB settlers without any reasonable cause, and then caused his subordinate to lie in the investigation of the incident; he, too, faced a disciplinary rather than a criminal process. His total punishment was a 5,000 NIS fine.

- On 2012, the PID decided not to press criminal charges against a police officer who was photographed attacking and then strangling a demonstrator during a civil protest. The demonstrator testified she was also hit by two other policemen who arrested her at the officer's order. PID found the officer's behavior a matter of "unprofessional" conduct, not a criminal issue, and did not address his responsibility for his subordinates' acts.

- On December 2013, a senior IP officer was convicted of slapping (in 2011) a demonstrator and then putting her under a false arrest. The event was documented on three different video cameras; footage contradicted the officer's testimony in court. This case, too, was directed to the disciplinary channel. The IP disciplinary court convicted the officer of illegal use of force. His punishment was a severe reprimand.

- On April 2014, the Jerusalem magistrates court ordered Israel Police and a border policeman to pay 55,000 NIS damages to a Palestinian whom the defendant hit with his head, and then handcuffed, humiliated, threatened, and arrested with no apparent reason. As the verdict notes, this incident, too, was treated through a disciplinary (rather than criminal) procedure.

[202] Att. Avner Pinchuk and Ms. Nirit Moskovich from The Association for Civil Rights in Israel were of great assistance in assembling relevant information and cases here.

- Also on April 2014, a patrol policeman was convicted in three different offenses: abuse of a helpless person (Art. 368c of the Israeli penal code), assault leading to significant harm (Art. 380), and disruption of justice (Art. 244). These represented three different attacks, unusually brutal, including repeating electric shocks from a Tazer gun, all while victims were under official custody and at the mercy of the defendant. The total punishment was 28 months in prison.

A search through an Israeli index of all court cases did not yield information to contradict the picture drawn above. Even if some cases may have evaded our inspection, the norm seems clear: Israel Police personnel's abuse of official power to attack civilians is often treated through disciplinary channels. Criminal charges of violence against civilians are quite rare; and even an extreme and most unusual conviction of repeated on-duty sadism was answered by 28 months imprisonment – never easy for the prisoner but still far from relevant maximum punishments or proportionality.[203]

Another evidence for the low efficiency of the criminal channel in lack of a torture law is found in a report written by the Knesset Research and Information Center in 2011[204], according to which, during 2009, the Police Investigation Department opened a total of 1505 criminal investigations – 993 of them regarding on duty police violence. Of those, 46% were closed for lack of evidence and another 37% concluded that the defendants were not guilty. Another 3% were closed for "lack of public interest" and another 4% because the identity of the alleged abuser could not be established. Five percent of the 993 violence cases resulted in a disciplinary act, and only in 36 cases (4%) was a criminal indictment served. Moreover, another 845 complaints of police violence were dismissed for lack of interest to the public, or transferred to other authorities. That puts the indictments/complaints ratio at 2.16%.

We will further investigate the institutional context in Chapter II. Here we may say that IP personnel, too, seem considerably protected from complaints regarding abuse of power on duty. Unlike attacks by the IDF that are limited to Palestinian civilians, IP violence does not seem to focus one particular group, but on several.

Thus ACRI's position from Nov. 2014, based on various cases that ACRI represented in court and its accumulative research, establishes that: "Along the [last few] years, we bear witness to various incidents of discrimination and illegal violence by cops towards different minority groups in Israeli society: immigrants from Ethiopia or from the Soviet Union, settlers and social activists, Arabs and orthodox Jews. Sometimes these phenomena seem to orient from prejudice or racism among the cops; some other times they seem to represent the spirit of command".[205] Further research is still required to characterize this type of violence vis-à-vis its different target audiences.

IP Commanders' responsibility for illegal use of violence was addressed by Israel's State Comptroller, whose 2005 report warned about a double standard in the Police with regards to police

[203] Tel Aviv District Court case no. 37609-08-13, State of Israel **vs**. Sa'il Anna'Im.
[204] Ori Tal-Sapiro, **Updated Data on Police Violence**, The Knesset Research and Information Center, Jerusalem, 2011. On the Knesset website [Hebrew]: http://www.knesset.gov.il/mmm/data/pdf/m02826.pdf.
[205] ACRI's 2014 position paper on Over-policing and discriminating treatment towards migrants from Ethiopia. In Hebrew: http://www.acri.org.il/he/33317.

violence, and most significantly about the policy of field commanders to turn a blind eye and to silently consent to abuse of Police power.[206]

The available data (direct, methodical data is still pending reply from the IP[207]) and consultation with expert lawyers indicate that IP commanders are not criminally prosecuted for their responsibility for abuse conducted by their subordinates. Moreover, the Israel Penal Code does not set a specific offense in this case, but rather contents itself with the general notions of responsibility, helpless persons, accessory, and their like.[208] Thus one important possible safeguard against torture, namely: accountability of the chain of command is removed from the picture.

c. In the Israel Prison Service:

A search through an officially acknowledged commercial database of all case files in Israel since 2000 for any mention of the NPGID yielded 99 cases, of which only five were criminal files with criminal indictments against 7 IPS personnel suspected of violence against prisoners. Those were charged with: assault (Art. 379 to the Israeli penal code, max. punishment is 2 years imprisonment, 3 defendants), assault that leads to actual physical harm (Art. 380, 3 years max., 4 defendants), assault under aggravated circumstances (Art. 382, 6 years max., 2 defendants), as well as threats (Art. 192, 3 years, 1), obstruction of justice (Art. 244, 3 years, 1) and convincing another to lie during an investigation (Art. 245b, 5 years ,one defendant).

Of the above, two defendants were acquitted. One was convicted but his punishment and possible change of verdict pend a review of the probation service. The punishment of one prison guard who was convicted of Arts. 379, 382, and 245b, was 4 months of community service plus 6 months of conditional imprisonment and 2,500 NIS fine. Another who was convicted at the same case (minus Art. 245b) got a similar punishment, just without community service.[209] In yet another case, defendants were convicted of Arts. 244 and 380, but a verdict could not be traced.

Most other court cases against IPS personnel were pursued in the disciplinary route. The IPS annual reports give some indication of disciplinary action that follows unlawful use of force by IPS personnel. According to the reports[210], during 2011, the National Prison Guard Investigation Division (NPGID) investigated 136 complaints of illegal use of force, and another 17 complaints of threats; on 2012, the numbers were 108 and 9, accordingly. The IPS annual report of 2013 does not provide this important data. Instead, it mentions that "following a large number of false reporting [by IPS staff], it was decided to increase enforcement on that front" (p. 105). No specific goals or resources are mentioned, though. The IPS reports it indicted 12 staff members of illegal use of force in 2010, and another 3 in 2011. It registers no similar data for 2012, 2013. These numbers seem to represent disciplinary rather than criminal procedure.

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[206] Israel State Comptroller, Annual report 2005, Ch. 2, pp. 355-373.

[207] The Israeli Police's 2013 Annual Statistics Report does not cover Police violence or other misbehavior. See here [Heb.]: http://www.police.gov.il/Doc/TfasimDoc/shnaton_2013.pdf.

[208] A specific responsibility of commanders is noted in the Rome Statute of the International Criminal Court, Article 25.3(b), and 3 *bis*. See: http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf, pp. 18-19.

[209] [Heb.] Criminal Case 2429/04, State of Israel and State Attorney – Central District vs. Arik Rahum and Rami Kazamal.

[210] Reports are available for 2005-2013. Here we review the last 4 years. See on the IPS website [Heb.]: http://ips.gov.il/Web/He/News/Publications/Reports/Default.aspx.

The language of the IPS' annual reports gives a strong impression that abuse of prisoners and detainees is routinely handled by internal, disciplinary means rather than the criminal channel. Examination of the criminal records supports this notion. Disciplinary discussions of abuse were found to result with reprimands and minor, usually conditioned, prison sentences, if any. As noted above, other internal procedures sometimes lead to dismissal from service.[211] Either way we may conclude that criminal enforcement on IPS personnel with regards to torture-related offenses is poor to non-existent. Thus in the IPS context, too, substantive offenses do not serve to reduce officials' attacks on detainees or fight torture.

d. In the Israel Security Agency:

ISA interrogations are the main source for complaints of torture. This is due to the institutional setting and the continuous attention of public and HROs it has been getting over the years. The data of indictments and punishments due to ISA torture is accurate and clear: since 2001, of approximately 950 complaints of torture in ISA interrogations, zero criminal investigations were opened, hence zero indictments, convictions, punishment. In the case of ISA, and under Israeli circumstances, then, the effectiveness of the alternate offenses approach to fight torture is clearly zero. As the Turkish case demonstrates, this still does not promise that a criminalization of torture would be all the more effective; the policy and institutions that lead to the extreme situation of zero effectiveness should therefore be discussed, as in chapters 2B and 3, ahead.

2. SUMMARY

This section reviewed how Israeli "other offenses" fail to enforce or deter security forces from abusing detainees. The relevant offenses' maximum punishments are not proportional to the gravity of the torture crime, and they fail to cover the essential circumstances of the UNCAT crime of torture. *De-facto,* the data reviewed above shows that despites hundreds of complaints of abuse of detainees every year, the personnel of Israel's security forces are very rarely indicted for abuse on duty, even more seldom convicted, and that mostly for minor offenses, that produce exceptionally low punishments.

These conclusions echo the 2013 Turkel report recommendation to the Israeli Ministry of Justice to "… initiate legislation wherever there is a deficiency regarding international prohibitions that do not have a 'regular' equivalent in the Israeli Penal Law, and rectify that deficiency through Israeli criminal legislation." Specifically, "…the Ministry should ensure that there is legislation to transpose clearly into law and practice the absolute prohibition in international law of torture and inhuman and degrading treatment"[212].

It is therefore sound to conclude that at the case of abuse of detainees, the policy of substituting the criminalization of torture with more general, existing offenses does not produce proper punishment, deterrence, or corrective norms. To the contrary, the functionality of "other" offenses as such seems to serve an institutional habit of accountability-aversion. Again, there is no telling if given a distinct

[211] The IPS publishes its internal disciplinary actions. According to this publication, the IPS disciplinary court discussed two cases of "illegal use of force" during 2013. Both resulted with a reprimand, a small fine and conditional prison time. See the 2013 summary in the organization's website [Heb.]: http://ips.gov.il/Items/08553/2013.pdf, and specifically pp. 130-140.

[212] Turkel Commission Report, p. 365

crime of torture, investigation and punishment standards would be different. In fact, the analysis of investigations / preliminary examination institutions, ahead, implies that significant part of the problem lies there. Still, a clear, specific standard against torture may at least orientate and focus the currently variant relevant legal branches, investigatory and disciplinary bodies, as well as public and decision makers' discourse towards a more unitary conceptualization and examination of the phenomenon, which may also mean elevated recognition, treatment, and accountability.

Also note that under the current logic of "other offenses", acts that may amount to the UNCAT crime of torture are judged under varying norms, in different types of courts and under different authorities and standards, and in the context of varying power differences between torturers and torture-survivor – depending on the identity of survivors (whether Israeli or Palestinian), and the organizational identity of abusers. Considering the gravity of the act and the crime of torture, and given the strong interest of Israel not to commit (or at least not to be accused of committing) torture, such plurality of standards and norms in and by itself represents a move away from accountability to torture by the judiciary, and even more so by central authorities of the Ministry of Justice and the Attorney General.

CHAPTER II.B

VI.THE INVESTIGATIVE AND PRELIMINARY EXAMINATION BODIES

A. TURKEY

1. INVESTIGATIVE AUTHORITY

Article 160/1 of Turkish Procedural Criminal Code states that: "*As soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not.*" Under domestic law, this Article secures the principle of ex-officio investigation.

Article 161 of Turkish Procedural Criminal Code stipulates that the prosecutor is entitled to carry out any investigation and gather all necessary information with the help of the security officials under her/his command.

Article 161/5 of Turkish Procedural Criminal Code provides: *"Public employees who misuse or neglect their duties stemming from the statute, or duties required of them according to provisions in the statute, as well as superiors and officers of the security forces who misuse or neglect to execute the oral or written demands or orders of the public prosecutors, shall be prosecuted by the public prosecutors in a direct way. Governors and administrative chiefs of districts shall be subject to provisions of the Act on Adjudication of Civil Servants and Other Public Employees, dated 2 December 1999, No. 4483, and the highest degree superiors of the security forces shall be subject to the provisions of adjudication, which are applicable for judges while they are under adjudication for crimes related to their offices*".

According to this provision, prosecutors do not have the authority to investigate the highest authority in command of security forces at a provincial level. However, as mentioned above, the

prosecution process of state officials is subjected to distinct procedural rules which require permission for the crimes perpetrated in relation to their official duty.[213] Considering that the crime of torture can only be perpetrated by state officials under Turkish Criminal Code, we encounter with the problematic whether a permission for investigation can be claimed when it comes to the crime of torture.

With regards to that question, Paragraph 5 of Article 2 of the Act on Adjudication regulates that the crime of 'Torture' under Article 94 and 95, and the crime of 'Exceeding the limits of Authorization for Use of Force' under Article 256 of Turkish Criminal Code will be prosecuted by prosecutors on its own motion. In addition, according to Article 161/5 of Turkish Procedural Criminal Code, public officials as well as superiors and officers of security officers are also excluded from the Act on Adjudication and will be prosecuted by prosecutors in a direct way.[214] Therefore, within the scope of these crimes, administrative permission cannot be claimed to start an investigation against public officials and officers of security officers as well as their superiors.

According to Article 92 of the Turkish Procedural Criminal Code, the prosecutors are also entitled to inspect places of detention, check the situation of detainees, control the length of their custody and record their findings in the register of detained persons. This provision could have been considered of a great importance for the prevention of torture and other forms of ill-treatment if this right had been put into effect by prosecutors.

Parallel to the Turkish Procedural Criminal Code, The Law on Duties and Powers of Police and Regulation on Apprehension, Detention and Statement Taking also included obligation of prosecutors to inspect detention places.[215]

2. THE PROBLEMS REGARDING THE INVESTIGATION PROCESS

This section will look at the details of the Investigation Process and Prosecution Process in Turkey. In the specific, the first section will analyze whether administrative or judiciary permission is claimed in order to start an investigation against the perpetrators. In addition, we will also look for whether complaint is necessary to investigate specific types of torture such as a crime of torture including sexual assault. A comparison with international law will be made in order to determine whether Turkey's investigative procedures are in compliance with international standards.

a. The Matter of Administrative/Judiciary Permission

i. International Standards

[213] Act on Adjudication of Civil Servants and Other Public Employees, Law Nr. 4483, 02.12.1999 (from now on, it will be used as "Act on Adjudication"

[214] Article 161/5 of Turkish Procedural Criminal Code *"Public employees who misuse or neglect their duties stemming from the statute, or duties required of them according to provisions in the statute, as well as superiors and officers of the security forces who misuse or neglect to execute the oral or written demands or orders of the public prosecutors, shall be prosecuted by the public prosecutors in a direct way. Governors and administrative chiefs of districts shall be subject to provisions of the Act on Adjudication of Civil Servants and Other Public Employees, dated 2 December 1999, No. 4483, and the highest degree superiors of the security forces shall be subject to the provisions of adjudication, which are applicable for judges while they are under adjudication for crimes related to their offices*"

[215] Article 26 of The Law on Duties and Powers of Police and Regulation on Apprehension, Detention and Statement Taking

The main purpose of the investigation into torture is to establish the facts relating to alleged incidents of torture, with a view to identifying those responsible for the incidents and facilitating their prosecution.[216] According to the Istanbul Protocol, *"the investigative authority shall have the power and obligation to obtain all the information necessary to inquiry...They must also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify."*[217]

In parallel with the principles of investigation mentioned by the Istanbul protocol, ECtHR states that the requirement of permission for starting an investigation into allegations of torture and other forms of ill-treatment constitutes a violation of Article 3 on the ground that requirement of permission renders the investigation ineffective.[218]

ii. Domestic Law

The prerequisite for ex-officio investigation is the authorization of the prosecutor to start a criminal investigation without bound by any permission from any competent authority. In the case that permission is claimed to start an investigation, it will be distinctly in contrast with the principle of ex-officio investigation and independency of investigation authorities.

According to Paragraph 1 of Article 2 of the "Act on Adjudication of Civil Servants and Other Public Employees", the prosecution process of state officials is subjected to distinct procedural rules which require permission for the crimes perpetrated in relation to their official duty.[219] Considering that the crime of torture can only be perpetrated by state officials under Turkish Criminal Code, we encounter with the problematic whether a permission for investigation can be claimed when it comes to the crime of torture.

With regards to that question, Paragraph 5 of Article 2 of the Act on Adjudication regulates that the crime of 'Torture' under Article 94 and 95, and the crime of 'Exceeding the limits of Authorization for Use of Force' under Article 256 of Turkish Criminal Code will be prosecuted by prosecutors on its own motion. In addition, according to Article 161/5 of Law of Criminal Procedure, public officials as well as superiors and officers of security officers are also excluded from the Act on Adjudication and will be prosecuted by prosecutors in a direct way.[220] Therefore, within the scope

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[216] *Labita v. Italy*, App. No. 26772/95, 6 April 2000, para. 131-134

[217] The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman Degrading Treatment or Punishment are annexed to General Assembly resolution 55/89 of 4 December 2000 and to Commission on Human Rights resolution 2000/43 of 20 April 2000, para. 80

[218] *Tüfekçi v. Turkey*, App. No. 52494/09, 22 July 2014, paras. 46-49*; Karahan v. Turkey*, App. No. 1117/07, 25 March 2014, para. 45*; İşeri v. Turkey*, App. No.29283/07, 09 October 2012, para. 42; *Ümit Gül v. Turkey*, App. No. 7880/02, 29 September 2009, paras. 53-57; *Nazif Yavuz v. Turkey*, App. No. 69912/01, 12 January 2006, para. 49

[219] Act on Adjudication of Civil Servants and Other Public Employees, Law Nr. 4483, 02.12.1999 (from now on, it will be used as "Act on Adjudication"

[220] Article 161/5 of Law of Criminal Procedure *"Public employees who misuse or neglect their duties stemming from the statute, or duties required of them according to provisions in the statute, as well as superiors and officers of the security forces who misuse or neglect to execute the oral or written demands or orders of the public prosecutors, shall be prosecuted by the public prosecutors in a direct way. Governors and administrative chiefs of districts shall be subject to provisions of the Act on Adjudication of Civil Servants and Other Public Employees, dated 2 December 1999, No. 4483, and the highest degree superiors of the security forces shall be subject to the provisions of adjudication, which are applicable for judges while they are under adjudication for crimes related to their offices*"

of these crimes, administrative permission cannot be claimed to start an investigation against public officials and officers of security officers as well as their superiors.. However, starting an investigation against governors and administrative chiefs as well as the highest degree of superiors of the security forces is still subjected to the permission procedure under the Act on Adjudication.[221]

Even though the crimes of torture and exceeding the limits of authorization for use of force are excluded from the Act of Adjudication as stated under Paragraph 5 of Article 2 of the Act of Adjudication, the wording of Article 161/5 of Turkish Criminal Procedure Code leads to confusion whether prosecution of governors, administrative chiefs and the highest degree of superiors of the security forces are still subjected to the permission procedure. As a matter of fact, Article 94/5 of Turkish Criminal Code states that: "*The punishment to be imposed may not be reduced even if the offense is committed by negligence."*[222] As it is obviously seen from that wording of Article 94/5, the crime of torture can also be committed by negligence and the reducing of the punishment cannot be justified on the grounds of negligence. Therefore, in the case that the crime of torture occurred as a result of the negligence of their duties, governors, administrative chiefs and the highest degree of superiors of the security forces must be prosecuted without any necessary permission. [223]

However, in fact, it is observed that a permission for investigation is still required for the governors and highest degree of superiors of the security forces.[224]

b. The Matter of Complaint Requirement

i. International Standards

According to the CPT[225] , *"even in the absence of a formal complaint, (prosecutorial) authorities should be under a legal obligation to undertake an investigation whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred."*[226] The ECtHR also emphasised that *"even when, strictly speaking, no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has been used. Victims of alleged violations are not required to pursue the prosecution of officers suspected of ill-treatment on their own. This is a duty of public prosecutor who is better equipped in that respect."*[227]

ii. Domestic Law

Article 160/1 of Law of Criminal Procedure states that: "*As soon as the*

public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not." Under domestic law, this Article secures the principle of ex-officio investigation as mentioned above.

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[221] Article 161/5 of Law of Criminal Procedure
[222] Article 94 of Turkish Criminal Code, Law Nr.5237, 26.09.2004
[223] Governor of Ankara, 498.01.02-S-88 K., 29.05.2014
[224] Istanbul Prosecutor's Office, no: 2014/38648
[225] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
[226] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Standards, CPT/Inf/E (2002) 1-Rev. 2013, VIII Combating Impunity, para. 27
[227] *Lakatos and Others v. Serbia*, App. No. 3363/08, 7 January 2014, para. 80

In principle, complaint of the torture victims is not required for starting an investigation against the perpetrators. However, in practice, it can be observed that prosecutors do not start an investigation until a complaint is filed.[228]

As a result, it can be said that the problem regarding complaint requirement is due to the current legislation as well as the mentality of the implementers of the law[229]

B. ISRAEL

In the battle against torture, strong safeguards ought to be supplemented with effective investigation and enforcement that punish torturers and deter future abusers. As chapter 1 elaborates, acts of official abuse of detainees may be prosecuted by different systems and under different laws in Israel, depending on the identity of the perpetrators and that of torture survivors. The following sections therefore detail the authorities, obligation, and practice of different Israeli investigative bodies and their adjacent preliminary examination bodies – to determine the structure and outcomes of this multi-facet legal system.

1. THE INVESTIGATIVE BODIES

a. Introduction

i. PID: abuse by Israel Police and Israel Security Agency

The Police Investigation Department (PID) is an officially independent and autonomous body within the State Attorney's Office in the Israeli Ministry of Justice. It was established in 1992 in accordance with the recommendations of a joint inter-ministerial team of the Ministry of Justice and the Ministry of Police (currently: Ministry for Internal Security).

PID's budget proposals (Ministry of Justice, Israel Police) and the Budgets Division of the Ministry of Finance' data show that the PID's annual budget is in the range of NIS 10-12 million ($ 2.8-3.5 million), and its allocation of full-time staff positions ranges from 31 to 43. This staff is responsible for some 27,000 police employees (including approximately 8,000 Border Guard police – see the figures of the Central Bureau of Statistics for 2012), and for processing thousands of complaints every year.

The PID investigates complaints concerning police personnel suspected of committing criminal offenses incurring a penalty of more than one year's imprisonment (which includes the main "other" offenses). It is also responsible for investigating suspected offenses committed by ISA employees in the course of performing their function or in connection therewith, provided that the Attorney General or persons authorized on his behalf have decided to open an investigation. This authority was delegated to the State Attorney and two of his deputies[230].

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[228] In the case of M.Ş, even though the traces of torture are visible, the prosecutor refrained from establishing an investigation against the perpetrators until a complaint is issued.

[229] In regards to duty of investigation ex-officio, the issue of permission and complaint will be discussed more in detail below.

[230] See Police Ordinance (Amendment Nos. 12 and 18), section 49I1. There are several exceptions to the PID's investigative powers relating mainly to incidents involving the shooting of Palestinians by police officers; we will not discuss these aspects here (for details, see the Turkel Report, 256-9).

PID's mission is then to consolidate a criminal investigation file, and to recommend whether to prosecute. After completing the investigative process, the head of the PID or his deputy can recommend indictment. Senior attorneys in the PID are also empowered to close an investigation file[231]. The PID's recommendation to the State Attorney is not binding, but carries considerable professional and public weight. The final decision on indictment rests with the Prosecution Service or the State Attorney's Office, depending on the nature of the offense. As discussed below, criminal allegations against ISA or IP personnel may be conditioned by the Attorney General upon a preliminary examination, conducted by designated bodies.

One observable improvement in the PID is the gradual change in composition of its stuff – from former police employees to civilian investigators trained in a dedicated program. According to the PID's website, at the beginning of 2013 the latter counted 76 percent of the PID personnel.

ii. MPCID: Abuse by Israel Defence Forces

The Military Police Criminal Investigation Division (MPCID) has the authority to carry out criminal investigations into offenses allegedly performed by IDF personnel in the course of their service. Its investigators are soldiers performing regular compulsory service who participate in a 10-week training course and in-service professional training according to their seniority, rank, and position. As of 2007, some 400 investigators served in the MPCID (according to the division's publications).

Opening an IDF investigation is the authority of the MPCID, the military advocate general, or the military prosecutors[232]. The MPCID's function is formalized in the Military Jurisprudence Law (Part B – Examination, sections 251-282B), and particularly section 252(A)(3), which establishes that a military police officer is entitled to serve as an "examining officer" undertaking an investigation enabling the prosecution of a soldier before a military court. In many cases the decision to open an MPCID investigation is based on the operational debriefings undertaken by the army's operational chain of command. This is discussed further.

The outcome of the criminal MPCID investigation is forwarded to an attorney in the Military Advocate General's Corps for a decision – whether to nullify the complaint; to order its discussion under disciplinary law; or to instruct a military prosecutor to serve an indictment (Military Jurisprudence Law, sections 277-281). The Military Advocate General and the attorneys in the Corps are empowered to instruct a military prosecutor to serve indictment on the basis of the examination material, even in the absence of a specific complaint, or to serve indictment for a different offense from that which formed the basis of the examination (MJL, section 282A).

iii. NPGID: abuse by Israel Prison Service

The National Prison Guard Investigation Division (NPGID) in the Israel Police (part of the special investigations unit LAHAV 433) is responsible for investigating information concerning criminal offenses by staff of the Israel Prison Service (IPS) in the framework of their position. Most of the NPGID investigators are appointed after undergoing training as police investigators and after serving in the National Unit for International Crime (Turkel Report, 346). NPGID is headed by an

[231] Turkel Commission Report, p. 296.
[232] See: Chief of Staff Order 33.0304 – MPCID Examination and Investigations.

officer with the rank of chief superintendent, who as of 2009 had 11 investigators at his disposal. That year, IPS employers numbered around 7,800, and the total number of prisoners was approximately 22,000[233]. The NPGID may receive cooperation and reinforcement from other units in the Israel Police such as the National Unit for International Crimes, which provides additional investigators and with evaluation, intelligence, communications, and detective services (Turkel Report, 262-3).

After the NPGID completes its investigation, the file is forwarded to the State Attorney's Office together with a recommendation ("evaluation") as to whether to initiate disciplinary or criminal condition, and if not – why not. Alternately, suspicions of offenses by IPS personnel may first be preliminarily examined as detailed in the relevant section below.

b. Powers and Obligations of the Investigative Bodies

i. Decision to open an investigation:

In the PID: The Criminal Procedure Law mandates the opening of a police investigation when information is received from any source concerning the committing of an offense. To this end, the alleged events must constitute a violation of the law and the information must reveal a "preliminary factual basis" (Criminal Procedure Law, section 59). Accordingly, a "complaint" is defined by the police as "a report of an offense committed received in any manner, excluding an intelligence report"[234]. If a police officer is suspected of committing an offense, the information must be forwarded to the PID. The obligation to initiate investigations into suspicions against police personnel is reinforced and formalized in headquarters orders of the Israel Police[235]. All that notwithstanding, as also elaborated below regarding (non-) investigations of ISA personnel, the Israeli court has allowed to conduct preliminary examination as a routine procedure before any criminal investigation, which opens the floor for selective application of the duty to investigate.

In the MPCID: Chief of Staff Order 33.0304 establishes that the MPCID is obliged to open a criminal investigation "in instances in which there are grounds to suspect that the offenses detailed in the order have been committed" –similar to the PID. These offenses include various circumstances of injuring of a person, threats, or deliberately endangering a person which are relevant to our case. According to the Military Advocate General's Corps, the MPCID enjoys autonomous authority to open a criminal investigation "…on account of offenses committed in a military context or… by a person to whom the Military Jurisprudence Law applies"[236]. Specifically, the military advocate general is to consider information concerning violations of the rules of international humanitarian law he receives from media reports or independent reports regarding a certain incident. In such cases an investigation is supposed to be opened immediately (Turkel Report, 284).

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[233] See in IPS 2009 Annual Report [Heb.], pp. 60-61. Online: http://ips.millenium.org.il/IPS/reports/2009/index.html.
[234] National Headquarters Order 14.01.01, Processing a Complaint and an Investigation File.
[235] See Order 06.03.03, Investigation of Police Personnel by the Police and the PID.
[236] In a position paper forwarded by the Military Advocate General's Corps to the Turkel Commission, Turkel Report, 250.

In the NPGID: The general obligation of the police to open an investigation also applies to the investigators in the NPGID. The IPS Commission Order establishes that any suspected offense by prison guards relating to their performance of their duty must be forwarded to the NPGID. The obligation to launch an investigation is emphasized in IPS orders regarding the case of a written or oral complaint by a prisoner alleging that a prison guard used unlawful force against him[237]. Suspected criminal offenses by prison guards discovered during the course of an internal disciplinary examination must also be forwarded for investigation[238].

ii. Is the appropriate investigative body objective and neutral?

In the PID: The department belongs to the Ministry of Justice and is separate from the police and the ISA, which it is designated to investigate. The ongoing change from former-police to civilian investigators is particularly important for separation. The decision whether to investigate is thus separated from the investigated bodies. Nevertheless, in order to undertake its investigations the PID must rely on police resources (see the Turkel Report, 296), thereby creating a degree of dependence and also exposure of information from the investigation to the investigated body. When preliminary examination predates investigation, however, it is conducted inside the police – see ahead.

In the MPCID: The Military Police is separate from other army corps and is directly accountable to the IDF chief of staff. All the staff members in the MPCID are accountable to the unit's chain of command. In professional terms the MPCID is accountable to the Military Advocate General and the military prosecution.

Despite these elements of separation, however, the MAG still functions as the head of both the military prosecution system and the legal advice system. Thus, "[I]f an action he approved with his cap as legal advisor (or one of his staff approved) raises *prima facia* suspicion of violation of the laws of war, how can the MAG order an MPCID investigation concerning an issue in which he was personally or institutionally involved?" The independence of the investigative body is thereby undermined. Moreover, "In many instances, staff from the MAGC are required to investigate practices and operating methods which the Corps itself was involved in creating or approving. It is difficult to imagine a graver violation of the independence of the investigation body.[239]"

Also, though the MAGC's commander is still the Chief of Staff, and its budget is part of the army budget – therefore its considerations cannot be divorced from those of the body within whose framework it operates and in which all the offenses it investigates occur.

The Turkel Commission noted these flaws and recommended that the dependence of the military advocate general on the chief of staff be reduced; that the professional relationship between the MAG and the AG be strengthened; and that a unit be established within the MPCID to focus

[237] Order No. 02.10.00, Processing Criminal Offenses by Prison Guards.
[238] See Procedure No. 03.300.039 of the Investigations Division of the Israel Police, Processing Offenses by Prison Guards, as well as the orders of the Israel Prison Service Commissioner.
[239] All quotes in the paragraph above are from Yesh Din, **shadow report**, pp. 10-11.

specially on investigations into operational aspects, and in particular suspected violations of international humanitarian law (Turkel Report, 396-7). These changes have not been introduced.[240]

In the NPGID: The NPGID is a police unit, therefore separate from the Israel Prison Service that it is responsible for investigating. On February 2014, the previous head of Lahav 433 quit his role and the police altogether following accusations and an ongoing PID inquiry regarding suspicions of bribe that he took. On May 2015, it was revealed that another senior Lahav officer was systematically leaking secret information from the unit for benefits. Still, Lahav is also considered a fresher, more functioning part of Israel Police, and it is officially independent.

iii. Investigative Powers

In the PID: The PID, as an institution, holds the professional expertise and technical means required for professional investigation. Thus, for example, in a meeting with the Turkel Commission the head of the PID stated that "the PID has access to an intelligence system and has technological capabilities identical to those of the Israel Police." For the purpose of criminal identification, the department has access to the resources of the Israel Police. The criminal procedure order in the police specifically permits (and in this sense establishes an obligation of) "… to question orally any person who is believed to be familiar with the facts and circumstances of any offense investigated by that officer… and he is entitled to record in writing any statement made by a person so questioned"[241]. A complementary instruction prohibits any action to disrupt a complaint or to refrain from assisting in the investigative and auditing actions (section 2 U-X)[242].

The Israeli parliament ensured that investigations include the input of torture survivors / complainants as well: thus the Right of Victims of an Offense law (which applies to sex offenses and violence offenses investigated by the PID or by Israeli Police) orders (section 18) that once an investigation is opened, "a victim of an offense is entitled to make a written statement to the investigative body or to the prosecutor regarding any injury or damage he has incurred due to the offense… and is entitled to have the prosecutor present his statement to the court in the hearing regarding the sentence." In cases of alleged torture, however, investigations are held very seldom. Preliminary examinations and military debriefings, which precede criminal investigation, are not bounded by the Rights of Victims law.

In the MPCID: The Military Jurisprudence Law establishes (section 256) that "for the purpose of performing its function, the MPCID is entitled to question any person (including civilians) and to seize any object required for the investigation." Here, too, the term "entitled" establishes an obligation.

Specifically, the order of the supreme command of the IDF regarding the powers of the Military Police (06.0202) establishes the authority of an MPCID officer to take a soldier from his unit for the purpose of questioning; to detain a soldier wherever he may be; to search his belongings and to confiscate any object found there for the purpose of investigation; and to enter any base or military

[240] An AG directive published on April 2015 following the Turkel recommendations addresses the MAG's responsibility for investigations and processes of appealing the MAG's decisions to Israel's Attorney General, but only regarding investigations of death during IDF's military operations. See AG directive 4.5003: http://index.justice.gov.il/Pubilcations/News/Documents/Instruction-Pazar.pdf.
[241] Criminal Procedure Order (Testimony), part A, section 2(1).
[242] Procedure for Police Disciplinary Offenses, no. 06.01.01.

facility, including without warning. All these actions require the assistance of the commanders of the units in which they are undertaken. Alternatively, the MPCID may undertake these investigative actions without the knowledge of the unit commanders according to investigative considerations (section 35 of the order).

A position paper presented by the Military Advocate General's Corps to the Turkel Commission emphasized and expanded on the MPCID's general obligation to investigate: "Among the other actions undertaken by the MPCID," the paper noted, "it must collect as many details as possible regarding the incident… Furthermore, the MPCID is entitled to receive assistance from other bodies for the purpose of advancing the investigation… and to request opinions from experts for the purpose of clarifying questions requiring technical or other expertise." In particular, the MPCID is empowered "to collect testimonies throughout Israel (at IDF bases, MPCID bases, police stations, or various offices;" to contact the complainants (according to approach of the Military Advocate General's Corps, such contact takes place mainly through the human rights organizations) in order to receive relevant information in their possession; and to collect their testimony[243].

In the NPGID: As an Israel Police unit, the investigative powers of the NPGID are similar to those of police. Specifically, the police Procedure for Processing Offenses by Prison Guards (No. 03.300.039) emphasizes the need for urgent processing of complaints relating to the unlawful use of force by IPS personnel. The Procedure also instructs that such complaints are to be collected promptly, and that "external signs of the use of force on the complainant's person" are to be documented in writing and by means of photography. The investigators are to seize "any exhibit of relevance to the complaint presented to him while collecting the complaint.[244]"

Procedure 03.300.039 also makes particular mention of the authority (and obligation) to detain the suspect (of torture, in our case) and to search his home, his person, or any other place as required for the proper management of the investigation. It obliges the IPS to make available for review and seizure any document or object in its possession required for the investigation and to enable the NPGID investigators to enter all the IPS facilities, including imprisonment facilities, for the purpose of performing their function. Exceptions to this rule are IPS facilities used by the ISA – which *de-facto*, once again, selectively interferes with investigations of torture of Palestinians.

iv. Limits on the investigation of complaints made by those detained for "security offenses"

The review above suggests that investigation bodies of Israeli security forces do not lack legal authority to open or conduct investigations. With the exception of the MPCID, which is under IDF command, investigation bodies also seem properly separated from investigated institutions. The shift in PID's personnel from former police to civilian investigators supports this notion. In the case of security offenses (as defined in chapter 1), however, investigation powers are seriously derogated:

[243] Position paper presented by the Military Advocate General's Corps to the Turkel Commission, the Turkel Report, pp. 288-9.

[244] To better its investigations, NPGID was connected (2010) to the computer infrastructure of the IPS "… in a manner allowing it access to the existing databases of prison guards and prisoners" (in a position paper of the deputy State Attorney to the Turkel Commission, Turkel Report, 298).

(a) **The "dual cap" of the MAG** undermines the independence of investigation of torture in the Israeli army. Similarly, MAGC' subordination to the Chief of Staff, who is also the leader of fighting against Palestinians in the Occupied Territories, moves the military justice system away from any appearance of neutrality. Both factors impact almost exclusively the cases of Palestinian survivors of IDF torture, the vast majority of whom are suspects of "security offenses".

(b) **No audiovisual documentation of interrogation of "security offenses" detainees:** The rule set in the Criminal Procedure Law (Interrogation of Suspects)[245] orders the audio-visual documentation of investigations of suspects of serious crimes (10 years imprisonment or more). This obligation, however, does not exist regarding ISA interrogations, which come under the general secrecy of ISA actions in the ISA Act-2002. The 2008 temporary provision (which is repeatedly renewed) set in Art. 17 of the Criminal Procedure Law (Investigation of Suspects) further exempts all interrogations regarding "security offenses".

Lack of documentation prevents vital, irreplaceable evidence. It also holds back effective system feedback, oversight, and learning. Moreover, the situation in which suspects of similar serious crimes (say murder) may be interrogated under different restrictions raises serious doubts as to the willingness to properly protect or fairly investigative "security" suspects.

(c) **Denial of access to ISA interrogation and detention facilities:** the access to these facilities (though they are IPS-governed) is restricted to certain functions within the ISA. Exception to the denial of external access is the status of "Internal Visitor", usually granted by the minister of Public Security to civil servants by virtue of their official roles. They thereby receive comprehensive powers of examination relating to the facilities of the IPS and the Israel Police[246]. An examination by human rights organizations in 2009, however, showed that all Internal Visitors from the Public Defender's Office "… were denied access… to detention cells and/or to facilities used by the ISA for holding detainees interrogated thereby.[247]"

According to Israel's deputy State Attorney, the state allows entry to ISA facilities and to the IPS cells where "security detainees" are held during and between interrogations only to specific attorneys from the Consultation and Legislation Department of the State Attorney's Office; and such rounds of inspection had already been held, their (classified) summaries distributed to various

[245] Criminal Procedure Law (Interrogation of Suspects)-2002.

[246] The institution of the official visitor is based on sections 71-72 of the Prisons Ordinance [Combined Version], 5731-1971 and is regulated in IPS Commission Order No. 03.04.00 – Official Visitors in the Prisons. The official comptrollers are appointed by the minister and are drawn (section 3.A. of the order) from the following sources: Employees of the Ministry of Justice and other government ministries, according to a list prepared by the Ministry of Justice; members of the Council for Criminology under the auspices of the ministers of justice and internal security; representatives of the Israel Bar in accordance with the list forwarded by the Bar; employees of public bodies that request authorization of persons on behalf as official visitors and whom the minister sees fit to empower as stated; and any other person whom the minister sees fit to appoint as an official visitor. As can be seen, the minister's authority to appoint internal visitors is relatively broad and entails a responsibility to utilize this power in order to improve the ministry's operations.

[247] Letter from Attorney Lila Margalit, Association for Civil Rights in Israel, to Attorney General Manny Mazuz, October 28, 2009. It should be noted that according to the ISA Law (section 13), the ISA comptroller enjoys broad access to all information in the organization. However, the comptroller is not a neutral or transparent function: His identity is determined by agreement between the prime minister and the head of the ISA and the manner and deliverables of his actions are classified.

[247] In discussions with the human rights organizations on this issue in 2010

official bodies[248]. The State Attorney finds this situation a proper balance between the need for external supervision and the threat to security inherent in exposing the ISA facilities to external eyes.

HROs' recommendations that Visitors be appointed that do not defend state considerations for a living, and that the summaries of their visits to ISA facilities be published, were not met.

Israel has so far (Feb. 2015) refused to ratify the optional protocol of the UNCAT, which sets mechanisms for the prevention of torture, including the regulation of visits to places of detention and interrogation.

(d) **A double record system in the written documentation of the ISA:** Written summaries by ISA interrogators ("memorandums") supposedly detail the principal subjects raised in the course of interrogation, as well as special incidents, intermissions, means of interrogation, and requests by the interrogatee. In practice, such memorandums contain very partial mention, if at all, of violent interrogation techniques, injuries, or medical condition as later reported by complainants and found in medical files. In the past, the ISA used to maintain a double system of memorandums: One version presented to external bodies, and another classified, internal ISA version.

Thus abuse of "security offenses" detainees, who to date are almost 100% Palestinians, becomes particularly hard to investigate regardless of available resources. In what follows, the procedural rights of detainees are explored, including their derogation under different exceptions to and branches of Israeli law.

c. Criticism of Investigative Bodies' practice – a summary

PID: Over the years, PID's functioning has repeatedly come under serious criticism. Thus the 2003 report of the Orr investigative commission[249] identified "serious defects" in the patterns of debriefing, reporting, and documentation concerning incidents in which the police was involved, including lack of "…full and genuine real-time reporting and debriefing…", and "An extensive phenomenon of defective documentation was found…" at junior and senior echelons alike (Orr Report, Chapter Six, 27-8).

In 2005 the State Comptroller published its own report which severely criticized the operations of the Police Investigation Department. The criticism related to such aspects as norms for reporting and open investigations; the level of professionalism of the investigations; a defective policy of non-prosecution; and numerous additional problems.

The (2007) Zeiler Commission, which examined internal defects in the Israel Police, recommended the formalization in a procedure and in powers of a broad practice of opening investigations into

[248]In discussion Reply from Deputy State Attorney (Special Functions) Attorney Shai Nitzan to the Association for Civil Rights in Israel regarding the restriction of visits by official visitors from the Public Defender's Office to detention facilities at which ISA interrogees are held (Ministry of Justice reference: 811-99-2010-00011), January 21, 2010.

[248]**Position paper**, Adalah, Physicians for Human Rights-Israel, Al-Mezan Center for Human Rights, Public Committee Against Torture in Israel, April 2010.

[249] The Orr Commission was the official commission appointed "to investigate the clashes between the security forces and Israeli citizens in October 2000" – events in which the police killed 13 Palestinian citizens of Israel.

police behavior. It also recommended the institutionalization of open channels of information between the PID and bodies within the police for the purpose of mutual notification regarding matters of common interest[250].

In 2013, the Turkel Report stated that PID investigators [still] lack training in international law, and in particular in the rules of international humanitarian law.[251]

It is beyond the scope of the current research to assess the overall influence of the gradual change in the PID's composition, on norms of investigation of police violence.[252] Indications exist, however, that police violence and lack of accountability still preside: thus, according to Att. Yoav Sapir, Israel's current (2015) National Public Defender, PID's inquiries into severe and widespread violence towards civilians are not exhaustive, which also conveys a negative message to policemen and complainants[253].

This opinion is supported by data of total indictments, convictions, and punishments presented in chapter II above. It can also be demonstrated through PID's repeated failure to indict police officers even when strong evidence of a crime exists. Thus, e.g., the PID has recently closed the investigation of group abuse by special police forces of a Bedouin Israeli citizen and his two sons, while they were handcuffed and under arrest. Abuse included beating to unconsciousness, using a stun grenade, and urinating on the father in public. The court criticized the arrest, ordered the release of the survivors, and ordered urgent medical treatment. Though the PID admitted a suspicion for "unusual use of force", it ignored the lack of a signed arrest report, and its investigatory actions in the case included only the interrogation of two policemen. PCATI joined the appeal on the decision to close the file, served in Feb. 2015[254].

MPCID: Yesh Din's Oct. 2014 shadow report to the UN Human Rights Committee details the "structural failures" of MPCID investigations, which according to the ongoing research of the organization "… render it incapable of conducting serious investigations into offenses committed by soldiers against Palestinians." (p. 8). Failures include delays in the decisions of the Military Advocate General's whether to open a criminal investigation and whether to submit an indictment,

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[250] In contrast to this last recommendation, several proposed laws have sought to formalize an excessive segregation between the investigative body (the PID) and the investigated body (the Israel Police). These proposals were not adopted. For example, see the **Knesset debate** on the Proposed Law: Amendment of the Police Ordinance (Composition of the Police Investigation Department), 5766-2006 on Wednesday, February 28, 2007.

[251] Ballas, **Prevention of Torture in Israel/Palestine**, forthcoming, p. 17.

[252] It may be claimed that some change of internal investigative practice *has* occurred, following 2014-2015 PID investigations and a series of high-profile resignations from the force of senior IP officers who expect to be indicted for corruption and / or offenses of sexual harassment and sexual assaults towards fellow policewomen. Though also very different from the case of detainees' torture, this testifies to the susceptibility of IP to public norms.

[253] Speaking at a professional convention on 29.1.2015; see in: Itamar Levin, **Investigations of police violence are not exhausted** [Heb.], in the Israeli website "news first class": www.news1.co.il, full report available to subscribers only.

[254] See: Amira Hass, **Officers abused detainees – and not investigated**, Haaretz newspaper [Heb.], 27.2.2015. For other cases see, e.g. (Hebrew): Oct. 2014 YNET news site article: PID closes criminal investigation of a police cadet who was accused and witnessed hitting a civilian over a parking space, though accuses him through disciplinary procedure); Sep. 2014 Haaretz article, PID works slowly and eventually decides not to investigate complaint of assault of a demonstrator by 4 policemen; and a continuously updated list of IP criminal conduct and related issues in "The Fischler Report" blog, collected and written by attorney and former investigator at the National Unit for Investigations of Fraud, Pini Fischler: http://halemo.net/fishler/report.pdf.

foot-dragging in the implementation of investigations, low quality of investigations, and frequent failure of investigators to collect critical data. (pp. 8-11)

The Turkel Report (2013), too, notes the delays in MPCID's action as a primary cause of investigation ineffectiveness. Its recommendations to set binding timeframes and limits to prosecution decisions have not been implemented. The Committee also noted the need for professionalization of the MPCID, and recommended to establish a special department within the PID that would investigate suspicions of criminal conduct in the course of operational military action instead of the MPCID. (pp. 321-333)

Btselem's position paper regarding the Turkel recommendations, based on 25 years of research, states that: "It is B'Tselem's experience… that the system for investigating Palestinians' complaints regarding violation of their rights is barely functional. On the face of it, the system seems to operate… but in reality, the process is inefficient and drags on for many years.[255]"

PCATI's report of June 2014 further analyzes MPCID's investigations of soldiers' violence towards detainees, based on 133 cases of abuse represented and followed by the organization between 2007-2013. It points out delays during the investigation process, low quality of investigations, failure to locate suspects, avoidance from examining the scenes of the alleged crimes, lack of translators to Arabic at the service of mainly Hebrew-speaking investigators, and also offensive treatment of survivors during the investigation of their complaints.[256] Of the 133 complaint files, "78% were closed, mostly by the military prosecution, but some also by complainants giving up after long periods without progress. The other 27% are outstanding, some for as long as six years."[257]

Not least important, norms of investigations of violence against Palestinians are part of a larger Israeli public debate regarding the Occupation and the prospects of a Palestinian state. In the Israeli public eye, the arguments of human rights are often reduced to support of a Palestinian struggle against Israel, and investigation or punishment of security forces for their criminal acts against Palestinians are commonly perceived as nuisance and an obstacle to security.[258]

NPGID: The review of IPS court cases found that prison guards' violence towards prisoners is often treated through the disciplinary, rather than criminal channel; and that court intervention is often needed for the NPGID to even reply prisoners' complaints.

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[255] B'Tselem, **Six months after Turkel second report published, time to implement recommendations**, position paper, 11 Aug. 2013. Online: **http://www.btselem.org/press_releases/20130808_position_paper_on_turkel_report**.

[256] Aviel Linder, *The short arm of the law*, Indecisive investigations [unofficial name], Public Committee Against Torture in Israel, Jerusalem, June 2014. Hebrew: http://stoptorture.org.il/files/%20%D7%9C%D7%90%20%D7%A0%D7%97%D7%95%D7%A9%D7%94.pdf.

[257] In Irit Ballas, Torture Prevention in Israel/Palestine, p. 20.

[258] See, e.g., Michael Tuchfeld, Bennett back Giv'ati, NRG, 4.1.2015: Israel's (then) Minister of Economy, leader of "The Jewish Home" party (and former commander in an IDF commando unit) backs IDF soldiers who fought in Gaza during the 2014 assault aka "Protective Edge". Bennett declared that the Gaza fighting must not be criminally investigated but only debriefed within the military; A similar position was expressed 4 days later by the (Likud Party) Defence Minister (and former Chief of Staff) Moshe Ye'elon. See: Noam Amir, Ye'elon: I hope MPCID does not investigate the event in Raffah, Maariv newspaper [Heb.], 8.1.2015. Online: http://www.maariv.co.il/news/military/Article-459184. Such hopes by the Defence Minister carry exceptional weight when the army investigates itself.

NPGID's reluctance to investigate is demonstrated in HCJ 14944/12 – where PCATI represented and joined a complaint by a female prisoner of ongoing torture and abuse by ISA and IPS during her arrest and interrogation. Abuse included sexual harassment, deprivation of essential medical treatment, and humiliating imprisonment conditions. NPGID chose to avoid investigation of the original complaint, as it directed it to a host of other official bodies – the PID, OCGIC, IPS Chief Medical Officer, and the Ombudsman at the Ministry of Public Security. The court appeal demanded to open criminal investigation of the events.

The 2010 annual report by the Public Defense unit in the Israeli Ministry of Justice, based on inspections of 26 IPS imprisonment facilities, 10 IP arrest facilities and 13 arrest facilities in courts, draws the following picture: "In our 2008 report," reads the report[259], "we addressed many prisoners' complaints of malfunctions during the process of submitting their motions… which gave the troubling impression of... repeating violations of the right to free access to justice. During 2009-2010… prisoners' reports from different imprisonment facilities testify that jail officials burden the process of appealing with no apparent reason, sometimes to the point of depriving prisoners of the aid they wished to demand in court."

Jail norms, so it seems, might delay justice for prisoners even before the NPGID is involved. This highlights NPGID's lack of investigative initiative, and the prevalence of silencing, investigation-averting norms. Other information of NPGID's conduct still awaits (Feb. 2015) replies to Freedom of Information requests delivered by PCATI.

To conclude shortly, the review of IP, PID, and NPGID operation reveals that despite of existing *de-jure* authority and availability of professional resources, the criminal investigations of misconduct, and specifically of violence by security personnel towards detainees, are significantly flawed. Many times, disciplinary procedures replace criminal ones; the process of investigation is significantly and unnecessarily delayed; and basic investigative procedures are often neglected. The MAG and the Attorney General enhance de-criminalization of abuse of detainees by affirming their subordinates' recommendations and no overturning their decisions not to investigate, and by refraining from prioritizing investigative resources, training, and norms-setting within the investigative units.

Criminal investigations of torture in the ISA, by law under the authority of the PID, were not reviewed above because they do not exist. The next section reviews the preliminary examination bodies which operate alongside investigative units and have an important role in investigation policy. Special attention is given to preliminary examinations in the ISA, which *de-facto* keep survivors' complaints of torture by ISA interrogators away from any criminal investigation.

2. THE PRELIMINARY EXAMINATION BODIES

Alongside each Israeli investigative body there exists an official body that is responsible for the preliminary examination of complaints (hereby also: PE, PEB). The typical purpose of preliminary examination mechanisms is to enable initial clarification of charges and determine whether a basis exists for criminal investigation. Similarly, in Israel, this process is recognized as an instrument to

[259] Quote (freely translated) from Section B.19.a.1.See online [Heb.]: http://index.justice.gov.il/Units/SanegoriaZiborit/DohotRishmi/Documents/Doch20092010.pdf.

filter out false complaints, to prevent the possible use of complaints to hinder official functioning, and to examine appointments to senior official positions[260].

In Additional HCJ Hearing 1396/02,[261] the Supreme Court established that the legal obligation to open a criminal investigation into offenses of more than 3 years imprisonment may be conditioned upon a preliminary examination. Indeed, properly regulated PE mechanisms may serve effective enforcement and the public interest. The coming review suggests, however, that Israeli PEBs often halt and potentially damage criminal investigation of torture complaints. The authority and conduct of the Attorney General to overturn PE recommendations is also discussed.

a. In the IDF – operational debriefing and a special MAG unit

Operational Debriefing: As a rule, the IDF's first and immediate fact-finding mission in any incident during military action is an "operational debriefing": "A clarification conducted by the army in accordance with army orders concerning an incident that occurred during an exercise or an operational action, or in connection therewith." (Military Jurisprudence Law, section 539A) They therefore cover a very significant portion of soldiers' interaction with Palestinians. Operational debriefings are conducted with the soldiers who participated in the military action and their commanders; and they may continue on to higher echelons. Debriefing files serve the Military Advocate General in his decision whether to open criminal investigation.

The protocols of IDF operational debriefings, their summary, findings, and conclusions are all supposed to improve military professionalism. They *cannot* be used as evidence in a trial relating to the examined incident, and may not be forwarded to "any person undertaking a criminal investigation in accordance with any law" (Ibid, Ibid). Among other reasons, this is due to the fact that the debriefing is not subject to the rules of evidence; the soldiers who (are obliged to) participate in it are not entitled to be represented by an attorney during its course; and they do not enjoy the right to remain silent or other immunity against self-incrimination.[262]

Yesh Din's report of 2011 explains that "in the last decade, the MAGC [Military Advocate General's Corps] instituted a policy known as the 'investigation policy'" according to which "… investigations into certain offenses (including abuse) are to begin immediately upon receipt of a complaint." The operational debriefing, however, is still a condition to investigations, as "the opening of a criminal investigation into alleged offenses committed during operational actions is conditional upon holding a preliminary 'inquiry' that is generally based on an 'operational

[260] See Attorney General's Instruction 1.1500, Examination of Appointments by the Legal Advisors to Government Ministries. During a discussion by the Knesset plenum on August 28, 2013, Deputy Government Secretary, Mr. Aryeh Zohar, specified the positions appointments to which require preliminary examination: The chief of staff, the chief commissioner, the head of the ISA, the head of the Mossad, the commissioner of the IPS, the governor of the Bank of Israel, and the deputy governor of the Bank of Israel.

[261] Additional HCJ Hearing 1392/02, **Movement for Quality Government in Israel v Attorney General, State Attorney's Office, and Chairperson of the Securities Authority**.

[262] Military Jurisprudence Law, section 539A, and in particular sub-section (4). The Military Advocate General is also entitled to transfer materials from the debriefing to bodies in the army that require this material "for the purpose of performing their function." The chief of staff, in his turn, is entitled to transfer such materials to professional bodies outside the army for the purpose of performing their function, but not if he has found that the transfer of the materials endangers state security.

debriefing.' Based on the examination of the findings of the operational debriefing by the MAGC […], a decision is made as to whether to open a criminal investigation by the MPCID.[263]"

Legal experts, politicians, human rights organizations, and also senior officials in the military establishment repeatedly mention the significant influence of the operational debriefings on the decision whether to launch a criminal investigation, and ensuing inherent problems, e.g., lack of objectivity and neutrality in self-examination; lack of legal and professional investigative skills; and a tactical-military focus rather than considerations of law and enforcement.

The reliance on operational debriefings for the MAG's decision whether to open a criminal investigation also delays possible investigations, and possibly also disturbs the scene of the examined crime and the chain of evidence, especially considering that those who undertake the debriefing lack relevant investigative and legal expertise[264]. Furthermore, "… the operational debriefing (with rare exceptions) does not consider the narrative of the victims of the offence, civilian eyewitnesses, or indeed any person other than the soldiers and officers involved in the operation under examination.[265]"

The Turkel Commission discussed military debriefings in depth, and concluded that a non-military mechanism is established that would decide whether to launch criminal investigations separately from the professional military fact-finding mission. The Turkel Report highlights the need of professionalism, expertise, and promptness that would "… facilitate[s] a potential investigation and [does] not hinder it" (Turkel Report, 148). It recommends that a maximum period of time be allocated for the preliminary clarification and for the MAG's reasoned decision whether to investigate (Turkel Report, particularly pp. 428-430). To date, a routine independent examination or investigation of operative military incidents is not at sight.

The Military Advocate for Operational Affairs Unit: Towards the end of 2007, "… a section for Operational Affairs was established within the Military Prosecution system". The roles of the Military Advocate for Operational Affairs squad include examining operational debriefings; advising the MAG and the IDF International Law Department on opening fire regulations; handling complaints, examinations and investigations of offenses during operative action or towards civilian population in IDF-held territories / during fighting.[266]

The authority of the MAOA concentrates on recommending the MAG "… whether to open a criminal investigation following complaints of offenses allegedly committed by soldiers and officers, concerning incidents that occurred during operational activity." Alternately, the MAOA may also authorize the closing of an investigation file, return it to the MPCID for further investigation, or recommend that the MAG press charges against suspects. Recommendations may

[263] Lior Yavne, Alleged Investigation, Yesh Din, Tel Aviv, 2011, 9, 24 (emphasis in original).

[264] See for example: Lior Yavne, **Exceptions - Prosecution of Soldiers during and after the Second Intifada, 2000-2007**, Yesh Din, Tel Aviv, 2008, 26-30; Noam Hofstadter, **Grossly Illegal**, Public Committee Against Torture in Israel, Jerusalem, 2008, 27-8 (in Hebrew); **Investigating IDF Offenses against Palestinians**, Yesh Din, Tel Aviv, 2009; Lior Yavne, **Alleged Investigation**, Yesh Din, Tel Aviv, 2011, Part B.

[265] Yesh Din, Alleged Investigation, p. 8

[266] Lior Yavne, Alleged Investigation, Yesh Din, Tel-Aviv, 2011, pp. 21-22; Turkel Report, p. 246.

only be made, however, after the findings of an operational debriefing in the case are passed to the MAOA unit[267].

As Chapter II shows, indictment rates of IDF soldiers in complaints of harming Palestinians are very low. Next to very problematic investigations by the MPCID, MAOA's workload may serve as another explanation: thus, during 2008 the MAOA had received 441 criminal investigation files, 400 complaints, and 20 operational investigation files for examination; and in 2009 it handled 949 operational complaints. Those were handled by a team of "only a small number of subordinate lawyers" (Yesh Din 2011), which according to the Turkel Report (p. 246) counted "approximately ten" prosecutors. With an average of nearly one hundred new cases a year for each prosecutor, and an average processing time of between 1.3 (in decisions not to prosecute) and over two years (in other cases), MAOA's workload is accumulating. The long examination periods certainly transgress the original function of PEBs, and hinder investigations.[268] Moreover, the authority to prosecute soldiers under Military Justice expires within 6 months of their release from service; their cases are then transformed from the MAG to the State Attorney, which results with further delays, legal work, expenses and run-around for complainants.

b. In the Israel Police – police debriefing:

The Criminal Procedure Law establishes the police obligation to open an investigation if it learns by any means that an offense has been committed by a police officer. For this purpose, (1) the alleged acts must constitute a legal violation and (2) the complaint must reveal a "preliminary factual basis" (Criminal Procedure Law, part D, section 59). In order *not* to open an investigation it must be shown that at least one of those two conditions was not met. "Preliminary factual basis" may be established through a preliminary examination.

Complaints or information about suspected criminal offenses by police are forwarded for PE by an attorney from the SA's. If the attorney decides to open an investigation the complaint or information is then forwarded to an investigation team in the PID (Turkel Report, 296).

Under operational circumstances, complaints are examined through the preliminary track of "police debriefing", which is very similar to IDF's operational debriefing. The police debriefing is defined in the Police Law as "a clarification held in the Israel Police in accordance with procedures issued by the commissioner or by a person on his behalf regarding an incident that occurred during an operational action… or in connection therewith." Police debriefings are conducted by police personnel, who are expected to be trained in the basic craft of investigation[269].

Police debriefing may be specifically conducted in incidents occurring in the course of police operations in the field of state security, as well as "in the Judea and Samaria Area under the command of a soldier serving in the IDF" (section 102A(2),(3))[270].

[267] Quotes in: Alleged Investigation, p. 23.
[268] Alleged Investigation, pp. 22, 36-38, quoting MAGC, Operational Reports for 2008, 2009.

[269] Police Law (Disciplinary Law, Clarification of Police Complaints and Sundry Provisions), 5766-2005.
[270] The Police Law remains silent regarding the identity of the staff member who undertakes the debriefing, and leaves this matter to regulations and procedures to be enacted. This remains for further research

Like its military counterpart, the police debriefing may constitute a source for an instruction to open an investigation: The attorney general may ask to review a police debriefing and to order the opening of an investigation on the account of suspicions arising therefrom (section 102(B)(4)(B)). And, also similar to the IDF debriefing, police debriefing materials are classified and not available for criminal investigation or by way of evidence in a trial relating to the incidents examined (section 102(B)(1),(2),(3))[271].

In 2007, Israel's deputy State Attorney for criminal affairs adopted a working procedure by which police debriefings of incidents in the Occupied Territories are sent to the MAG and IDF's senior commander of the incidents' area, to consider their opinion regarding the opening of an investigation. This unusual instance of voluntary erosion of authority has been explained as an attempt "to narrow the gaps between the fact that the military advocate general relies on the [IDF] operational debriefing following incidents in the IDF while the deputy state attorney relies on the police debriefing regarding incidents in the police" (Turkel Report, 294).

Data of the effects of police debriefings on PID investigations is still scarce, and deserves the attention of a separate study.

c. In the IPS – the Officer for Prisoners Complaints and the Public Complaints Officer:

According to the IPS orders, any complaint or information concerning the unlawful use of force by a prison guard requires the immediate referral of the information to the National Police Guards Investigation Division (NPGID) without a preliminary examination[272].

That notwithstanding, the police Procedure for Processing Offenses by Prison Guards (No. 03.300.039) establishes that the head of the NPGID is empowered to order the holding of a preliminary examination before deciding how to handle a complaint, for the purpose of which he is entitled to draw on the assistance of the **Officer for Prisoners Complaints (OPC)**.

The OPC is the body designated to receive all prisoner complaints, in sealed envelopes and without any other body being permitted to intervene in the complaint.[273] It forms part of the Audit Unit in the Ministry for Internal Security, and accordingly has a professional audit-oriented character, and is not part of the audited body (IPS).

According to Mr. Yoel Levi, in charge of Freedom of Information and a senior deputy to the head of the Ministry of Public Security[274], OPC's authority is focused on fact-finding regarding complaints of prisoners' living conditions and their rights. To fulfill its duties, it is entitled to undertake an independent preliminary examination, in the course of which it has the authority to meet with the complainants and also with any prison guards (but not to question them officially).

[271] The attorney general is empowered to forward materials from the debriefing to public bodies for the purpose of their functions, but he must refrain from doing so if the transfer of materials is liable to endanger state security (section 102(B)(5)(A)).

[272] IPS Commission Order No. 02.10.00, Processing Criminal Offenses by Prison Guards, section J.

[273] See IPS Commission Order No. 04.37.00, Prisoners Complaints, section 5.

[274] The following paragraph relies on the reply of the Ministry for Internal Security dated May 12, 2014 to an inquiry from the Public Committee Against Torture in Israel in accordance with the Freedom of Information Law, paras. 4-6 of the reply.

The OPC is also entitled to recommend that the IPS "grant relief or take actions and steps" in a case it examines. Thus if the OPC finds that a complaint raises suspicion that prison guards have committed a criminal offense, he is obliged (by section 5.B. of the Prisoners Complaints Order) to forward the complaint without delay for NPGID investigation.

In turn, the head of the NPGID may decide that despite the OPC's opinion, there is no call to suspect a criminal offense, in which case he may forward the complaint to the **Public Complaints Officer (PCO)** – a second PEB that operates in the Office of the IPS Commissioner. The PCO may also address suspicions of disciplinary, rather than criminal matters; and it may also be authorized to examine complaints which according to the OPC need of further clarification.

Thus the head of the NPGID may decide whether to open an investigation, and also forward the examination of complaints between PCO and OPC. In practice, as the IPS 2013 report notes, "increase of exceptional occurrences of false reporting by prison guards" led to strict punishment, however still by the disciplinary rather than criminal branch of the IPS.

The 2013 report also tells that alongside disciplinary action, many hearings were held in the process dismissing from the service guards who harmed "the organization or its values, security, other staff members, or prisoners.[275]" These hearings, we are told, led to many enforced vacations and also firing or not prolonging the contracts of "more than a few" prison guards. This is the most far-reaching statement found in the 2005-2013 annual reports regarding recognition of and fighting prison guards' misconduct. Even this important step, however, was limited to disciplinary action.

The IPS is openly busy with its organizational norms. Nevertheless, the review of relevant court cases and IPS annual reports finds that guards' violence is addressed very seldom, and considered by the organization an internal, disciplinary matter.[276]

The information introduced above indicates that preliminary examinations bodies enhance treatment of criminal offenses with disciplinary tools and standards, and thereby hinder proper investigation and proportionality of punishment. This assumption still begs further research of relevant IPS ad also IP PEBs. As the following section shows, the assumption is well substantiated for preliminary examinations of official brutality against prisoners by the ISA.

d. In the ISA: The Officer in Charge of Interrogee Complaints and its SA supervisor

Complaints of criminal offenses committed by ISA personnel are examined by the Officer in Charge of ISA Interrogee Complaints (OCGIC, in Hebrew: "Mavtan") and its subordinate investigators. The OCGIC is subordinated to an senior attorney of the State Attorney's office, who decides whether to accept the examination's recommendations.

The OCGIC was established in 1992 as an internal, disciplinary ISA function, following an intensifying public debate over ISA norms and practices of interrogation, and routine of false

[275] Freely translated from IPS 2013 annual report, pp. 104-105.
[276] See 2005-2013 online (Heb.) here: http://www.ips.gov.il/Web/He/News/Publications/Reports/Default.aspx.

reporting and perjury[277]. Criminal investigations of ISA personnel were put in the hands of the PID that was established that same year. It then became the task of the OCGIC to conduct pre-PID examinations when authorized by the Attorney General.

Since the Israel Supreme Court's 1999 ruling on torture (HCJ 5100/94)[278], the policy of the Attorney General has been to conduct preliminary examinations into every complaint of torture in ISA interrogations. Since 1999, the AG has remained satisfied with the decisions of the head of the OCGIC that accepted all recommendations of the OCGIC, which were always *not* to launch a criminal investigation into ISA torture complaints, without a single exception.

Human rights organizations have repeatedly petitioned the HCJ against this routine of internal (hence dependent, biased) preliminary examination. In 2010, Israel's AG declared that the OCGIC will be transferred from the responsibility of the ISA to the Ministry of justice. The aim of the transfer was to reduce the conflict of interests inherent to the secretive oversight mechanism, and to enhance transparency. This decision was ratified by a 2012 Supreme Court ruling, the result of six PCATI petitions on behalf of 26 victims, which relied on the expected transfer as an argument to accept the OCGIC as a sufficiently independent examination mechanism.[279] The transfer was finally completed in the beginning of 2014.

The new OCGIC, a former chief military prosecutor, holds the position of deputy to the Director-General of the Ministry of Justice. According to the Ministry[280] the 2013 budget for the OCGIC was one million fifty thousand NIS, and included a total of three full time positions, and one short-term, part-time position. In 2014, one part-time, short-term position was added.

Authority: The AG's authority to order a preliminary examination of complaints against ISA interrogators is grounded in Police Ordinance, Sec. 49(9)1 (b), which puts the authority to open a criminal investigation in the hand of the Attorney General and allows him to order a preliminary examination.

It is the position (maintained in a number of HCJ petitions) of PCATI and other HROs that the according to the law, criminal investigations should be opened into any complaint of torture, while a preliminary decision not to investigate may be justified in exceptionally baseless complaints. But this is never the case with indications of torture in the ISA (were affidavits, bruises on victims' bodies, names of interrogators, or other specific knowledge are available): in practice, both the Attorney General and the Israeli Supreme Court read the law so as to grant the AG wide discretion on whether to investigate or to launch a preliminary examination. A Supreme Courts' decision from August 2012 has restated the AG's authority to use the mechanism of preliminary examination as default in any suspicion of ISA torture[281].

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[277] The OCGIC was officially established by the Israeli Government's 24th ministerial committee on the ISA, "Procedure for Examining Interrogatees," (20/5/1992). legal/historical background is elaborated in the following Chapter.

[278] HCJ 5100/94, *PCATI v. Government of Israel and ISA.* See (Heb.): http://www.stoptorture.org.il/he/node/656, last access Sep. 2014.

[279] Partial ruling in HCJ 1265/11, **Public Committee Against Torture in Israel et al. v Attorney General**.

[280] In replies to PCATI's Freedom of Information Requests by attorney Michal Tene (ombudsmen and referent of FOI in the Ministry of Justice) from May 26th, Aug. 12th, and Sep. 14th 2014.

[281] HCJ 1265/11, *PCATI et. al. v. Attorney General*, Par. 29-37.

Once the OCGIC's examination is completed, its report is brought before its superior in the State Attorney, who may recommend not to investigate (and to close the case).[282] The authority to order a criminal investigation is **only** in the hands of the Attorney General or the State Attorney and two of its deputies.[283] A preliminary decision not to investigate may be appealed before the AG, or if the AG was involved in the decision it can be appealed before the Supreme Court.

Investigative authorities: the OCGIC and its supervisor attorney are authorized as "disciplinary investigators" within the ISA, which allows them to collect testimonies from interrogators. As with other PEBs, however, testimonies before the OCGIC cannot be used in criminal proceedings, as set in articles 13 and 17 of the ISA Act regarding "internal investigations"[284]. As we learn from an official reply by the Ministry of Justice, OCGIC's investigators act in the capacity of "disciplinary investigators" also after the transfer of the unit to the Ministry of Justice[285].

The authority of the OCGIC to access classified documents, review general information on detainees, detention facilities, and conditions of detention is not entirely clear. The OCGIC's inquiry into complaints is retrospective in nature – it occurs after the period of imprisonment and interrogation by the ISA, in large part because detainees are most often kept incommunicado during this period.Therefore the scene of the alleged crime of ISA torture is most likely contaminated by the time of examination.

Even so, a proper inquiry requires familiarity with detention and interrogation conditions, and to the extent possible, documentation of the incidents in question. Likewise, meaningful enforcement requires the authority to make unannounced visits to detention facilities. But OCGIC personnel do not have the authority to access the ISA's detention and torture sites. A freedom of information request revealed that the current (2014) supervisor was granted the status of Official Visitor, which allows her to visit any detention facility, "including the classified ones"[286].This still does not necessarily include interrogation facilities, and it also leaves open the question of visits without prior notice. Whether the OCGIC will use this authority to examine the actual conditions of ISA detention, interrogation, and torture is yet to be seen. One good indication for that may be the extent to which the OCGIC will make such information public.

The OCGIC's Operation in Practice: OCGIC's examinations may lead to disciplinary sanctions. At one point, the Government claimed that in four cases it took "substantial measures" and drew lessons following the OCGIC's investigations.[287] The head of OCGIC made similar claims in his

[282] See Police Order, art. 49(i)(1); and HCJ 1265/11, para. 104-105. This authority was originally (2005) delegated from the Attorney General to The State Attorney and its deputy, and then (2009) to a senior attorney at the State Attorney office.
[283] Therefore the OCGIC is not an investigative body, though it conducts typical investigative action.
[284] And see also*:* Civil Service (Discipline) Law, 1963, LA 390; *see also* Civil Service (Discipline) (ISA and The Institute for Intelligence and Special Operations) Order, 1979, CR 1750; and also in the Turkel Report, p. 302-303. The former legal adviser to the ISA, too, states that the OCGIC's inquiries are meant to be limited to disciplinary issues, and if suspicion of criminal wrongdoing arises during his inquiry, the OCGIC should transfer the investigation to the PID. As noted above, this has yet to happen. See: Aryeh Roter, **ISA Act – The Anatomy of Legislation**, Israel National Defense College, University of Haifa, Haifa (2010) p. 58 n. 152 [available only in Hebrew].
[285] A letter from Attorney Michal Tene, see fn. 43.
[286] In a letter from Attorney Michal Tene (Ombudsmen and FOI referent in the Ministry of Justice) to PCATI, 12.8.2014.
[287] Accountability Denied, p. 12.

testimony to the Turkel Commission (Turkel Commission Report, p. 354). In both cases the claim remained general, and the details classified.

PCATI and other HROs systematically follow up and compile data about complaints of torture and abuse of detainees by ISA interrogators. Since 2001 to date (Feb. 2015), over 950 such official complaints were served. All of them were transferred to examination by the OCGIC; all examination conducted ended with the recommendation *not* to open a criminal investigation. The Attorney General accepted all these recommendations.

Of the 950 complaints, about 85% were dismissed as groundless. In the rest of the cases, the recommendation not to investigate was based on the claim that interrogators could engage in abusive treatment under the "necessity defense". Though this goes against the ruling of the High Court of Justice (HCJ 5100/94), the HCJ itself refrains from intervening in this policy of the Attorney General, which amounts to legal immunity to ISA interrogators[288].

At the time of writing (Feb. 2015), 14 months into the operation of the OCGIC in the Ministry of Justice, the average treatment time of complaints of torture followed by PCATI and currently open at the OCGIC is just over 30 months. That, while – in the context of wide Israeli military operations in the West Bank ("Brother's keeper") and Gaza ("Protective Edge") – the number of Palestinians' complaints of torture by ISA has been multiplied by 4 between 2012 and 2014. Nevertheless, in response to the Supreme Court from Dec. 2014, the state has stated that all preliminary investigations of ISA torture complaints that are still open will be concluded by June 2015.

The longstanding *de-facto* immunity to ISA interrogators from investigations leaves no choice but to determine that the OCGIC and its supervising attorney function as a veto mechanism on the way to launching criminal investigations. To that we should add actual and potential damage caused by OCGIC's involvement in the investigation:

i. Harming Investigations

Like with other PEBs, OCGIC's increased and prolonged involvement in criminal cases may taint the evidence in future investigations. Israel's State Attorney's review from 2007 determined that the OCGIC's inquiries were not properly documented, and its investigative skills and capacity were "very limited" – which is all the more problematic when dealing mainly with trained and experienced interrogators.

Since complainants are not allowed to be interviewed by the OCGIC in the presence of their attorneys (Turkel Report, p. 354), the inquiry becomes a quasi-formal, secretive process, which raises "serious doubts regarding the OCGIC's ability to carry out an effective investigation", and points at "serious failures" in the effectiveness and thoroughness of inquiry. (Turkel report, p. 416)

ii. Preventing the examination of basic conditions in which the torture occurs

There is no evidence that OCGIC examines either the conditions of detention and interrogation or interrogations' oversight or documentation. Considering its ongoing recommendation against further examination (investigation) of these conditions, the OCGIC serves to buffer the PID and the court

[288] See HCJ 1265/11, and also in: "**Accountability Still Denied**," Public Committee Against Torture in Israel, Jerusalem (2012) pp. 3-7.

system from the basic conditions that lead to torture in the ISA, and thus also contributes to the secrecy of the torture mechanisms.

To conclude shortly, the OCGIC and its supervising attorney are found to exercise semi-investigative powers, including the collection of testimonies from complainants and from ISA interrogators. Their inquiries are slow, ineffective, and hold back not only criminal investigations of torture but also examination of the conditions that lead to torture.

The OCGIC's supervisor therefore allows Israel's Attorney General to dismiss claims of torture in the ISA while also avoiding its authority to review torture complaints. Thereby the OCGIC and its supervisor protect the Israeli legal system from handling hundreds of complaints of torture and abuse. This latter should be considered their main function[289].

CHAPTER II

SAFEGUARDS FROM TORTURE- PROCEDURAL LAW AND THE RIGHTS OF DETAINEES

This chapter examines the main procedural rights of detainees, established in order to secure due process and to protect against the misuse of power, and thereby serving as important protections against torture and ill-treatment. As stated by ECtHR[290], where there is a high risk of ill-treatment, fundamental safeguards like right to a doctor of the detainee's own choice, the right to lawyer or right to notify a third party of the detainee's own choice may prevent ill-treatment.[291] The analysis of local procedures presented here is thus crucial to the project and to the research question regarding the degree of compliance between local legistlation on torture, and international standards and obligations.

Since Turkey and Israel are committed to different procedural standards in international law, and their legal systems differ from one another, the examination of procedural safeguards they apply also differs. Thus, the procedural law of Turkey is hereby examined vis-a-vis detailed standards of ECtHR and CPT. The examination includes specific problems potentially rendering the investigation ineffective, such as counter investigations/prosecutions against alleged victims, and the threat of administrative and penal sanctions faced by victims or their relatives and loved ones.

Israel's legal structures display special complexity (which is laid out in chapter 1) which in turn leads to varying legal standards. The analysis of Israel's procedural safeguards will therefore

[289] Read also in: Accountability Denied, 2009.
[290] *Algür v Turkey,* App. No. 32574/96, para. 44; *Ayşe Tepe v. Turkey*, 29422/95, 22.7.2003, para. 38.
[291] For the comment of Human Rights Committee, the supervisory body of UN International Covenant on Civil and Political Rights in the same direction see, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), para. 11.

compare civilian and military (Occupied Territories) law, and also compate the rights of detainees accused of "security offenses" versus non-security, "regular" offenses. As Israel is not a member to ECHR, its local standards are mainly compared with more general UNCAT principles, to which Israel is obliged. The examination of specific procedural rights is accompanied by the introduction of core issues influencing the Israeli procedural system as a whole, namely: access to justice, appeals, special protections for minors, and lastly, administrative detention. In Israel and Turkey, aspects of medical rights are compared against the standards of the Istanbul Protocol.[292]

I. SPECIFIC PROCEDURAL SAFEGUARDS UPON DETENTION

A. Lawfulness of Detention

1. TURKEY

According to the ECtHR, the lawfulness of the detention will be determined based on whether the deprivation of liberty is in compliance with national law and whether there is a continuing legal basis. Furthermore, the European Court emphasized that the law must be accessible and foreseeable, and that the deprivation of liberty must also be in accordance with Convention provisions.[293]

Since torture and other forms of ill-treatment are mostly conducted during deprivation of liberty, we must first of all look at the right to personal liberty and security under the Constitution of Turkey. In parallel with international standards stating that the rights and freedoms of a person may only be limited in exceptional circumstances according to a procedure prescribed by law, Article 19 of the Constitution also considers the circumstances for restriction of rights and freedoms of a person as limited by affirming that " *No one shall be deprived of her/his liberty except in cases where procedure and conditions are prescribed by law*." [294] Before mentioning the procedure and conditions prescribed by law in detail, it is worth while to examine Article 13 of the Constitution, stipulating that: "*Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality*."[295] Therefore, it is obvious that all the limitations must be in accordance with the requirements of democratic society and the principle of proportionality, in addition to the current domestic legislation and international standards mentioned above. Furthermore, procedural safeguards meant for the prevention of torture and ill-treatment cannot be limited under any circumstances, as stated in Paragraph 1 of Article 13 of the Constitution. This is also due to the essence of procedural safeguards which aim to prevent the exercise of arbitrary force during the deprivation of liberty of a person and while she/he is under the control of the executive? authority.

Under domestic law, arrest/detention is mainly regulated in the Criminal Procedure Law, The Law on Duties and Powers of Police and Regulation on Apprehension, Detention and Statement Taking.

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[292] The Principles of Effective Investigation and Documentation of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment are annexed to General Assembly resolution 55/89 of4 December 2000 and to Commission on Human Rights resolution 2000/43 of 20 April 2000

[293] *Jecius v. Lithuania*, App. No. 34578/97, 31 July 2000*; Baranowski v. Poland, App No.28358/95,28 March 2000 ; Labita v. Italy*, App. No. 26772/95, 6 April 2000

[294] Paragraph 2 of Article 19 of the Constitution of Turkey, Law Nr: 2709, 9 November 1982

[295] Ibid., Article 13

Article 90/2 of Turkish Criminal Procedural Act states that: " *In cases where an arrest warrant issued by the judge or issuance of an apprehension order is required, and there would be peril in delay; if there is no immediate possibility to ask permission from the public prosecutor or their superiors, the officers of the security forces shall be entitled to arrest the individual without a warrant.*"[296] Furthermore, law enforcement officers may also make an arrest if a person is seen while committing an offense.[297] According to the Criminal Procedural Code, arrest by law enforcement officers can be made under four circumstances:

- In cases when a person is seen while committing an offense
- In cases when an arrest warrant issued by the judge
- In cases when issues of apprehension is required
- In cases when there would be prejudice in delay

If one of these conditions is met, law enforcement officers are allowed to arrest a person. With regards to lawfulness of detention as a procedural safeguard, one of the impotent side of this legislation is that the phrase " *prejudice in delay*" is unclear. Even though "*prejudice in delay*" is defined under Article 4 of Regulation on Apprehension, Detention and Statement Taking as "*situation when trace, sign and evidence of the crime has the possibility to get disappeared or the identification of the suspect could be impossible, if not taken into custody immediately*"[298], the scope still remains ambiguous.

Article 90/5 of Law of Criminal Procedure states: *"In cases ... where an individual was arrested without a warrant according to paragraph on above and handed over to the security forces, or where an individual was arrested without a warrant in accordance to paragraph two above, the public prosecutor shall be informed immediately; further interactions shall be conducted upon the orders of the public prosecutor."*

In the context of Article 90/5, notification of the public prosecutor is sufficient to establish the lawfulness of detention. However, this measure cannot be considered sufficient as a preventive measure since most of torture and ill-treatment cases occur during the period between apprehension and custody. In that regard, a regulation stipulating that a suspect apprehended will be taken before a prosecutor immediately, would be more meaningful if the aim is to prevent torture and ill-treatment.

On the other hand, according to Article 91 of Criminal Procedural Code, the law enforcement officials are entitled to take person into custody up to 48 hours with informing public prosecutor. The deprivation of liberty thus also restricts other related rights such as the right to access a lawyer or notification of the detention to a Third Party of choice.

[296] Article 90/2 of Law of Criminal Procedure
[297] Article 90/1 of Law of Criminal Procedure
[298] Regulation on Apprehension, Detention, and Statement Taking, issue no: 25832, published in Official Gazette on 1 June 2005

Article 13 of the Law on Duties and Powers of Police also contains particular stipulations for law enforcement officers' power of apprehension , such as:

- *In case of catch someone in the act of crime or other cases prejudicious, if delayed, for suspects, if there is strong impression, sign, indication, evidence that they committed or attempted to commit an offence;*
- *For persons if a warrant has been issued for their apprehension or detention.*
- *For persons who resist against or/and objects to preventive measures taken by police in accordance with the law*[299]

In addition to the Criminal Procedural Law, the Law on Duties and Powers of Police states that person, for example during a protest, can be apprehended and taken into custody. As it will be mentioned below, such power of police can be misused and can also be used as a means of torture and ill-treatment since such wording as *"resisting against or/and objecting to preventive measure taken by police"* is quite open to misinterpretation.

With regards to lawfulness of apprehension, it is worth considering Law No 2911 on Meetings and Demonstration which authorizes law enforcement officers' to apprehend people during a meeting and demonstration. This relates to the stipulation articulated in the Law on Duties and Powers of Police. Article 24 of Law No 2911 states that , in case of occurrence of an unlawful event in a meeting which commences lawfully, one of the head security officer of the location who is nominated by the civilian authority "*shall warn the crowd to obey the Law and disperse, otherwise force will be exercised.*" Also pursuant to the Article 25 of the Regulation on the Action Force of Police: "*Authorized head officer will order dispersion.*"[300] However, according to Article 25 of Law No 2911, "law enforcement officers shall apprehend persons committing offense and criminal without any warning or any command from the superiors." As it is obviously seen, even the wording of this Article point out to the unlawfulness of the apprehension made in accordance with that law since Law No 2911 gives authority to law enforcement officers to determine whether someone is criminal or not based on their prejudices or ideological backgrounds. In addition, this wording of Article 25, denies the "presumption of innocence" which is one of the main principles of criminal procedural law. For example, during the Gezi events beginning from June 2013, peaceful protests and demonstration were regarded as criminal offenses in accordance with the same mentality of the political party in power, AKP. As a result, many of the demonstrators were taken into custody unlawfully and their freedom of liberty constrained in an arbitrary way. As it will be mentioned below, other procedural safeguards can be taken in conjunction with the lawfulness of detention.

Regarding informing detainees about charges and rights, Article 5/2 of ECHR stipulates that: *" Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and charges against him.*"

[299] Article 13 (a,b, e) of Law on Duties and Powers of Police, Law No: 2559, published on 14.07.1934

[300] Since the main subject of this section is to analyse procedural safeguards, the question of whether the use of disproportionate force amounts to torture/ ill-treatment or not will not be discussed.

Article 19/5 of the Constitution states: "*Individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offenses committed collectively this notification shall be made, at the latest, before the individual is brought before a judge.*"

In accordance with the Constitution, Article 6/4 of the Regulation on Arrest, Detention, and Statement Taking, guarantees that the arrestee, regardless of the offense, will be informed of the reason for the arrest, accusations, the right to remain silent and the right to access a lawyer, object of arrest, and other legal rights in writing or orally.

Article 90/4 of Criminal Procedural Law states: *"law enforcement officers shall inform the individual arrested without a warrant promptly about his legal rights, after taking measures to prevent him from escaping, and harming himself and others.*"

Compared with the provision in the Constitution, Criminal Procedural Law introduces another ground for notifying the arrestee of her/his right, mentioning that law enforcement officers will notify arrestee after taking measures preventing her/his escape, and preventing harm to herself/himself or others. Considering that it is vital that some of the rights to be notified are accessed from the first moment of arrest, such as right to inform relatives, right to access to a lawyer and right to remain silent, it can be said that the provision under Criminal Procedural Law contradicts the

right to defence and fair trial. As a matter of fact, in many of its decisions, ECtHR found that Article 5/2 of ECHR had been violated by Turkey .[301]

Notification of rights should be made in a manner understandable to an average rather than a formal notification. For this reason, notification should include information about the content of the rights, ways and terms of enjoyment. [302] As also indicated by Human Rights Committee: *"Even in national security cases, police and security officials are required to provide written reasons for a person's arrest, which should be made public and subject to scrutiny by the courts.*[303]*"*

Furthermore, a form containing those rights in straightforward manner should be systemically given to the arrestee at the very beginning of their custody, and then, persons concerned should be asked to sign a statement confirming that they have been informed of their rights in a manner they understand.[304]

Notifying people of their rights promptly also has great importance for the prohibition of torture as well as the freedom and security of a person. Only by notifying people of their rights in a timely manner, effective use of rights and prevention of torture can be maintained. As mentioned by ECtHR, notification of rights is essential for enjoyment of other rights since there is a direct relation between the notification of rights of the arrestee and control of the legality of deprivation of

[301] For example, see *Sinan Tanrıkulu and Others v. Turkey*, Application No. 50086/99, 03.05.2007, para. 35
[302] *Fox, Campbell and Hartley v. UK*, para 40; *H.B v. Switzerland*, Application No. 26899/95, 05.04.2001, para 47. For instant, it is not sufficient to inform the arrested person only to which article of a law her/his arrest based on. *Murray v. UK*, Series A. No. 300-A, para.76
[303] Concluding Observation of the Human Rights Committee: Sudan, UN Doc CCPR/C/79/Add 85, para.13
[304] CPT Standards, 12th General Report, (CPT/Inf (2002(15), para. 4

liberty.[305] On the other hand, violating this procedural safeguard may provide an opportunity for torture and ill-treatment: the detainee is in an extremely vulnerable position, with no information about her/his rights to challenge her/his detention/arrest. In other words, restricting the liberty of a person in contradiction with the law prescribing the notification of her/his rights could in itself amount to ill-treatment.

On the other hand, ECHR provides no explicit reference to the official record of the detention period.Yet the ECtHR stated that the authorities bear the responsibility to ensure that they keep detailed and accurate records concerning the person's detention and place themselves in a position to account convincingly for any injuries.[306] The CPT also mentioned that *"the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, in which would be recorded all aspects of his custody and action taken regarding them"*[307]

Article 97 of Criminal Procedural Law states: "*The proceeding of an detention shall be recorded. In this record there shall be a clear indication of the offense for which the suspect has been arrested, under what circumstances, where and at what time he had been apprehended, who made the arrest and by which member of the security force the suspect had been specified, a clear indication shall be included that the rights of the suspect have been explained to him in the full extent*."

Article 6(7) of the Regulation on Arrest, Detention, and Statement Taking also states: "*A record is taken for arrest. This record explicitly sets out the for which offence, under what conditions, where and when, by whom the person is arrested, and who issued this record, and the rights of the arrestee are fully explained; a copy of this record is given to the arrestee. Also an "Arrest and Detention Record – Suspect and Accused Rights Form" (Annex-A) attached to this Regulation and which indicates that his rights are notified in writing and he understands this, is issued and a copy of it is given to that person*."

Article 12 of the Regulation of Regulation on Apprehension, Detention and Statement Taking also mentions what kind of information must be included in the official records during the detention period, to be be recorded in a different registry kept in detention centers. These records are significant for the prevention of torture and investigation/prosecution of those who perpetrated the crime of torture.

2. ISRAEL

➢ As a rule, Israeli law demands a warrant for every arrest – whether under the regular Israeli legal system (Detention Law, section B(a), art. 4) or under the military law of the Occupied Territories (in Order concerning Security Provisions, section 31). As the practitioners who advised the current research all agreed, and as testimonies of torture survivors clearly demonstrate, however, the default demand of a signed arrest warrant is commonly and legally bypassed in both legal systems, by Israel Police and IDF alike.

[305] *Van Der Leer v. Holland*, Series A no.170, 21.02.1990, para 28; *Fox, Campbell and Hartley* v. UK, Series A. 190-B, 27.03.1991, para.40
[306] *Salman v. Turkey*, App. No. 21986/93, 27 June 2000
[307] 2nd General Report of the CPT, para. 40

Thus, civilian Israeli law (arrest law, art. 23) allows an arrest without a warrant by any policeman who has reasonable grounds to suspect that the person arrested has committed an offense that should lead to arrest, and answers one of a few criteria. Thus if a person has committed an offense justifying an arrest before the policeman's eyes and the latter believes that the alleged offender may thereby present a risk to the safety of another person, that of the public or of the state – a warrant-less arrest is granted. Alternative criteria regard the severity of the suspected crime (mostly aggravating circumstances), the potential harm to justice in lack of arrest (e.g., a reasonable grounds to believe that the suspect will not appear for inquiry), a reasonable grounds to believe that the suspect would endanger the security of another, of the public, or "of the state". These criteria are quite wide, and markedly depend on the police' judgment of "reasonable grounds to believe", which makes them wider still.

Notably, in the last couple of years, quite a few police arrests of non-violent protesters were criticized by the courts as pointless, unjustified, and hard to understand. Some of those led to civil lawsuits and compensations paid by the police.[308] Israeli activists, criminal lawyers, and civil rights organizations repeatedly claim that the authority to arrest is used much too lightly.[309]

While minors' as a rule usually enjoy special protections, the law (Youth act, art. 9.g) allows summoning minors accused of security offenses to an investigation without notifying a member of her/his family.

In the military law of the Occupied Territories, arrest without a warrant is even simpler: any soldier (or other authorized security personnel under the OT's commander) has the authority to arrest without warrant any person who disobeys any of the bans in the Order regarding Security Provisions (see chapter 1.1), or whom there is reason to suspect that he might have done so. These criteria are met very often; in fact, since they are completely dependent on the discretion of every policeman and every soldier, they are met every time a policeman or a soldier so decides. The question of false arrests is therefore not really an issue in the Occupied Territories, though not due to the caution of the authorities but rather since their legally proclaimed powers are so wide.

Another related aspect is the rights of prisoners convicted of security offenses. The "security" categorization penetrates also the Israel Prison Service, where it separates between different types of prisoners and derogates the safeguards of some. Thus IPS order 04.05.00 allows declaring prisoners of a "security" type as "… an internal administrative decision of the IPS, regardless of any other legal instruction…" This may "… facilitate the proper management of imprisonment facilities, by keeping those groups separately from other prisoners". Among the criteria for classification we find "(a) the existence of a "nationalist motive"; (b) concrete aid to those hoping to harm state

[308] See, e.g. [Heb]: Alma Biblash, The tool against false arrests: suing the police for compensations, Local Talk, 20.8.2014; Aviad Glikman, Police to compensate four left-wing activists for their false arrest, YNET, 10.4.2011; Att. Gabi Lasky, Report of representation in arrest procedures during 2011, PHR website: http://www.phr.org.il/uploaded/1644_ArrestReport_Heb.pdf.

[309] On a related issue, the former President of the Supreme Court, Judge Dorit Beinisch, recently criticized Israel Police for setting itself goals of arrests until the end of proceedings, the numbers and proportion of which increased radically between 2010 and 2013. See a report from Jan. 18th 2015 in the Maariv newspaper: http://www.maariv.co.il/landedpages/printarticle.aspx?id=461504.

security; (c) suspicion of a defined list of "clear security offenses," such as we saw above; and also (d) the parallel offenses in the military law of the Occupied Territories.[310]

"Security prisoners" are therefore mostly those Palestinians arrested for trying to fight the occupation. The IPS depicts them as especially dangerous, which subsequently "... necessitates their imprisonment separately from [regular] criminal prisoners and the placement of special limitations on them with regard to connections with the outside world, including vacations, visits, telephone calls and conjugal visits".[311]

B. The Right to Access a Lawyer

Effective implementation of the right to access to lawyer plays a significant role in documentation, publication and protection of a person from torture as well as the prevention of impunity of perpetrators of torture crime.

1. TURKEY

Article 6(3)(c) of the ECHR states that: "*Everyone charged with a criminal offense has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it fee when interest of justice so require."*

Regarding right to access to a lawyer, the ECtHR presented the following important principles[312]:

- Access to legal assistance in police custody is a right not only for minors but for everyone.[313]
- The systematic deprivation of people of their right to a lawyer during police custody where they are tried by the state security court is against the spirit of the Convention.[314]
- In cases where a lawyer is not mandatory, it is possible for the accused to waive this right. However, the waiver must be such that it leaves no room for suspicion and must be protected by minimum safeguards proportionate to its significance.[315] The existence of a form where the applicants have checked and signed the relevant boxes thereby waiving their right to a lawyer may not be sufficient by itself. In addition, even if the person has waived his right during interrogation, he must be reminded again of his right to a lawyer him during confrontation.[316]

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[310] Commissionership Ordinance No. 04.05.00, Definition of a "security prisoner", last updated Feb. 2006.

[311] Commissionership Ordinance No. 03.02.00, Rules regarding Security Prisoners, last updated June 2014.

[312] Kerem Altıparmak, Implementation of the Judgment of Salduz/Turkey, Access to Lawyer Monitoring Report, p.5

[313] Aba v. Turkey, no. 7638/02 24146/04, 03.03.2009; Adalmış and Kılıç v. Turkey, 25301/04, 1.12.2009; Gürova v. Turkey, no. 22088/03, 6.10.2009.

[314] Amutgan v. Turkey, no. 5138/04, 03.02.2009, para. 18.

[315] Yunus Aktaş and toher v. Turkey, no. 24744/03, 20.10.2009, para. 43.

[316] Savaş v. Turkey, no. 9762/03, 8.12.2009, para. 67.

- The Court uses the wording "legal assistance in custody" rather than legal assistance during interrogation.[317]
- A brief meeting with a lawyer, even if held before the interrogation, is not sufficient to meet the standards of the Convention.[318] An opportunity to obtain legal assistance must be provided during other criminal procedures in addition to interrogation.[319]

The CPT also stressed that *"the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment."* The right of access to a lawyer must include the right to talk to her/him in private. The persons concerned are entitled to have a lawyer present during any interrogation conducted by the police. Furthermore, even though the CPT recognizes *that "in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice"*, it also requires that access to another independent lawyer must be provided.[320]

With regard to the statements and the interrogations, Article 147/1(c) of Criminal Procedural Law states that *"the suspect or accused shall be notified that he has the right to choose a defence attorney and obtain his legal assistance. In cases where he cannot hire an attorney, and if he wishes to use the services of one, an attorney shall be appointed by the bar association."*

As an additional safeguard to the right to access a lawyer, Article 148/4 states *that "Statements obtained by the law enforcement in the absence of an attorney shall not be taken as a basis for judgments other than in cases where the suspect or accused has confirmed such statements in court or before a judge."*

Article 149/1 of Criminal Procedural Law guarantees the right to access a lawyer by stating: "*The suspect or accused may benefit from advice of one or more defense counsels at any stage during the investigation or prosecution; in cases where the suspect or accused has a legal representative, he may also choose a defense counsel on his behalf*."

Moreover, Article 149/3 ensures: "*The right of the lawyer to consult with the suspect or the accused, to be present during the interview or interrogation, and to provide legal assistance shall not be prevented, restricted at any stage of the investigation*." In practice, this provision guarantees that interviews with lawyer should be made in full confidentiality – i.e., not heard or watched by public officials. Any othe circumstance is a violation of just trial.[321] This procedural safeguard has also great significance for the prevention and discovery of torture. For example, the suspect's right

[317] Aba v. Turkey, no. 7638/02 24146/04, 03.03.2009, p. 9; Arzu v. Turkey, no. 1915/03, 15.9.2009, para. 46; Tağaç and others v. Turkey, no. 71864/01, 7.7.2009, para. 35; Çimen Işık v. Turkey, no. 12550/03, 16.7.2009, para. 12; Gülçer and Aslım v. Turkey, no. 19914/03, 16.6.2009, para. 12

[318] Fatma Tunç v. Turkey (no.2), no. 18532/05, 13.10.2009, para. 14

[319] Soykan v. Turkey, no. 47368/99, 21.4.2009, para. 11. Ahmet Arslan v. Turkey, no. 24739/04, 22.9.2009, para. 8 and 10; Tağaç and others v. Turkey, no. 71864/01, 7.7.2009, paras.11-12; Here, there is an absence of legal assistance in both the identification and the reconstruction procedures.

[320] CPT Standards, *Extract from the 12th General Report* (CPT/Inf (2002) 15), para.41

[321] *Öcalan v. Turkey* , Application No. 46221/99, 12.05.2005, para. 133

to confer with her/his lawyer in a suitably private place is necessary for communicatng her/his allegations of torture and ill-treatment.[322]

Even though, at first sight these provisions seem to guarantee the right to access to a lawyer in a broad way, Paragraph 2 of Article 149 restricts the right as such: *" In the investigation phase during the interview, the maximum number of lawyers allowed to be present shall be three."* Furthermore, Article 21 of the Regulation on Apprehension, Detention and Statement Taking brings extra stipulation to the limitation of the number of the lawyers by stating: " *if arrestee requests, maximum three legal counsellors shall be present during statement taking without requiring powers of attorney provided not to delay the investigation.*" This stipulations of "*not to delay the investigation*" and "*if arrestee request*" are in contradiction with Criminal Procedural Law. Therefore, it is obvious that this regulation is unlawful since a regulation issued depending on Criminal Procedural Law may not be more restrictive than the Law itself.

Finally, Article 150 of Criminal Procedural Law is as follows:

"(1) The suspect or accused shall be asked to choose a defence attorney, if the suspect or accused declares that he is not in position to hire an attorney an attorney will be appointed on his behalf if he so requests.

(2) In cases where any suspect or accused who does not have an attorney is a minor, disabled, speech or hearing impaired an attorney shall be appointed on his behalf without the requirement of his request.

(3) Provisions of paragraph two shall apply in investigations and indictments requiring a lower limit of imprisonment of more than five years."

As indicated above, legal assistance is mandatory only in case of an offence calling for an upper limit of imprisonment of minimum five years. This provision makes legal assistance in many offences dependent on the demand of suspects.[323] Accordingly, a suspect in a crime which does not require minimum 5 years' imprisonment risks being subjected to ill-treatment or torture during custody due to the lack of sufficient procedural safeguards.

According to Article 153 of Criminal Procedural Code, the right of a lawyer to access a file may be restricted by judge's decision if it poses a threat to the process of prosecution.

On the other hand, Inspection Reports of the Ministry of Justice observe that in fact, suspects are not duly reminded of their right to an attorney[324] and even in cases where legal assistance is mandatory, no reminder had been made.[325]

[322] Article 154 of Criminal Procedural Law
[323] İdil Elveriş/Galma Jahic/seda Kalem (2007), Mahkemede Tek Başına, İstanbul Bilgi Üniversitesi Yayınları, İstanbul, pp.21-22 in" Implementation of the Judgment of Salduz/Turkey, Access to Lawyer Monitoring Report", p.12
[324] Ministry of Justice Board of Inspection List of Recommendations, 2005, Article No: 77, 88 and 117 Reported by Galma Jahic/İdil Elveriş (2010), An Evaluation of the Right to a Defence Lawyer: Changing Laws, Unchanging Practice "Müdafiliğe İlişkin Bir Değerlendirme: Değişen Kanunlar, Değişmeyen Sonuç, 90 TBB Dergisi, p. 170.
[325] Ministry of Justice Board of Inspection List of Recommendations for Criminal Courts, 2009, Article No: 117 Aktaran Jahic/Elveriş, p. 170.

In many cases, it is apparent that the right of access to a lawyer was hindered. For instance, the lawyer who observed that his client had been subjected to torture during custody in the police station, was charged with perjury after he tried to take photos to prove that torture had been perpetrated. [326] In another case associated with the arrest of lawyers in 2013, the lawyers gathered in the Courthouse to meet their colleagues in order to provide legal assistance just before they were brought before the prosecutor. The police prevented the lawyers from meeting their colleagues by using force, injuring three of the lawyers. The prosecutor in the case decided not to prosecute the police officers involved, citing the wish to avoid "double jeopardy". This is obviously in contradiction with the Procedural Code, since once the objection to a decision not to prosecute is accepted, the prosecutor is obliged to start an investigation. The lawyers who were attacked by police officers were charged themselves with use of force against police officers. [327]

2. ISRAEL

The rule in civilian Israeli law is that anyone may meet with his or her attorney immediately upon their arrest – "without delay" (Detentions law, section 34). In military law, the term used is "as soon as possible" (OPS, section 56(c)), which may sound similar to a lay ear. But who gets to decide when is "possible?" In many cases, the decision is left in the hands of interrogators.

Indeed, the Israeli right to meet an attorney includes many exceptions. In the civilian law, access can be delayed for "several hours" if it is deemed a substantive risk to the investigation. In "security" offenses this extends to 10 days delay, to be authorized by the officer in charge of the investigation, and up to a total of 21 days by order of a District Court judge with the permission of the State Attorney.

In the Occupied Territories, military law allows a few hours' delay of access by any commander who thinks it may foil an investigation or other relevant arrests; up to 96 hours if a police superintendent or higher is convinced it is necessary for the maintenance of security of the area, human life or in order to foil an offense of more than 3 years imprisonment; and up to 8 days, 96 hours at a time, by a military judge who is convinced that secrecy is required for the security of the area or for the interrogation.

In Military "security offenses" arrests, a written decision by the officer in charge may delay meeting with an attorney for up to 15 days. An IP chief superintendent / head of the ISA interrogations department / an authorized IDF Lieutenant Colonel (or higher) may extend the delay by another 15 days. A military judge may prevent meeting for additional periods of 30 days at a time and up to 90 day if convinced that this is required by the region's security or investigation needs .

PCATI's 2010 report estimates that among the 11,970 West Bank Palestinians investigated by the ISA between 2000-2009 (according to ISA data), between 70 and 90 percent were denied immediate access to a lawyer. The average time of delay in cases represented by PCATI during 2005-2007 was 16.7 days. Ten percent of the delays lasted over 30 days. A 2012 position paper by

[326] The case of Ahmet Çevik, Antaly 4th Assize Court,http://www.radikal.com.tr/antalya_haber/avukata_iftira_ve_suc_uydurma_davasi-1236167
[327] Istanbul Prosecution Office, no: 2013/ 10545 S., decision; 2013/24179-2107 , date: 11.11.2014

three HROs from Israel and from Gaza re-states the frequent delay of "security offenses" detainees' access to their lawyers.[328]

Though a 2012 court petition against the "unacceptable discrimination between Palestinians detainees and Israelis leaving in the same area" yielded some improvements in that field, "[s]till, many Palestinian detainees are only allowed to see a lawyer after they confess."[329] Israeli courts routinely accept the requests of the ISA to deny Palestinians' access to a lawyer and their justifications to do so. This is yet another testimony to the strong position of secret security considerations in the legal system.[330]

C. Notification of Her / His Detention to a Third Party of choice

1. TURKEY

The CPT mentioned that *"a detained person's right to have the fact of his/her detention notified to a third party should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards.(e.g any delay in notification of custody to be recorded in writing and reasons therefore, and to require the approval of a senior police officer unconnected with the case or a prosecutor.)"*[331]

➢ As a matter of fact, in many cases ECtHR stated that a person's right to talk with his/her relative is a safeguard against torture and that lack of communication is a source of deep concern both for the person and his/her relatives.[332]The right to access relatives is therefore also related to private life and family life.[333]

Article 19/7 of the Constitution states: "*The next of kin shall be notified immediately when a person has been arrested or detained*."

Article 95 of Criminal Procedural Law also states: *" The status of an individual apprehended, taken into custody, or ordered to have an extension of custody shall be notified to one of the relatives; or*

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[328] Al-Mezan Center for Human Rights, ADALAH, Physicians for Human Rights – Israel, **Inhumane Conditions of Imprisonment of Palestinian Security-Classified Prisoners in Israeli Prisons**, 2012: http://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Position%20paper%20Prison%20conditions%20English%20final%2031_7_2012.pdf.

[329] Ballas, Torture Prevention in Israel/Palestine, p. 12.

[330] And see PCATI's report on the matter: Dr. Maya Rosenfeld, **When the Exception Becomes the Rule**, The Public Committee Against Torture in Israel, Jerusalem, Nov. 2010.

[331] CPT Standards, *Extract from the 12th General Report* (CPT/Inf (2002) 15), para.43

[332] *McVeigh and Others v. the United Kingdom*, Appl. No. 8022/77, 8025/77 and 8027/77, Commission Report, 18.3.1981, Decisions and Reports 25, p. 15.

[333] In *Sarı and Çolak v. Turkey* case it is adjudged that detention for 7 days without communication with the family violates Article 8. 42596/98, 42603/98, 04.04.2006.

an individual designated by the arrestee or person taken into custody, by the order of the public prosecutor, without delay. In cases where the individual apprehended or taken into custody is a foreigner, her/his status shall be notified to the consulate of the country of citizenship if she/he doesn't oppose the notification. "

➢ The problem with Article 95 of Criminal Procedure Code is that the notification to a third part of her/his choice or a relative can only be made by order of the public prosecutor. By restricting the right to inform relatives or third party of her/his choice without legal reasons, Article 95 obviously contradicts international legal standards.

2. ISRAEL

As with the other procedural rights reviewed above, Israeli law fully supports immediate notification of the arrest to a third party of the arrestee's choice – in both civilian (Detentions Law, section 33(A)) and military (OPS, section 53(A)) law. Yet again, exceptions change the picture - and for Palestinians the change is complete: In regular ('civilian') law, for non-security offenses, this right can be suspended up to a total of 7 days, 48 hours at a time, if approved by a district judge, *and* a written confirmation from the Minister of Defence or the Police Commissioner, stating that the secrecy of the arrest is necessaryand in the best interest of the investigation. For suspects in security offenses, the maximum delay is up to 15 days, with the authorization of the Minister of Defence.

In the Occupied Territories Military Law allows a judge to withhold notification of the arrest (also *ex parte*) for up to 8 days, 96 hours at a time if the suspected offense carries a maximum punishment of 3 years or more. For security offenses suspects, the maximum delay is 12 days by a judge who was convinced that the delay is necessary for an investigatory rationale or for the security of the area. Permission is also granted to an initial 24 hours delay if the head of an ISA interrogation squad or an IDF Lieutenant Colonel (or higher) believes that the delay is necessary due to the needs of the investigation.

D. The Right to be Brought Promptly Before a Judge (Habeas Corpus)

1. TURKEY

➢ Habeas Corpus is chronologically last but the most important right among the safeguards of a person deprived of his liberty. For a person deprived of his liberty, to be brought before a judge, of is one of the important acquisitions of the process of constitutionalization. The principle of *Habeas corpus* allows a person deprived of his liberty to have the court control the legality of the arrest, and allows the judge to oversee whether an arrestee is alive and whether h/she is subject to torture or ill-treatment. ECtHR explains this dual function as follows:

➢ "The Court will go no further than to stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 paragraph 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, "one of the fundamental

principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention"[334]

➢ Therefore international human rights law not only explicitly sets forth the right of *habeas corpus* but also points out that it is an absolute right. Pursuant to the Paragraph 4 of the International Covenant On Civil And Political Rights, "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release." Pursuant to Paragraph 3 of the Article 5 of the European Convention of Human Rights. anyone arrested or detained has the right to be brought promptly before a judge or other officer authorized by law. Paragraph 4 also states that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the legality of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

➢ The importance of this safeguard and its role in determining and preventing torture and other forms of ill-treatment is set forth in the judgment in the Aksoy case,[335] pronouncing explicitly that the right of *habeas corpus* may not be suspended even if other procedural safeguards are suspended.

➢ By stressing the role of judicial and prosecuting authorities in combating ill-treatment by the police, the CPT also mentioned that "*the judge must take appropriate steps when there are indications that ill-treatment by the police have occurred. In this regard, whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order forensic medical examination and take the necessary steps to ensure that allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment."*[336]

➢ Article 91 (3) of the Code of Criminal Procedures allows a maximum of four days of detention in conformity with international criteria. However, even for collective crimes, unless necessary, detainees must be brought before a judge as soon as possible, pursuant to the principle of exception.

➢ Habeas Corpus, undoubtedly, is not a superficial safeguard. Both the legality of the arrest and the possibility of ill-treatment must be examined as thoroughly as possible. For the right to be effective, the judge should be scrupulously observant about signs of torture and ill-treatment, whether or not a complaint is made. Judges may draw conclusions from the physical state, attitude and behavior of the suspect, as well as from the behavior of the law enforcement officers. If the judge entertains a suspicion, the

➢ detainee must be examined by a physician.

➢

2. ISRAEL

[334] For example; see: *Sakık and Others v. Turkey*, No. (87/1996/706/898-903, 26 November 1997, para. 44
[335] Aksoy v. Turkey, No. 21987/93, 18 December 1996;
[336] CPT Standards, *Extract from the 12th General Report* (CPT/Inf (2002) 15), para.45

The general rule in Israeli law is that arrestees must be brought promptly before a judge ("as soon as possible - Detentions Law, section 29, and also in OPS, section 31A(A)).

Derogations: Under regular circumstances, civilian Israeli law allows not bringing a detainee before a judge for up to 24 hours, and only if the arrest took place just before a Sabbath and a holiday, and waiting is the only alternative. For urgent investigative activities, the officer in charge of the investigation may delay a court hearing by maximum 48 hours from the time of the arrest.

In security offenses, the Temporary Order gives a commanding officer (with approval of head of ISA investigations department) the authority to delay for up to 48 hours, if convinced that such a pause in the detainee's interrogation might seriously damage the investigation. Another signed permission may extend deprivation to a total 72 hours. An additional 24 hours delay (total – 96 hours) may be ordered by the court in unusual cases, at the written request of the head of the ISA and the consent of the AG, and if the court is convinced that bringing the detainee before a judge would seriously harm an investigation that may save human lives.

The military law allows for suspending a judge's review for up to 48 hours in case of Sabbath and holidays. It then authorizes IP officers to delay juridical review of the arrest for up to a total of 8 days in case they are convinced that such a pause in the interrogation may substantively harm the investigation, and if given the approval of the head of the ISA Interrogations Department. If an officer is convinced that bringing the detainee before a judge is liable to harm a critical investigative action meant to prevent harm to human life, delay may be prolonged up to 8 days.

A detainee captured in a "battlefield arrest" (in context of battle / anti-terror action, and perceived as viable threat) may be denied access to court for up to two days without any special authorization.

While court petitions by some non-profit organizations yielded slow improvement in the procedural rights under military law[337], these changes also highlight the differences between detainees charged with security offenses and other detainees' procedural safeguards.

➢

E. Right to Request A Medical Examination by a doctor of Her/ His Choice

1. TURKEY

The significance of forensic examination has been emphasized in the Istanbul Protocol as regards allegations of torture and other forms of ill-treatment. This international document states that the investigator should arrange for a medical examination of the alleged victim immediately, regardless of the length of time since the torture occurred, in order to prevent acute signs from fading. It also

337 See, e.g, HCJ 4057/10, ACRI, Yesh Din and PCATI **vs.** IDF Commander of the Judea and Samaria Area; HCJ 3368/10, Palestinian Prisoners Office and others **vs.** Israel's Minster of Defence, IDF Commander of the Judea & Samaria Area.

states that the examination should include an assessment of the need for treatment of injuries and illnesses, psychological help, advice and follow-up.[338]

Article 99 of Criminal Procedural Law states "*Provisions... for the procedure how to conduct the health control...shall be enacted by an internal regulation*."

The procedure regarding medical examination is regulated by Article 9 of the Regulation on Arrest, Detention, and Statement Taking which enumerates the circumstances under which suspects and accused will be examined by a doctor :[339]

- ➢ If the arrestee will be detained or arrested by force;
- ➢ Replacement of detainee for any reason;
- ➢ Extension of the period of detention;
- ➢ Before being released or forwarded to the judicial authorities in order to determine the medical condition of arrestees
- ➢ For treatment of detainees with deteriorated health for any reason, or in suspicious health condition; examination and treatment of any such persons having a chronic disease, if they so request, will be provided by an official doctor under the supervision of doctors by her/his choice.
- ➢ During any transfer of a detainee to a new detention centre, detainee should be re-examined before her/his acceptance to such new centre.

According to the judgements of ECtHR and Supreme Courts, any injuries found following the release of detainee will be considered as caused during detention unless medical condition of a detainee is reported, and will result in trial of the persons in charge of detention.[340]

a. Medical Examination and Reporting Process

Article 9/5 of the Regulation on Arrest, Detention, and Statement Taking states: *" The medical examination is conducted by Institution of Forensic Medicine or official health institutions*." As mentioned by this provision, a detainee has no right to a medical examination by a doctor of her/his own choice in the beginning of the detention period.

Article 9/9 of the Regulation states that if he detects any sign that the suspect is subject to torture or ill-treatment, the doctor must inform public prosecutor about the crime. However, in point of fact, in many cases doctors ignore physical signs of torture and ill-treatment and issue reports stating that

[338] UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, para.104

[339] Also pursuant to the Article 13 of the Law on Duties and Powers of Police, medical conditions of following persons will be confirmed by a medical report

[340] 1st Criminal Chamber of the Supreme Court of Appeals 2004/4786 E., 2005/1232 K.; 10th Chamber of the Council of State, 1996/8578 E., 1998/1734 K.; *Dikme v. Turkey*, 11.07.2000, Appl No: 20869/92, para. 78; *Abdulsamet Yaman v. Turkey*, 22/11/2004,Appl. No: 324446/96, para. 43.

"there is no sign of ill-treatment." At that moment, the right to lawyer appears as a complementary safeguard to right to medical examination. The right to a lawyer during the medical examination is stipulated under Article 149/3 of Criminal Procedure Law: " *The right of the lawyer to consult with the suspect or the accused, to be present during the interview or interrogation, and to provide legal assistance shall not be prevented, restricted at any stage of the investigation and prosecution phase.*" In contrast with Article 149/3 of Criminal Procedural Law, Article 9/10 of the Regulation restricts the right to a lawyer by stating that a lawyer can only be present during medical examination if the doctor requests that the police also be present. Since regulations cannot be in contradiction with the legislation[341], the aforementioned Article of the Regulation must be regarded as void.

Besides there is no provision regarding determination of psychological trauma which may occur as a result of torture and ill-treatment even though psychological trauma is considered as significant as physical signs of torture and ill-treatment in order to provide effective investigation against perpetrators.[342]

b. Confidentiality and privacy of doctor-patient relation

As mentioned above, all medical ethic codes from the Hippocratic oath to the Istanbul Protocol note the obligation of confidentiality between doctor and patient. However, when it comes to judicial medical examination, the doctor has also an obligation to report medical findings that are obtained in the medical examination process. Therefore, a doctor must inform the patient that any information obtained during the interview and examination may be included in the report.

➢ During judicial examination and inspection, the commitment of the doctor to the fundamental human rights and freedoms and rules of privacy must also certainly be conveyed.[343]

➢ It is essential that examination must be conducted in an environment out of sight and hearing of other persons, affording privacy to the doctor and the patient, and according to the rules governing doctor-patient relations. These should be observed scrupulously, especially in the examinations of detainees.[344]

Article 9/10 of the Regulation on Arrest, Detention, and Statement Taking states: "*The detainee and the doctor must stay in private. If requested by doctor for the reason of her/his security, medical examination shall be conducted under the supervision of law enforcement officials. In case that examination is conducted under supervision of law enforcement officials and if requested by the examiner, the patient's lawyer may be present during the examination.*"[345] However, as stated by Article 9/4 of the Regulation, the law enforcement officers who take the statement of the detainee and conduct an investigation and the law enforcement officers who brought detainee to the medical

[341] Article 11/2 of the Constitution of Turkey
[342] Report of the UN Special Rapporteur on the question of torture, E/CCN.4/1999/61/Add.1, para.113(d).
[343] Ministry of Health, Regulation no. 2005/143 dated 22.09.2005, Article 3.2.4; Istanbul Protocol para.124
[344] Ministry of Health, 2005, Article 3.2.4; Istanbul Protocol para.124
[345] This point is also emphasized by Ministry of Health, regulation no.2005/143 dated 22.09.2005, Article 3.2.4

examination should be be separate persons. If this is impractical due to insufficiency of law enforcement personnel, this must be documented.

Privacy of doctor-patient relation is very significant since the doctor is the first person whom a detainee has ito contact with after his/her apprehension by law enforcement officials. In case of being subjected to torture or ill-treatment during apprehension/detention, the presence of law enforcement officials during medical examination may lead to coercive measures applied to the detainee or the physician, pressuring them not to document torture or ill-treatment.For this reason the European Committee for the Prevention of Torture stated that interview with physician should be made in an environment out of sight and hearing of the law enforcement officials.[346] The General Assembly of Criminal Chambers of the Supreme Court of Appeals also indicated that an examination conducted superficially will result in punishment, not only of the law enforcement officials but also of the physician for derilection of duty.[347] An examination conducted in the presence of law enforcement officials was considered as a ground for annulment of the judgment in the case popularly known as the "Manisa case".[348]

c. Informed Consent

Under domestic law regarding detainees, there is no provision regulating informed consent of a detainee. Article 17/2 of the Constitution states: " *The corporal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without her/his consent*."

Article 17/2 of the Constitution is obviously in contradiction with Istanbul Protocol indicating that persons have the right to refuse to cooperate with all or part of the interview/examination.[349]

d. Confidentiality of Medical Reports

➢ As stated above, the medical reports must be confidential and must not be made available to law enforcement officials under any circumstances.[350]

➢ Contradicting the principle of confidentiality, Article 9 of the Regulation on Arrest, Detention, and Statement Taking stipulates that one copy of the report issued at the time of arrest or entry to detention centre should be kept by the health institution which issued the report, a second copy should be given to the detainee, and a third copy given to the relevant law enforcement official to be kept in the investigation file. Instead of submitting the report to the law enforcement official, submission to the prosecutor by post or by hand would have maintained accordance with Istanbul Protocol.

[346] Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 29 March 2004, CPT/Inf (2005) 18, para. 38

[347] General Assembly of Criminal Chambers of the Supreme Court of Appeals, E. 2002/8-191 K. 2002/362, T.15.10.2002. Similarly see, 4th Criminal Chamber of the Supreme Court of Appeals, E. 2003/19418 K. 2005/5688, T.13.6.2005

[348] General Assembly of Criminal Chambers of the Supreme Court of Appeals E. 1999/8-109 K. 1999/164 T. 15.6.1999

[349] Istanbul Protocol, para. 89 and 165

[350] Istanbul Protocol, para.126, also see, Report of the UN Special Rapporteur on the Question of Torture, 113(d).

➢ On the other hand, Article 9 of the Regulation on Arrest, Detention, and Statement Taking stipulates another measure for secure delivery and for the prevention of replacement or alteration of the medical report determining the medical condition of the person for the period in custody, separately from the report issued at the time of arrest or entry. Also in accordance with Article 157 of Criminal Procedure Code, a copy of medical reports issued during the extension of detention period or replacement, or the exit from detention centre is kept by the health institution, and two copies are swiftly delivered to the relevant Chief Public Prosecutor's Office in a sealed envelope by the health institution. A copy is given to the detainee or her/his lawyer by the Public Prosecutor and a copy is kept in the investigation file.

2. ISRAEL

Israeli law does not stipulate that a patient may choose his/her doctor, only that he is entitled to refuse treatment by a particular physician. According to the Patient's Right's Law (1996), paragraph 7, the patient is entitled to seek a second opinion. Detainees are in theory also entitled to request a second opinion, after having been examined by an IPS physician or referred by the IPS to a specialist.

In practice, however, access is a main issue here: the process is extremely lengthy, expensive (unless facilitated by an NGO), and not always feasible. A doctor would have to be willing to get a permit and then come to prison, which requires the loss of about two full days' work, and a lawyer will have to obtain the necessary permission – not a trivial matter. If not allowed to meet a lawyer, a detainee would probably not be aware of this right. Convicted security prisoners, whose access to a phone and to visits is very limited, are also not likely to be aware of the possibility unless their families happen to be in touch with a human rights organization or can afford to pay for ongoing legal advice.

a. Medical examination and reporting process:

According to the Patient's Right's Law (1996), paragraph 17, health professional are required to document the past medical condition, diagnosis, and the treatment given and prescribed. In addition, IPS regulations require medical staff to document injuries using a particular "Injury form", stating the cause of the visit to the clinic as "injury"' and to photograph them.

In practice, records in both hospitals and IPS clinics often make no mention of injuries or the alleged cause, falling short of proper diagnosis and documentation, including the lack of precise description of the cause as described by the victim, the lack of precise description of the injury, a photograph of the injury and treatment of the injury. This missed diagnosis necessarily leads to problems in treatment (e.g., diffuse pain is diagnosed as psychosomatic, rather than the effect of damage to ligaments and tendons). IPS and hospital medical staff continuously fail to diagnose torture as a pathogen, never actually using the ICD-10-CM Diagnosis Code Z65.4 (applicable to victims of torture) or local equivalents (diagnosis of torture under the Health Maintenance Organizations); medical files continue to be incomplete and lacunose. This includes failure to photograph the injury, in spite of IPS regulations requiring such documentation.

b. Confidentiality and privacy of doctor-patient relation

According to the Patient's Right's Law (1996), paragraph 10, all health professionals are required to maintain the patient's privacy and dignity. In practice, NGOs have received reports of hospital

examinations conducted with no privacy, in the presence of the security forces. In addition, the vast majority of IPS medical professionals do not speak Arabic (or Tigraniya), curtailing their ability to communicate privately and professionally with many patients. In IDF camps (Etzyon and Hawarra), medics can sometimes get by in very minimal Arabic (but detainees are still required to sign medical forms in Hebrew, which of course negates informed consent). In Holot and Saharonim, other inmates are called to serve as interpreters. In prison, other inmates – or the guards – are called to serve as interpreters, negating completely the privacy of the exam and the ability of the patient to trust the medical professional's confidentiality.

c. Informed consent

According to the Patient's Right's Law (1996), paragraph 13, informed and freely given consent is a prerequisite for any medical treatment. In practice, the communication problem detailed above harms irreparably the concept of informed consent.

d. Confidentiality of medical reports

According to the Patient's Right's Law (1996), paragraph 19, all medical staff are required to keep patient information confidential. Paragraph 20.4 allows for the passing of confidential information to other medical personnel, among other clearly defined exceptions. In theory this is maintained. In practice, there are several problems:

- Medical records of examinations conducted in hospitals for detainees are often given to the guards and not the patient, breaching his confidentiality
- Medical records are usually not transferred between army camps and IPS facilities. As anyone injured in the course of the arrest may also be likely to spend 24-48 hours at an army camp, where the injuries will be first recorded, this creates a crucial gap in documentation.

II. PROCEDURAL SAFEGUARDS IN DIFFERENT STAGES OF INVESTIGATION AND PROSECUTION

A. TURKEY

1. Impartiality and Independence of the Court

While deciding whether a court is independent, the following components must be taken into account: the manner of appointment of its members, the duration of their office, the existence of guarantees against outside pressures and whether the body presents an appearance of independence.[351] Furthermore, the Court must also be independent of both the executive branch and political parties.[352]

In considering the impartiality of the Court, ECtHR distinguished between subjective impartiality and objective impartiality.[353] In the context of subjective impartiality, proof of actual bias is required. In other words, the personal impartiality of an appointed judge is presumed until there is

[351] See, *Campbell and Fell v. UK*, 28 June 1984, para.78
[352] *Ringelsen v. Austria*, 16 July 1971, para. 95
[353] *Piersack v. Belgium*, 1 October 1982, para.30

evidence to the contrary.[354] For example, in *Lavents v. Latvia*[355], ECtHR held that the requirement of impartiality was violated since the judge made comments about the case to the press before the trial had been concluded.

In the context of objective impartiality, ECtHR stated that:

➢ *"under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified."*[356]

➢ According to the Court, any judge who presents a legitimate reason to fear lack of impartiality must withdraw.[357] In addition, if a defendant raises the issue of impartiality, it must be investigated unless it is "manifestly devoid of merit."[358]

The withdrawal of a judge due to the lack of impartiality is stipulated under Article 22 and 24 of Criminal Procedural Code of Turkey.

2. Duty to hear witnesses/alleged victims/ Ability of the victim to participate in prosecution process

Hearing the witnesses and alleged victims of torture as a part of gathering evidence is of great importance in order to prevent the impunity of the perpetrators. The testimony of the witnesses is stipulated under Article 43-61 of Criminal Procedural Code of Turkey.

Considering that the crime of torture and ill-treatment is perpetrated by public officials who are, in general, armed security officers, witnesses may refrain from testimony from fear. Therefore, it is necessary to take measures protecting witnesses against the alleged perpetrators who are state agents. However, under domestic law, there is only one provision, protecting witnesses testifying regarding organized crimes.[359] Since the crime of torture and ill-treatment is not considered an organized crime, there is no protection of witnesses under domestic law, which is therefore manifestly ineffective in preventing the impunity of the perpetrators.

According to Article 234 of Law 5271, a victim has the right to be informed of hearings, participate in public trials, request copies of prosecution documents, demand the hearing of witnesses and appeal against decisions and verdict of the Court. Under Article 237 of Law 5271, a victim can only ask to participate in the proceedings at a court of the first instance. Once the verdict has been

[354] Ibid.
[355] *Lavents v. Latvia*, 28 November 2002.
[356] *Fey v. Austria*, 24 February 1993, para.30
[357] *supra* Note 41, para.30
[358] *Remli v. France*, 23 April 1996, para. 48
[359] Article 58 of Law No: 5271

appealed, the victim can no longer ask to participate in that phase of prosecution. On the other hand, a victim can ask questions to the accused and witnesses only via judge whereas her/his legal representative can raise such questions directly, as stipulated under Article 201 of Law 5271.

B. ISRAEL

1. Torture survivors' Access to Justice

Throughout the process of arrest, complaint, and investigation, there exists a basic question of detainees' (future complainants') access to justice: while everybody is entitled to legal representation, accessibility includes many other vital elements. Economic barriers are the most evident: the different stages of examination and prosecution are costly, laborious, and emotionally draining. Without the assistance of a human rights organization, the cost of legal representation might easily reach 50,000 to 150,000 NIS, which for most complainants poses an insurmountable obstacle.

As one typology suggests, the access of deprived populations in Israel to justice ia typically influenced by their geographic location (away from commercial, legal centers); lack of common language and cultural background with insensitive and understaffed legal instances; mistrust in the legal system, based on long-standing discrimination and negligence by the state; and similar perception of the judiciary as foe rather than potential friend.[360] In the case of Palestinian detainees / complainants, these obstacles are even more significant:

(a) MPCID has no bases in the West Bank, which by and large prevents filing complaints by Palestinians directly. "Most complaints are [then] submitted in police stations at the District Coordination Offices and [by] human rights organizations"[361] ;

(b) The economic situation in the OT is far worse than in Israel, which further distances complainants from proceedings and legal representation, including inevitable appeal discussions, is considerable burden for the average Israeli, and much more so to the average Palestinian. Alternately, the cost of representation is paid by human rights bodies. The public Defense is not authorized or allowed to represent Palestinians who are residents of the Occupied Territories;

(c) Detainees of security offenses who survived torture have all the more reason to address the state as enemy, and mistrust authorities. Ongoing negative investigation and prosecution results reaffirm the sense of pointlessness that discourages further complaints.

(d) Security, Palestinian detainees speak Arabic, while the court's language is Hebrew, and vast majority of prosecutors and judges do not speak Arabic.

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360 Yoram Rabin, **The Access to Law as a Constitutional Right**, Bursi Publishing house, Israel, 1998; Yuval Elbashan, **The accessibility to justice of deprived populations in Israel**, in: *Alei Mishpat*, Vol. C, 1984, pp. 496-533.

361 Yesh Din, Shadow Report, p. 11.

To these we should add the Public Defense's random examination in 2012 of hundreds of prisoners' motions, which found that for Israeli citizens / residents, 51.3% of prisoners' complaints lacked legal representation (p. 74). The PID's annual report also found various defects in IPS' treatment of prisoners' motions, including regular closure of files without reasonable argument, repeated breach of the right to access the law and pressure on prisoners who request such access, simple malfunction and inefficiency, and more (pp. 72-73).

2. Vulnerability of prisoners in transit

Different reports testify that prisoners become exceptionally vulnerable in the course of their transit between imprisonment / court / other facilities. Thus, e.g., PCATI's 2008 report reveals that serious and repeated abuse in transit of Palestinian detainees under IDF authority is grounded in lack of specific regulations in the IDF regarding this especially vulnerable phase.[362]

In the IPS, clear instructions do exist regarding transit and escort of prisoners, which is mostly handled by the Nachshon special IPS unit. Nachshon currently counts just over 1,000 "warriors", as they are officially called, who escort about 1,800 criminal and "security" prisoners each day, about 390,000 a year. The number of escorts (hence weak safeguards spots) is reported to be growing every year, correspondingly to number of detainees and prisoners.[363] Escort responsibilities include the transit of ISA and Palestinian prisoners from the Occupied Territories, between courts, jails, police stations, and IPS units.

The Nachshon website indeed notes that "[T]he transit of prisoners from one place to another is an observance weak spot". The weakness at point, however, regards the risk that prisoners pose to the "warriors": "[at the time of transit]… this dangerous population is not locked behind bars", which demands high fighting skills, pedantry, and sharp reactions in order to neutralize the danger, as phrased there [freely translated, NH]. Responsibility to the well-being or rights of the prisoners in transit is not mentioned.

Partial reports of Nachshon's conduct towards prisoners exist, which suggest problematic treatment of prisoners. Thus, a news article from 2009 (Heb.) quotes accumulating judicial criticism of Nachshon's practice for causing "considerable suffering and distress" to prisoners through bad treatment and long delays, which according to a member of the Israeli Legal Chamber amount to "a demonstration of disregard and contempt to detainees' dignity, to the point of depriving them of their constitutional rights and damage to the rule of law."

A more recent critique was sounded in the Public Defender's report from Feb. 2014, which documented the imprisonment of detainees in iron cages in the open air, where they were held while waiting for transfer to different court hearings – sometimes overnight, sometimes with minors and adults together in the same cage.[364] The cages treatment was reported again in September 2014 by

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362 No Defence, esp. pp. 3-19.

363 See: http://ips.gov.il/Web/He/About/Units/SpecialUnits/Nachson/About/Default.aspx, and in IPS 2013 annual report, pp. 21-22.

364 See: (Heb.): http://index.justice.gov.il/Units/SanegoriaZiborit/News/Pages/Doch_Kluvim.aspx.

an "Official Comptroller" on behalf of the Ministry of Public Security. Its concerns included "chaos and loss of tens of thousands of working hours" as the result of bad management; and "inhumane" treatment towards prisoners.[365] Lack of official IPS data of prisoners' rights in transit or of their complaints leaves such criticism unanswered.

3. Impartiality and Independence of the Court Discussing Allegations of Torture / Ill-treatment

Israeli courts are independent, and by common legal standards they are also considered impartial and unbiased.[366] In cases of torture, however, the issue of security, and security considerations, take a front seat. This typically entails possible breaches of court impartiality, which may certainly have a role in the poor enforcement of the law in cases of abuse of detainees, described and demonstrated above:

(a) Israeli courts regularly accept the position of the security establishment brought to judgement, if directly connected to arrests and torture or not – whether by accepting the legality of such practices or by ruling them beyond the jurisdiction of the courts. Thus, e.g., the Israeli Supreme Court allowed the military tactics of selective executions without a trial (HCJ 769/02); supported the army's authority to deport Palestinians from the West Bank to the Gaza strip (HCJ 7015/02); authorized a policy forbidding Palestinians married to Israelis to gain permanent Israeli residency (HCJ 7052/03); accepted the IDF position declining investigation of cases of death caused by IDF action when tactical assessments suggest to suffice with a military debriefing (HCJ 9594/03); determined, with some corrections of route, that building the fence (wall) between Israel and the OT on Palestinian land is legal (HCJ 7957/04); approved again and again frequent administrative detentions, and allowed prolonged arrests of Palestinians charged with security offenses (HCJ 3368/10, 4057/10). One rare counter example is the Israel Supreme Court's decision to stop the IDF tactic of using Palestinian civilians as human shields. But this exception only proves the rule: usually, while the Supreme Court may restrain security-reasoned policies and tactics, the balance it strikes allows time and again for serious violations of Palestinians' human rights, as briefly demonstrated above.

    It may therefore be claimed that the Israeli Supreme Court's consideration of torture allegations coming from security offenses detainees, and even more so regarding ISA interrogations, is tainted with the a-priori sympathy of the court to security-related argumentation or agency. This may explain the court's decisions - reviewed in chapter 1 - limiting but still practically allowing for torture to exist and for torturers not to be punished, as well as the poor punishment for abuse of detainees by different security forces (reviewed in chapter 2).

(b) Court impartiality in torture complaints further suffers from the confidential nature of ISA policies and procedures, the allowing of frequent *ex-parte* deliberations and presentation of confidential materials to the court in cases involving security offenses. This is in addition to the

[365] See: http://www.posta.co.il/index.php/widgetkit/

[366] Military courts are not addressed here, as Israeli security personnel are only prosecuted in Israeli courts.

frequent disregard of the duty to update complainants of torture of developments in their cases: all of this which accumulates to an imbalanced presentation of torture complaints with the permission of the court.

(c) Impartiality may also be hindered by the fact that the vast majority of Israeli judges serve in the IDF – some of them in combat units, others as part of their juridical careers. Thus, e.g., of the current (2015) 15 judges in the Israel Supreme Court, one served as an IDF tank commander, another as a major in the Israel Air Force; another judge was an intern in the department of the legal adviser to the Ministry of Defence, another was a senior adviser in the MJ corps and still fulfills active reserve service as major in the unit, yet another was appointed as reserve judge in a West Bank military court, and another served as a lieutenant colonel in the MJ crops turning to a civil legal career. To Israeli ears, this sounds normal or at least reasonable, as obligatory military service is still the norm in Israel. But when court impartiality in is the issue, the clear personal affiliation of judges with the security system, their past partnership in decisions and representation of its interests, and their ongoing legal training and acceptance of the basic assumptions of the 47-years long military occupation which yields 99% of torture complaints, all this will certainly affect impartiality.

In this context it should also be mentioned that though about 20% of Israeli citizens are Palestinians, the Supreme Court has only one Palestinian judge on board: judge Salim Joubran became the first (and so far only) Palestinian to hold this permanent position in 2004 (before him, judge Abdel Rahman Zuabi held a temporary SC appointment for 9 months during 1999). On 2012, Associate Justice Joubran criticized the Israeli policy of appointing Arab judges, and revealed that only 60 of about 650 Israeli judges – less than 10% - were Arabs. A 2015 research revealed the significance of representation to judicial impartiality in Israel, as it statistically established that "… the ethnic composition of district court panels is highly consequential for Arab defendants, who are more likely to win their appeals (and less likely to lose the prosecution's appeals) when a panel that includes at least one Arab judge hears their case", and that "[B]y contrast, the outcome of the appeals process for Jewish defendants is independent of the ethnic composition of the appellate panel."[367] It may be assumed that the Israeli courts' judgment of security forces' violence towards Palestinians suffers at least similar bias.

Appeals: An important feature of proper prosecution is the complainant's right to appeal administrative decisions, including judicial ones. Though still within the same judicial system, appeals also foster impartiality, as they allow for second opinion and thus partially neutralize potential personal juridical bias.

In the context of torture, the most relevant appeals regards "… the decision to end an investigation and close the file without serving an indictment" (as instituted in Section 64 of the Criminal Procedure law). To the end of serving such appeal, any decision not to investigate or not to prosecute should be given a written notice "… that also states the reason for the decision, which is to say the grounds for closing the file".[368] But, in June 2010, a State Attorney update to Directive

[367] Grossman, Guy, et al., Descriptive Representation and Judicial Outcomes in Multi-Ethnic Societies, in: American Journal of Political Science (Forthcoming), 2015, quotes in pp. 32-33.
[368] Yesh Din, **The assault on the institution of appeals**, Tel-Aviv, June 2011, quotes in p. 1. Online: http://www.yesh-din.org/userfiles/file/Position%20Papers/YESH%20DIN_Eng_The%20Assault.pdf.

14.8 concerning the right to review investigation materials canceled the right to review files that are closed on grounds of 'insufficient evidence', which is officially estimated to account for 55%-60% of the closing of investigation files in Israel (and in cases monitored by Yesh Din: 88%). At the time, notices of closing investigation files were habitually delayed, and in the case of Palestinians often did not reached their destination at all. Thus the maximum period (extendable but usually not extended) of 30 days for submitting an appeal (Criminal Procedure Law, section 63) was almost impossible to meet.[369]

Since 2012, some progress has been made on the front of appeals: in PCATI's HCJ 1265/11, the right to appeal recommendations of preliminary examinations directly to the Court, rather than through the customary administrative petition process, was recognized; the Court also obliged the State Attorney to allow appeals against the preliminary closing of ISA torture complaints (which sadly prolongs the preliminary stage even further); and in May 2013, the Court also held (HCJ 7273/12) that a complainant's counsel may examine censored material related to the case: The counsel may copy by hand documents from the OCGIC's questioning of complainants, ISA interrogators, witnesses, and suspects. As of the end of 2014, PCATI lawyers were permitted to examine sixteen complaint files and summarize them in writing.

The (2013) Turkel Report called upon the Israeli legislator to set in law a right to appeal MAG's decisions before the AG (p. 339), which might reduce the bias of the army legal system discussed in chapter 2, and allow ongoing external monitoring of military law besides the HCJ. Israel's Attorney General recently responded to these recommendations with a directive meant to underline the independence of the Military Attorney General, and to clarify the boundaries as well as the interface between AG and MAG. Directive 8.b effectively sets the right to appeal the MAG's decisions before the AG, as it states that the AG will address MAG's decisions whenever the former finds the decisions outside the line of acceptable legal norms.[370]

Appeals results: The accumulative data of Yesh Din's cases as of 2011 shows that appeals against the closure of investigation files in complaints by Palestinians from the West Bank against Israeli security officials are rarely accepted: one of a total of five appeals against **MPCID** investigation decisions, and one of the twelve appeals by Yesh Din against **PID** decisions.[371] ACRI's data regarding its own appeals on decisions to close **PID** complaint files counts a total of 19 appeals out of 32 files between May 2008 and Sep. 2014, of which 18 were denied, and one accepted.

PCATI's data regarding its appeals against decisions to close torture cases counts a total of 26 appeals between December 2012 and February 2015. Of those, 7 concern PID files, one an MPCID-examined case, and the other 18 against the recommendations of the supervisor Attorney of the OCGIC. Two of the 26 appeals yielded a decision to allow the complainants to sound their versions before the OCGIC – which did not take place at the stage of original examination. Eleven appeals, served between April 2013 and June 2014, received no response as of yet. Eight appeals were

[369] Yesh Din, **The assault on the institution of appeals**, pp. 4,8, and fn. 7.

[370] See AG Directive 9.1002 (updating directive 21.869A), April 2015, in: http://index.justice.gov.il/Pubilcations/News/Documents/Instruction-Pazar.pdf

[371] On appeals against decisions made in cases of Palestinians' complaints of violence by Israeli citizens civilians: 27 of 156 (17.5%) were accepted, of which in 19 the police decided to renew the investigation; 7 were SA decisions to renew the investigation, and only one successful appeal on a decision not to indict. See: Yesh Din, **The assault on the institution of appeals**, p. 3.

decided against the petitioners. After permission was granted to review the OCGIC examination files, 3 appeals were withdrawn after the review of materials, and 2 others are still pending. The average time of waiting in open appeals is over a year. The process of appeals is still useful, however, as the state's replies very gradually come to include more details of the inquiries and considerations behind their decisions.

The accumulative data therefore suggests that appeals against closing complaints of violence by security force are most often denied, and only very seldom lead to re-opening of a file. Moreover, appeals prolong the already dragging preliminary and criminal inspections. Still, the advancement made in the field of appeals is important. This is especially true in the cases of torture and abuse of ISA detainees, where secrecy often keeps complainants and their attorneys in the dark. Ongoing access to examination materials is important not only to survivors and their attorneys, though, but also to researchers, strategy-makers, and advocates partaking in the battle against torture.

4. Duty to hear witnesses/alleged victims/Ability of the victim to participate in prosecution process

According to the Rights of the Victims of an Offense Law, 2001, a victim of an offense "is entitled to receive information about his rights as a victim of an offense and about the manner in which the criminal proceeding is conducted… about the current stage of the criminal proceeding [relating to his claim]…" (section 8(A)(B)). Among other rights, the victim (or his attorney) is entitled to review the statement of claim; to receive information about assistance services provided to the victims of an offense; to be present at a closed hearing regarding his claim, except on special grounds (including reasons of security); and to make a written statement to the investigative body and the prosecutor regarding any injury and damage he sustained due to the relevant offenses (ibid.).

Unfortunately, the Rights of Victims of an Offense Law does not apply to offenses committed by soldiers, and it applies only when a criminal investigation is already pursued. The law is thus irrelevant to 99% of all complaints of torture and violence made by Palestinians, and to only the handful of abuse complaints against IP or NPGID reaching indictment.

5. The Rights of Minors

The derogation of the rights to notify of the arrest to a third person of choice, to meet with a lawyer, and to be brought before a court, all addressed ahead, is less extensive in the case of minors. In recent years, a series of court appeals and advocacy work by Israeli human rights organizations and international bodies has brought upon improvement in the procedural rights of minor detainees, especially in the Occupied Territories. Latest changes to the Order regarding Security Provisions have narrowed much of the gap between minors' formal procedural rights in Israel and in OT. Despite such improvements, Palestinian minor detainees are still much less protected than Israeli ones.

Thus, with regards to specific rights, while Israeli law (Youth Act, art. 9.g) determines that the notification of minor's arrest may be delayed by 8 hours if notification might harm state security, in military law the notification of their arrest may be delayed just as adults' (OSP, art. 136). Police officers in the Territories have the authority to delay bringing detained minors before a judge for up to two or four days, depending on age (OSP, art. 31). In Israel, the maximum such period is one day

(Youth Law, Art. 10c). Article 38 of the OSP still allows a judge of the Military Court of Appeals to extend or re-arrest suspects before their indictments for consecutive 90 days periods, with no maximum registered. This article is valid for minor Palestinians as well.

Beyond specific rights, while cases of minors are handled in Israel by police officers with specific training and position within the force, military law does not set parallel protections or institutions. Similarly, the Israeli law sometimes instructs the treatment of minors by designated institutions, e.g., social workers, a hostel, a foster family.[372] The military law cannot come up with parallel assistance for arrested minors. Thus having similar derogation rules for Israeli and Palestinian minors, does not equal similar balance between authority and responsibility for them.[373]

6. Administrative Detention: Total Derogation

Administrative detention, which requires no more than a suspicion with no requirement of evidence or aspecific criminal act, is enabled in Israel by three pieces of legislation: most arrests rely on articles 284-294 in the Order regarding Security Provisions of the Military Law; some are authorized by the Emergency Act (arrests)-1979. In both legislations, a high authority (In the WB: the IDF commander of the West Bank or other commanders authorized by him. In Israel: the Defence Minister) may order the detention of any person under their jurisdiction who they have "reasonable grounds to believe… must be held in detention for reasons to do with regional security or public security". The third source of authority is the Internment of Unlawful Combatants Law, which Israel uses "… to detain without trial Palestinian residents of the Gaza Strip, where the military legislation was repealed upon implementation of the 'disengagement' plan, in Sep. 2005."[374]

Administrative detentions in the Occupied Territories are permitted for consecutive periods of up to 6 months at a time, pending judicial review. They permit reasoned deviation from the rules of evidence and *ex parte* procedures. Emergency Act (arrests) also authorizes the IDF Chief of Staff to sign an order for the arrest (for up to 48 hours) of anyone he assumes the Defence Minister might put under administrative detention at that time (art. 2c), thus initiating this extreme measure as a matter of operative routine.

International law may permit the use of administrative detention, but only as an inevitable and rare exception. In sharp contrast, over the last 5 decades Israel has routinely used this procedure to arrest thousands of Palestinians in the Occupied Territories, most of them for a year or longer.[375] As of July 2014, Israel was holding 446 Palestinians under administrative detention. Israeli human rights

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[372] Noted in the Youth Law (Trial, Penalization, and Means of Treatment), 5731-1971, sections 10A, 10G, 12, 12A, 13, and all of chapter G. Similar protecting functions for minors are also found during a trial and during imprisonment – See in Youth Law (Trial, Penalization, and Means of Treatment), 5731-1971, e.g. chapters D, E.

[373] And read also in: **One Rule, Two Legal Systems**, pp. 63-75.

[374] See: B'Tselem, review of administrative detentions, last updated Sep. 2014, online: http://www.btselem.org/administrative_detention.

[375] Only 9 administrative detainees were Israeli citizens (residents of WB settlements). See B'Tselem's updated follow-up, based on official: http://www.btselem.org/administrative_detention/statistics.

organizations note an increase in administrative detentions since Israel's 2013 and 2014 military operations in Gaza and in the West Bank. As we just learned, those detainees suffer the worst degree of legal derogations of procedural rights, and their safeguards are further eroded as they are held in separation from non-administrative detainees (art. 14(a)).

The practice of administrative detentions officially declares the supremacy of "security reasons" over all other considerations, including the law itself. Its common application poses a practical and a normative counter-weight to the "proper" rule of law manifested in the rules of procedural rights. The routine of rights-derogating exceptions for Palestinians then rests between the "proper" rule of law and this anti-law habit.

In recent years, many administrative detention orders were issued against Palestinian prisoners upon their release, thereby extending their detention beyond the terms set by the regular legal military procedure, and illustrating the flexibility of the rule of law – from rule, to exceptions, to military law, to emergency, beyond-the-law authority. Administrative detentions have been also used to pressure Palestinians into collaboration with the ISA, which further demonstrates the linkage between the status of risk to state security, derogation of procedural rights, and detainees' vulnerability to ill treatment by authorities.[376]

Already authorized by the Supreme Court and well-practiced by the MAG Corps, widespread administrative detentions are a handy tool, ready to be widely used against any individual from any group seen as a security risk by the state.

III. FACTORS INFLUENCING THE IMPUNITY DURING INVESTIGATION AND PROSECUTION OF TORTURE INCIDENTS

A. TURKEY

1. Counter Allegations against torture victims

As mentioned above, with regards to the judiciary/administrative permission mechanism for public officials, it can easily be said that there are several provisions for the protection of public officials against accusations. In addition, criminal law provisions give them an opportunity to accuse victims of torture and ill-treatment of "prevent[ing] public/judicial authorities from performing [their] duty" under Article 265.These provisions are used against victims in almost every case as a means of impunity; they are also used as a tool to intimidate torture and ill-treatment victims from lodging complaints against the perpetrators.

The underlying logic is that the injuries of the victim occurred as a result of her/his own actions rather than the act of torture or her/his resistance to apprehension.

Accusing the victim by counter-allegations does not require much evidence since the official reports of police officers prepared after an act of torture and ill-treatment are considered \ sufficient to bring charges. In contrast with allegations of torture and ill-treatment, counter-allegations do not require

[376] On administrative detentions upon release from prison and as means of pressure see in: Att. Tamar Peleg-Sarik, **The Mysterious Aspects of Adminstrative Detention**, in: Tarabut Website, 13.8.2011 [Heb.]: http://www.tarabut.info/he/articles/article/administrative-detention/.

any proof (such as a medical report) to prosecute the victims of torture. In markes\d contrast, in many cases no charges are brought against the perpetrators despite a medical report, explicitly stating that the victim wass subject to torture and ill-treatment.

As an example, in 2010, 22487 people were charged with preventing public/judicial authorities from duty under Article 265 and 8257 of them were convicted whereas only 1128 of the public officials were charged with excessive use of force under Article 256[377], intentional injury under Article 86[378], torture under Article 94[379] and 95[380] and 105 of them convicted. With regards to the crime and ill-treatment under Article 243 and 245 of former Turkish Criminal Code, 326 cases were brought up and 29 public officials were convicted. [381]

B. ISRAEL

1. The need for protection of torture survivors from retribution by authorities

The Witness Protection Law defines the status of a "threatened witness" and a "protected witness." A "threatened witness" is a person who has provided information or agreed to cooperate in the framework of an investigation or prosecution, and whom the police believe to be endangered (him or his family) due to his testimony. A "protected witness" is a "threatened" witness whom the police decided to include in its witness protection program. This decision is made in accordance with the criteria established in the law, and particularly in various regulations, at the discretion of the commander of the program and subject to its priorities and resources. These provisions are intended for exceptional cases, and in any case they are not applicable during the preliminary examination but only at the stages of investigation and prosecution.

A "threatened witness" is entitled to personal protection and accommodation in a secret location as the responsibility of the state (Witness Protection Law, section 30). A "protected witness" receives a broader protection package that may include relocation, changed identity, and so forth.

These witness protection plans may sound particularly relevant to complainants of torture or abuse by the authorities, and even more so in the case of Palestinian survivors of torture, since they depend on ISA, IDF, and sometimes also Israel Police for their daily existence – from movement and employment permits to arbitrary arrests permitted by law. This vulnerability, however, is not addressed, and witness protection programs are not likely to be applied to protect complainants of torture by Israeli officials.[382] Why so?

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[377] 630 public officials were charged with the crime of excessive use of force under Article 256 and 25 of them were convicted.

[378] 17 public officials were charged with the crime of intentional injury under Article 86/3-d and none of them were convicted.

[379] 139 public officials were charged with the simple form of torture crime under Article 94/1 and 40 of them were convicted whereas 11 public officials were charged with the crime of torture by sexual harassment under Article 94/3 and 3 of them were convicted. In addition, 1 person other than a public official was charged with participating in torture under Article 94/4 and he/she was acquitted.

[380] 4 public officials were charged with torture causing death under Article 95/4 and 8 public officials among 4 cases were convicted.

[381] Follow-up Report to the United Nations Committee Against Torture on the 3rd Periodic Report of Turkey, October 2012, Human Rights Foundation of Turkey Publications 84.

[382] Requests made in this regard by PCATI in a few cases of torture by Israel Police were all rejected by the relevant authorities.

Firstly, we should note that the status of "protected witness" and "threatened witness" is not commonly granted, among other things for lack of resources.

Secondly, in order to declare a witness as "threatened," it must be proved that he faces a threat or danger from the subject of the complaint or others associated with the act. Meeting this burden of proof in contacts with officials from the security system can be expected to be particularly difficult, since it implies the existence of a form of deliberate extortion within the system – which is much harder to admit than incidental malpractice.

Yet another crucial point is that like the Rights of Victims of Offenses law, the witness protection program comes into play only after a criminal investigation is opened, an evidential file is consolidated, and there are "defendants" and "witnesses" in the case. As we just learned, this leaves Palestinian complainants out of the picture.

ACRI's letter to the Attorney General from April 2011 reveals existing practice to use ISA investigations as deterrence from political action, with the cooperation of IP, through misrepresentation of investigatory authority.[383] Yesh Din's Aug. 2011 report demonstrates violence and (explicit and implicit) threats by IDF and even MPCID towards Palestinian complainants, as well as the constant tension and fear that (potential) complainants have to cope with.[384] PCATI's data lists at least fifteen complaints of torture that were withdrawn due to suspected harassment on part of Israeli security forces.

Claims about IP, IDF, and ISA retribution and deterrence-driven action in different contexts are not rare. We are familiar with, e.g., the practices of false arrests by IP (sometimes declared explicitly in court) of political activists; targeted police and IDF action against journalists (in the OT often resulting in shooting, injuries and sometimes death); and ISA, IDF-assisted extortion of Palestinians into collaboration in return for movement permits for life-saving medical treatment[385]. We also recall one case in which a gang of policemen planned and executed (2006) terrorist attacks against the head of a crime organization that threatened their families and attacked their houses; and the public debate over recent high profile criminal investigations of senior police officers (see fn. 26), that was replete with mutual allegations of revenge and counter-revenge within the police force.

These examples stand to testify that a norm of retribution is not alien to Israeli security forces. The problem of un-protected complainants of assault by security forces was partially addressed by the Turkel Commission, which recommended (p. 333) extending the Rights of Victims of an Offense Law to include the protection of complainants whose case is under MPCID investigation. The recommendation was not fulfilled.

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383 A letter from advocate Laila Margalit to Israel Attorney General, Yehuda Weinstein, April 5th 2011. Online (Heb.): http://www.acri.org.il/he/17475.

384 Alleged Investigation (2011), Ch. 5.

385 See: Ran Yaron, Holding Health to Ransom, Physicians for Human Rights – Israel, Tel-Aviv, 2008.

Conclusion

We began this venture with the observation that, at first glance, Turkey and Israel take completely different legal approaches to the question of torture. On the one hand, Turkey shows us a country with a criminalization of torture and a stated commitment to regular safeguards; and on the other hand in Israel we have an avoidance of the very use of the word "torture" in the legal framework – and of course, the mechanisms and procedures employed by the two states appear to be very different, as the in-depth examinations of chapters 2 and 3 have shown us. And yet our examination of the facts on the ground leads to the inescapable conclusion that the different structures and frameworks have similar functions and engender similar results. Stated most succinctly, torture is de facto used, permitted and condoned by the state; as a rule, torturers enjoy impunity; and both countries deny the applicability of the term "torture" to the vast majority of the instances brought up here. The issue to be addressed in the following pages, then, is the source – or sources – of this similarity. What are the underlying forces shaping these two divergent systems, generating two sets of tactics leading to the same goal – i.e., preserving legally the norm of torture in face of shifting public and international demands? And having identified these forces, what are the most effective measures that can be undertaken in each country in the attempt to eradicate torture?

Local and universal context

The very difference in the legal routes pursued by Israel and Turkey leads us to our first conclusion: viewing and analyzing the problem of torture solely through legal spectacles is not sufficient. The legislation and the case laws do not in themselves provide answers for the persistence of the practice. Thus, although Turkey's legislation prohibiting torture is extensive and advanced, in fact acts that amount to torture are most usually prosecuted as other offenses, and not as crimes of torture.[386] The Turkish example therefore clearly demonstrates that in the absence of an active policy against torture, the criminalization of torture is insufficient to fight the phenomenon. Norms and behaviors, shaped by the socio-political background, also play a role. For instance, as demonstrated in the discussion of the convoluted and far-reaching ties between the judicial system and the security establishment in Israel, the very assumptions that judges, doctors, and investigators bring to the issue heavily impact the outcome. And similarly in Turkey, the postponement of the execution in the sentences of prisoners who are seriously ill becomes possible only if they are not considered a "security risk", regardless of medical documentation supporting their release. In addition, recently adopted "Internal Security Package" in Turkey, strengthen the wall of "security" where the rights and freedoms have always clashed.

On the other hand, in the context of Turkey, this study is glad to report that the torture in official detention centers has decreased. When torture and other forms of ill-treatment are practiced, it is more often for the purpose of punishment and deterrence, as opposed to the previously more common use of torture as a part of criminal investigation, and to elicit confessions.

While a detailed sociological analysis of either country is beyond the scope of the current study, we can point the way for future investigations. First, we see that torture as used by the state is an act in which the individual is marked by the state – sometimes physically, and always conceptually – as

[386] See *supra* Notes 112-113 in Chapter II

standing beyond the boundaries of its legal system. This is marginalization at its most literal, as the tortured are pushed beyond the boundaries of the state's protection, and outside the boundaries of officially acknowledged acts. In both countries, this is achieved through the discourse of public order and public security. The supposed exigencies of an emergency situation permit the exceptionalism that characterizes both systems: a state of emergency becomes the default, and justifies criminal behavior by state agents. Security has always played a central role in both countries, and it has vouchsafed public consent to the impunity granted to perpetrators of torture. This phenomenon is not, of course, limited to Israel and Turkey – in fact, the last decade has shown us that most countries are susceptible to a routinization of such exceptional emergency measures. An attempt to struggle against this attitude necessitates addressing the specific socio-political context in each country, while keeping in mind that these reactions are universal. Neglecting the first aspect (the local) will lead to an international human rights discourse that appears divorced from the reality and norms on the ground.[1] Neglecting the second aspect (the universal) runs the risk of feeding the exceptionalism and a concomitant closing of horizons, rather than fostering a wider, more comparative discourse. The comparative perspective may bring out the universal nature of torture, anti-torture measures, torture-enhancing practices, and the struggle against torture, beyond local divisions between center and margins, while keeping in mind local contexts.

Quis custodiet ipsos custodes?

It is a centuries-old truism that no system is able to investigate its own abuses effectively and systematically. This insight is demonstrated again and again in the details of this study, both in Turkey and Israel, both in the breach and in the rare instances where the involvement of external forces leads to positive developments. Thus, in Israel we see that the astounding proliferation of investigation mechanisms acts as an obstacle in and of itself. Firstly, because every investigative mechanism employs its own methodologies, interpretations, training of manpower, and organizational norms – which erodes radical standards and complicates the struggle against torture. Secondly, even when the investigation is nominally separate from the security authority under suspicion, its very affiliation creates a misplaced loyalty. Thus, e.g., the head of the committee investigating allegations of misconduct by medical staff in Israel may be formally independent but is nevertheless intricately enmeshed within the health system. In Turkey we see the flip side of the coin – an example of how a truly independent (and powerful) entity can bring about change. The introduction of the European Court of Human Rights, and specifically the use of independent visitors from outside Turkey to detention centers, has been behind many of the advances and the changes from 1990's to today.

This observation leads us to a second recommendation, which is the need for a general move towards unifying norms regarding torture and implementing them under a single, central authority. For both countries, this would mean a strong National Preventing Mechanism, independent from any security authorities and overpowering their authorities. An NPM of sorts was established in Turkey in January 2014, but it lacks the structural and operational independence required in the

Paris Principles, and specifically guarantees for the independence and impartiality of the members who are appointed by the Government.[387] No such plans for an NPM exist in Israel. [388]

In the absence of NPMs, the real power to change the use, prosecution, and punishment of torture lies in the hands of the Attorney General, and its superior – the Minister of Justice. Therefore, these two functions are at the heart of any effort to systematically reduce torture; and without their support, any such attempt would be bound to fail. For civil society, this recommendation may require a slight conceptual shift, as the usual human rights instinct is to call for investigation wherever and whenever problems are encountered, or to ameliorate and improve existing (examination, investigation, appeal, etc.) mechanisms. Instead, this approach would have NGOs refrain from suggesting developments, working rather to aggregate all mechanisms under one roof, allowing for a unified understanding of the definition of torture and employing accepted international standards, such as the Istanbul Protocol.

A comparative outlook of detailed, qualitative descriptions of local cases allows deciphering the functions of local torture-enhancing institutions through a more general outlook of institutional circumstances that eventually allow wide-scale torture. Thus the risks of badly implemented criminalization of torture may be observed without losing sight of its advantages if properly used; potential problems, such as the courts' oversight of anti-torture norms, can be stipulated while the need for restrictions by the judiciary is not lost; and so on.

As the current study shows, both Turkey and Israel still use their legal institutions to allow torture; and although very different from each other, the willingness of both states to implement international standards challenging the use of torture is still very low. In both states, the struggle against torture and the application of local and / or international norms has brought some improvements; and both still have a long way to go before eradicating torture altogether. The study repeatedly demonstrates how various laws, regulations, and mechanisms de-facto allow accountability-free torture of those labeled a risk to "state security" or to the "public order". These definitions are political by definition, and may be changed and expanded at will. In both states, the application of law-less state violence against political resistance deserves further empirical attention. It is therefore suggested to further investigate the sites of state violence – the changing "enemies" proclaimed by Israel, Turkey, and other states, as they employ state violence, whether illegal, justified by emergency laws, or unacknowledged.

[387] See in a November 6th 2013 report by the Human Rights Commissioner of the Council of Europe: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2395759&SecMode=1&DocId=20 79692&Usage=2; 18 March 2013, Christof Heyns, Special rapporteur for Extrajudicial, Summary or Arbitrary Executions: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/122/89/PDF/G1312289.pdf?OpenElement; EU Commission's 2013 Progress Report on Turkey dated 16 October 2013: http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/tr_rapport_2013_en.pdf.

[388] This study does not include any section regarding NPMs. This is not to underplay in any way the significance of the absence of such mechanisms: they have the potential to play a significant role in preventing torture and other forms of ill-treatment.

ANNEX: THE HISTORICAL FRAMEWORK IN ISRAEL

The criminalization of torture *per se* is a central demand of the international mechanisms aiming to stop torture. While torture is not uncommon, neither in Turkey nor in Israel, one difference between the two countries stands out immediately and has been repeated throughout this study: namely, Turkey has specific legislation that prohibits and criminalizes torture, while Israel does not. In what follows, we examine the main developments of the legislation and judicial approach towards torture in Israel and over the last three decades focusing on the changes which occurred in the legal situation and public perceptions and policies. Our hope is that this may allow for a more nuanced understanding of the current situation and provide a firmer basis for effective recommendations.

INTRODUCTION

Israeli law does not give explicit authority to torture. The Israeli High Court of Justice (HCJ) also prohibits torture as defined by international law, though it allows protection from prosecution in certain circumstances of torture and abuse of detainees by formal authorities. Israel's Basic Law: Human Dignity and Liberty,[389] which has a supra-legal status, further guarantees the prohibition against harming a person's dignity (art. 2), and the right to protect one's dignity (art. 4). The right to dignity is not absolute, however, and may be balanced against other state interests and other principles (defined in art.8), as long as the derogation of dignity is empowered by law or a legal authority, fits Israel's values as a Jewish and democratic state, comes to serve a "proper purpose", and its extent is not greater than what is required under the circumstances. This makes the prohibition of torture according to the HD&L Basic Law open to derogation for various reasons and circumstances – in sharp contradiction to torture-related principles in international law.

Israeli law also sets the procedural rights of detainees, which include the possibility of their derogation under certain exceptional circumstances. As elaborated throughout the study, different branches of the Israeli law apply different procedural rules, differing also in their possible derogations.

The examination of legislation on torture, including frequently used exceptions, the prosecution of torture suspects, and practical habits of torture is at the heart of the current study. The legal background of torture in Israel includes the lack of criminalization of torture in Israeli law, policies

[389] See in the Knesset website: https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm

permitting or condoning torture policies adopted and approved by the Supreme Court of Israel, and widespread derogation of detainees' procedural rights – a primary defence from torture – that is rooted in the "security offenses" category, which practically discriminates between Palestinians and Israelis under Israeli jurisdiction.

In the legal dynamics of torture, four significant characteristics of the Israeli legal system stand out: (1) an ongoing state of emergency that is continuously renewed by the Israeli parliament (*Knesset*); (2) the existence of a separate legal system which regulates the ongoing military rule of Israel over the Occupied Palestinian Territories (the military law in the Occupied Territories); (3) a "security offense" exception under civil Israeli law, which is subject to a political definition; and (4) the existence of separate legal standards applicable only to soldiers, whose the authority is established in the civilian criminal code (under the Military Justice Act-1955, also known as MJA). These characteristics are not unique to Israel, but they do affect deeply both the discourse and the application of norms and laws against torture.

Each of these four phenomena of Israeli law responds to perceived threats to state security. The first three define different categories of "security offenses" – a wide exception, whose application allows for easy suspension of detainees' procedural rights. Those accused of "security offenses" are systematically discriminated against vis-à-vis suspects in other offenses under the same (civil / military) system. These four characteristics are briefly examined below.

A. DIFFERENT LEGAL SYSTEMS UNDER ISRAEL LAW

Legal segregation in the Occupied Palestinian Territories

Within its official borders (the internationally recognized border, as of June 4 1967, also known as "the green line"), Israel applies Israeli law. In the West Bank, and until 2006 also in the Gaza Strip, however, the state applies Israeli military law to the prosecution of Palestinians, while Israeli residents of the Occupied Territories are prosecuted under the Israeli legal system.[390] As shown in chapter 2 above, the authoritarian military legal system significantly diminishes detainees' procedural rights. Though beyond the scope of the current study, it should be noted that until 1966, Palestinian citizens of Israel were subordinated to a military rule within official Israeli borders, which included a military legal system.

[390] See ACRI's detailed report from 2014: One Rule, Two Legal Systems**:** Israel Regime of Laws in the West Bank, The Association for Civil Rights in Israel, Tel-Aviv, 2014; Yael Barda, *The Bureaucracy of the Occupation*, Van Leer Institute, Jerusalem, 2012 (in Hebrew). Imprisonment conditions, however, are determined mostly by Israeli law, as since 2006 the IPS has been gradually taking responsibility for the large majority of prison facilities in the West Bank, previously managed by the IDF.

The Military law also includes its own definition of a "security offenses" category, under which detainees' procedural rights are derogated even further. Those are enumerated in the third Addendum to the Order regarding Security Provisions (OSP, order no. 1684, 2009)[391], which covers serious offenses of violence, as well as minor ones such as "disturbing a soldier", "intervention in IDF matters", partnership in an illegal organization, and so on.[392] Thus the absolute authority of the military turns any Palestinian under this regime into a potential suspect of security offenses, which leads to hundreds of thousands of rights-derogating arrests – the origin of the vast majority of torture cases.

Emergency law

Ever since its establishment in 1948, Israel has imported to its legal system the Defense (Emergency) Regulations-1945, set by the former colonizer of Palestine, the British High Commissioner.[393] The emergency regulations effectively allow the Israeli government to side-track regular law and govern through military rule (including establishing courts, using severe punishments, regulating civilian life, and restricting basic human rights). The declaration of an official state of emergency is extended annually by the Knesset.[394]

The emergency situation endows the concepts of "state security" and effective enforcement with much legal and political gravity. Emergency regulations also empower other laws and regulations. According to Member of Knesset Avraham Michaeli (a member of a government committee established in 2009 to amend the emergency situation), as of Dec. 8th 2014 there were 8 laws and 51 orders that relied on the emergency authority. As MK Michaeli further stated, limitations on procedural rights of detainees that currently rely on the state of emergency regulations are currently being folded into a new anti-terror law, which has been in the making throughout most of 2014 and 2015.[395]

The **Defense (Emergency) Regulations – 1945 also provide the primary definition for "security offenses"** in regular Israeli law, which leads to rights' derogation (detailed in chapter 2). Side by side with offenses relating to violence and fighting, these regulations include also more general and

[391] The list of offenses draws from the OSP, from the Defense (Emergency) Regulations-1945, and from Military Order No. 101, forbidding incitement and propaganda.

[392] See the essence of the above argument and some examples in: Dr. Maya Rosenfeld, **When the Exception Becomes the Rule**, Public Committee against Torture in Israel, Jerusalem, Nov. 2010, and esp. pp. 14-27.

[393] For basic reading on the topic see, e.g., Michal Tzur and David Kreminzer, Defence (Emergency) Regulations – 1945, position paper no. 16, The Israel Democracy Institute, Jerusalem, 1999 [Heb.], pp. 14-27.

[394] The latest extension of the emergency situation was approved by the Knesset in its 187th session, on Dec. 8th 2014.

[395] See [Heb.] in the Knesset website – 187th assembly meeting, 8.12.2014, 16:00.

harmless behavior such as "Miscellaneous offenses against maintenance of public order" (art. 64), harming public safety, the defense of Israel or public order.

The 'security offense' exception under Israeli criminal law[396]

Non-emergency, civil Israeli law contains its own "security offenses" category. It relies on two primary sources:

(a) The Israeli Detention Law, which allows for the arrest of suspects in security offenses without a warrant, a delayed notification of their arrest and their access to an attorney, and their shackling in public places[397]; and

(b) The 2006 Temporary Order (so far always renewed) concerning Detainees Suspected of Security Offenses (hereafter: "the Temporary Order").[398] The offenses registered as "security offenses" under the Temporary Order are similar to those registered in the arrest law, but without the most general behaviors such as, e.g., assisting an illegal organization. At the same time, it allows for a greater derogation of procedural rights.

The categorization of "security offenses" under the temporary order does not rely on evidence but rather on the interpretation. Thus an offense becomes a security offense if it is listed in the temporary order, and it is "… conducted under circumstances that allow the creation of suspicion of harm to state security, or in affiliation to a terror activity." (Art. 1) Enforcement bodies are thus invited to translate their dominant views of 'state security' into legal derogation of basic human rights, and thereby increases the risk for torture.

An additional and distinct law for soldiers

IDF soldiers are subject to the Military Justice (here: MJ) – a set of rules and legal institutions governed and operated by the IDF, all instituted in one law as part of the regular Israeli legal system: the Military Justice Act.[399] The system of MJ includes prohibitions, sanctions, investigative

[396] See also: Irit Ballas, Torture Prevention in Israel/Palestine: A System of Exceptions and Exemptions, forthcoming; Maya Rosenfeld, **When the Exception Becomes the Rule**, Public Committee Against Torture in Israel and Nadi al-Asir, Jerusalem, 2010, pp. 15-18.

[397] The detailed list refers, as we saw, to the Emergency Regulations. It also refers to clause (b) and (d) of Chapter (G), and articles 143, 144, 146, 147 of the of the Israeli Penal Code-1977; articles 2 and 3 of the Prevention of Terror Ordinance – 1948; most of the offenses set in the Prevention of Infiltration Law (Offenses and Sentencing) – 1954; Art. 8 of the Terrorism Funding Prevention Law – 2005; as well as suspicion of the lists' parallel offenses in the military law of the Occupied Territories.

[398] Criminal Procedure Law (Detainee Suspected of Security Offense) (Temporary Order) - 2006. Art. 8 of the Temporary Order instructs the Minister of Justice to report on the use of the law to the Knesset Constitution, Law and Justice Committee according to detailed quantitative indicators. These reports will are examined in chapter 3 (monitoring mechanisms) below. The Temporary Order has been extended several times, and it is currently valid (as of October 2014) until December 31, 2015. A parallel category of "security offenses" also exists in Israeli military law of the Occupied Territories.

[399] Military Justice Law, 1995.

mechanisms, bodies of prosecution and defense, courts, procedural rules, and appeal mechanisms. The MJA 'imports' certain offenses from the civilian Penal Law and applies them to the persons governed by the law, while including special penal provisions ('military offenses'). [400]

Soldiers may be criminally prosecuted either under offenses registered in the MJA or in the civilian Israeli Penal Code. Military Justice, which is influenced first and foremost by military norms, therefore does not function only as a regular disciplinary mechanism but also as a possible substitute to the civilian penal code. Thus the "security" context affects not only the legal rights of detainees but also the legal norms used to prosecute their offenders.

To conclude, different branches of Israeli law set different authorities to derogate detainees' procedural rights, relying on "security offenses" categories and discriminating between Israelis and Palestinians also in that regard. As the HCJ itself explained the need of such authority, in its decision *not* to order the annulment of the state of emergency:

> *"Israel is a normal country that is not normal; it is normal because it is an active democracy that protects basic rights… [and because] [i]t also lives up to its designation as a Jewish and a democratic state. Israel is not normal, however, since its very existence is still under threat, its relations with neighboring countries are still not settled, and its struggle against terror still continues, and is likely to continue in the foreseeable future."*[401]

Thus "normality" (democracy) is handled by the legal rules, and security-related "abnormality" – by legal exceptions, which trickle down to various aspects of Israeli legislation and practice.

B. ISRAELI LAW ON TORTURE – THE OFFICIALLY UNPUNISHED USE OF OFFICIALLY DENIED AUTHORITY

Substantive Law Relating to Torture in Israel

[400] See in the Turkel Commission Report, p. 276. The 'Turkel Commission' is the short name of the public commission of inquiry formed by Israel regarding the events surrounding the "Marmara" flotilla, a Turkish aid boat to the Gaza Strip which Israeli commandos seized, killing nine passengers and injuring about 20 in the process. The commission's official name is "The Public Commission to Examine the Maritime Incident of 31 May 2010." The second portion of the commission's report (hereafter – "Turkel report") enumerates the examination and investigation mechanisms in Israel, details some of their origins, authorizations and modes of conduct at the time of the report's publication (February 2013), both in their own right and in light of the requirements of international law and its standing in Israeli jurisprudence. See: http://www.turkel-committee.com/content-157-c.html. The report's finding and recommendations are not binding. The Chakhanover committee, appointed (Jan. 2014) by the Israeli government to examine the implementation of the Commission's recommendations, was due to serve its conclusions in November 2014. As of March. 2015 it is still in session.

[401] Freely translated from the Court's 2012 decision in a 1999 petition served by the Association for Civil Rights in Israel. See: ACRI **vs.** Israeli Parliament and the Israeli Government, HCJ 3091/99 (Heb.), Par. 18.

Israel does not have a law criminalizing torture, despite its repeated and ongoing formal commitment to international law institutions – as manifested in its signature and ratification of Geneva Convention (IV) (and specifically art. 146, 147), and the Convention Against Torture and Cruel, Inhuman or Degrading Treatment and Punishment (hereafter: UNCAT, specifically art. 4). Customary international law is also joined by the repeated recommendations of the CAT committee and the HR Committee calling on Israel to criminalize torture.[402]

Over the years, the absence of a crime of torture from Israeli law was addressed by a number of official Israeli bodies. Thus, in 1999, the Ministry of Justice drafted a bill prohibiting torture; and in 2007 the Knesset Constitution, Law and Justice Committee discussed a proposal to include the prohibition against torture in the Israeli Draft Constitution. Yet these and more recent proposals[403] were not pursued. As the comparative outlook ahead makes clear, there is also no guarantee that criminalization of torture would amount to the UNCAT torture offense even if pursued. To understand this situation, we need to examine the history of the Israeli legal system's approach to torture.

The public debate on Torture since the mid-1980's [404]

Torture in "security" matters is commonly acknowledged to have been widespread in the 1970s and 1980s. The issues arose to public prominence through two instances – the "Bus 300 Affair" and the Nafsu Affair. In April 12, 1984, four armed Palestinians kidnapped a civilian bus full of passengers, and demanded the release of Palestinian prisoners in return for the hostages. The kidnapped bus was stormed by Israeli troops. Official announcements following the rescue operation stated that all four kidnappers and one civilian were killed during the operation. However, a photograph published shortly afterwards in the Israeli newspaper *Hadashot* showed two of the kidnappers led walking from the scene, dragged by ISA agents.

An internal committee of inquiry was then appointed to investigate the deaths of the two captives, known as the "Bus no. 300 Affair". The committee established that they were killed by blows from

[402] Israel's response to these calls is that all act of torture are offenses under its laws; See the reporting cycles of Israel to the Committee and links to full texts in the website of the Office of the High Commissioner for Human Rights (OHCHR), under CAT: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ISR&Lang=EN. See also paragraph 14 of the latest concluding observation on the fourth periodic report of Israel, beginning: "The committee reiterated its concern that to date, no crime of torture in conformity with article 7 of the Covenant has been incorporated into the State Party's legislation". As noted in a study on war crimes by the Israeli human rights organization Yesh Din, while national legal adherence to international legal norms may vary in format, the option taken by Israel to regard its existing laws as a satisfactory substitute is rarely chosen. Turkey is among the few other states pursuing this rout (though not on torture). See (also alternatives approaches): Lior Yavne, **Lacuna – War Crimes in Israeli Law and Court-Martial Rulings**, Yesh Din, Tel-Aviv, 2013, pp. 18-22.

[403] Including the reccomendation by the Turkel Commission Report, p. 365.

[404] See a detailed timeline on the website of HAMOKED – Center for the Defence of the Individual: http://www.hamoked.org/timeline.aspx?pageID=timelinetorture, last access: Sep. 2014

a stone after an interrogation, following specific orders, but did not assign any responsibility for the deaths. Subsequent allegations of a cover-up peaked with the resignation in 1985 of three senior ISA officials, after the head of the ISA refused to reveal the full details of the event. The resignation eventually led to a criminal investigation (1986).

Before any indictments were served, however, the by-then resigning head of the ISA (at the time: General Security Service, also known as Shin-Bet) and other potential defendants were granted amnesty by the Israeli president. Among the pardoned was the then-head of the ISA operations directorate, who later became a member of the Knesset for a short while. Another senior ISA officer, a member of the inquiry committee leaked its ongoing investigation materials to the head of the ISA, was granted the same amnesty.

In 1987, six years after standing trial for treason, espionage, and assisting the enemy in a time of war, the by-then-dismissed IDF first lieutenant Izzat Nafsu appealed to the Supreme Court of Israel to overturn his conviction. Nafsu claimed that his confession was extorted by torture, and that the head of his interrogation team fabricated evidence in his trial. The Supreme Court accepted Nafsu's claims, changed his indictment, and significantly reduced his sentence. The court also stated that ISA agents committed perjury and disrupted the investigation.[405] The topic of torture had become politicized: and the two affairs shone a public spotlight on interrogation methods which were used routinely on thousands of "security" cases.

Against this background, the Israeli government formed in 1987 the "Commission of Inquiry in the matter of Interrogation Methods of the General Security Service regarding Hostile Terrorist Activity"[406] which was headed by retired President of the Supreme Court, Moshe Landau (the Landau Commission).

The Landau Commission was given the mandate to examine ISA's methods and procedures of interrogating suspected terrorists, and the provision of evidence in courts regarding such interrogations. The Commission's report devoted a lot of attention to a culture of perjury and deceit on behalf of ISA interrogators and senior officials, in and outside the court. On the issue of actual

[405] See the verdict, Criminal Appeal 124/87, in HAMOKED website: **http://www.hamoked.org.il/TimelineFramesPage.aspx?returnID=timelinetorture&pageurl=http://www.hamoked.org.il/Document.aspx?dID=Documents1644%22**.

[406] *Report of the Commission of Inquiry in the matter of Interrogation Methods of the General Security Service regarding Hostile Terrorist Activity*, First Part [Hebrew] (Jerusalem: October, 1987) (the Landau report). The report is available in a Israel Government Press Office translation, in Hamoked website: http://www.hamoked.org/files/2012/115020_eng.pdf.

torture, the commission called for avoiding a situation which includes "the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity."[407]

At the same time, however, the Landau commission also determined that under certain guidelines, interrogators who use violence against detainees may find refuge in the "defence of necessity"[408], according to which: "A person shall not bear criminal liability for an act [he committed] that was immediately necessary for the purpose of saving his or another's life, freedom, body or possessions from tangible danger or severe harm that resulted from the given circumstances at the time of the mentioned act, provided he could not have chosen otherwise but to perform that act."

An annex to the Landau report, which remains secret to this day, establishes the guidelines to possible application of the criminal law defence, "defence of necessity", as ***a-priori*** justification to use forms of "non-violent psychological pressure of an intense and prolonged interrogation… with a moderate measure of physical pressure".[409] No such authorization, however, exists in Israeli law.

In practice, torture during ISA interrogations continued under the Landau reports' secret criteria, while very few ISA interrogators were convicted for such deeds. The resistance of Israeli human rights organizations to that policy, headed by Public Committee Against Torture in Israel, included dozens of petitions to Israel's High Court of Justice. The first petitions were rejected, but in the early 1990s the court conjoined seven petitions served on behalf of ten petitioners to one case – HCJ 5100/94[410] – that came to be known as the "Torture Petition".

Indeed, the most recent developments regarding torture in Israel are actually in the realm of court rulings and guidelines. The ruling in this case was a watershed moment, leading to a drastic and immediate reduction in the number of instances in which torture was used. At the same time, the ruling also provided a legally sanctioned loophole, in effect welcoming or at least allowing the continuation of systematic torture in certain "security" cases. In its September 1999 ruling in the torture petition, the Israeli Supreme Court reiterated Israel's obligation to the "absolute" prohibition of torture and other ill-treatment,[411] but refused to rule on whether the interrogation methods the ISA uses constitute torture or ill-treatment under international law. Instead, the court refers throughout the HCJ 5100/94 discussion of ISA interrogation methods to "physical means" of interrogation. Sleep deprivation was ruled acceptable if declared part of interrogation needs (rather

[407] *Ibid.*, p. 80.
[408] Israeli Penal Code, art. 34(k).
[409] Landau Commission Report, para 4.7.
[410] The case joined together a long list of petitions by PCATI, The Center for the Defence of the Individual, and ACRI: HCJ 5100/95 **Public Committee Against Torture in Israel v. Government of Israel and the General Security Service (1999)**.
[411] *Ibid.*, para. 23.

than a method of coercion), and three specific methods were outlawed outright – the "frog" position (a couching stress position), "Shabeh", and shaking.

The Court further ruled that ISA interrogators' authority is the same as police officers', and hence they enjoy no additional to employ "physical means" in interrogations. Yet at the same time the court acknowledged the existence of extreme "ticking time-bomb" situations, in which a specific interrogator who employs "physical means" at his own discretion may be exempt from criminal liability *ex-post-facto*, based on the defence of necessity.[412]

The court's ruling was therefore a step forward in the battle against torture, as it negated the Landau Commission's stance on the authority to torture – a change of norm and a central reason for significant decrease in ISA torture. The landmark ruling decreased dramatically and overnight the number of detainees tortured. At the same time, however, the torture petition ruling also left a legal path for torture by the ISA to proceed without punishment and without investigation. As the previous chapters have shown, the examination of "necessity" is blocked by a lack of criminal investigations into torture, thus leaving the widening interpretation of "ticking bombs" situation unregulated and unbalanced by the HCJ.

The Court also ruled that the Attorney-General could "instruct himself" regarding the circumstances under which the defence of necessity might apply.[413] The Attorney General's relevant instructions, published a month later in 1999, and their interpretation by the ISA backed by the Supreme Court, have come to allow a policy of ISA interrogations that led to nearly a thousand complaints of torture since 2001. This joins the procedural rights' exceptions observed above in a legal system, making torture a feasible reality, most notably so in the case of "security offenses" and security offenders.

While the torture petition was undoubtedly an important step forward, UN human rights treaty bodies as well as Israeli and international legal experts have rejected those components of the Supreme Court's view which facilitate the continuation of torture. The practice of torture and impunity evolving from the aforementioned crack in the prohibition demonstrated amply that the 1999 ruling is not enough, and further steps towards eradication of torture in Israel are an absolute necessity.

[412] *Ibid.*, para. 38.
[413] *Ibid.*, para. 38.

NGOs have continued to fight against the post-1999 situation of ongoing (though significantly decreased) torture and impunity to torturers. In 2008, PCATI and two other Israeli human rights organizations filed a motion to the High Court of Justice demanding that it hold the ISA to be in contempt of the court for ignoring the HCJ 5100/94 ruling, by routinely continuing to employ and authorize violent interrogation methods specifically prohibited by the ruling. The Court refused to discuss the merits of the motion and dismissed it, mainly on the grounds that the '99 ruling was declarative by nature, and therefore cannot by revoked through a motion of contempt.[414]

Conclusion

So far, enhanced public and juridical attention to the issue of torture in Israel has led to important changes of policy: more and more facts and questions of torture were revealed to the public, and ISA actions have become somewhat more accountable to public and possibly also juridical criticism; the variety of physical torture techniques in use has narrowed, and their application has become less common. Nevertheless, ISA torture continues systematically, and torturers are not brought to justice.

Though subsequent court petitions have resulted in some procedural improvements, as of Jan. 2015, the criminalization of torture in Israel is still not in sight, while existing Israeli law does not make "torture" as defined in CAT a criminal offense. Preliminary examinations of ISA torture complaints repeatedly rely on the "necessity defense" to exempt interrogators from criminal investigation (see chapter 2), though the defense ought to be a matter of criminal procedure, with the tacit approval of the Supreme Court. ISA interrogation routine still produces dozens of torture complaints every year, and more so in proximity to large military operations. PCATI's (confidential) list of cases shows that out of more than 950 complaints of torture in ISA interrogations, submitted from 2001 to 2014, not a single criminal investigation was opened and not a single indictment served in cases of torture by the ISA.

[414] HCJ 5100/94, 4054/95, 5188/95 *Public Committee Against Torture in Israel et al* ***vs.*** *Prime Minister of Israel et al*, request under the Contempt of Court Ordinance, ruling of 6 July 2009. As came to be known upon the publication of the 2014 study of the Senate Select Committee on Intelligence into the CIA's detention and interrogations program, the Israeli legal structures of "ticking time bombs" and "defence of necessity" became an inspiration to the CIA's position on the issue since as early as November 2001. As such, they were also put to use by the US government (see in Senate Select Committee on Intelligence, **Committee Study of the Central Intelligence Agency's Detention and Interrogation Program**, Declassified version, approved Dec, 2012, United States Senate, here: http://www.intelligence.senate.gov/study2014/sscistudy1.pdf, pp. 19 (fn. 51), 196, 197 (fn. 1155).