BY THE RULES

Comparative Study on the Legal Framework of Torture in Turkey and Israel

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This executive summary results from a long-running project. Its aim is to present a comparative analysis of the practice of torture and other forms of ill treatment in two countries: Turkey and Israel. Analysis of both the similarities and differences between the two countries facilitated our understanding of the common tools required for the fight against torture: our hope is that this study will be of help to all those engaged in the fight against impunity. The full text can be found on the websites of the organizations.

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INTRODUCTION AND METHODOLOGY

This research began by questioning the root causes of impunity for perpetrators of 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 clear differences between Israel and Turkey, in terms of their respective size, history, and ethnic and religious make-up. However the two countries do share significant similarities, not only by virtue of their relative geo-political proximity, but 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. Furthermore, both countries have a harrowing history of widespread and systematic torture in the 1980s and 1990s. Since then, however, the frequency and nature of torture have changed in various ways further examined herein.

This comparative study aims to examine this shift — in its various facets, to provide a portrait of the legal and procedural frameworks relating to torture in both countries, and illustrate the realities that they have helped shape. 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.

Turkey is a country that criminalizes torture and other forms of ill-treatment by law and is party to the European Convention on Human Rights (ECHR). Israel is a state where no criminalization legislation has been introduced, although it is party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[2]. These facts then point to the foremost element surrounding the problem: In both countries, torture and other forms of ill-treatment continue to exist and the national legal and political conditions enable — if not promote — impunity. Both countries, despite differences in legislation, possess and employ institutional means to protect perpetrators.

We have thus attempted to assess the practice of torture and its investigation by referring to internationally accepted principles and standards that both countries are party to. First, the study assesses the domestic provisions in both countries' laws

1 Other forms of ill-treatment is predicating cruel, inhuman or degrading treatment or punishment throughout the study.

2 Also referred to here as 'the Convention'

which enable impunity after acts of torture and other forms of ill-treatment, according to international standards. Its second feature is the procedural safeguards which are meant to ensure the efficacy of the measures in preventing torture and other forms of ill-treatment and in protecting detainees from the possibility of torture by making their detention formally known and thereby assigning accountability to their holders. Therefore this study also evaluates the legislation which ensures procedural safe guards and their implementation.

The factors presented here also point out the limitations of this comparative analysis – i.e., the great difference in local context and local legislation. Within this framework, we establish that torture serves as a key component in both states' ongoing struggle over their own sovereignty, and is used to assert dominance over populations and groups perceived as a threat to national security and public order.

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 it critically. In addition, this study does not include a historical analysis specific to the two countries, but rather maintains a focus on current conditions. It 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: International standards and local legislation

The prohibition of torture under international law is examined here with reference to the international instruments prohibiting torture, which set forth the crucial components of the crime of torture and the obligations on states to prevent torture and ill-treatment. Accordingly, elements of the crime under the domestic laws of Israel and Turkey will be introduced in order to show whether they comply with both states' standing obligations to international standards which they ratified and to which they committed themselves.

I. Prohibition of Torture

Torture aims not only at deliberate destruction of the physical and emotional well-being of individuals, but also — in some instances — the dignity and will of entire communities[3]. For this reason, as well as its egregious nature, the prohibition of torture is found in a number of international human rights and humanitarian treaties as well as declarations, and is also regarded as a principle of general international law[4]. Furthermore, the prohibition of torture is considered to be *jus cogens,* a 'peremptory norm' of general international law. Rules of *jus cogens* cannot be contradicted

3 Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Introduction", para 2

4 International Covenant on Civil and Political Rights (CCPR), ECHR, Universal Declaration of Human Rights (UDHR)

by treaty law or by other rules of international law under Article 53 of the Vienna Convention on the Law of Treaties.[5] The absolute prohibition of torture and other forms of ill-treatment is underlined by its non-derogable status — meaning that under no circumstances can states set aside or restrict this obligation, even in times of war or other emergency situations.

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

The following elements should to be taken into account for qualifying an act as torture or another form of ill-treatment: The nature and purpose of the act, intention of the perpetrator, and involvement of public officials or other persons acting in official capacity.

The internationally recognized understanding of torture is found in Article 1 of UNCAT, where torture is defined as *"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."* When it comes to other forms of ill-treatment, Article 16 of the UNCAT describes them as *"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."*[6] The jurisprudence of the United Nations Committee against Torture (CAT) and European Court of Human Rights (ECtHR) contribute to understanding the definition of torture and other forms of ill-treatment.

Causing pain and suffering must intentionally be inflicted upon the person in order to qualify as torture and other forms of ill-treatment. In keeping with the definitions in Article 1 and 16 of UNCAT, the purpose of torture is as a technique of criminal procedure, the means punishment and deterrence. "Criminal procedure" refers to forbidden methods of interrogation, such as the use of force to obtain information or extract a confession. "Punishment" refers to retaliation for actions committed, sometimes by people who diverge from the state's political ideology. Similarly, "means of deterrence" refers to the illicit use of force for intimidation. Although the purpose of torture can be categorized under these three headings, these three categories are

5 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 53.

6 Despite the existent debate surrounding the differentiation (and the importance of the distinction) between torture and other forms of ill-treatment, this research does not purport to delve into this issue.

not exhaustive, and they may also be imployed with one other in practice. 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.

2. Obligations of States

The obligations of the states are divided into three non-exclusive phases: prevention, accountability and reparation. With respect to UNCAT, states shall take effective legislative, administrative, judicial or other measures to prevent acts of torture. Taking effective measures encompasses appropriate legislation, which identifies certain conduct as other forms of ill-treatment in such a way that it will not overlap with the scope of torture (in order to prevent a situation where conduct is prosecuted merely as ill-treatment, or other related crimes, where the elements of torture are present). Given the absolute prohibition of torture and its non-derogable nature, UNCAT embodies the principle that an order of a superior or public authority can never be invoked as a justification of torture. This principle also ensures that those exercising superior authority cannot avoid criminal responsibility for torture or ill-treatment committed by their subordinates.

States are obligated to regulate the offense of torture as a crime under their criminal law, and in accordance with the elements of torture mentioned in Article 1 of the Convention. The compliance of the definition under domestic law (with the standards in the Convention) is one of the most important factors in preventing torture and ensuring accountability. Additionally, the punishment must be regulated by taking into account the gravity of the crime, and creating a deterrent for potential perpetrators.

States also have procedural obligations to conduct an effective investigation into the allegation of torture and ill-treatment. Moreover, they are obliged to introduce and ensure the right to reparation in their legal systems (including restitution, rehabilitation, compensation, guarantees of non-repetition and satisfaction).

II. Domestic Application of Prohibition on Torture

This section will clarify the application of the prohibition, while paying attention to the differences between the two legal systems, and considering the areas where they coincide.

The Israeli legal system has four main characteristics significant to our discussion. Firstly, there is an ongoing state of emergency that is continuously renewed by the Israeli parliament (Knesset). Secondly, the existence of a separate legal system regulates Israel's ongoing military rule over the occupied Palestinian territories (OPT), creating what amounts to an ethnically segregated legal system. Thirdly, Israeli civil law includes a "security offense" exception that follows a political definition. Lastly, as

in other countries, a separate legal standard is applicable only to soldiers.

Turkey's legal system has no such ethnic segregation, but there are profound similarities related to the rhetoric of necessity which is prominent in both countries.

As a matter of constitutional law, Israel's Basic Law: Human Dignity and Liberty has a supra-legal status. It further guarantees the prohibition against harming a person's dignity, and the right to protect one's dignity. Nevertheless, the right to dignity is not absolute and may be balanced against other principles and state interests. By comparison, the Constitution of Turkey 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". Thus articulated, the prohibition of torture has been provided with a constitutional guarantee which does not allow for any derogation. It is also worth noting that according to the Constitution, international conventions concerning human rights take precedence over domestic law, which means that domestic legislation must comply with related international human rights conventions[7].

1. Substantive Law Relating to Torture and Other Forms of Ill Treatment

Israeli law contains no specific prohibition, definition or criminalization of torture despite its repeated and ongoing formal commitment to international law[8]. International bodies such as CAT and Human Rights Committee (HRC) have urged Israel many times to criminalize torture and the absence of a crime of torture under Israeli law has been addressed over the years by a number of official Israeli bodies[9].

Israel has claimed that existing provisions within its penal code ("other offenses") have the effect of criminalizing all acts of torture. It is important to clarify that the Israeli Supreme Court, sitting as High Court of Justice (HCJ) has determined that no authorization to torture may be given in advance. Yet the same court, in a 1999 milestone ruling, determined that ISA workers suspected of violating rules of interrogation because of necessity may be exempt from criminal conviction or even prosecution if they interrogate suspects during "ticking time bomb" situation. In addition to these "other offenses", Israel's Basic Law: Human Dignity and Liberty (HDaL), which has a quasi-constitutional status, further guarantees the prohibition against harming a person's dignity and their right to protect it. As it has been stated previously, however, the right to dignity is not absolute and may be balanced against state interests. This may be interpreted as rendering the prohibition of torture under

7 Cf. also the interpretation of General Assembly of Criminal Chambers of the Supreme Court of Appeals (2005/7-24, 2005/56, 24.5.2005) that is of the opinion that that the international conventions duly put into effect bear the force of law, results in application, directly.

8 Israel is party to the Geneva Convention (IV), CCPR, UNCAT

9 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, also recommended by the Turkel Commission Report of 2010. Yet these and later proposals were not pursued.

the HDaL open to derogation in various circumstances. The status of torture in Israeli legislation is therefore not wholly clear, and the 1999 HCJ ruling has had the effect of rendering the prohibition on torture a derogable one, in stark contrast to principles and rules of international law.

Different branches of Israeli law present different procedural rules, and include possible exceptions, including, for example, a different and distinct law for IDF soldiers. Most importantly, there are two different legal systems under Israeli law: one applicable within its own borders, and another — based on military law — for Palestinians living in the territories occupied in 1967 (barring East Jerusalem). Both these legal systems include rules in response to perceived threats to state security, thus creating a wide category — "security offenses" — within which the state's powers are enhanced while the rights of the detainees are restricted, both procedurally and substantively.

By stark contrast Turkey has regulated torture as an offense under its criminal code. An act of torture can be defined as the infliction of physical and/or mental suffering, affecting a person's sense of perception and his ability to act of his free will, or causing abuse and violating a person's dignity. The distinction between torture and other forms of ill-treatment must be emphasized to define the extent of the crime, thus ensuring that investigation and prosecution are carried out according to the true nature of the crime — that is, to prevent prosecution of crimes of torture from being mis-managed as cases of ill-treatment. However several problems still remain. One issue which has come up about the nature of torture is the result of a mistaken interpretation: some courts require "systematic infliction" in order to consider an act to be torture. In addition, the crime of torture is formulated in a way that it can be perpetrated for any kind of purpose: under the regulation there is no mention of the common purposes criminal investigation, punishment or deterrence. This omission can in fact protect perpetrators by making the distinction between torture and other related crimes ambiguous. A third problem concerns the nature of the perpetrators: The crime of torture is defined in a way that persons who are not public officials are not be regarded as main perpetrators of torture, even if and when they act in an official capacity, unless they have participated in a crime perpetrated by public officials.

2. Substituting the Crime of Torture with Other Crimes

One distinct consequence of the dearth of clear provisions for punishing torture and other ill-treatment, in compliance with UNCAT, is that in both countries we see the practice of substituting the offense of torture with other crimes which results in a climate of impunity.

Israel attempts to deny that it is in breach of its duty to criminalize torture — mainly, by claiming that torture is criminalized in all but name, i.e. as other crimes. Such substitutions are established in Israel's penal code, which also applies to the state's security forces in their activities in the OPT, and in the Military Justice Act. The replacement of a crime of torture with other offenses subordinates to any specific

obligations under international law regarding torture or torturers to the national — in this case, Israeli — legal framework. As a result cases of torture may be treated far less seriously than they should be under international law. Worse still, the 1999 HCJ ruling created a legal loophole by applying the "defense of necessity" to interrogators who torture under certain circumstances, creating a 0% investigation rate.

Albeit the legislation in Turkey explicitly mentions the crime of torture, perpetrators are prosecuted instead on torture related crimes such as torment, excessive use of force, intentional injury and misuse of public, rendering the existence of the crime of torture under domestic law ineffectual.

These other offenses fail to prevent public officers from using torture and other forms of ill-treatment, and lead to the impunity of perpetrators. The maximum punishment for torture fits the gravity of the crime, however invoking related offenses instead leads to disproportionately light punishments, further manifested in a suspended sentence, the delayed pronouncement of a judgment, amnesty and statutes of limitations. All together, these indicate a paucity of preventive measures and effective investigation and prosecution. Thus the accumulated data indicates that substitution of other related crimes permits a serious derogation and an eventual dissolution of the concept of torture (as a crime). As we have seen, the same holds true for the Israeli case. Additionally, acts that may amount to the UNCAT crime of torture are judged under shifting norms, in different types of courts, under multifarious authorities and standards, and according to the power relations between torturers and torture survivors. Considering the gravity of the act and the crime, such a variety of standards and norms — in and of itself — demonstrates a move away from responsibility. The very use of alternate offenses seems to serve an institutional habit for avoiding accountability. It is important to adhere to a clear standard which distinguishes between torture and other related crimes. At least this may orientate and focus the currently divergent legal branches, investigatory and disciplinary bodies — as well as public and decision makers' discourse — towards a more unified conceptualization and examination of the phenomenon. This in turn could lead to better recognition, treatment, and accountability.

3. Conducting effective Investigation into Allegations of Torture and Other Forms of Ill Treatment

Turkey's Criminal Procedural Code stipulates that the prosecutor is entitled to carry out an investigation and gather all necessary information with the help of the security officials under his[10] command. The prosecution of state officials is subject to clear procedural regulation: since only crimes perpetrated by state officials are considered to fall under the Criminal Code of Turkey definition of torture, the question arises whether permission to commence investigation can be gained. It is crucial to emphasize

10 Possessive references are made in the masculine form for the fluency and fluidity of the article, however it encompasses members of both sexes and all genders.

that the Act on Adjudication dictates that only prosecutors will prosecute charges of torture — which means that the system leans heavily towards citing other crimes rather than conducting a full-scale investigation into torture allegations. Moreover, launching an investigation against governors and administrative chiefs, as well as high-ranking security officers, is still subject to the Act on Adjudication procedure of receiving permission to initiate an investigation.

In Israel the process is plagued by the multi-faceted legal system, according to the organizational identity of the perpetrators. For example, acts committed by Israel Police and ISA are investigated under Police Investigation Department (PID) at the State Attorney's Office in the Israeli Ministry of Justice. Concurrently, the Military Police Criminal Investigation Division (MPCID) has the authority to carry out criminal investigations into offenses allegedly carried out by Israel Defense Forces (IDF) personnel during their service. Finally, the National Prison Guard Investigation Division (NPGID) is responsible for investigating information concerning criminal offenses by members of the Israel Prison Service (IPS). Alongside each investigative body there also exists an official body that is responsible for the preliminary examination of complaints. Typically, the purpose of these preliminary examination mechanisms is to enable initial clarification of charges, and determine whether there are grounds for criminal investigation. In fact, these mechanisms act as a barrier, rather than a filter, preventing effective investigation while maintaining the appearance of appropriate procedure.

PID investigates complaints against police and ISA employees suspected of committing serious criminal offenses in the course of their duty. Their mission is then to consolidate a criminal investigation file and recommend whether prosecution should be pursued. The final decision regarding indictment rests with the Prosecution Service or the State Attorney's Office — depending on the nature of the offense. One observable improvement in PID is the gradual change in composition of its staff — from former police employees to trained civilian investigators.

MPCID's function is defined under the Military Jurisprudence Law. The outcome of their criminal investigation is forwarded to an attorney in the Military Advocate General's Corps for the decision whether to dismiss the complaint, order its deliberation under disciplinary law, or pursue an indictment.

The data gathered here shows that, despite the existing *de-jure* authority and availability of professional resources in PID, MPCID and NPGID, the criminal investigation of misconduct — specifically the violence by security personnel towards detainees — is significantly flawed. Frequently disciplinary procedures replace criminal ones, the process of investigation is significantly and unnecessarily delayed, and basic investigative procedures are often ignored. All this is also true of the Officer in Charge of Israel Security Agency Interrogee Complaints (OCGIC), the preliminary investigative mechanism for the Israel Security Agency (ISA). Since Israel's Supreme Court ruled on torture in 1999 (HCJ 5100/94), the Attorney General's policy has been to conduct

preliminary examinations into every complaint of torture in ISA interrogations.

Similarly, operational debriefings, which serve as main preliminary examination mechanisms in the IDF and Israel Police, have significant influence on the decision whether to launch a criminal investigation and often produce problems which inherently continue to repeat themselves — e.g., lack of objectivity, neutrality, and inadequate legal and professional investigation skills. As this study further indicates, the other preliminary examination bodies (the Officer for Prisoners' Complaints and the Public Complaints Officer) tend to address criminal offenses with disciplinary tools and standards, thereby hindering proper investigation and appropriate punishment.

Where allegations against ISA are concerned it is clear that the OCGIC, with his semi-investigative powers, enables the Attorney General to dismiss claims of torture while also sidestepping its authority to review claims: Thus the OCGIC and his superior guard the Israeli legal system against fully handling innumerable complaints of torture and abuse.

These brief sketches of the two legal systems highlight the importance of independent, prompt, effective investigatory mechanisms into allegations of torture and other forms of ill-treatment. Whether a single organization is in charge — as in Turkey, or multiple bodies — as in Israel, all aspects of the prohibition of torture need to be addressed at every stage.

4. Right to Reparation

Under Article 14 of UNCAT, states are obliged to recognize the right to remedy, which includes the right to reparation as one of its components. Both Turkey and Israel lack a concrete regulation to address the needs of torture survivors. This paucity reveals a great deal about the states' understanding of torture. The prohibition itself is not only about prevention and accountability — it is also about providing people who have been subjected to torture or other forms of ill-treatment with effective mechanisms of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. All this — as well as understanding the repercussions of torture — is missing from the official discourse.

Under its general provisions, Turkey has regulations concerning the release of persons whose liberty is restricted, bringing complaints to Constitutional Court, and demanding re-examination of cases relating to the right to reparation. The Civil Procedural Law and the Law on Administrative Proceeding Law also makes provisions for compensation, although none of the legislation concerned includes specific stipulations in cases of torture.

Israel has seen isolated incidents where torture survivors from the 1980s and 1990s reached a settlement with the state, which resulted in payment to them or their family. These adjudications, however, 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 OPT have no jurisdiction for compensation lawsuits. In addition, a recent HCJ ruling states that enemy combatants have no standing in civil tort cases. Over all, in both countries, the person whose body and soul have suffered is not at the center of the system.

CHAPTER II – Procedural Law

This chapter examines the main procedural rights of detainees, which are meant to secure due process, protect detainees against the misuse of power, and thereby serve as important protection against torture and other forms of ill-treatment. In fact, these crimes usually occur during deprivation of liberty.

Before reviewing the comparative analysis of basic safeguards, there are two main factors that should be highlighted: As Turkey is a member of the Council of Europe, it is also party to a number of regional human rights treaties under this organization. Turkey's recognition of the compulsory jurisdiction of the ECtHR has had particularly serious impact on domestic law. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment's (CPT) periodic and ad hoc visits to Turkey should also be mentioned. Due to this influence, Turkey's domestic law has mostly aligned with international standards, especially with regard to basic safeguards. Thus, Turkey's procedural law is examined vis-a-vis the detailed standards of ECtHR and CPT. Since Israel is neither a member of Council of Europe, nor a party to ECHR and the ECtHR's jurisdiction is not recognized, its domestic standards are mainly assessed under general UN principles, to which Israel is obligated. As previously mentioned, the analysis of Israel's regulations on basic safeguards differs between civilian and military law, and the rights of detainees accused of "security offenses" add yet another variable, as discussed below.

1. Basic Safeguards Under Detention

The lawfulness of any detention is elemental in exploring the basic safeguards of detainees.

The Constitution of Turkey acknowledges the right to liberty and security in compliance with ECHR. Due to the essence of procedural safeguards, which aim to prevent the exercise of arbitrary force during the deprivation of liberty, the Constitution stipulates that under no circumstances can procedural safeguards be limited entirely.

The basis of the safeguards is defined under Criminal Procedure Code, The Law on Duties and Powers of Police, and Regulation on Arrest, Detention and Statement. Theoretically, arrest requires a warrant; in a situation where a person is arrested without a warrant, the prosecutor is notified immediately. In Israel, whether under the regular Israeli legal system or under the military law of the OPT, a warrant is required. Similar to regulations in Turkey, civilian Israeli law permits the 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. In the military law of the OPT, any

soldier has the authority to arrest — without a warrant — any person who disobeys the bans in the Order regarding Security Provisions, or if there is reason to suspect that he might have done so.

Israel has another exception, guarded by significantly different regulations: Administrative detention, which can be implemented solely on suspicion — with no need of evidence or even a specific criminal act — is enabled in the Order regarding Security Provisions of the Military Law, and some detentions are also authorized by the Emergency Act. 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, which is no longer subject to military legislation after the 'disengagement' from Gaza (September 2005). Administrative detentions in the OPT are permitted for consecutive periods of up to six months at a time, pending judicial review. Over the last five decades Israel has routinely used this practice to arrest thousands of Palestinians in the OPT — most of them for a year or longer

Under regulations in Turkey, the detainee, regardless of the offense, must be informed of the reason for his arrest, accusations, the right to remain silent and the right to access a lawyer, object of the arrest, and other legal rights. Compared with the provision in the Constitution, Criminal Procedural Law introduces another police which stipulates that law enforcement officers must notify the detainee after taking measures to prevent his escape or ability to harm himself or others. Given that for some of the rights immediacy — i.e. from the first moment of arrest — is vital (e.g. the rights to inform relatives, access a lawyer and remain silent), it can be said that this provision under the Criminal Procedural Law contradicts the essence of the right to a defense and the right to a fair trial. As a matter of fact, in many of its decisions, ECtHR found that Article 5/2 of ECHR[11] had been violated by Turkey when this requirement had not been fulfilled. Promptly informing people of their rights has great importance for the prohibition of torture as well as for the freedom and security of an individual. Only by notifying people of their rights in a timely manner can effective use of rights and prevention of torture be maintained. On the other hand, there is no explicit reference under ECHR to a need to keep an official record of the detention period. Nevertheless, the ECtHR stated that it is the authorities' responsibility to ensure that detailed and accurate records are kept concerning a person's detention, and place themselves in a position where they can account convincingly for any injuries — this is repeated in the CPT. These records are essential for the prevention of torture and for the investigation and prosecution of those who have committed crimes of torture and abuse.

Efficient implementation of the right to access a lawyer plays a significant role in documentation, publication and protection of a person against torture, and in the prevention of perpetrators' impunity. The Criminal Procedural Code of Turkey states that the suspect or accused shall be notified of his right to choose a defense attorney. During the investigation, a suspect is entitled to consultation with a lawyer whose

11 Right to Liberty and Security

presence cannot be restricted during the interview or interrogation. These are all helpful measures, but it is important to take into consideration that the right to legal aid is only mandatory in the case of an offense that carries a minimum imprisonment of five years — in other cases the right of access to a lawyer is hindered.

In Israeli civil law, anyone may meet with his lawyer immediately upon arrest "without delay", and in military law, "as soon as possible". This ambiguity is worsened by the many exceptions to the right to legal representation under Israeli law. Under civil law access can be delayed for "several hours" if deemed a concrete risk to the investigation. For security offenses this becomes 10 days' delay and up to a total of 21 days, by order of a District Court judge with the permission of the State Attorney. In the OPT, military law allows for a few hours' delay by any commander who thinks it may nullify an investigation or other relevant arrests, up to 96 hours. This can be extended to as much as eight days — 96 hours at a time — by a military judge who is convinced that confidentiality is required for the security of the area or the interrogation. In military arrests on grounds of "security offenses", a written decision by the officer in charge may delay the detainee's access to an attorney for up to 15 days. An Israel Police Chief Superintendent, the head of the Israel Security Agency Interrogations Department, or an authorized IDF commander — Lieutenant Colonel or higher — may prolong this delay by 15 more days. A military judge may further prevent access to a lawyer for additional periods of 30 days at a time if he is convinced that the region's security or investigation require it, up to 90 days. This is, therefore, very far from being an adequate safeguard.

In many cases ECtHR mentioned that a person's right to talk with his relatives as a safeguard against torture, and that lack of contact is a source of deep concern — both for the person and his family. Notifying the next of kin is constitutional in Turkey. However, in contradiction to international law and the Constitution, the Criminal Procedural Code allows an exception which restricts the notification of a third party, by order of the prosecutor.

The Israeli regulation concerning the right to notify next of kin is similar to that of the right to access legal representation. In regular civil law this right can be suspended for up to seven days — 48 hours at a time — if approved by a district judge *and* a written confirmation from the Minister of Defense or the Police Commissioner which states that the secrecy of the arrest is paramount to the investigation. For suspects of security offenses, the maximum delay is a maximum of 15 days, pending the Minister of Defense's authorization . In the OPT, however, military law allows a judge to withhold notification of the arrest (also *ex parte*) for up to eight days — 96 hours at a time — for an offense whose maximum sentence is three years or more. The maximum delay for security offenses is 12 days, pending authorization by a judge convinced that the investigation or the security of the area require it.

Habeas Corpus is chronologically last, but the most important right among the safeguards of a person deprived of his liberty. For him to come before a judge is one

of the important elements in of the process of constitutionalization. The principle of Habeas corpus enables the court's right to control the lawfulness of the arrest, and allows the judge to ascertain whether the arrestee has been subject to torture or ill-treatment. International human rights law not only explicitly sets forth the right of habeas corpus, but also stipulates that it is an absolute right. The Criminal Procedure Code allows a maximum of four days' detention.

The general rule in Israeli law is that arrestees must be brought promptly before a judge — but, again, there are exceptions: Israeli civil law permits a 24-hour delay. If there are urgent investigative activities, the commanding officer may delay a court hearing by a maximum of 48 hours from the time of the arrest. In security offenses, the Temporary Order gives a commanding officer — with approval from the head of Israel Security Agency Investigations Department — authority to delay a court appearance for up to 48 hours. Another signed permission may extend this to a total 72 hours. An additional 24 hours' delay — a total of 96 hours — may be ordered by the court in unusual cases, at the written request of the head of the ISA and the Attorney General's consent 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 the suspension of a judge's review for up to 48 hours. It then authorizes Israel Police officers, pending the approval of the head of the Israel Security Agency Interrogations Department, to delay juridical review of the arrest for up to a total of eight days in cases where they are convinced that ceasing the interrogation may actually harm the investigation. Furthermore, if an officer is convinced that bringing the detainee before a judge is liable to harm the execution of a critical investigative action that is meant to prevent harm to human life, delay may be prolonged up to eight days.

The significance of examination and documentation in the case of torture and ill-treatment the allegation has been emphasized in the Istanbul Protocol[12]. The procedure regarding medical examination is regulated under the Regulation on Arrest, Detention, and Statement in Turkey: the Institution of Forensic Medicine or an official health institution conduct the medical examination (a detainee has no right to a medical examination by a doctor of his own choice in the beginning of the detention period). Regulations state that if any sign of torture or ill-treatment is detected, the doctor is obliged to inform the public prosecutor. Medical codes of ethics state that the physician is obligated to maintain doctor-patient confidentiality, however, when it comes to a judicial medical examination he also has an obligation to report his findings in the medical examination process. In contrast, the Israeli medical examination procedure relies on the Patient's Right's Law. Health professionals are required to document the past medical condition, diagnosis, and the treatment prescribed. IPS regulations also 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. Nonetheless, as the study elaborates, medical documentation often makes no mention of injuries or their

12 Istanbul Protocol, para.104

alleged cause, falling short of proper diagnosis and documentation. This can include the lack of a precise description of the cause as described by the patient, the sparse definition of the injury, and the scarcity of photographic documentation or treatment of the injury.

Regulations in Turkey underline the importance of privacy in doctor-patient relations, since the physician is the "first responder" after apprehension by law enforcement officials. The only exception is a doctor's request, for reasons of his security, that the medical examination be conducted under the supervision of law enforcement officials. In the Israeli case, all health professionals are required to maintain the patient's privacy and dignity. Examination of data provided by relevant civil organizations shows that, in fact, medical examinations are often conducted with no privacy and in the presence of the security forces. Moreover, the language barrier, necessitating the presence of a translator, and the shortage of professional translators, often completely negates the privacy of the examination and patient's ability to trust the medical professional's confidentiality.

It is internationally agreed that medical reports are confidential and must not be made available to law enforcement officials, under any circumstances.[13] However the Regulation on Arrest, Detention, and Statement in Turkey requires that a copy of the report issued at the time of arrest (or entrance to a detention center) must be kept by the health institution that issued it, a second is given to the detainee, and a final copy is handed to the relevant law enforcement official for the investigation file. All medical staff are required to keep patient information confidential in Israel, but in fact detainees' medical records in hospitals are often given to the guards. Here, as before, we have one country with a law which officially complies with international standards which are not applied in practice, and in the other country the law simply is not compatible with international standards.

2. Procedural Safeguards at Different Stages

Throughout the process of arrest, complaint, and investigation, there is a basic question regarding detainees' (future complainants') access to justice. Impartiality and independence of the court, the procedural safeguards necessary to obtain the full participation of the torture survivor in prosecution process, are the focus of this section.

The access of deprived populations in Israel to justice might typically suffer from their geographic location away from commercial and legal centers; the absence of common language and cultural background; contact 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 ally. In the case of Palestinian detainees and torture survivors, the geographic

13 Istanbul Protocol, para.126

location, economic situation, language barrier and composition of the courts present even more daunting obstacles. As a matter of fact, research suggests that the climate of impunity and the construction of a security discourse are the leading elements preventing a survivor from perceiving justice as a right.

Considering that the crime of torture and ill-treatment is perpetrated by public officials, witnesses may refrain from testifying because of fear or intimidation. Therefore, it is necessary to take measures in order to protect witnesses against the alleged perpetrators. This is not done by either Israel or Turkey.

The matter of procedural safeguards adds to the image we have drawn, which is certainly quite grim. Despite certain changes for the better in recent times, both countries are far from a situation where procedural guarantees against torture and ill-treatment reflect an ethical-legal commitment to detainees' human rights.

CONCLUSION

We began this study with the observation that, at first glance, Turkey and Israel have completely different legal approaches to the question of torture. On the one hand, Turkey appears to be a country with a criminalization of torture and a stated commitment to set and regulated safeguards. On the other hand, in Israel we see a case of avoidance of the very use of the word "torture" in the legal framework. As a result, the mechanisms and procedures employed by the two states appear to be very different. 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 succinctly, in both cases torture is — in reality — used, permitted and condoned by the state officials. As a rule, torturers enjoy impunity and both countries deny the applicability of the term "torture" to the vast majority of the instances mentioned here. The issue addressed in the study, 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., legally preserving the norm of torture in face of shifting public and international demands?, Having identified these forces, what are the most effective measures that can be undertaken in each country in an 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 lens is insufficient. Legislation and case laws in themselves do not provide an explanation for the persistence of the criminal practice. Thus, although Turkey's legislation prohibiting torture is extensive and advanced, acts that amount to torture are, in fact, usually prosecuted as offenses other than torture. The example in Turkey clearly demonstrates that, in the absence of an active policy against torture, its criminalization is a poor

means of fighting the phenomenon — norms and behaviors, shaped by the socio-political background, also play a role. For instance, the far-reaching ties between the judicial system and the security establishment in Israel heavily impact the processes' outcome. Similarly, in Turkey, the postponement of executing sentences of prisoners who are seriously ill becomes possible only if they are not considered a security risk, regardless of whether medical documentation supports the case for their release. In addition, Turkey's recently adopted Internal Security Package strengthens the wall of "security", adding exceptions and exemptions to detainees' rights.

On the other hand, in the context of Turkey this study is pleased to report that torture in official detention centers decreased until the second half of 2000s following the integration of procedural safeguards, which were due to the efforts of NGOs and international monitoring mechanisms. Unfortunately, this does not mean that torture has been eradicated, but rather that its nature has changed. When torture and other forms of ill-treatment are enacted, 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 the extraction of confessions.

While a detailed sociological analysis of either Turkey or Israel is beyond the scope of the current study, we can point towards several possible 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, always conceptually — as 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 of officially acknowledged acts. In both countries, this is achieved through the discourse of public order and security. The supposed demands 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 demonstrated that most countries are susceptible to a habituation of such measures. An attempt to struggle against this attitude requires addressing the specific socio-political context in each country, while remembering that these reactions are universal. Neglecting the local aspect will lead to an international human rights debate that appears divorced from the reality (and norms) on the ground. Neglecting the universal aspect runs the risk of further enabling exceptionalism and a concomitant closing of horizons, rather than fostering a wider, more analogous discourse. The comparative framework has proven its efficacy in pointing out universal commonalities through the study of local particularities, which fit the study of torture well and may prove fruitful.

It is an old truism that no system is able to investigate its own abuses effectively and systematically. This appears again and again in the details of this study — both in Turkey and Israel — and both when the system fails (the usual, most common pattern) and in the rare instances where the involvement of external forces leads to positive developments, such as the positive influence exerted by the EU in Turkey. In Israel we therefore see that the astounding proliferation of investigative mechanisms is an obstacle in and of itself: Firstly, because each one employs its own methodologies, interpretations, manpower training and organizational norms; these bureaucratic mechanisms stand in the way of basic standards — e.g., proportional punishment, and duties, such as the duty to investigate. Secondly, even when the investigation is actually separate from the security authority under suspicion, its very affiliation creates a misplaced loyalty. Thus, for example, 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 (which nullifies any objectivity). 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 the 1990s until today. It appears that productive efforts by NGOs and others have been the result of involving strong and respected external actors.

This observation leads us to a second recommendation, which is the need for a general shift towards unifying norms of the prevention and investigation of torture, and their implementation under a single, central authority. For both countries, in the first instance, this would mean a strong National Preventing Mechanism (NPM) — independent from any security authority that is capable of overriding them. An NPM of sorts was established in Turkey in January 2014, but it lacks the structural and operational independence required in the Paris Principles — specifically in terms of its guarantees of the independence and impartiality of its members who are appointed by the Government.

No such plans for an NPM exist in Israel to date and there is a noticeable lack of a strong, independent, and effectual investigative body. In the absence of such mechanisms, the real power to change the use, prosecution, and punishment of torture lies in the hands of the Attorney General and the Minister of Justice, his superior. Therefore, these two positions are at the heart of any effort to systematically reduce torture — without their support, any attempt is bound to fail. For civil society, this recommendation may require a slight conceptual shift, resisting the urge to ameliorate and improve existing mechanisms (examination, investigation, appeal, etc.). This approach would have NGOs refraining from the suggestion of ameliorating developments — instead they would have them work to aggregate all mechanisms under one “roof”, enabling a unified understanding of the definition of torture and employing accepted international standards, such as the Istanbul Protocol.

As the full-length study shows, both Turkey and Israel still use their legal institutions to allow torture. Although they are very different, the willingness of both states to implement international standards which challenge the use of torture is practically nonexistent. For both nations the struggle against torture and the application of local and international norms has brought some improvements, but both still have a very long way to go before torture is eradicated altogether. The study repeatedly demonstrates how various laws, regulations, and mechanisms, ipso facto, allow accountability-free torture of those labeled as a risk to state security or public order. These definitions are political by nature, and may be changed and expanded at will. In both countries the application of lawless state violence against political resistance merits further empirical attention. We therefore end with a call for further investigations into the sites of state violence — the changing "enemies" proclaimed by Israel, Turkey, and other states, as they employ state violence — whether ruled illegal, justified by emergency laws, or completely unacknowledged.