



*Communication to the Office of the Prosecutor of the International Criminal Court
Under Article 15 of the Rome Statute*

SITUATION IN THE STATE OF PALESTINE

**War Crimes in the Interrogation
Chamber:**

The Israeli Systematic Policy of Torture, Inhuman and Degrading Treatment,
Unlawful Deportation, and Denial of Fair Trial of Palestinian Detainees

Respectfully submitted as part of the Office of the Prosecutor's investigation into the
Situation in the State of Palestine

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List of Acronyms and Abbreviations

AG	<i>Attorney General</i>
CAT	<i>UN Convention Against Torture</i>
FIDH	<i>International Federation for Human Rights</i>
HCJ	<i>High Court of Justice (Israeli Supreme Court)</i>
HRC	<i>UN Human Rights Committee</i>
ICC or Court	<i>International Criminal Court</i>
ICCPR	<i>International Covenant on Civil and Political Rights</i>
IDF	<i>Israel Defense Forces</i>
IHL	<i>International Humanitarian Law</i>
IIC	<i>Inspector for Interrogee Complaints</i>
IPS	<i>Israeli Prison Service</i>
ISA	<i>Israeli Security Agency (aka Shin Bet or Shabak)</i>
oPt	<i>occupied Palestinian territories</i>
OTP or Prosecutor	<i>Office of the Prosecutor</i>
PCATI	<i>The Public Committee Against Torture in Israel</i>
PTC	<i>Pre-Trial Chamber</i>
SPO	<i>Security Provisions Order</i>
TIDT	<i>Torture, Inhuman or Degrading Treatment</i>

Executive Summary

This communication demonstrates that agents of the Israeli Security Agency (ISA) and other state officials have systematically subjected Palestinian individuals suspected of involvement in national security crimes to torture and inhuman and degrading treatment, unlawful deportation from the Palestinian territories into Israel for the purpose of such treatment and denial of the fundamental right to fair trial. The communication is submitted by the Public Committee Against Torture in Israel (PCATI), an Israeli NGO established in 1990 and dedicated to the elimination of torture and cruel, inhuman, and degrading treatment, together with the International Federation for Human Rights (FIDH), an international human rights NGO established in 1922 and federating 192 member organisations in 117 countries. PCATI and FIDH submit that the crimes described in this document are an essential part of the war crimes committed within the Situation in the State of Palestine, and therefore request that the ICC Office of the Prosecutor (OTP) investigate these crimes as part of its ongoing investigation into this situation.

Factual Basis

Over 1,300 complaints of torture by Israeli authorities were submitted to Israel's Justice Ministry between 2001 and June 2021. These have resulted in two criminal investigations and no indictments. This communication is based on 17 cases in which individuals represented by PCATI were abducted from the occupied Palestinian territories (oPt) for the purposes of interrogation by the Israeli security agencies, which included torture and inhuman and degrading treatment. These 17 cases, which have been anonymised in this document, fall within the territorial and temporal jurisdiction of the OTP investigation: all of them involve crimes that began on Palestinian territory, after June 2014. All evidential materials – including victim complaints and corroborating evidence – are securely stored by PCATI. The OTP is invited to access these evidential materials directly upon request.

There is a significant body of evidence concerning arrests of Palestinians in locations in the oPt by teams of Israel Defense Forces (IDF) soldiers and ISA agents. After being blindfolded and maltreated in field interrogations, they are, as a matter of course, deported to detention locations outside the oPt. This system of unlawful deportations, constituting extraordinary renditions, runs contrary to Article 76 of Fourth Geneva Convention (which stipulates that an occupying power may not detain residents of the occupied territory in prisons outside of the occupied territory). Arrests are routinely initiated or prolonged under administrative orders. During these arrests and transfers to Israel, Palestinian detainees are often subjected to torture, inhuman and degrading treatment, and other inhumane acts. This treatment begins in the territory of the oPt.

Violent ISA interrogations take place in several locations in Israeli detention centres: Kishon ('Jalameh'), Petach Tikva, Jerusalem ('Russian Compound'), Ashkelon ('Askalan'), and Beer Sheva. During these interrogations, euphemistically referred to as 'military interrogations', Palestinian detainees are subjected to the ISA's most gruelling torture techniques. PCATI and FIDH aver that this ill-treatment and torture is a continuing act that commences on arrest in the oPt.

The methods used during such interrogations include methods explicitly prohibited by the Israeli High Court of Justice since 1999 (see *Public Committee* case). These include shackling detainees to chairs in various stress positions, e.g., the so-called 'banana' and 'frog' positions, sometimes while shaking, slapping or beating them, or pulling limbs in unnatural directions. Sleep deprivation is particularly common, sometimes by multiple prolonged interrogations each lasting over 30 hours, as well as interrogation or accommodation in extremely cold temperatures, and detention in filthy, insect-infested cells, with constant artificial lighting. PCATI has documented cases of nude interrogation; denying access to toilets; and sexual intimidation, as well as threats to family members. These different methods are often used simultaneously or in cyclical repetition, over a period of several days. PCATI received testimony from detainees who said that they had provided false confessions in the hope of putting an end to interrogations.

Torture at the hands of ISA has caused both physical and mental injuries and symptoms during and long after the torture sessions. Among the physical injuries inflicted directly during interrogations, PCATI documented evidence of loss of consciousness, broken teeth, hematomas, muscle tear, bloody stools, loss of ability to eat independently, and temporary loss of sensation in limbs due to tight shackling. Multiple detainees have reported not being able to walk after torture sessions, in which case they were carried to the shower, or taken there in wheelchairs.

Evaluations conducted in accordance with the *Istanbul Protocol*, have documented long-term mental and physical harms resulting from torture. Harms to physical health include long-term injuries to the legs and/or back, caused by techniques of tying detainees in contorted positions, and hair loss. Psychological symptoms observed by experts include depersonalisation, flashbacks, nightmares, anxiety, and depression.

Nature of the Crimes

The crimes alleged in this communication fall into three categories of war crimes: (a) crimes of torture and other inhuman acts of a similar character, in violation of Articles 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(b)(xxi) of the Rome Statute; (b) unlawful deportation or transfer of occupied population, in violation of Article 8(2)(a)(vii), 8(2)(b)(viii) of the Rome Statute; and (c) denial of fair trial, in violation of Article 8(2)(a)(vi) of the Rome Statute. All crimes alleged herein are perpetrated in the

context of and associated with the occupation, and therefore, are associated with an international armed conflict and constitute war crimes. The analysis does not preclude that the conduct described in this communication may amount to additional offences under the Rome Statute.

Jurisdiction

The alleged crimes fall within the jurisdiction of the ICC. Material elements of the crimes of torture, inhuman and degrading treatment, denial of fair trial, and deportation take place in part within the territory of the oPt. Ill-treatment and the denial of fair trial begin on arrest in the oPt and continue in Israel. The war crime of unlawful deportation is an inherently trans-border crime, which commences in the oPt. Further, the forcible removal of victims from territory under the jurisdiction of the ICC to a territory outside the jurisdiction of the ICC is premeditated to facilitate the continued perpetration of the crimes.

In the context of the cases presented in this communication, all three categories of war crimes should be regarded as unbroken chains of events that begin in the oPt, continue in Israel, and often end in the oPt. Consequently, all crimes alleged in this communication meet the Court's jurisdictional criteria.

Gravity

The systematic high-level planning of arrests, deportations and torture is central to the gravity of the alleged crimes. Israeli interrogators impose torture according to a methodical and premeditated plan. Since 1999, the so-called 'Rubinstein memorandum' has created a formalised system of torture requiring bureaucratic pre-approval from high-ranking officials. This system has subsequently been institutionalised by ISA officials in internal guidelines that have been endorsed and upheld by the Israeli High Court of Justice (HCJ).

Victims of ISA acts of torture were targeted by reason of their identity as members of the Palestinian people residing in the oPt, without Israeli citizenship. Such targeting was based on political, racial, national, ethnic or religious grounds, amounting to a form of discrimination and persecution, which further underlines their gravity.

Complementarity

The cases of the 17 victims of torture represented by PCATI, forming the factual backbone of this communication, have all been closed by the Israeli Ministry of Justice, without prosecution. PCATI and the victims have not sought judicial remedy against these administrative decisions, designed to shield torturers from accountability, since Israel's highest court has failed to provide victims of torture with criminal justice and

indeed has approved the bureaucratic procedure under which torture is conducted. In the cases of *Abu-Ghosh* and *Tbeish*, decided within the temporal scope of the ICC's investigation into the Situation in Palestine, the HCJ rubber-stamped the ISA's use of torture. The court ruled that the 'physical measures' used in the cases of *Abu-Ghosh* and *Tbeish* did not amount to torture and expanded the scope of situations in which such measures are considered legitimate, thereby condoning the procedure which provides ex-ante approval of such acts to ISA. The HCJ de facto approved a sophisticated mechanism which provided ISA with airtight immunity and thus became an active part of Israel's systematic violations of its obligations under international law. Consequently, justice for war crimes presented in this communication is not available in Israel.

Israel's systematic lack of accountability has been raised by various international human rights mechanisms. To cite only the most recent reference, in its Concluding Observations in the fifth periodic review of the State of Israel in March 2022, the UN Human Rights Committee (HRC) stated that it is deeply concerned by 'reports of the widespread and systematic practice of torture and ill-treatment by the Israeli Prison Service guards and the Israeli Security Forces against Palestinians, including children... particularly... the use of physical and psychological violence, sleep deprivation, stress positions and prolonged solitary confinement, including against children and detainees with mental or psychosocial disabilities'. The HRC also noted 'a very low rate of criminal investigations, prosecutions and convictions concerning allegations of torture and ill-treatment'.

Interests of Justice

With regard to the Situation in Palestine, the OTP has already found that '[t]here are no substantial reasons to believe that an investigation would not serve the interests of justice'. Indeed, investigating the crimes presented in this communication is an imperative of justice for the victims of torture, and for all the residents of Palestine and Israel in general. Severing these crimes from other allegations related to the Situation in Palestine would result in an unfair and arbitrary investigation, in which some victims are recognised as such by the Court and by the international community, while others are ignored and silenced.

PCATI is in contact with the victims whose testimony forms the factual basis for this communication. They have expressed to PCATI their desire to pursue justice before the ICC in an attempt to exercise their most fundamental rights, which have thus far been ignored. We invite the OTP to engage in dialogue with the victims, as well as with PCATI and similar organisations, including Palestinian organisations, who are their representatives within the local community.

As an Israeli organisation, PCATI does not take communication with the ICC lightly and is well aware of the price the organisation and its members may pay, publicly and otherwise, for even approaching the ICC. Nonetheless, the Filing Parties stand behind the communication's underlying message: Israeli authorities are currently using torture systematically against Palestinians, during arrests and interrogations, while the Israeli legal system, including its judicial system, has proven unwilling and unable to hold torturers accountable, leaving the victims, our clients and beneficiaries, with no effective remedy and no access to justice. With this in mind, we are turning to the ICC as a court of last resort.

Part I: Introduction

Overview and Request

1. This communication to the Office of the Prosecutor (OTP or ‘Prosecutor’) of the International Criminal Court (ICC or ‘Court’) provides information on crimes within the jurisdiction of the court in the Situation in Palestine, as envisaged in Article 15(2) of the Rome Statute of the ICC.
2. On 3 March 2021, the OTP confirmed the opening of an investigation into the Situation in the State of Palestine.¹ The investigation covers crimes within the jurisdiction of the Court that are alleged to have been committed since 13 June 2014.² According to the decision of the ICC’s Pre-Trial Chamber (PTC) on 5 February 2021, the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem.³ This communication shows that there is a reasonable basis to believe that personnel of the Israel Security Authority (ISA, known also as General Security Service - GSS - and colloquially as *Shin Bet* or *Shabak*), their commanders and/or superiors, Israel Defense Forces personnel, and government officials responsible for these security agencies, have perpetrated the war crimes of unlawful deportation, torture and other forms of inhuman and degrading treatment and denial of fair trial against Palestinian detainees. These heinous crimes fall within the jurisdiction of the ICC and the remit of the OTP investigation of the Situation in Palestine.
3. The crimes alleged in this communication fall into three categories of war crimes: (a) crimes of torture and other inhuman acts of a similar character, in violation of Article 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(b)(xxi) of the Rome Statute; (b) unlawful deportation or transfer of occupied population, in violation of Article 8(2)(a)(vii), 8(2)(b)(viii) of the Rome Statute; and (c) denial of fair trial, in violation of Article 8.2(a)(vi) of the Rome Statute. As detailed below, there is a reasonable basis to believe that the alleged crimes were committed by ISA interrogators, under purported authority granted by ISA officers and/or members of the Israeli government. The crimes of torture and inhuman and/or degrading treatment (TIDT) were preceded and facilitated by systematic unlawful deportation and transfer of detainees from the territory of Palestine into Israel; and in turn

1 ICC OTP, *Statement of the ICC Prosecutor, Fatou Bensouda respecting an investigation of the Situation in Palestine*, 3 March 2021, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>

2 *Id.*

3 Pre-trial Chamber I, No. ICC-01/18 *Situation in the State of Palestine*, 5 February 2021, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

facilitated administrative detention and admission of torture-tainted confessions, both constituting violations of the right to a fair trial.

4. As stated in its *Summary of Preliminary Investigation Findings*, the OTP has reasonable basis to believe that several crimes under the Court's jurisdiction have been committed in the Situation in Palestine.⁴ These include four groups of allegations: (1) war crimes allegedly committed by members of the IDF in the context of the 2014 hostilities in Gaza; (2) war crimes allegedly committed by *Hamas* and other Palestinian armed groups in the context of their activity in Gaza; (3) war crimes allegedly committed by Israeli authorities in the West Bank, including East Jerusalem, in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014; (4) crimes allegedly committed by members of the IDF in relation to the use of lethal and non-lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel.
5. The *Summary* further provides that, 'The Office will be able to expand or modify the investigation' beyond these crimes where the reasonable basis threshold has already been met, and investigate 'other alleged acts, incidents, groups or persons [...] so long as the cases identified for prosecution are sufficiently linked to the situation.' In light of the alleged crimes detailed below, such an expansion of the investigation on the Situation in Palestine is necessary, so as not to 'erroneously inhibit the Prosecutor's truth-seeking function'.⁵ On the basis of this communication, PCATI and FIDH request that the OTP expand the investigation to the crimes herein described.
6. At least since the 1967 occupation of the West Bank and the Gaza Strip, and to an extent that is not entirely known, the ISA has been practising torture and ill-treatment of detainees in interrogations while providing false testimonies to courts and investigating bodies that covered up the illegal practice. The history reveals the systematic and deep-seated nature of the practice since the occupation of the West Bank and Gaza in 1967. An official investigation committee's report in 1987

4 ICC OTP, *Situation in Palestine: Summary of Preliminary Examination Findings*, 20 December 2019, available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf>.

5 *Id.*, paras 8 and 9. As noted in the *Summary*, para. 7, the Court's case law provides that, '...once the threshold for initiating an investigation is met, the Prosecutor may proceed with an investigation into the situation as a whole and not just the particular acts or incidents identified and brought forward to substantiate that threshold. To do otherwise would be to pre-determine the direction of a future investigation, and narrow its scope, based on the limited information available at the preliminary examination stage. It would convert the facts provisionally identified as meeting this threshold into binding parameters that would regulate the scope of any future investigative inquiries. This approach would be inconsistent with the Prosecutor's duty of independent and objective investigation and prosecution, as set in articles 42, 54 and 58 of the Statute.'

(‘the Landau Commission Report’) condemned perjury but legitimated the use of ‘moderate physical pressure’ by the ISA. Subsequently, between 1987 and 1999 the Israeli legal system officially embraced what it called ‘moderate physical pressure’ against Palestinian detainees, as part of its system of military occupation imposed on Palestinian residents of the occupied Palestinian territories (oPt).

7. During the 1990s, Israeli citizens found themselves subject to a devastating terrorism campaign. Palestinian armed groups targeted Israeli civilians on the streets of Israeli cities with suicide bombs in buses and in other public spaces. These attacks aimed to thwart the peace initiatives of that period. Against this backdrop, in a much celebrated 1999 ruling on a petition submitted by PCATI (referred to as *Public Committee*), the Israeli High Court of Justice (HCJ) seemed to articulate a prohibition of previously approved physical interrogation techniques, which may amount to TIDT.⁶ While failing to explicitly state that the ISA had engaged in torture, the 1999 judgement specified that the ISA’s interrogation techniques had been prohibited. This was viewed by many, including by PCATI at the time, as a major victory for the rule of law and for human rights.⁷
8. Yet, PCATI and others gradually discovered that the 1999 *Public Committee* ruling contained a loophole.⁸ The judgement ensured neither firm protections against torture nor accountability for victims. Rather, it became part of a legal and bureaucratic system that not only ‘shielded’ interrogators who used torture from criminal prosecution (within the meaning that would later be enshrined in Article 17(2)(a) of the Rome Statute), but also provided them with prior authorisations and guarantees of impunity. As years passed, it became clearer to PCATI that ill-treatment of Palestinian detainees, albeit initially on a smaller scale compared to the 1990s, remained rife and systematic. Over 1,300 complaints of torture against Israeli authorities have been filed with Israel’s Justice Ministry

6 Israeli High Court of Justice (HCJ), 5100/94 *Public Committee Against Torture v. Government of Israel*, 6 September 1999, available at <https://hamoked.org.il/items/260.pdf> (henceforth: *Public Committee*).

7 See e.g., Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 CASE W. RES. J. INT’L L. 343, 343 (2006); Owen Fiss, *Law is Everywhere Tribute*, 117 YALE L.J. 257, 273 (2007) (‘The depth of [Justice Barak’s] commitment to human dignity is most clearly revealed in his decision denying the military the authority to subject anyone, including Palestinians or even suspected members of Hamas or Hezbollah, to harsh and aggressive interrogation techniques that he regarded as torture.’)

8 See e.g., Smadar Ben-Natan, *Revise Your Syllabi: Israeli Supreme Court Upholds Authorization for Torture and Ill-Treatment*, 10 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 41–57 (2019); Itamar Mann & Omer Shatz, *The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987 - 2009*, 6 HARVARD UNBOUND 59–110 (2010); Irit Ballas, *Fracturing the ‘Exception’: The Legal Sanctioning of Violent Interrogation Methods in Israel since 1987*, 45 LAW & SOCIAL INQUIRY 818–838 (2020); Nimer Sultany, *Activism and Legitimation in Israel’s Jurisprudence of Occupation*, 23 SOCIAL & LEGAL STUDIES 315–339 (2014); Karin Loevy, *EMERGENCIES IN PUBLIC LAW: THE LEGAL POLITICS OF CONTAINMENT* 218–260 (2016).

between 2001 and June 2021. These have resulted in two criminal investigations and no indictments.⁹

9. In the period within the scope of the investigation into the Situation in Palestine, since June 2014, HCJ jurisprudence further degraded protections for Palestinian detainees. In the cases of *Tbeish*¹⁰ and *Abu-Ghosh*,¹¹ the ‘physical measures’ used against them were approved by Israel’s highest court, which ruled they do not amount to torture, in violation of Israel’s obligations under international law.¹² The bureaucratic bypass around the protections offered by the *Public Committee* ruling was now enshrined in the governing jurisprudence. The *Tbeish* and *Abu-Ghosh* decisions revealed the extent to which the ISA has institutionalised the use of torture and inhuman treatment as an interrogation technique; and how Israel’s highest court, which in many contexts functions with laudable professionalism, became part and parcel of a system that is unwilling to hold torturers accountable for their crimes.
10. The pattern that emerged over the past decades combined the torture of detainees, a bureaucratic system of authorisation, and a legal system designed to ‘shield’ the torturers from prosecution. This pattern, which forms the core of this communication, shows that Palestinians in the oPt, who are suspected of involvement in terrorism, are subjected to a systematic structure of TIDT.
11. As explained and expanded below, Palestinians suspected of involvement in terrorist or political activity are arrested in locations in the oPt, often late at night, by teams of IDF soldiers and ISA agents. After being blindfolded and maltreated in field interrogations, they are, as a matter of course, deported to detention locations outside the oPt, contrary to Article 76 of Fourth Geneva Convention (which stipulates that an occupying power may not detain residents of the occupied territory in prisons outside the occupied territory). The arrests and deportations themselves very often include conduct prohibited by the Rome Statute, including *inter alia* torture, inhuman and degrading treatment, and other inhumane acts, as freestanding crimes and as parts of a wider campaign of persecution against the

9 PCATI, TORTURE IN ISRAEL 2021: SITUATION REPORT, 26 June 2021, available at <https://stoptorture.org.il/en/torture-in-israel-today/>.

10 HCJ, 9018/17 *Firas Tbeish v. Attorney General*, 26 November 2018, available at <https://tinyurl.com/2p9xmbsz>. For English translation, see <https://tinyurl.com/4pj48xzc>.

11 HCJ, 5722/12 *As’ad Abu Ghosh et al. v. Attorney General et al.*, 12 December 2017, available at <https://tinyurl.com/5dha3285>.

12 Israel ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT) on 3 October 1991. See CAT ratification status here: <https://tinyurl.com/uw695w5n>. See also, Yuval Shany, *Back to the Ticking Bomb Doctrine*, The Israel Democracy Institute, 27 December 2017 (stating that after *Abu Gosh*, the ‘legal situation is, in my opinion, incompatible with Israel’s obligations under international law, and inconsistent with the need to effectively protect the fundamental rights of interrogees.’)

Palestinian population of the oPt. The deportations into Israeli territory are premeditated for the purpose of applying more brutal forms of torture. They also remove the detainees from Palestine, into an area where Israeli authorities exercise a greater degree of control and have an organisational and physical infrastructure which facilitates more egregious TIDT. As we explain in Part IV below, the ICC has jurisdiction over crimes which commence in the oPt and continue in the territory of Israel.

12. Systematic deportations of Palestinian detainees from the oPt to the territory of Israel by ISA and IDF, are abductions amounting to a practice of extraordinary renditions. As one scholar notes in a different context, ‘An “extraordinary rendition” typically consists of a complex series of events. After being captured in a certain country, the rendered person is transferred to a detention facility in another country. There he is interrogated, and, in many cases, tortured or subjected to other forms of inhuman treatment. He does not face any criminal charge or a trial by an independent judicial body.’¹³ This is precisely how the ISA and the IDF transfer detainees from the oPt to Israel to be interrogated and subjected to torture and inhuman and degrading treatment. While extraordinary renditions are often used to circumvent subsequent criminal charges, their primary purpose in Israel/Palestine is to allow for the TIDT to be inflicted uninterrupted, with the aim of obtaining information and confessions,¹⁴ i.e., to facilitate unlawful TIDT in an organised, controlled, protected, and uninterrupted manner.
13. During these interrogations, which are sometimes euphemistically referred to as ‘military interrogations’, Palestinian detainees are subjected to the ISA’s most gruelling torture techniques. As detailed in Part III below, the latter often consist of cyclical sessions including beatings, sleep deprivation, stress positions, painful shackling, sexual and psychological humiliation and abuse, and other techniques, all with the involvement of medical personnel and with the purported authorisation of the ISA responsible command, in a bureaucratised manner. Cumulatively, this conduct amounts to the crime of torture as defined by the Rome Statute, and

13 Francesco Messineo, ‘*Extraordinary Renditions*’ and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy, 7 J. INT’L CRIM. JUSTICE 1023, 1025 (2009).

14 In the Israel/Palestine situation, Palestinian detainees are ultimately prosecuted in military courts in the oPt that cannot be regarded as independent courts, are held in administrative detention without due process, or in rare cases are prosecuted in an Israeli civilian court. On the lack of independence and impartiality of military courts see HRC, General Comment No. 32, *Right to Equality Before Courts and Tribunals and to a Fair Trial (Art. 14)*, CCPR/C/CG/32, 23 August 2007 (GC 32); U.N. Commission on Human Rights, *Draft Principles on the Administration of Justice through Military Tribunals*, E/CN.4/2006/58, 13 January 2006, Principle No. 15 (Decaux Principles); *Incal v. Turkey*, Reports 1998-IV, 1547 29 EHRR 449; *Öcalan v. Turkey* (App. No. 46221/99) (2003) 39 EHRR 10.

therefore lies at the heart of the Court's subject-matter jurisdiction (*ratione materiae*).

14. These TIDT techniques are inflicted in a systematic, intentional manner, following ISA guidelines that were acknowledged and approved by the Israeli HCJ in the recent case of *Tebeish v. Attorney General* (2018), and are backed up by ISA high command and the Israeli government. Israeli law enforcement authorities, including the Attorney General, courts, military courts, and the Inspector of Interrogate Complaints (IIC, *Mavtan*), a department of the Justice Ministry dedicated to ISA oversight, share responsibility for the fact that those suspected of torture remain free from accountability. PCATI's data and legal analysis, detailed below, demonstrate that the Israeli Justice system is currently unwilling and unable to offer redress to victims of torture; and this Court can, and in our view must, now intervene.
15. The Filing Parties therefore request that the Court investigate the crimes alleged in the communication. Several of these crimes are believed to be ongoing, requiring urgent consideration by the OTP.

The Filing Parties

16. This Article 15 communication is submitted by PCATI and FIDH.
17. The Public Committee Against Torture in Israel (PCATI) was established in 1990 as an Israeli-registered non-governmental organisation (NGO) and has continuously sought to abolish the use of torture in Israel and obtain accountability for victims.¹⁵ Over the years, PCATI has been a major voice protesting the use of torture from within Israeli society. We have continuously sought to ensure accountability within the legal system. This work has included the representation of hundreds of complainants before Israeli authorities; and the submission of numerous petitions to the HCJ on issues of principle. The organisation represents Israelis, Palestinians, refugees, and immigrants who have been subjected to torture or to cruel, inhuman or degrading treatment at the hands of Israeli authorities.
18. The International Federation for Human Rights (FIDH) is an international and independent human rights NGO established in 1922, which today unites 192 member organisations in 117 countries around the world. PCATI is one of FIDH's member organisations in Israel. FIDH's mandate is to work to protect victims of human rights violations, to prevent such violations and to bring the perpetrators to justice. In order to do so, FIDH works with its member and partner

¹⁵ Full information about PCATI can be found at <https://stoptorture.org.il/en/>.

organisations to document human rights violations, conduct advocacy work and engage in strategic litigation in support of victims' rights to truth, justice and reparation. One of FIDH's priorities is to fight impunity and protect populations from the most serious crimes.

19. FIDH International Secretariat's headquarters are based in Paris (France) and FIDH has had a delegation to the International Criminal Court (ICC) in The Hague, the Netherlands, since 2004. FIDH regularly brings representatives of member and partner organisations to The Hague to increase their capacity on international justice, the ICC and documenting serious human rights violations, to strengthen their actions involving strategic litigation and to contribute to improving relationships with the various organs of the ICC. FIDH has also submitted numerous Communications under Article 15 of the Rome Statute to the OTP on different situations where crimes under the Rome Statute have been or are in the process of being committed and no genuine national investigations and prosecutions have been undertaken. FIDH's delegation in The Hague also closely monitors ICC activities and participates in the Court's consultations with NGOs, especially relating to victims' rights.

Methodology

20. This communication is based on documentation carried out by PCATI throughout its 30 years of existence, as well as on joint research and analysis conducted by both Filing Parties over the past six months. During this period, the Filing Parties were supported in research and drafting of the communication by consultants with particular expertise on the situation, international criminal law and submissions to the ICC.
21. This filing is based in particular on the factual elements and analysis of cases in which PCATI represents victims of torture, inhumane and degrading treatments at the national level. These cases were selected on the basis of the following criteria: all victims were abducted from the oPt for the purposes of interrogation by the Israeli security agencies, which included torture and inhuman and degrading treatment, therefore satisfying the OTP investigation's territorial jurisdiction. These 17 cases also fall within the temporal jurisdiction of the OTP investigation, since all of them involve crimes that began after June 2014. In all cases, a complaint of torture has been filed by PCATI on behalf of the victims to the relevant unit in the Israeli Ministry of Justice, and all complaints have subsequently been dismissed by the Ministry. These 17 cases were also selected because they are among the most severe incidents that have been documented by PCATI since 2014. Victims include both men and women and thus are referred to in gender-neutral terms.

22. All 17 victims have given their informed consent for their case to be used in this communication to the ICC Office of the Prosecutor. Nonetheless, in order to maintain the safety of PCATI's clients, who may face repercussions by Israeli State agencies for agreeing to have their case included, the Filing Parties have anonymised their identity, as well as some identifying details in their cases (e.g., methods and results of TIDT).
23. All evidential materials - including victim complaints and corroborating evidence – are securely stored by PCATI. The OTP is invited to access these evidential materials directly upon request.
24. Throughout the process, the Filing Parties implemented security and safeguarding measures in accordance with the risk assessment and the 'Do No Harm' principle.
25. Additional information was collected and analysed from reliable reports and open-source data, including Israeli court documents and other state-issued documents (e.g., AG guidelines, concluding observations by national commissions of inquiry, etc.). Other sources included reports and statements from UN bodies, such as the UN Human Rights Committee and the UN Committee Against Torture, EU institutions and courts, and reports by NGOs working on the ground, as well as a wealth of academic research published on violations of international human rights law, humanitarian law and international criminal law, and in particular torture, in the context of the Israeli occupation of the oPt.

Part II: Historical Context

26. The legal and policy framework for ISA torture has evolved over decades, setting the stage for crimes within the jurisdiction of the Court in the post June 2014 period. This evolution demonstrates: (a) the systematic nature of the practice of torture; (b) the lack of accountability for torturers in Israel; and (c) the existence of state policy to commit crimes of torture, inhuman and degrading treatment, deportation, and denial of fair trial. The following part of the communication provides this necessary historical background.¹⁶
27. The use of torture and ill-treatment against detainees within the context of the conflict currently under investigation in the Situation in Palestine predates the establishment of Israel in 1948. During the years of the British Mandate over Palestine, local mandate authorities used torture in interrogations directed against

¹⁶ Parts of this historical context are based on Mann and Shatz, *supra* note 8.

militant groups, both Palestinian and Jewish.¹⁷ During the Israeli military government period, which lasted from 1948 to 1966, the Palestinian population in Israel was subject to disproportionate arrests and criminalisation, and procedural rights of defendants in security trials were often curtailed.¹⁸ After the 1967 war, when Israel began its occupation of the oPt, torture became central in exerting control and suppressing resistance, practices that were reflected in reports about alleged human rights violations by Israeli officials.

28. Notable reports about Israeli torture against Palestinian detainees began to appear in the late 1970s. In 1977 *Amnesty International*,¹⁹ the *Swiss League for Human Rights*²⁰ and the *International Committee of the Red Cross* all sought to obtain information on the interrogation of Palestinian detainees from the oPt in Israeli facilities. On 19 June 1977, the London *Sunday Times* published ‘Israel and Torture’.²¹ The article stated that ‘the degree of organisation evident in its application removes Israel’s practices from the lesser realms of brutality and places it firmly in the category of torture.’ It further described Israeli torture as ‘organised so methodically that it cannot be dismissed as a handful of ‘rogue cops’ exceeding orders.’²² As professor David Kretzmer has written, at this stage the Israeli response to allegations of torture was characterised by denial.²³
29. In 1984, *Al-Haq* (or ‘Law in the Service of Man’) published its own report on the same topic, titled *Torture and Intimidation in the West Bank: the Case of Al-Fara’a*

17 Darius Rejali, TORTURE AND DEMOCRACY 30 (2009).

18 Alina Korn, *Crime and Legal Control: The Israeli Arab Population during the Military Government Period (1948-66)*, BRITISH JOURNAL OF CRIMINOLOGY 574–593 (2000); Irit Ballas, *Boundaries, obligations and belonging: The reconfiguration of citizenship in emergency criminal regimes*, THEORETICAL CRIMINOLOGY 1, 4-8 (2021).

19 London ‘Sunday Times’ Publishes Investigation of Torture in Israel, AI NEWSLETTER, August 1977, <https://www.amnesty.org/en/wp-content/uploads/2021/06/nws210081977en.pdf>. See also *The*

Colonization of the West Bank Territories by Israel, Hearings before the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, United States Senate Ninety Fifth Congress, First Session on The Question of the West Bank Settlement and the Treatment of the Arabs in the Israeli-Occupied Territories, 17-18 October 1977, 78-79 <file:///C:/Users/user/Downloads/479240.pdf>.

20 *Swiss Team Says Israel Used Torture on Arabs*, N.Y. TIMES, 13 September, 1977, <https://www.nytimes.com/1977/09/13/archives/swiss-team-says-israel-used-torture-on-arabs.html> (last visited Apr 25, 2022).

21 *Israel and Torture*, 6 J. PALESTINE STUD. 191–219 (1977 (‘special document’ section including the 1977 *Sunday Times* story, a reply from the Israeli embassy in London, and a reply from the *Sunday Times* to Israel’s embassy)).

22 *Id.*, at 192 A copy of the *Sunday Times* report was later circulated to the UN Secretary General: <https://unispal.un.org/UNISPAL.NSF/0/FE3D603D74F5729B85256FE0006CC519>

23 David Kretzmer, *The torture debate: Israel and beyond*, in CRIME, SOCIAL CONTROL AND HUMAN RIGHTS 124 (David Downes, Paul Rock, Christine Chinkin & Conor Gearty, eds., 2007).

Prison.²⁴ The report focused on what scholars have termed ‘torture lite’²⁵ in the context of collective punishment imposed on entire populations in order to break down emerging resistance to Israeli occupation. This was called, in Israeli slang, ‘*terturim*’ (which may be translated as ‘bullying’ or ‘hazing’). As *Newsweek* reported, ‘Beyond constant police patrols, the most common manifestations of *tertur* are the wholesale roundups that take place whenever West Bank Arabs stage nationalist demonstrations. Israeli border police have been witnessed forcing Arabs to sing the Israel national anthem, slap each other’s faces and crawl and bark like dogs. The police also arrest thousands of Arabs each year on ‘security’ charges, which can range from blatant terrorism to simply reading blacklisted books.’²⁶ *Al-Haq* stated, ‘To facilitate this practice of *tertur*, Rafael Eitan recommended the establishment of a detention/exile camp – “even if it does not have the conditions of a normal prison”.’²⁷ This was the *Al-Fara’a* prison which was the focus of the early *Al-Haq* report. The report introduces affidavits of detainees from *Al-Fara’a*, all of which describe a reality of daily intimidation and threats, deliberately poor conditions and lack of communication with families. None of the detainees who provided statements were ever questioned on specific allegations, or put on trial for a specific offence. In each case they were taken from their homes or their daily lives, sometimes late at night or before dawn, spent time in detention, and were then simply released. The report reflects a reality of widespread inhuman and degrading treatment, which had not yet been systematised and bureaucratised as it would later become.

30. These pioneering reports, while important, did not lead Israeli society at large to confront the issue of torture. The process, which would only emerge in the late 1980s, would end up legalising torture. Over the years, torture would become the product of a carefully crafted bureaucracy. Below, we turn to the events that led to torture becoming part of the system of control in the occupied West Bank, Gaza, and East Jerusalem.

The Landau Commission

31. Two public scandals that implicated ISA in illicit treatment of detainees led to the decision to establish the Landau Commission. One involved the torture of Izat

24 The International Commission of Jurists and Law in the Service of Man (Al-Haq), *TORTURE AND INTIMIDATION IN THE WEST BANK: THE CASE OF AL-FARA’A PRISON* (1984), <https://www.alhaq.org/publications/8161.html>.

25 Jessica Wolfendale, *The Myth of ‘Torture Lite’*, 23 *ETHICS & INTERNATIONAL AFFAIRS* 47–61 (2009).

26 Quoted in *Torture and Intimidation in the West Bank* *supra* note 24, at 3.

27 *Id.*, at 4.

Nafsu, a Circassian Israeli military officer, who had been convicted of treason.²⁸ The other involved the murder by ISA agents of two Palestinian detainees who hijacked a bus and the subsequent cover-up of events.²⁹

32. In 1987, the Landau Commission published a detailed report ('the Landau Report') on the use of 'physical pressure' by ISA.³⁰ It found that torture and inhuman and degrading treatment of Palestinian detainees had been widespread in Israel since the occupation of the West Bank and Gaza in 1967.³¹ The Landau Commission's report discusses the public scandals with harsh condemnation. It emphasises the damage they caused to the public image of ISA as a law-abiding security service.³² While the report expresses 'understanding' of the need to use 'moderate physical pressure', it also voices alarm at what it describes as a practice of perjury by ISA interrogators who testified on the interrogation of Palestinian detainees.³³

'The revelation of this method increased the crisis of confidence in the GSS's [ISA's] moral fibre, which had begun earlier, and it is undermining the sense of self-confidence and self-respect of every GSS officer. This evil must be eradicated, for it is a matter of life and death for us all, in the full sense of the term'.³⁴

33. The Landau report did not use the word torture in describing Israeli practices. But it was the first official Israeli document to show that physical pressure was systematically used against Palestinian detainees. As shown above, Palestinians had reported Israeli torture long before the report was published.³⁵ However, this was doubtlessly the deepest and fullest examination of such practices to date. The finding that torture started with the occupation of the West Bank and Gaza, intimately tied this practice to occupation and military control over a civilian population.
34. The Landau Commission found that Israel's ISA was, in fact, *dependent* on physical pressure exerted upon detainees. The report explains:³⁶

28 See the Nafsu case, AP 124/87 *Izzat Nafsu v. The State of Israel*.

29 See the Landau Report, *infra* note 30, 148.

30 *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 146, (1989) ('Landau Report') available at https://hamoked.org/files/2012/115020_eng.pdf.

31 *Id.*, 158, 160-161.

32 *Id.*, 148.

33 *Id.*, 148.

34 *Id.*, 148 – 149.

35 See *supra* note 24.

36 The Landau Report, *supra* note 30, 184.

‘The effective interrogation of terrorist suspects is impossible without use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information. Interrogation of this kind is permissible under law, as we interpreted it above, and we think that a confession thus obtained is admissible in a criminal trial, under the existing rulings of the Supreme Court.’

35. After providing a so-called ‘essential catharsis’³⁷ purging ISA of the former practices of perjury, the report recommends a framework for the legalisation of ‘moderate physical pressure.’³⁸ The report does not however endorse arbitrary violence against detainees. As Kretzmer explains, ‘the commission assumed that if the authorities were allowed to use coercive methods of interrogation that may involve cruel, inhuman or degrading treatment [...] they would refrain from “hardcore torture”.’³⁹ ‘Physical pressure’, writes the commission, was generally kept to the minimum necessary level. The idea was that to keep it minimal, it had to be recognised legally. The Landau Commission further observes and recommends a pattern of consultations with and confirmation by high-ranking officials within the security service when physical pressure is deemed to be needed in interrogations.
36. In words that were later quoted by the HCJ, the Landau Commission wrote that ‘methods of police interrogation which are employed in any given regime are a faithful mirror of the character of the entire regime’.⁴⁰ The Landau Commission’s arguments for endorsing physical pressure in interrogations provide the historical source for the contemporary reality of torture and ill-treatment in the oPt and in Israel.

The period following the Landau Commission’s report revealed considerable new evidence about Israeli torture, which once again met with international opprobrium. For example, in 1994, Human Rights Watch (HRW) published *Torture and Ill-Treatment: Israel’s Interrogation of Palestinians from the Occupied Territories*.⁴¹ The report found that ‘Israel’s two main interrogation agencies in the occupied territories engage in a systematic pattern of ill-treatment and torture – according to internationally recognized definitions of the terms – when trying to extract from Palestinian security suspects confessions or

37 *Id.*, 149.

38 *Id.*

39 Kretzmer, *supra* note 23, at 126.

40 The Landau Report, *supra* note 30, 77.

41 Human Rights Watch, *TORTURE AND ILL-TREATMENT: ISRAEL’S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES*, June 1994 <https://www.hrw.org/reports/pdfs/i/israel/israel946.pdf>.

information about third parties.’⁴² As summarised by HRW, ‘The methods used in nearly all interrogations are prolonged sleep deprivation; prolonged sight deprivation using blindfolds or tight-fitting hoods; forced, prolonged maintenance of body position that grow increasingly painful; and verbal threats and insults.’⁴³ As described in Part III below, these methods are still being systematically used today.

The 1995 Commission on Legislation against Torture and the ISA Law

37. In 1994, following Israel’s ratification of the UN Convention Against Torture (‘CAT’) in 1991 and several private bills seeking to prohibit torture, the Israeli government established a commission to examine a statutory prohibition on torture. The commission started convening in 1995, while the case of *Public Committee against Torture in Israel v. The State of Israel* was pending in front of the Supreme Court (see details below). Its work did not result in statutory amendments. Israeli law to this day lacks a clear prohibition on torture that is compatible with international law.
38. Documents from the commission’s work that have recently been released by the Israeli State Archive show, in unequivocal terms, that the practice and authorisation of torture were endemic in this period and relied on the defence of necessity set out earlier in the Landau Commission report.⁴⁴ Minutes of the meetings of the Commission on Legislation against Torture in 1995 state on numerous occasions that ISA uses a ‘Permissions Schedule’, apparently listing the various permissions available to interrogators. The legal advisor to ISA, Shabtai Ziv, is quoted saying that ISA procedures have been approved by a committee of government ministers headed by the Prime Minister in which the Attorney General and the State Attorney (Chief of Public Prosecutions) participated. And yet, ISA did not agree to a statutory prohibition of torture. Ziv further says that ISA cannot operate without recognition of the legal defence of necessity, and that he has ‘no doubt that any international inquiry committee would determine the practice in Israel as blatant torture.’⁴⁵ Dorit Beinisch, then a senior state attorney and later the Chief Justice of the Israeli Supreme Court, is quoted saying that findings in

42 *Id.*, xxiii.

43 *Id.*

44 Minutes of the Meeting of the Commission on Legislation against Torture, 24 February 1995; 29 March 1995, Israeli State Archive 21439-6.

45 *Id.*

complaints against ISA are very similar to the allegations in the complaints, only that ‘the acts are performed under permission.’⁴⁶

39. Overall, the minutes make clear that the discrepancy between, on the one hand, the systematic Israeli practice of torture and, on the other, the non-recognition under international law of the defence of necessity in cases of torture and ill-treatment was well known to the authorities. Further, the security apparatus blocked any legislation that would prohibit or jeopardise the ongoing practice of torture and ill treatment.
40. Another consequence of the ongoing torture scandals and the petition to the HCJ against ISA torture practices was the General Security Service Law of 2002 (ISA Law). Responding to arguments in the petition that ISA is not even authorised by law to conduct interrogations, and to opposing arguments that the ISA should be formally authorised to practice TIDT, the government proposed a draft ISA Law in 1989, adopted in 2002, which for the first time formalised the operation of ISA. The law does not mention torture but adopts extremely broad language authorising ISA to pursue multiple national security purposes, including (in Article 7(b)(1)) ‘to thwart and prevent illegal activity intended against national security, the orderly democratic government, or government institutions.’ For these purposes, ISA was authorised in Article 8(a)(3), ‘to interrogate suspects and suspicions relating to the commission of offences or conduct investigations to prevent such offences referred to in Article 7(b)(1) or other areas determined by the government (...).’⁴⁷
41. To this day, Israel has not adopted any legislation explicitly criminalising torture. This despite the State’s obligation as signatory to both the UN Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), as well as Israel’s repeated declarations expressed to the UN Human Rights Committee and other international mechanisms that it intended to do so.⁴⁸ Israel did, however, adopt a law providing ISA with extremely broad powers for pre-emptive investigations and interrogations.

46 *Id.*

47 The Bill acknowledges that ISA had been operating for a long time prior to its legalisation, providing the legal framework for ISA as a unit within the Prime Minister’s Office, which acts in accordance with government decisions: https://www.nevo.co.il/Law_word/law17/PROP-2689.pdf (p. 224).

48 See UN Human Rights Committee concluding observations of the fifth periodic review to the State of Israel, 30 March 2022, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2fISR%2fCO%2f5&Lang=en

The Public Committee Ruling and its Aftermath

42. The 1999 HCJ ruling in *Public Committee against Torture in Israel v. The State of Israel* was perceived as a victory against torture.⁴⁹ Ostensibly, the HCJ struck down the *Landau Commission* framework operating between 1987 and 1999 and ruled out physical pressure in Israeli national security interrogations. Yet, there is significant continuity between the pre-1999 and the post-1999 period. This continuity spans all the way to the present and reveals why Israel is unwilling to prosecute cases of torture.
43. At the centre of Justice Aharon Barak's opinion in the *Public Committee* decision are seven methods of torture. These include shaking, various contorted stress positions – typically tilted, handcuffed, head-covered or blindfolded with loud music playing - and sleep deprivation.⁵⁰ While the decision discusses these at some length, it seemingly prohibits torture and inhuman and degrading treatment generally, under Israeli domestic law and under Israel's international law obligations, as part of a norm of *jus cogens*.⁵¹ The crucial loophole pertains to the way the HCJ deals with the criminal law defence of *necessity*, which is provided for under Israeli Penal Law.⁵²
44. In his opinion, Justice Barak recognises that, in certain circumstances, an interrogator can escape criminal liability. This protection is granted under the doctrine of necessity when the crime is purportedly *justified*.⁵³ In a ticking bomb scenario, interrogators are presumed to be justified in committing acts of torture, when they reasonably believe that they are saving lives. If interrogators *know* - with the required immediacy and certainty - that the crime of torture they will commit will save numerous lives, they are permitted *ex-post-facto* to break the law.

49 For the judgement, see *supra* note 6. See e.g., Goldstone (2006), Fiss (2007) *supra* note 7.

50 For a more detailed description of the means of interrogation, see *Id.*, paras. 9 - 13.

51 'This conclusion is in perfect accord with (various) International Law treaties – to which Israel is a signatory – which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment" (...) These prohibitions are "absolute". There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable'. See *Id.*, para. 23.

52 Penal Law – 5737-1977, LSI: Special volume (1977) (hereafter: Penal Law), Article 34K: 'A person shall bear no criminal liability for an act required to have been done immediately by him to save his or another's life, freedom, body or property from an imminent danger of serious injury deriving from the circumstances at the time of the act, and for which no alternative act was available.'

<https://tinyurl.com/4wt79bb4>.

53 See generally Arnold Enker, *Duress, Self-Defense and Necessity in Israeli Law Reform of Criminal Law: Self-Defense and Necessity*, 30 ISR. L. REV. 188–206 (1996).

As commentators have emphasised, the form of justification here is the same as in paradigm cases of self-defence.⁵⁴

45. This controversial legal theory ended up amounting to an arrangement shielding interrogators who use torture from criminal prosecution. The decisive matter appears in one sentence that had dramatic influence in the years to come: ‘The Attorney General can instruct himself regarding the circumstances in which investigators shall not stand trial if they claim to have acted from a feeling of “necessity”.’

One month after the decision was published, then Attorney General (and now former Supreme Court Justice) Elyakim Rubinstein issued a memorandum (the ‘Rubinstein Memorandum’) reflecting the Israeli government’s new position. Citing the above sentence, Rubinstein enumerated the circumstances in which he will ‘consider’ not pressing charges against an interrogator.

46. Article 4 of the Rubinstein Memorandum (translated in Annex I of this submission) instructs the interrogators to ‘always note the rule of law and the rights of suspects; but while acting within the limits of law, they should not ignore their own need for proper protection in their work’. Rubinstein explains that the Attorney General will decide whether to press charges according to criteria including (1) the *level* of the officials who were consulted before applying physical pressure on a detainee; (2) their involvement in the decision to apply physical pressure; and (3) the degree to which the physical pressure was regulated. ISA interrogators are expected to consult with officials above them, potentially spreading responsibility up the administrative ladder. The emphasis on consultation, confirmation, and regulation from above highlights the continuity between the post-1999 reality, and the one that the Landau Commission had established.
47. This is perhaps clearest in Article 7(2)(b)(4) of the Rubinstein Memorandum: ‘The Security Service should have internal guidelines, inter alia, on the system of consultations and authorisations within the organisation which are needed for this matter.’⁵⁵

While Justice Barak’s ruling referred to the Attorney General guidelines in relation to post facto criminal liability of interrogators and included a statement on prohibition of regulation of violent interrogation methods, the ISA guidelines authorised by Rubinstein concerned the prospective decision to apply ‘special

54 See e.g., the use of deadly force comparison in Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law* 48 AM. J. COMP. L. 661 (2000).

55 See Annex I.

means' in interrogations. The legal framework of 'necessity' thus shifted from criminal law and individual prosecutorial decisions, which are always post-facto, into a principle of governmental actions. As such, it is prospective, institutionalised, and subject to bureaucratic regulation, creating a legal framework for unlawful acts.⁵⁶

48. On 7 November 2006 Haaretz newspaper published an article titled 'Complaints: ISA Interrogators Tear Off Beards and Sodomise Detainees'.⁵⁷ The article reports the return of ISA to the 'old interrogation methods' that were expressly banned in the *Public Committee* decision. It was based on new testimonies that PCATI had collected and on criminal complaints it had submitted to Israeli law enforcement authorities. Indeed, by that time, PCATI had filed around 500 such complaints, none of which resulted in a criminal prosecution.⁵⁸
49. Alongside the old methods that had supposedly been abolished, new methods of torture had emerged. One detainee, Assam Rashed from the city of Tulkarem, described how an ISA officer pulled off his beard. Aaref Tabajna of Nablus said that he was tied from the ceiling with his head down, while the interrogators hit his testicles with their hands and a cloth-covered rod. An anonymous report described an interrogator who called himself 'Captain Daniel', who threatened the complainant with sodomy and then inserted objects into his rectum.⁵⁹
50. The Attorney General's office responded by saying that:⁶⁰ 'There are cases in which examination brings about amendments in procedures or similar changes. In exceptional cases, when we find that indeed there was a deviation from procedure, we decide upon a disciplinary or criminal procedure'. ISA, for its part, confirmed that torture was, once again, *authorised in advance*: 'The authorisation to use force in interrogations is given at the least from the head of the interrogation team, and at times comes from the head of the ISA himself'. Three days after the publication of the article, on 10 November, ISA published a 'clarification': 'the authorisation to use special means in interrogation can be given only by the head of ISA'.

In May 2007 PCATI published a new report titled 'Ticking Bomb'. Rather than focusing on many cases, this report was organised around relatively few, detailed accounts. The report unfolds the stories of nine detainees who were severely

56 Ben-Natan, *supra* note 8.

57 Nir Hasson, *Complaints: ISA Interrogators Tear Off Beards and Sodomise Detainees*, HA'ARETZ 7 November 2006 (in Hebrew) <https://www.haaretz.co.il/misc/1.1152146>.

58 *Id.*

59 *Id.*

60 *Id.*

tortured, from the time of their arrest, through interrogation, trial, and the (failed) attempts to initiate criminal prosecutions against interrogators.⁶¹

51. Reporting the case of a detainee named Bahjat Yaman, the report discusses another pertinent memorandum, serving as the record of his interrogation. Yaman claimed he was subject to various kinds of physical and mental torture, including hearing recordings of his own screams while he was given rest. The following memorandum from his interrogation, written by an ISA interrogator, provides some documentary corroboration to Yaman's testimony:⁶²

'Regarding Bahjat Yaman. Urgency in obtaining information for prevention of terrorist attack. Interrogated from 5.20.04 21:15 to 5.22.04 02:40 under the defense of necessity and means were alternately used.'⁶³

52. In a case like this, when interrogators applied torture or inhuman or degrading treatment, they appeared to already know that they were protected by the 'defense of necessity'. Former Attorney General Elyakim Rubinstein had suggested a pattern of 'consultations and authorisations', showing the causal connection between this system of authorisations and the Attorney General's instructions allowing for an ISA internal procedure of torture. This connection was also recognised by former Israeli Prime Minister Ehud Olmert.⁶⁴ In a letter to Avigdor Feldman, then counsel for PCATI (17 October 2007), Olmert's counsel explained:

'On the basis of this assertion by the Attorney General, internal guidelines have been prepared by the GSS, which state how consultations with senior GSS officials will be conducted when the circumstances of a particular interrogation fulfil the requirements of the necessity qualification...'

In the following years, PCATI reported on numerous cases of torture. Over the years, PCATI has observed a cumulative effect of various 'enhanced interrogation' methods, whereby each method alone did not always constitute torture but their use in combination crosses the torture threshold.

61 PCATI, *TICKING BOMBS: TESTIMONIES OF TORTURE VICTIMS IN ISRAEL*, May 2007, available at https://hamoked.org/files/2016/7243_eng.pdf.

62 Motion on behalf of the petitioners in HCJ, 5100/94 [2009] (Hebrew), appendices 5 and 6 (the document and an affidavit submitted to the Israeli High Court of Justice by Yaman's attorney, Mr. Labib Habib).

63 The original document was never obtained by Yaman's defense lawyer, Labib Habib. When Habib came to receive the evidence material for this case, he was not allowed to make a copy of this document and was instructed to make a handwritten copy. He later gave an affidavit about it. The content of the document is undisputed. Netan'el Benishu, vice president of the Ofer military court, wrote in his decision in Yaman's case: 'The fact that special means of interrogation was not concealed from the defense. It has obtained a document that can prove the use of such methods.' *Id.*

64 Motion on behalf of the petitioners in HCJ 5100/94 [2009] (Hebrew), app. 11

The Israeli Judicial System is Unable and Unwilling to Address Torture – A Historical Account

53. The bureaucratic infrastructure of torture and inhuman and degrading treatment had long been challenged in Israeli courts prior to the triggering of the ICC's jurisdiction. One form of legal challenge has been through criminal proceedings, in which the admissibility of confessions was contested. The second was a motion for contempt filed by PCATI at the Israeli Supreme Court to declare that the administrative use of the 'necessity procedure' is inconsistent with *Public Committee*. The third way was through petitions to the HCJ pursuing accountability of officials in individual cases. In all three contexts, courts have refrained from interfering with ISA's use of torture during interrogations.
54. Furthermore, after June 2014, the starting date of the ICC's jurisdiction, the Israeli Supreme Court went beyond simply refraining from intervention. In that period, described in Part III below, Israel's highest court condoned the practice in the *Abu Ghosh* and *Tbeish* judgements. This section describes the earlier sources of Israeli courts' unwillingness to hold torturers accountable in accordance Israel's obligations.
55. The existence and the legality of the 'necessity procedure' is rarely dealt with in criminal cases, even when the admissibility of confessions is challenged. However, in multiple cases in the Jerusalem district court the procedure was acknowledged and upheld. One case in which this procedure left visible footprints is *State of Israel v. Amro Al Aziz*.⁶⁵ In the *Al Aziz* verdict, Justice Zvi Segal expressly stated that:

[The interrogators] implemented in the case of Ahmad an interrogation procedure, that is supposed to grant immunity by virtue of the necessity defense according to paragraph 34(11) of the Penal Law 5737(1977), which the ISA interrogators call the 'necessity interrogation' procedure. In court, Ahmad detailed the interrogatory means implemented against him, including physical pressure and threats (pp 113, 114–135), and in the primary examination and the cross examination, the interrogators even clarified the import of the means implemented including physical pressure' (testimony labelled 'Dotan' on pp. 142, 143, and 157).

65 TPH 775/04 *State of Israel v. Amro Al Aziz* (10.29.05, unpublished), p. 59.

56. Although ‘granting immunity’ seemingly contradicts Justice Barak’s holding in *Public Committee*, the procedure was upheld - and the statement in question was deemed admissible. Justice Yoram Noam, who also presided in the case, concurred on this point: ‘the interrogators viewed the means that they implemented, which they called “necessity interrogation”, as protected by virtue of the necessity defense according to paragraph 34(11) of the Penal Code.’⁶⁶
57. In November 2008 PCATI challenged state practices of interrogation in a motion for contempt of court. The claim was very simple: the very existence of a necessity *procedure* negates the criminal defence of necessity and turns the practice into an advance authorisation.
58. Justice Dorit Beinisch, then President of the Israeli Supreme Court, based her summary dismissal of the motion on two propositions: (1) a motion for contempt was not the right procedure; (2) the plaintiff has not laid out sufficient factual grounds for ‘the severe claim that has been raised’. However, importantly, the State did not dispute the existence of the procedure but contended that it is in line with *Public Committee*.⁶⁷
59. Justice Beinisch found that allowing institutionalised torture is a reasonable interpretation of *Public Committee*. She explained that the motion for contempt was the wrong procedural avenue: deciding on this issue demands an interpretation of *Public Committee* and is not simply an issue of *applying* the decision. The decisive paragraph in *Public Committee* invoked by Justice Beinisch includes the following statement: ‘We do not exclude the possibility that the protection of ‘necessity’ will be awarded to an ISA interrogator, *through the discretion of the Attorney General in his decision whether to prosecute*, or, if he stands trial, through the discretion of the court’ (emphasis added). The Israeli Supreme Court was well aware of how *Public Committee* granted a form of immunity for torturers, deeming this acceptable.
60. To summarise, a pattern coupling practices of torture with cover from the Israeli executive and judicial branches long preceded the starting date of the ICC’s jurisdiction in the Situation in Palestine. As the next part of this communication

66 See also, TPH 775/04 *State of Israel v. Al Sayd* (9.22.05, unpublished): ‘From what was said it emerges that there was justification for holding the interrogation for many hours and even during the night-time hours in terms of the importance and urgency of the matter. In the course of the interrogation, the accused was not deprived of sleep intentionally, for a period of time, as an end unto itself, and when the “necessity interrogation” ended the accused was allowed time to rest, with the purpose of not wearing him down’.

67 BHCJ, 5100/94 *Public Committee Against Torture v. Israel*, 6 July 2009, available at <https://hamoked.org.il/document.php?dID=264>.

shows, the same pattern largely persists within the Court's jurisdiction *rationae temporis*.

Part III: Factual Allegations

TIDT at the Hands of ISA: the post-June 2014 period

61. Multiple sources clearly demonstrate that practices of abducting Palestinians from the oPt for the purposes of torture in Israel have continued since the Court's jurisdiction on the Situation in Palestine was triggered in June 2014.
62. An investigative report by Haaretz newspaper found in May 2015 that instances of TIDT were on the rise according to 'a trend, that began in the second half of 2014'.⁶⁸ According to the report, 'in the second half of 2014, there were 19 complaints of sleep deprivation, 12 of beatings, 18 of tying and two of shaking. All in all, there were 51 instances reported, as opposed to eight in the first half of the year.'⁶⁹
63. Moreover, a 2017 report cites, N., a former senior interrogator who was authorised to approve "special means".⁷⁰ Notably, N. described stress positions that also appear in the victims' statements, detailed below.⁷¹ The report, which focuses on events that fall within the Court's temporal jurisdiction, states:⁷²

'N. discussed some of those methods as well. For instance, he said, sometimes the interrogator needs to grab the suspect's shirt, pull him close and scream at him. He also described forcing a suspect to raise his hands to shoulder height while they're handcuffed behind his back.

The conversation revealed that all the interrogators were well aware of the pain these methods cause the suspects. Some had even tried out the uncomfortable positions for themselves to determine how hard it was to maintain them.'

68 Chaim Levinson, *Torture of Palestinian Detainees by Shin Bet Investigators Rises Sharply*, HA'ARETZ, 6 March 2015, available at <https://www.haaretz.com/.premium-torture-by-shin-bet-investigators-rises-sharply-1.5332951>.

69 *Id.*

70 Chaim Levinson, *Torture, Israeli-style – as Described by the Interrogators Themselves*, HA'ARETZ, 24 January 2017, available at <https://tinyurl.com/3pncvdf>.

71 *Id.*

72 *Id.*

64. ISA interrogators have also confirmed practices that may amount to torture, within the temporal scope of the current investigation, in testimony before the Israeli judiciary. For example, one interrogator under the pseudonym of Miguel (a name that has also appeared in victims' testimonies), explained: 'a great part of the power of the "necessity defense" is its mental effect on those who are interrogated, who are put under great tension and opaqueness, and do not know how far the violent behaviour of the interrogators may take them'. 'Miguel' further clarified that the means employed are 'painful and perhaps very painful', having tried them on himself in the past. He also confirmed that 'the necessity interrogation includes humiliating statements, which are not employed in a regular interrogation.'⁷³ It should be added that the case in question was *not* a case against an interrogator. As will become clearer below, Israel refuses to prosecute perpetrators of torture.
65. The persistence of the pattern of Israeli abductions and subsequent torture was further confirmed in the high-profile 2019 case of Samer Arbeed, as published in numerous open sources.⁷⁴ ISA initially arrested Arbeed on 26 August due to his suspected involvement in the murder of Rina Shnerb. On 2 September, an Israeli military court issued an administrative detention order against him, but during a later hearing the court ordered his release. On 25 September a special unit of Israeli forces rearrested Arbeed. According to testimony, he was badly beaten during his arrest in front of his workplace.⁷⁵ He was then deported from Palestine and taken to the ISA's interrogation centre at the Russian Compound in Jerusalem, where he was denied access to his lawyer. The ISA then apparently received permission to 'use exceptional measures to investigate' in his case, i.e., to employ the 'necessity procedure'. On 25 September, Arbeed was rushed to a Jerusalem hospital in critical condition. He was unconscious, respirated, underwent dialysis for kidney failure, and was diagnosed with several broken ribs.⁷⁶
66. The Ministry of Justice announced on 29 September 2019, that it had commenced an investigation into the circumstances leading to Arbeed's hospitalisation. Yet, on 2 October, a military court extended Arbeed's detention, noting that his condition had improved, and allowed the ISA to resume his interrogation. In anticipation of this interrogation, security authorities reinstated a temporary ban on Al-Arbeed's

73 See Criminal Case 932-01-16 *State of Israel v Anonymous (detainee)*, 19 June 2018, available via 'Nevo'. See also PCATI, *SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE LIST OF ISSUES PRIOR TO REPORTING CONCERNING THE SIXTH PERIODIC REPORT OF ISRAEL*, 25 June 2018, available at

https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ISR/INT_CAT_ICJ_ISR_31652_E.pdf.

74 Amnesty International, *Israel/OPT: Legally-sanctioned torture of Palestinian detainee left him in critical condition*, 30 September 2019, available at <https://tinyurl.com/ms7wj4fd>.

75 Yuval Shany, *Special Interrogation Gone Bad: The Samer Al-Arbeed Case*, LAWFARE, 10 October 2019.

76 *Id.*

access to his legal representatives.⁷⁷ On 24 January 2021, Israeli Attorney General Avichai Mandelblit closed the investigations against ISA into the circumstances leading to Arbeed's hospitalisation.⁷⁸ As Prof. Yuval Shany explained:⁷⁹

‘This case provides another illustration of the inadequacies of Israel’s laws and procedures [...] It also underscores the significant gap between Israeli law and international law relating to coercive interrogations. [...] the dire consequences of the Al-Arbeed interrogation—resulting in the detainee’s almost dying—raise serious questions about whether the legal distinction between special interrogations constituting and not constituting torture, as detailed by the 1999 guidelines, was observed in the case. This case again underscores the lack of a real dividing line between torture and other forms of intentional infliction of pain and suffering.’

67. Alongside the testimonies in court proceedings described above, Arbeed's case demonstrated publicly that ISA practices of torture were by then normalised in Israel.⁸⁰

Summary of ISA's Practice Using TIDT Based on Selected Complaints

68. Below we summarise information received about cases in which PCATI is the direct legal representative of victims, all of whom have given their expressed consent to be included in this submission. Nonetheless, in order to maintain the safety of our clients, who may face repercussions by Israeli State agencies for agreeing to have their case included, we have anonymised their identity, as well as some identifying details from their cases (e.g., methods and results of TIDT). Should the OTP decide to open an investigation into the issue of TIDT as presented in this submission, PCATI will provide all the necessary details to the OTP, in order for the OTP to be able to fulfil its task, thereby bringing a measure of justice to a context of intense, solidified, and bureaucratised criminality.
69. The previous sections have shown how TIDT of detainees has become part of the Israeli security apparatus and legal and security system applied to the oPt. This

⁷⁷ *Id.*

⁷⁸ Addameer, *Addameer Condemns the Israeli Attorney General's Decision to Close the Investigation Against the Shabak for Committing Torture Against Samer Arbeed*, 24 January 2021, available at <https://tinyurl.com/3y9tause>.

⁷⁹ Shany, *supra* note 75.

⁸⁰ See also United Nations Human Rights Office of the High Commissioner, *Israel must end impunity for torture and ill-treatment - UN experts*, 8 February 2021, available at <https://tinyurl.com/22ed57ef>. ('We are alarmed at Israel's failure to prosecute, punish and redress the torture and ill-treatment perpetrated against Mr. Al-Arbeed. Addressing such abuse is not at the discretion of the Government or the judiciary, but constitutes an absolute obligation under international law').

section presents evidence of abduction of Palestinians from the oPt by Israeli security forces for the purposes of TIDT in 17 cases in which PCATI represents the victims. These cases have been selected because they fall within the Court's temporal jurisdiction (i.e., they took place after 13 June 2014), as well as material and territorial jurisdiction (as explained further below). Victims include both men and women and thus are referred to in gender-neutral terms.

70. The evidence obtained independently by PCATI includes affidavits by detainees, medical physical and mental evaluations in accordance with the *Istanbul Protocol*,⁸¹ and statements by the IIC within the Israeli Ministry of Justice in response to PCATI's complaints. While PCATI retains detailed affidavits of each instance, they are summarised here collectively and chronologically, according to the arrest and interrogation process, in order to establish the facts of the crimes and demonstrate their well-established patterns. In this section, factual allegations are supported by the evidence in cases referred to in footnotes, which are listed in Annex II.
71. Whilst not identical, there are significant commonalities between documented cases that must be highlighted. These commonalities reflect continued practices that have been in place for decades. The 17 cases that form the basis of this part of the communication are examples of those in which the victim was represented by PCATI. There is a reasonable basis to believe that the practices applied in those cases have been applied in many other cases that fall within the scope of the ICC's jurisdiction.
72. An interrogation in the cases, as documented by PCATI, typically begins with an arrest, under an arrest warrant issued by the IDF or without a formal order, based on suspicions. Often, detainees are subsequently detained under an administrative detention order, issued immediately after arrest,⁸² or after a first period of interrogation.⁸³ Some detainees are arrested as suspects of security offences and are subsequently charged in a military court in the West Bank. Administrative detention is purportedly authorised in the West Bank pursuant to the *Security Provisions Order* ('SPO', 'tsav bidvar hora'ot bitachon'), *Order Regarding Administrative Detentions (Temporary Provision) [Consolidated Version] No. 1591-2007*, as well as the Defence (Emergency) Regulations - 1945.⁸⁴ Unlike arrest in the context of criminal procedure, administrative detention is used,

81 Istanbul Protocol: *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* originally produced in 1999 (Istanbul Protocol)

82 See e.g., Victims No. 7, 8.

83 Victim No. 1.

84 Shiri Krebs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court*, 45 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 639 (2012).

ostensibly, to prevent a future security risk. In fact, administrative detention is used almost exclusively in the oPt, and almost exclusively to detain Palestinians (and not Jewish Israelis).⁸⁵ Administrative detention of Palestinians is subjected to periodic extensions by the military commander which must be approved by a military judge, a procedure based on secret evidence, not disclosed to the detainees or their lawyers.

73. All testimonies of TIDT on which this communication is based were given by individuals arrested in the oPt. These arrest operations take place during the night⁸⁶ or around dawn,⁸⁷ in victims' homes.⁸⁸ They are conducted by masked IDF soldiers, accompanied by one or more ISA agents (referred to as 'captain').⁸⁹ During the arrests, homes of detainees' families, often multi-generational households, are raided with alarming noise, including banging on doors with soldiers' weapons, shouting, sometimes accompanied by dogs. Soldiers typically order all family members into one room while violently searching the rest of the house and taking the arrested person into custody in front of their families. During the arrests, detainees are beaten, as are at times other family members. Detainees, as well as other family members, particularly women, are sometimes threatened and/or subjected to curses and profanities, as well as sexual humiliation,⁹⁰ in some cases directly in front of the person being arrested. During this initial phase of arrest, detainees reported being tied by plastic restraints in painful ways,⁹¹ and blindfolded.⁹²
74. From their homes, detainees are transferred to interrogation facilities. The transfer occurs with the detainees blindfolded,⁹³ and is often accompanied by violence.⁹⁴ For example, victims of different instances described being tied and laid down on the floor of a military vehicle,⁹⁵ with soldiers kicking them and stepping on their

85 Human Rights Watch, *A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION* 89 (2021), available at <https://tinyurl.com/5n8rv3zj>; Amit Preiss and Eyal Nun, *THE ADMINISTRATIVE DETENTION IN ISRAELI LAW: THEORY, SUBSTANCE, PROCEDURE AND SUPPLEMENTARY ISSUES* (2019) (in Hebrew), 39-41. According to the data provided by Preiss and Nun, both of them former military judges in the oPt military courts, every year between 1967 and 2016 Israel imprisoned between hundreds to one thousand Palestinian administrative detainees in the West Bank and the Gaza Strip. Inside Israel (where it can be applied to Israeli citizens, most of them Jewish) the use of administrative detentions is very sparse and usually no more than a few cases, that annually never exceeded a few dozen. See also Krebs, *supra* note 83.

86 Victims No. 1, 2, 3, 4, 10, 13, 14.

87 Victim No. 4.

88 Victims No. 2, 13.

89 Victim No. 3, 13.

90 Victims No. 1, 2, 5, 13, 14, 17.

91 Victims No. 2, 4.

92 Victim No. 4.

93 Victims No. 2, 3, 4, 6, 10.

94 Victims No. 4, 5.

95 Victims No. 5, 13.

bodies with their boots.⁹⁶ One victim described that during the transfer he was subjected to strangling.⁹⁷ During transportation detainees may again be subjected to threats and curses.⁹⁸ Violence during detainee transportation has been inflicted upon detainees while they were fully captive and debilitated.⁹⁹ These measures during transportation, at least in some cases, generate continuous violent pressure, exerted across distances and while exiting the oPt and entering Israel. On the way to the site of interrogation, soldiers may make a stop, while the detainee spends hours waiting, handcuffed and blindfolded.¹⁰⁰ The transfer of detainees from the oPt into Israeli territory, which is prohibited under international humanitarian law,¹⁰¹ is often carried out without informing the detainee that they are being removed from the oPt.¹⁰²

75. Being painfully shackled and blindfolded for lengthy periods of time during the transfer, and often while waiting for the interrogation to start, detainees suffer not only direct violence but prolonged disorientation, induced helplessness, and fears of more violence they cannot see, avoid, or respond to. The violence during deportation, from the moment of arrest to the moment of arrival at the final interrogation site, establishes a continuum of inhuman and degrading treatment and/or torture, lasting for the entire duration of the transfer.
76. Military and police detention facilities are situated both in the oPt, and in several locations in Israel, while ISA interrogation facilities are located exclusively inside Israel. Detainees that are expected to undergo ISA interrogations are thus typically transferred into Israel. Detainees have experienced TIDT on both sides of the 'green line' (separating the oPt and Israel), within the context of single continuous interrogations.¹⁰³
77. The ISA and IDF authorities deport detainees from the oPt into Israel with knowledge and intent that they will be tortured there. This knowledge and intent is inferred first from the consistent location of ISA facilities inside Israel and the way that this pattern has been implemented systematically over the years.¹⁰⁴ Beyond

96 Victims No. 10, 13.

97 Victim No. 3.

98 Victim No. 3.

99 Victim No. 3, 4.

100 Victim No. 5.

101 Fourth Geneva Convention, Articles 49, 76

102 Victim No. 1.

103 Victim No. 7.

104 The location of interrogations inside Israel has been taken for granted and mentioned in passing by the Israeli Supreme Court in all the decisions on allegations of torture mentioned in this communication, so much that it has related to torture as a matter to which only domestic Israeli Law applies. On the mass transfer of prisoners and detainees to Israel see HCJ, 2690/09 *Yesh Din v Commander of IDF Forces in the West Bank* (2010), available at

this systematic nature, there have been specific instances in which detainees have been threatened, while still in the oPt, that they will suffer harsh treatment required to make them talk once they will be delivered to infamous interrogation facilities in Israel.¹⁰⁵ Finally, when detainees are transferred to interrogation outside the oPt they are tortured according to the ‘necessity procedure’. Torture is then the only plausible reason for the deportation.

78. According to the relevant testimonies, the initial phase of interrogation is aggressive¹⁰⁶ and includes behaviours amounting to TIDT, such as slapping,¹⁰⁷ painful tying of hands,¹⁰⁸ curses,¹⁰⁹ threats,¹¹⁰ beatings by multiple interrogators simultaneously,¹¹¹ and threats to harm the detainee¹¹² and their family members.¹¹³ Threats include rescinding family members’ work permits, a policy whose existence appears to be confirmed.¹¹⁴ In other cases, family members are arrested in order to pressure detainees during interrogation. ISA agents typically promise that the family member will be released if the detainee confesses.¹¹⁵ The interrogation of one family member is sometimes shown to another, in order to exert pressure on the latter.¹¹⁶ The practice of detaining family members and making threats against them was prevalent long before 2014 and has continued since as documented by PCATI.¹¹⁷

https://hamoked.org/files/2010/111511_eng.pdf. Specifically on interrogations and remand hearings inside Israel see HCJ, 6504/95 *Wajia v. State of Israel* (unpublished, 1.11.1995); Ben-Natan, *supra* note 8, 54-56. For NGO reports, see for example: Hamoked and B’tselem, *DARK METHODS: TREATMENT OF PALESTINIAN DETAINEES IN THE PETACH TIKVA DETENTION FACILITY*, October 2010, available (in Hebrew) at <https://hamoked.org.il/files/2010/113160.pdf>.

105 Victim No. 3.

106 Victim No. 10.

107 Victim No. 8.

108 Victims No. 3, 5, 6, 8.

109 Victims No. 3, 6, 7, 10.

110 Victims No. 3, 5, 6, 9.

111 Victim No. 1.

112 Victim No. 3.

113 Victims No. 4, 7.

114 Victim No. 3 (government reply).

115 Victim No. 7.

116 Victim No. 17.

117 PCATI petitioned twice to the HCJ, challenging this practice in the case of Mahmood Sweti, a detainee who attempted suicide and suffered serious mental trauma after his wife and father were summoned to the detention facility and shown to him as prisoners. see: HCJ, 3533/08 *Swety v. Israeli Security Agency* (9.9.2009); HCJ, 1266/11 *Sweti v. Attorney General* (21.10.2012). The wider policy of using family members in interrogations to threaten and pressure detainees in interrogation has been documented by PCATI and other Israeli NGOs, in several reports, see PCATI, *FAMILY THERAPY: THE USE OF FAMILY MEMBERS TO PRESSURE INTERROGEEES BY THE ISA*, 2008, available (in Hebrew) at <https://hamoked.org.il/files/2010/110291.pdf>; Hamoked and B’tselem, *DARK METHODS: TREATMENT OF PALESTINIAN DETAINEES IN THE PETACH TIKVA DETENTION FACILITY*, October 2010, available (in Hebrew) at <https://hamoked.org.il/files/2010/113160.pdf>; PCATI, *FAMILY THERAPY CHAPTER 2: CONTINUED USE OF FAMILY MEMBERS TO PRESSURE INTERROGEEES BY THE ISA*, 2012, available (in Hebrew) at <https://hamoked.info/website/files/2012/1156931.pdf>.

79. In most cases, at a certain point in the interrogation, ISA officers stop and announce that from that point the detainee will be subjected to ‘military interrogation’ (*‘hakira tsva’it’*).¹¹⁸ In some of these cases, testimonies indicate that ISA officers announced to detainees that they have obtained pre-approval from responsible authorities to impose such ‘military interrogation’.¹¹⁹ On some occasions it was also mentioned that the Prime Minister had provided such approval.¹²⁰ This claim of having senior-level approval conforms to the patterns exposed in the period following the *Public Committee* judgement which stipulated that interrogations under the ‘necessity procedure’ require such approvals. The dire prospect of a ‘military interrogation’ is also used, during interrogations, as a threat in and of itself.¹²¹
80. Before this ‘military interrogation’ begins, detainees are searched, often naked,¹²² which can entail sexual humiliation,¹²³ including by use of search equipment.¹²⁴ Detainees go through general inspection by a medical doctor, sometimes consisting of a few basic questions.¹²⁵ Sometimes this medical inspection takes place on the way to the ultimate interrogation facility, in the vehicle used for the purpose of deporting the detainee from the oPt.¹²⁶ No such medical inspection is conducted for regular detention in Israel, and the decision to do so indicates that the authorities are aware that they are deporting the detainees for the purpose of torture interrogation.
81. From the authorities’ perspective, the medical examination determines whether the detainee’s medical condition allows for the harsh interrogation to come. The medical inspection records pre-existing conditions, which reflects the authorities’ knowledge that the interrogation may be physically risky and damaging. This medical assessment is an aspect of the bureaucratised nature of the infliction of pain and suffering.¹²⁷
82. ‘Military interrogation’ is a euphemism for the imposition of torture.¹²⁸ To be clear, it does not appear to have any specific relationship with the military (IDF) and is conducted by ISA interrogators. While this is the language used vis-à-vis detainees, in legal language this is described as ‘necessity interrogation’. Among the methods

118 Victims No. 2, 13.

119 Victims No. 2, 13.

120 Victims No. 11, 13, 14.

121 Victim No. 1.

122 Victims No. 1, 3, 5, 6, 10.

123 Victim No. 14.

124 Victim No. 5.

125 Victims No. 2, 4, 14.

126 Victim No. 4.

127 Victim No. 4.

128 Victims No. 1, 8.

used during such ‘military interrogations’ are methods that the HCJ has specifically found to be illegal in the *Public Committee* judgment. These include shackling detainees to chairs in various stress positions¹²⁹ e.g., the ‘banana’¹³⁰ position, sometimes while slapping or beating them,¹³¹ or pulling limbs in unnatural directions.¹³² Detainees have testified that they have been tied in such position from twenty minutes¹³³ to one hour,¹³⁴ but the pain they cause lasts long after the contorted position is no longer imposed on detainees.¹³⁵ Detainees have also described being tied to a chair, while their arms are pulled powerfully in an unnatural direction.¹³⁶ A stress position without the use of a chair consists of crouching on tiptoes, tied, for prolonged periods, referred to as the ‘frog’ position.¹³⁷ ISA interrogators have also used a technique of shaking,¹³⁸ including while shackled and tilted in a chair.¹³⁹ Shackling is sometimes accompanied with applying bandages on arms, apparently so as to minimise evidence of violence on the flesh.¹⁴⁰ In general, small chairs, on which sitting is painful and induces muscle stress, have been a central instrument of Israeli methods of torture and seem to remain so.¹⁴¹ A detainee described how they were shouted at from very close up as they were tied in a stress position. Testimony also indicates ISA has tied a detainee to a ‘cement bed/bunk’ in at least one case.¹⁴² Strangling has occurred not only during transfer of a detainee (described above), but also during ‘military interrogation.’¹⁴³

129 Victims No. 1, 2, 5, 7, 8, 10, 11, 13, 14, 17.

130 Victims No. 1, 8, 14.

131 Victim No. 2, 8, 10, 11.

132 Victims No. 1, 8, 13.

133 Victims No. 1, 13.

134 Victim No. 2.

135 Victims No. 1, 13.

136 Victims No. 2, 13 14.

137 Victims No. 2, 8, 14.

138 Victim No. 2.

139 Victims No. 10, 13.

140 Victims No. 1, 13, 14.

141 Victim No. 1.

142 Victim No. 7.

143 Victim No. 13.



The 'banana' (left) and the 'frog' (right) stress positions. Illustrations by Ishai Mishory, from May 2007 report by B'tselem and HaMoked - the Center for the Defence of the individual.

83. Other methods that PCATI has recorded since June 2014 include beatings of detainees,¹⁴⁴ often when tied to a chair and in particular areas of the body such as the thighs, knees, and legs, or intimate parts of the body; sleep deprivation;¹⁴⁵ interrogation or accommodation in extremely cold temperature;¹⁴⁶ detention in filthy, insect-infested cells,¹⁴⁷ with constant artificial light (sometimes red, orange, or yellow);¹⁴⁸ nude interrogation;¹⁴⁹ denying access to toilets;¹⁵⁰ shouting threats using sexually abusive words, as well as threats of house demolition or deportation;¹⁵¹ and playing sounds that are presented as those of relatives being tortured.¹⁵² Detainees describe being positioned blindfolded to receive beatings, which continued after they had fallen to the floor, and being strangled by a piece of cloth.¹⁵³ One detainee described being shown to another in order to intimidate the latter by demonstrating his injuries.¹⁵⁴

144 Victims No. 1, 13.

145 Victims No. 1, 2, 3, 4, 6, 8, 10, 11, 13, 14, 17.

146 Victims No. 1, 3, 4, 5, 11.

147 Victims No.6, 13.

148 Victims No.1, 4, 5, 7, 9, 11, 13.

149 Victim No. 13.

150 Victims No. 3, 7, 8.

151 Victims No. 3, 5, 6, 7, 8, 10, 11, 14.

152 Victim No. 13.

153 Victim No. 13.

154 Victim No. 13.

84. These different methods are often used simultaneously or in cyclical repetition, for a number of days. Detainees describe being tied in a stress position, interrogated, and then tied in another stress position for further interrogation, in a repetitive and cyclical pattern.¹⁵⁵ Interrogators have used the word ‘exercise’ (*tamrin*) to refer to particular methods or cycles of torture methods, including positions that are particularly straining to the muscles and the skeleton.¹⁵⁶ Such cycles can be long, and in one example a victim estimated that it lasted 10-15 hours.¹⁵⁷ The cyclical pattern of contorted seating, sleep deprivation, agitation and beatings, when taken together, appears to be the most common method of torture.
85. Testimony shows that during the days of ‘military interrogation’ detainees are typically given around 3 hours for sleep, shower, and toilet access each day.¹⁵⁸ Testimonies further show access to showers being delayed for days.¹⁵⁹ Consecutive harsh interrogation has at times lasted several days.¹⁶⁰ At other times it has lasted for nearly a month,¹⁶¹ in another case for 45 days.¹⁶² This period is characterised by insufficient nutrition, or food and/or water of very poor quality.¹⁶³
86. Harsh and illegal interrogation can also continue after military interrogation has been declared over. In one case, a detainee that was subjected to military interrogation was then brought before a psychiatrist. Despite saying that he was not planning to commit suicide, authorities proceeded to tie him to a bed for four days, from which he was unshackled twice a day for meals.¹⁶⁴
87. Detainees have experienced both physical and mental injuries and symptoms during and long after the torture sessions.¹⁶⁵ Among the physical injuries inflicted directly during interrogations, PCATI documented evidence of loss of consciousness¹⁶⁶ sometimes multiple times during an interrogation,¹⁶⁷ broken teeth, bloody mouth,¹⁶⁸ bloody eyes, hematomas,¹⁶⁹ muscle tear,¹⁷⁰ loss of ability

155 Victims No. 1, 8.

156 Victims No. 10, 11.

157 Victim No. 5.

158 Victim No. 11.

159 Victim No. 6.

160 Victims No. 13 (5 days); 14 (3 days).

161 Victim No. 5.

162 Victim No. 6.

163 Victims No. 3, 4, 6.

164 Victim No. 13.

165 Victim No. 1.

166 Victims No. 1, 5, 7, 13.

167 Victim No. 7.

168 Victim No. 1, 13.

169 Victim No. 7.

170 Victim No. 8.

to eat independently,¹⁷¹ insect bites from filthy cells requiring medical attention.¹⁷² Multiple detainees reported not being able to walk after torture sessions, in which case they were carried to the shower, or taken there in wheelchairs.¹⁷³ Longer term harm includes damaged hearing and eyesight.¹⁷⁴ Among the mental harms of interrogation, a detainee experienced anxiety attacks during interrogation sessions;¹⁷⁵ another lost the ability to distinguish between day or night.¹⁷⁶ Another detainee was tortured despite a documented pre-existing mental disability.¹⁷⁷ Several results of severe physical and mental harm cannot be described here as it is feared that such information may reveal the identity of the victims.

88. Torture at the hands of ISA has caused long term damage to health. Evaluations conducted in accordance with the Istanbul Protocol consider mental as well as physical harms that torture inflicts upon its victims. Among the psychological symptoms observed by experts are depersonalisation, flashbacks, nightmares, anxiety, and depression.¹⁷⁸ Among harms to physical health are long term injuries to the legs and/or back,¹⁷⁹ corresponding to techniques of tying detainees in contorted positions,¹⁸⁰ and hair loss.¹⁸¹
89. According to testimonies, Israeli medical doctors have been involved in interrogations, though sometimes medical intervention has been delayed.¹⁸² Doctors have examined interrogated individuals not only before but also during interrogations, and have communicated with them in a way that indicates knowledge of TIDT.¹⁸³ During these interventions, doctors have shown lack of independence, and their responses have not been determined by medical needs but by interrogation needs.¹⁸⁴ Detainees reported having been sedated or given pain killers and then sent back to interrogation.¹⁸⁵ According to victim testimony, one doctor refused to give the victim treatment when they were sent to a clinic with severe facial bruising.¹⁸⁶ PCATI has also obtained evidence of a detainee being

171 Victim No. 1.

172 victim No. 6.

173 Victims No. 1, 13.

174 Victim No. 2.

175 Victim No. 4.

176 Victim No. 1.

177 Victim No. 7.

178 Victim No. 1.

179 Victims No. 8, 9.

180 Victims No. 1, 6.

181 Victim No. 2.

182 Victim No. 6.

183 Victim No. 1.

184 Victims No. 1, 4, 5, 6.

185 Victims No. 5, 8.

186 Victim No. 1.

slapped in a medical clinic.¹⁸⁷ In one case, medical staff allegedly administered shots to a detainee without consent and without informing them of the substance being injected.¹⁸⁸ Medical records are often partial and lack central important aspects of the treatment of detainees.¹⁸⁹ In certain cases medical staff seemingly proposed minor amendments to interrogation protocol in order to relieve some of its physical or mental harms.¹⁹⁰ In one case, medical documentation from violent interrogations included a diagnosis of PTSD.¹⁹¹

90. During such torture sessions, prayer has been prevented¹⁹² or interrupted in degrading ways.¹⁹³ Detainees have further been scolded and/or humiliated based on their religious practices and customs¹⁹⁴
91. Torture interrogations have included curses and blasphemous or vulgar language,¹⁹⁵ directed towards detainees or women family members, including threats directed at family members.¹⁹⁶ One detainee testified that interrogators threatened to demolish their family's home (an illegal practice that Israel has employed to allegedly 'deter' terrorism).¹⁹⁷ Such language has been used during physically violent interrogation as well as separately.¹⁹⁸
92. PCATI received testimony from detainees who said they provided false confessions in an attempt to put an end to interrogations.¹⁹⁹
93. When detainees have been brought before judges in remand hearings that take place in military courts within the oPt, military judges have reportedly asked ISA interrogators whether 'military interrogation' has been approved. This question by a person acting as a judge reflects acquaintance and complicity with the practice.
94. There is evidence that ISA attempts to hide and downplay the physical scars created by its use of torture.²⁰⁰ ISA has long developed techniques that do not leave

187 Victim No. 7.

188 Victim No. 7.

189 Victim No. 5.

190 Victim No. 4.

191 Victim No. 1.

192 Victim No. 7.

193 Victim No. 1.

194 Victim No. 5.

195 Victims No. 1, 3, 5.

196 Victims No. 1, 2, 3, 4, 6, 7, 8, 11.

197 Victim No. 11.

198 Victim No. 1.

199 Victim No. 5.

200 Victims No. 8, 10, 11.

physical marks in order to conceal torture, such as the cumulative use of sleep deprivation, loud music, exposure to hot and cold conditions, stress positions, and shaking detainees' heads while tightly holding their shirts.

95. Detainees have been denied access to lawyers during the initial period of detention and interrogation, held in incommunicado detention.²⁰¹ Detainees have been denied access to lawyers and/or representatives of the ICRC.²⁰²
96. When torture is practised regularly, it is at times directed towards people who are not involved in criminal or security-related activity. In one case, the victim testified that an ISA agent had admitted that the victim was not connected to the activity about which ISA had sought information. According to their testimony, the detainee received an apology.²⁰³
97. All the complaints in the cases that form the basis of this section of the communication have been closed by the authorities, with no criminal proceedings triggered. It is notable and remarkable that authorities have replied to the complaints, openly admitting that detainees have been interrogated under a procedure ostensibly authorising the ISA to apply the 'necessity defence.'²⁰⁴ Another phrasing that recurs in these responses is that victims have been interrogated with 'special methods.'²⁰⁵ One response explicitly notes that a detainee was interrogated more than a dozen times for extremely long durations.²⁰⁶

Part IV: Analysis of Alleged Offences

98. The factual basis of this communication is analysed below according to the relevant provisions of the Rome Statute, the ICC *Elements of Crimes*, and in the light of the Court's jurisprudence. The following analysis does not preclude that the conduct described above may amount to additional offences under the Rome Statute.

Contextual Element – The Existence of Armed Conflict and Occupation

201 Victims No. 1, 7, 13, 17 (the latter was denied access to a lawyer for 40 days).

202 Victim No. 11.

203 Victim No. 14.

204 See e.g. reply, Victim No. 14.

205 See e.g. reply, Victim No. 1.

206 Victim No. 17 (details with PCATI).

99. The OTP has confirmed its analysis that the territory of Palestine – the West Bank, including East Jerusalem, and the Gaza Strip (oPt) – are all occupied territories and have been so since their occupation by Israel in 1967. On this basis, the OTP has found a reasonable basis to believe that Israeli agents have perpetrated war crimes in the West Bank and the Gaza Strip, including by transferring Israeli civilians to the West Bank.²⁰⁷ The status of the territory as occupied began in 1967, when Security Council Resolution 242 of 22 November 1967 called on Israel to withdraw its armed forces from the occupied territories.²⁰⁸
100. All crimes alleged herein are thus perpetrated in the context of and associated with the occupation, and therefore, constitute war crimes. Occupation is regarded as a context of armed conflict for the purpose of contextual elements of war crimes. Article 2 of Geneva Convention IV of 1949 provides: ‘The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.’ The ICTY has previously defined occupation for the purpose of international criminal law.²⁰⁹
101. The formal position of the Israeli government has been that it does not regard the oPt as formally occupied and therefore does not acknowledge the applicability of the Geneva Conventions, however this position is not accepted by international legal bodies, most notably the International Court of Justice.²¹⁰ Moreover, the status of the oPt as being under belligerent occupation has been acknowledged and discussed numerous times by the Israeli Supreme Court,²¹¹ and by all branches of the Israeli government.²¹² Additionally, the Israeli government has ‘voluntarily’ accepted the application of the ‘humanitarian’ provisions of the convention. Other provisions of IHL, regardless of classification as ‘humanitarian’ (which has never been clarified by Israel), also apply by virtue of the status of the oPt, Israel’s

207 ICC OTP, *Situation in Palestine: Summary of Preliminary Examination Findings*, 20 December 2019, available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf>.

208 S/RES/242(1967) <https://daccess-ods.un.org/tmp/3280898.92864227.html>

209 *Prosecutor v. Naletilić & Martinović*, Judgement, IT-98-34, 31 March 2003, para. 217.

210 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 1, available at <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>. See also: Eyal Benvenisti, *THE INTERNATIONAL LAW OF OCCUPATION* (2012); Aeyal Gross, *THE WRITING ON THE WALL* (2017).

211 See e.g. HCJ, 393/82, *Jamiat Iskan Ilmualimoun alt’awouniya almahdouda almasouliya*, 28 December 1983, available at <https://hamoked.org.il/items/160.pdf>.

212 See Israeli State Ombudsman, *The Activity of Military Courts in the Area of Judea and Samaria*, 6 May 2009 (in Hebrew), available at <https://tinyurl.com/4ft3u7ky>, stating that ‘Israel is holding the area of Judea and Samaria by way of “belligerent occupation”, which stems from the military control in this area. The legal meaning of this condition are, *inter alia*, that Israeli law does not apply in Judea and Samaria, including the enforcement of law and order, for the protection of security and public order.’

accession to the Geneva Conventions, customary international law, and relevant decisions of the HCJ.

102. As such, the contextual element of war crimes in relation to conduct taking place in whole or in part on Palestinian territory – namely the existence of an armed conflict or occupation – is met. All war crimes alleged in this communication took part in the context of or were associated with the armed conflict and Israeli occupation.

Israeli ISA Agents Knowingly Committed Acts of TIDT as War Crimes

103. The Rome Statute and ICC Elements of Crimes define the war crime of torture and break it down into the following elements:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

104. The inclusion of the adjective ‘severe’ clearly indicates that the pain or suffering inflicted needs to be considerable for a finding of torture.²¹³ On the other hand, views that only the most extreme forms of violence can constitute torture have been rejected. Thus, during the drafting of the Convention Against Torture (which forms the basis of the Rome Statute definition of torture), states declined to adopt a proposal by the United States of America to define torture as occurring only when ‘extremely severe pain or suffering, whether mental or physical, is deliberately and

213 See for instance Committee against Torture, *Dragan Dimitrijevic v Serbia and Montenegro*, Communication No. 207/2002, UN Doc. CAT/C/33/D/207/2002 (2004), para. 5.3; *Jovica Dimitrov v Serbia and Montenegro*, Communication No. 171/2000, UN Doc. CAT/C/34/D/171/2000 (2005), para. 7.1. See also: *Salman v Turkey*, Application No. 21986/93, ECtHR judgment of 27 June 2000, paras. 114-115; *Cantoral Benavides case (Peru)*, Series C No. 69, IACtHR judgment of 18 August 2000, paras. 91, 100, 104. Obversely see for instance *Case of Gäfgen v Germany (Application No. 22978/05)*, ECtHR Grand Chamber judgment of 1 June 2010, para. 108.

maliciously inflicted on a person by or with the consent or acquiescence of a public official,²¹⁴ or a proposal by the United Kingdom to replace the word ‘severe’ in the (then draft) definition with ‘extreme.’²¹⁵

105. The pain and suffering threshold for the crime of torture is a question of fact that must be decided on a case-by-case basis. Consistent jurisprudence by national and international criminal courts as well as human rights bodies and experts has established that certain acts are recognised as torture in and of themselves as their application, even on their own, is enough to occasion severe pain or suffering. These include *inter alia* placing victims in excruciating positions,²¹⁶ interrogations under threat to life,²¹⁷ rape and sexual assault,²¹⁸ hitting with canes and sticks,²¹⁹ knocking unconscious,²²⁰ mock executions,²²¹ and psychological abuse.²²²

106. However, more often than not, torture is inflicted through a combination of acts or methods, each one not necessarily inflicting severe pain or suffering either instantly or on its own.²²³ This necessitates an assessment of the combined, or cumulative pain or suffering of the victim to establish their severity. It is noted that, all other things being equal, pain and suffering will increase the longer a pain-inflicting method is applied and the greater the number of such methods used.

214 Commission of Human Rights, 35th session, Summary prepared by the Secretary-General in accordance with Commission resolution 18 (XXXIV), UN Doc. E/CN.4/1314, 19 December 1978, para. 28.

215 Summary Records of the Commission on Human Rights, 35th session, UN Doc. E/CN.4/1314/Add.1, 18 January 1979, para. 1.

216 See for instance *Aksoy v Turkey*, Reports 1996-VI, ECtHR judgment of 18 December 1996, para. 64; Report of visit of the Special Rapporteur on torture to Turkey, UN Doc E/CN.4/1999/61/Add.1, 27 January 1999, para 14; *Aaktaş v Turkey*, (Application No. 24351/94) ECtHR (3rd Sec.) judgment of 24 April 2003, para. 319 (all referring, *inter alia*, to the method of ‘Palestinian handing’, namely the victim’s hands being tied behind the back and the body suspended by the tied hands).

217 ICTR, *The Prosecutor v Akayesu*, Judgement, ICTR-96-4-T, 2 September 1998, para. 682.

218 ICTR, *The Prosecutor v Akayesu*, Judgement, ICTR-96-4-T, 2 September 1998, para. 682 and 597, respectively.

219 ICC-02/04-01/15-1762, *Prosecutor v Ongwen*, Judgment, para. 3028.

220 Ibid.

221 Human Rights Committee, *Muteba v. Zaire*, Communication No. 124/1982, Report of the Human Rights Committee, UN Doc. A/39/40, pp. 182 ff; *Gilboa v. Uruguay*, Communication No. 147/1983, Report of the Human Rights Committee, UN Doc. A/41/40, pp. 128 ff.

222 *Estrella v. Uruguay*, Communication No. 74/1980, Report of the Human Rights Committee, UN Doc. A/38/40, pp. 150 ff.

223 See for instance Human Rights Committee, *Ann Maria Garcia Lanza de Netto v Uruguay*, Communication No. 8/1977 (3 April 1980), UN Doc CCPR/C/OP/1 at 45 (1984), para. 9 (torture combining, *inter alia*, electric shocks, hanging by the hands, immersion of one victim’s head in dirty water and was almost asphyxiated); *Aydın v Turkey*, European Court of Human Rights, Reports 1997-VI, (Application No. 00023178/94), Judgment of 25 September 1997, para. 84 (combining blindfolding, beating and psychological anguish (Ms. Aydın was also raped, which the Court determined would have also constituted torture independently, *ibid.*, para. 86); *Maritza Urrutia v Guatemala*, Series C No. 103, IACtHR judgment of 27 November 2003, paras. 78, 194(2) (the victim was, *inter alia*, held incommunicado for eight days, kept hooded and handcuffed to a bed, subjected to constant light and noise, threats of rape, torture and harm to her family).

107. International human rights bodies, courts, and experts have concluded that ISA interrogation methods and their analogues in other countries constitute torture. As early as 1997, the Committee Against Torture observed:

[ISA interrogation] methods include: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill; and are in the Committee's view breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.²²⁴

108. As documented in this communication, ISA continues to use these methods in the present. Thus, the cumulative use of these methods, applied by public agents of Israel for the purpose of obtaining confessions or other information, amounts to the war crime of torture as defined in the Rome Statute and Elements of Crimes.

109. ISA perpetrators were fully aware of the factual circumstances that established the fact of the occupation and armed conflict, as they conduct their operations in the oPt and in close cooperation with the IDF as the military government of that territory. While Israel has not always accepted this status under international law, its status as such is a basic fact of Israeli life and especially of its security agencies. The instances of torture described above were not all perpetrated during active hostilities, and yet, under the law of occupation, they are associated with an international armed conflict.

110. ISA officers have inflicted severe physical and mental pain and suffering upon multiple people, while in custody and under ISA's control. The pain that resulted from ISA interrogations did not arise from lawful sanctions, nor was it incidental to them. PCATI and FIDH conclude that ISA agents have perpetrated acts of torture and inhuman and degrading treatment under Article 8(2)(a)(ii), 8(2)(a)(iii), and 8(2)(b)(xxi) of the Rome Statute, with each occurring at least in part in the oPt.

Israeli ISA Agents Knowingly Committed Acts of Unlawful Deportation

²²⁴ Report of the Committee against Torture, UN Doc A/52/44 (1997), paras. 256–7. This follows similar conclusions by the Special Rapporteur on torture, see Report of the Special Rapporteur on torture to the Commission on Human Rights, UN Doc E/CN.4/1997/7, 10 January 1997, para. 121.

111. Under the Rome Statute, unlawful deportation or transfers of population are war crimes, in violation of Article 8(2)(a)(vii), 8(2)(b)(viii) of the Rome Statute. Article 8(2)(a)(vii) prohibits ‘Unlawful deportation or transfer or unlawful confinement’. The *Elements of Crimes* break this war crime into the following elements:

1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

112. Article 8(2)(b)(viii), prohibits ‘the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory’. The *Elements of Crimes* break this war crime into the following elements:

1. The perpetrator:
 - (a) Transferred, directly or indirectly, parts of its own population into the territory it occupies; or
 - (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
1. The conduct took place in the context of and was associated with an international armed conflict.
2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

113. The latter provision, which relates to the transfer of groups or populations, is also applicable to this case since the systematic nature of transfers of detainees and prisoners from the oPt to Israel affects thousands of people, all protected persons from occupied territories, each year, for decades.

114. Both provisions establish in international criminal law the general principle that the occupied population must not be forcibly removed from the occupied territory, which is precisely what Israeli policy does. Article 8(b)(viii) of the Rome Statute mirrors Article 49 of the Fourth Geneva Convention, which prohibits forcible transfers of protected persons to a location outside of the occupied territory. Article 49 provides only one exception, which is not applicable here, relating to evacuation for the security of the population or ‘imperative military reasons’. Of

further key relevance is Article 76 of the Fourth Geneva Convention, recognised as closely related to Article 49. It provides that ‘protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.’ Israel’s policy of systematically detaining and imprisoning Palestinians outside of the occupied territory is therefore clearly in breach of International Humanitarian Law. When, additionally, such transfer or deportation is conducted for the purposes of torture outside of the occupied territory, the violations are even more severe.

115. There is no doubt as to the coercive or forceful nature of the transfers – victims are detained, forced into vehicles (often violently) and taken across the border into Israel. There is no element of choice or consent involved. Nowadays, Israel holds almost all Palestinian detainees and prisoners in detention facilities and prisons inside Israeli territories. While this communication focuses on the unlawful deportation of detainees (including administrative detainees) for the purpose of ISA interrogations and TIDT, this practice forms part and parcel of the total scale of this massive forcible transfer.

116. The unlawful deportation of detainees and prisoners from the oPt to Israel have been challenged before the HCJ, where the factual elements of the violations were acknowledged by the state and by the court.²²⁵ The HCJ has allowed these violations of IHL over the years on the following grounds: the Geneva Convention was not considered binding on Israel; Israeli domestic law allowed for these deportations; and, in the opinion of the court, the prolonged nature of the Israeli occupation justified deviations from IHL.²²⁶ None of these reasons provide any protection or justification under international criminal law or under IHL.

117. These HCJ decisions establish the systematic nature and the massive scope of transfer of the population of Palestinian detainees into Israel, as well as the awareness of Israeli authorities of their blatant violations of IHL.²²⁷ According to Israeli emergency legislation issued as early as 1967 and renewed ever since, any

225 HCJ, 253/88 *Sajadiya v. Defense Minister* (1988), PD 42(3), available at https://hamoked.org/files/2014/4060_eng.pdf; HCJ, 2690/09 *Yesh Din v Commander of IDF Forces in the West Bank* (2010), available at https://hamoked.org/files/2010/111511_eng.pdf. The petition in the *Yesh Din* case is available at https://hamoked.org/files/2010/111510_eng.pdf.

226 Ibid.

227 HCJ, 253/88 *Sajadiya v Minister of Defence* 1988 PD 42(3), 801: the HCJ considered the transfer of over 6,000 administrative detainees, in the beginning of the first intifada, into Israel, and their detention at the Ketsiot detention facility, finding that the Geneva Convention was not binding on Israel and that in any case, domestic legislation which allowed such transfers overrules international law and is binding for the court.

detention order or punishment that was issued in the oPt can be executed in Israel.²²⁸

118. While the detention centre in Ketziot was closed following the Oslo Accords, it was reopened in 2002 following the outbreak of the second intifada and is used to this day to contain hundreds of Palestinian administrative detainees.²²⁹ A military court which extends administrative detention orders operates in the same compound.²³⁰

119. In *Yesh Din v Commander of IDF Forces in the West Bank*,²³¹ the HCJ upheld a situation where Palestinian prisoners are routinely and in masses being transferred into Israel for detention, interrogation, and imprisonment:

‘After the withdrawal of IDF forces from the areas currently held by the Palestinian Authority, and the evacuation from detention facilities in those same areas, the number of detainees held in imprisonment facilities located in Israel grew substantially. Currently there is one detention facility – Ofer Camp – within the area, and according to the data elicited during the hearing, there are there 691 detainees, and the remaining Palestinian detainees, 6,594 in number, are held in various installations in Israel, and of them 1,362 are arrested, 1,104 are criminal convicts and 4,168 are security detainees. It will be noted that currently all the facilities in which Palestinians are detained – Ofer, Ketziot, Shikma, Jerusalem, Petach Tikvah, Megiddo and Kishon – are under the responsibility and maintenance of the Prisons Service.’

This passage accurately describes the situation until today, with the exact numbers slightly changing but remaining in similar scale and proportions. In the ruling, the HCJ reaffirmed the decision in *Sajadia*, adding that the prolonged nature of the occupation requires adjustments of IHL rules.

120. As a distinct part of the unlawful deportation policy, the deportations of detainees by ISA and the Israel Defense Forces (IDF) have a specific purpose: to remove Palestinian detainees from the oPt to designated detention facilities in Israel where TIDT takes place. They are thus orchestrated acts of extraordinary rendition. ‘An “extraordinary rendition” typically consists of a complex series of events. After being captured in a certain country, the rendered person is transferred to a detention

228 Emergency Regulations (Judea and Samaria and Gaza District – Adjudication of Offenses and Legal Aid) 5727 – 1967, extended numerous times: Law for Extension of Validity of the Emergency Regulations (Judea and Samaria and Gaza District – Adjudication of Offenses and Legal Aid) 5767 – 2007.

229 HCJ, 5591/02 *Yassin v. Commander of Military Camp Ketsiot* (2002), 408.

230 The HCJ approved the practice of holding military courts hearings inside Israel and in detention facilities (most of them are ISA facilities) in *Wajia v. State of Israel*, *supra* note 104.

231 HCJ, 2690/09 *Yesh Din v. Commander of IDF Forces in the West Bank* (2010).

facility in another country. There he is interrogated, and, in many cases, tortured or subjected to other forms of inhuman treatment.’²³² Or, in the words of another scholar, referring to the handling of suspects of terrorism by the CIA, such renditions are ‘the transfer of presumed terrorists captured and in custody of American officials from a state to another state to be interrogated and allegedly tortured, without observance of international and national norms on extradition, deportation or transit of prisoners.’²³³ This is precisely how ISA and the IDF transfer detainees from the oPt to Israel to be interrogated and tortured.

121. The systematic and organised unlawful deportation facilitates ISA interrogations under the ‘necessity procedure’ which take place in special facilities, located exclusively inside Israel.²³⁴ The transfer of detainees for the purpose of TIDT is premeditated and intentional since interrogation under the ‘necessity procedure’ requires a facility where interrogators and doctors are present, detention cells and interrogation rooms are in close proximity allowing the transfer of detainees from one space to another, interrogation rooms are equipped with instruments such as small chairs, shackles, speakers for music, etc. The transfer of detainees into ISA detention facilities is intended to subject them to harsh interrogations and deprive them of the protections of IHL.

122. Another aspect of the unlawful deportation of detainees for the purpose of TIDT is the practice of approving their further remand detention by military judges who preside over hearings in rooms dedicated to judicial hearings inside the said detention facilities. The remand hearings are performed in Israel and in the detention facilities themselves in order to facilitate more coercive interrogation; transferring detainees back to military courts in the oPt to conduct remand hearings would be time-consuming and would result in the interrogation being temporarily put on hold and the detainee having a break from the violent pressure of interrogators. This practice has also been upheld by the HCJ, which ruled that it is permissible under Israeli law which according to the HCJ overrules international law.²³⁵

123. In addition to violating Article 76 mentioned above, these hearings violate Article 66 of the Fourth Geneva Convention, under which protected persons can

232 See Messineo, *supra* note 13.

233 Michele Nino, *The Abu Omar case in Italy and the effects of CIA extraordinary renditions in Europe on law enforcement and intelligence activities*, 78 REVUE INTERNATIONALE DE DROIT PENAL 113–141 (2007), available at <https://www.cairn.info/revue-internationale-de-droit-penal-2007-1-page-113.htm#:~:text=Extraordinary%20rendition%20is%20the%20surrender,the%20practice%20of%20legal%20rendition.>

234 In Kishon (‘Jalameh’), Petach Tikva, Jerusalem (‘Russian Compound’), Ashkelon (‘Askalan’) and Beer Sheva.

235 HCJ, 6504/95 *Wajia v. State of Israel* *supra* note 104.

only be handed over to the occupying powers' military courts 'on condition that the said courts sit in the occupied territory'. Military courts are used, with the complicity of military judges, to unlawfully keep detainees in custody, outside the oPt, thus enabling and intensifying TIDT. This violation is also pertinent to the denial of fair trial, discussed in the next section.

124. For these reasons, Israeli authorities – knowingly and intentionally – unlawfully deported Palestinian nationals from occupied territory into Israel for the purpose of detention and interrogation under TIDT. Consequently, Israeli authorities are responsible for the war crimes of unlawful deportation or transfers of population under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.

Denial of Fair Trial

125. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial is a war crime under Article 8(2)(a)(vi) of the Rome Statute. The *Elements of Crimes* break this war crime into the following elements:

1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

126. Detainees from the oPt are all protected persons as defined by the Geneva Conventions.²³⁶ The Rome Statute criminalises the denial of fair trial in international armed conflict in and of itself, as a wilful prohibited conduct, which is unrelated to an eventual result. Therefore, it does not require proof of a resulting unfair sentence or execution.²³⁷ It can therefore relate to any stage of criminal trial

236 While some of them may qualify as prisoners of war, the distinction is of no relevance here since both groups are accorded the same status under the Rome Statute, and are also treated similarly by Israel which does not recognise their POW status, see: Smadar Ben-Natan, *Are There Prisoners in this War?*, in THREAT: PALESTINIAN POLITICAL PRISONERS IN ISRAEL 149–162 (Abeer Baker & Anat Matar eds., 2011).

237 Unlike denial of fair trial in a non-international armed conflict under Article 8(2)(c)(iv), which refers to passing sentences or executions.

proceedings or their absence, including to detention without trial or adequate judicial supervision.²³⁸

127. Articles 41, 42, and 78 of the Fourth Geneva Convention regulate internment, which is permissible only where it is absolutely necessary for reasons of security (known in Israel as ‘administrative detention’). Articles 66, 71, 72, and 76 specify the conditions and guarantees of trials in front of military courts. According to Article 147, breaches of these provisions constitute grave breaches and therefore war crimes, as reflected in the Rome Statute. Additionally, Article 75 of the First Additional Protocol to the Geneva Convention describes guarantees against arbitrary detention and unfair trial, specifying that such protections shall be afforded ‘without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria’.²³⁹

128. Detention and TIDT of Palestinians are followed by one of two courses of action: either they are detained administratively – known in IHL as internment – without intention to charge the victim before a court of law, or they are charged in front of a military court. In some cases, a suspect may move between the two courses of action: they may be arrested for investigation and then be held under an administrative detention order; or be detained administratively and then charged in a military court. Both courses are processed by the Israeli military court system in the oPt.²⁴⁰

129. In line with the mandate of PCATI, the present communication is focused on the connection between the denial of fair trial and TIDT, namely: (1) The military courts system in charge of detention and trials does not satisfy the requirements of impartiality, regular trial proceedings, and non-discrimination; (2) Detention proceedings keep the detainees in custody for protracted periods of time, when they can be tortured and ill-treated. Both administrative detention and pre-(military)trial detention proceedings are conducted outside the oPt, and do not afford required

238 Jennifer DePiazza, *Denial of Fair Trial as an International Crime: Precedent for Pleading and Proving it under the Rome Statute*, 15 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 257–490 (2017).

239 While Israel is not a party to the Additional Protocols to the Geneva Conventions, Article 75 is considered as customary international law and should therefore be considered part of the definition of the crimes of denial of fair trial according to the Rome Statute and Elements of Crimes.

240 Lisa Hajjar, *COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA* (2005); Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 395–419 (2007); Sharon Weill, *Reframing the Legality of the Israeli Military Courts in the West Bank*, in *THREAT: PALESTINIAN POLITICAL PRISONERS IN ISRAEL* 136 (Abeer Baker & Anat Matar eds., 2011); Hedi Viterbo, *Military Courts*, in *THE ABC OF THE OPT* 264–276 (Orna Ben-Naftali, Michael Sfard, & Hedi Viterbo eds., 2018).

judicial guarantees; (3) The torture-tainted evidence is produced in detention proceedings and trial, resulting in unfair detention, convictions and sentences.

130. Denial of fair trial is committed by Israeli authorities in systemic ways, as evidenced by the fundamentally unfair system to which detainees are subjected and the legal structures that enforce them.²⁴¹ The abuses of justice in the military detention and trial system, are widespread and affect the entire population of detainees, and a significant proportion of defendants.

(1) The Military Courts System is Discriminatory, Partial, and Irregular

131. The Geneva Convention demands that military courts of an occupying power shall be properly constituted, non-political, sit in the occupied territories (Article 66) conduct a regular trial (Article 71); that accused persons shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence (Article 72), all without adverse distinction or discrimination (Article 75).

132. Military courts ‘may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.’²⁴² Therefore, according to human rights law jurisprudence, they should not, in principle, try civilians.²⁴³ However, a state of occupation is an exception to this rule as the operation of military courts by the occupying power to try civilians is permitted under IHL.²⁴⁴ Due to the inherent problems of impartiality and independence of military courts it is necessary ‘to insure that such trials take place under conditions which genuinely afford the full guarantees stipulated in Article 14 [of the International Covenant on Civil and Political Rights]’.²⁴⁵

133. As repeatedly observed, the Israeli military courts fall short of fair trial guarantees as required by international standards and applied in Israeli civilian courts.²⁴⁶

241 DePiazza, *supra* note 238, describes this type of denial of fair trial as ‘category two’ cases, p. 65.

242 HRC, *General Comment No. 32, Right to Equality Before Courts and Tribunals and to a Fair Trial (Art. 14)*, CCPR/C/CG/32, 23 August 2007 (GC 32).

243 *Id.* The Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 2002 OEA/Ser.L/V/II.116, para 232; Draft Principles (No. 119).

244 HRC, *General Comment No. 31, Nature of General Legal Obligation Imposed on State Parties to the Covenant*, CCPR /C/21/Rev.1/Add 13, 26 May 2004; U.N. Commission on Human Rights, *Draft Principles on the Administration of Justice through Military Tribunals*, E/CN.4/2006/58, 13 January 2006 (Draft Principles), principle 4 – Application of Humanitarian Law.

245 GC 32, *supra* note 242, para 22; Draft Principles, *supra* note 244, Principle 15.

246 B’Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, *The Military Judicial System in the West Bank* (Report) (1989); Amnesty International, *The Military Justice System in the Occupied Territories: Detention, Interrogation and Trial Proceedings* (Report) (1991); Lawyers’ Committee for Human Rights, *Lawyers and the Military Justice System* (Report) (1992); Yesh Din: Volunteers for Human Rights, *Back Yard Proceedings* (Report) (2007); ACRI, ONE RULE,

Military criminal procedure sets harsher maximum punishments, provides fewer procedural guarantees than Israeli civilian procedure (as detailed below, including longer detention periods and denial of access to counsel), and defines offences in extremely broad terms which violate the principle of legality. Additionally, practical violations of defendants' rights abound: essential evidence material (such as ISA memorandums) is not provided in full to defence lawyers and is not translated into Arabic; interrogations are not documented by audio-visual recording, as they would be under Israeli civilian procedure; lawyers often do not have proper meeting rooms to meet with their clients; court decisions and precedents are not translated into Arabic, impeding the ability of Palestinian lawyers to provide adequate defence.²⁴⁷

134. Moreover, and non-coincidentally, the military court system in the West Bank is used by Israel exclusively to detain and prosecute Palestinian protected persons who are residents of the oPt, even though Israeli Jewish citizens are also subject to their *de-jure* jurisdiction as residents of the same territories.²⁴⁸ The Israeli military also operates a separate court martial system to detain and prosecute soldiers but prosecutes Palestinians in a completely separate legal system.

135. The military court system is therefore operated by Israel in a discriminatory manner whereby military courts apply reduced versions of procedural guarantees to Palestinians, as opposed to Jewish Israeli settlers and Israeli soldiers.²⁴⁹ The separation proves the discriminatory intent and that, contrary to the Geneva Conventions, the military courts are political, partial and irregular.

(2) Detention Proceedings Violate IHL Guarantees

136. Article 71 of the Geneva Convention states that protected persons shall be 'brought to trial as rapidly as possible'. Article 72 states that 'accused persons...

TWO LEGAL SYSTEMS: ISRAEL'S REGIME OF LAWS IN THE WEST BANK 5 (2014), available at <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>;

Hajjar, *supra* note 240; Viterbo, *supra* note 240.

247 Yesh Din: Volunteers for Human Rights, BACK YARD PROCEEDINGS (Report) (2007); HCJ, 3326/10 *Palestinian Ministry of Prisoners v. Commander of IDF forces*, *infra* note 251; Smadar Ben-Natan, *The Application of Israeli Law in the Military Courts in the Occupied Territories*, 43 *THEORY AND CRITICISM* 45–74 (2014).

248 Amnon Rubinstein, *Israel and the Territories: The Jurisdiction of the Courts*, 13 *TEL AVIV UNIVERSITY LAW REVIEW* 415 (1989); ACRI, *Id*; Hajjar, *supra* note 239, 58-61; Smadar Ben-Natan, *Citizen-Enemies: Palestinian Citizens and Military Courts in Israel and the Occupied Territories, 1967-2000*, in *THE POLITICS OF INCLUSION AND EXCLUSION IN ISRAELI-PALESTINIAN RELATIONS* (Amal Jamal ed., 2020); Smadar Ben-Natan, *Citizen-Enemies: Military Courts in Israel and the Occupied Palestinian Territories 1967-2000*, (2020); Smadar Ben-Natan, *The Dual Penal Empire: Emergency Powers and Military Courts in Palestine/Israel and Beyond*, 23 *PUNISHMENT & SOCIETY* 741–763 (2021).

249 ACRI, *supra* note 246.

shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence’.

137. Administrative detention proceedings and remand proceedings violate these guarantees in the following ways: (1) detention periods under military law applicable in military courts are extremely long, in order to enable interrogation and TIDT for protracted periods, violating detainees rights to be *brought to trial rapidly*; (2) ISA deprives detainees of their *right to counsel* during interrogations; (3) holding the detainees inside Israel, and holding detention hearings inside Israel, violates the detainees right to a lawyer *of their choice* and impedes them from *meeting freely* with a lawyer, since Palestinian lawyers from the oPt are not allowed to enter Israel and therefore cannot, as a general rule, meet freely and represent detainees inside Israel. Consequently, given that lawyers cannot meet freely with their clients, detainees’ right to *necessary facilities for preparing their defence* (for detention or trial proceedings) is also violated. Lawyers’ visits are also an important safeguard against TIDT, and therefore the inability of freely chosen lawyers to visit their clients removes this safeguard, thus serving the torture enterprise.

138. The period of initial detention before judicial review, and subsequent detention periods in pre-trial detention and administrative detention, are disproportionately long. Detention lasts up to eight days before the first judicial review, 15 days between remand hearings, and up to 75 days before indictment, all according the Security Provisions Order (SPO).²⁵⁰ The long detention periods were challenged before the HCJ by the Palestinian Ministry of Prisoners and once again, the HCJ upheld these long detention periods for security offences.²⁵¹ While the petition was pending and under the pressure of the court, the military shortened some detention periods for offences which were not security offences, but left detention periods for security offences unchanged. The cases discussed in this communication, and typically all cases of TIDT, are cases of suspected security offences and are therefore subject to the longer detention periods. The detention periods in the military law of the West Bank (both before and after the partial reduction) compared to Israeli criminal procedure are summarised in the following table which appears in page 24 of the decision:

250 Order Regarding Security Provisions (Consolidated Version) (Judea and Samaria) (No. 1651) – 2009, 234 CPOA 5902 (‘SPO’, ‘*tsav bidvar hora’ot bitachon*’); Order Regarding Administrative Detentions (Temporary Provision) [Consolidated Version] No. 1591-2007.

251 H CJ, 3326/10 *Palestinian Ministry of Prisoners v. Commander of IDF forces* (6.4.2014), available at

<https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ministry%20of%20Palestinian%20Prisoners%20v.%20Minister%20of%20Defense.pdf>.

	Initial detention until being brought before a judge	Detention before indictment	Detention until end of proceedings	'Bridge Detention' for purpose of filing an indictment
In the Region Offences that are not security offences	48-96 hours	20-75 days	A year + extensions of up to six months each.	Eight days
In Israel - Offences that are not security offences	24-48 hours	15-30 days	Nine months + extensions of up to three months each.	Five days
In the Region Security offences	96 hours – 8 days	20-75 days	18 months + extensions of up to six months each.	Eight days
In Israel – Security offences	24-96 hours	20-35 days	Nine months + extensions of up to three months each.	Five days
Minors in the Region – 12-14 years old	24-48 hours	15-40 days Security offences: 20-75 days	A year	Eight days
Minors in the Region – 14-16 years old	48-96 hours	Offences that are not security offences: 15-40 days Security offences: 20-75 days	A year	Eight days
Minors in the Region – 16-18 years old	Like adults: 48-96 days	Offences that are not security offences: 15-40 days Security offences: 20-75 days	A year	Eight days
Minors in Israel – 12-14 years	12-24 hours	20-40 days	Will not be arrested until the end of	Five days

old			proceedings	
Minors in Israel – 14-18 years old	24-48 hours	20-40 days	Six months + extensions of up to 45 days	Five days

139. Long detention periods, as well as administrative detention orders, reduce judicial scrutiny and defence rights in criminal proceedings. The use of long detention periods against Palestinians in suspected terrorist cases demonstrates a state policy of making it easier to torture detainees, and implies a specific intent to commit torture in those cases.

140. In ISA interrogations, detainees are denied access to lawyers during the periods of interrogation, and are held in incommunicado detention that impedes their ability to withstand the violent treatment. Restrictions on meeting counsel are legalised by the SPO, which authorises the ISA officer responsible for the interrogation to issue an order denying meetings with counsel.²⁵²

(3) Torture-tainted Confessions Used in Detention and Trial Proceedings

141. Administrative detention and remand proceedings, either during or after interrogation, and trial proceedings, may rely on detainees' confessions obtained through TIDT, as discussed in this communication.²⁵³

142. Military law provides, in principle, a procedure to challenge torture-tainted confessions ('a trial within a trial'); it does not provide any such mechanisms for witness' incriminating testimonies. In practice, however, and just as the Landau Commission documented decades ago, the testimonies of ISA agents deny torture, or the military court accepts the arguments of the military prosecution that the TIDT of the detainee was lawfully based on the 'necessity procedure'. Of all the hundreds of cases that have been dealt with and reviewed, PCATI is aware of only a single case where a torture-obtained confessions were declared inadmissible by a military court, in the case of *Ayman Hamida*.²⁵⁴ The single case is the exception which proves the rule that arguments of inadmissibility due to torture are routinely denied, and it speaks volume when compared to the hundreds of complaints of TIDT submitted by PCATI alone.

252 See para. 85 above, Victims No. 1, 7, 13, 14, 11, 17.

253 Hajjar, *supra* note 240, 68-75.

254 Judea Military Court, Case No. 5382/09 *Military Prosecutor v. Ayman Hamida* (30.11.2011). A request by PCATI to open a criminal investigation against the interrogators in the case (letters dated 16.2.2012, 10.2.2013) was denied.

143. The admission of torture-tainted evidence as evidence supporting administrative detention, remand, or convictions, results in unfair detention and sentences.

144. Consequently, in subjecting Palestinians to inherently discriminatory legal processes, systematically violating their procedural rights and relying on torture-tainted evidence, Israeli authorities have wilfully deprived Palestinian prisoners of the rights of fair and regular trial, which amounts to a war crime under Article 8(2)(a)(vi) of the Rome Statute.

Part V: Jurisdiction

145. For conduct to fall within the jurisdiction of the Court, it must: (1) fall within the category of crimes set out in Article 5 and defined in Articles 6 to 8 *bis* of the Rome Statute (jurisdiction *ratione materiae*); (2) fulfil the temporal conditions specified in Article 11 of the Statute (jurisdiction *ratione temporis*); and (3) meet the territorial or personal requirements in Article 12(2) of the Statute (jurisdiction *ratione loci* or *ratione personae*).

As discussed in Part IV above, the jurisdiction *ratione materiae* is met as the alleged conduct amounts to war crimes of TIDT, unlawful deportation and denial of fair trial.

The jurisdiction *ratione temporis* in this case is determined not only by the entry into force of the Rome Statute but also by Palestine's acceptance of ICC jurisdiction from 13 June 2014 onwards. Although the crimes alleged here have been committed since the onset of the 1967 occupation, this communication is limited to acts committed after 13 June 2014, as detailed in Part III above, in order to satisfy the temporal jurisdiction requirements.

146. The jurisdiction *ratione loci* of this investigation is limited to the territories of the State of Palestine, since only Palestine is a party to the Rome Statute while Israel is not. The crimes alleged here were committed by agents of Israeli authorities against Palestinian victims at least in part on Palestinian territory. Specifically, the alleged crimes fall within the jurisdiction *ratione loci*, for the following reasons:

- (i) Material *actus reus* elements of the crimes of TIDT took place at least in part within the territory of Palestine.
- (ii) In the context of this case, the unlawful deportation of victims from territory under ICC jurisdiction to a black hole of international accountability is done in order to facilitate the continued perpetration of the crimes with impunity.²⁵⁵ The deportation should therefore be seen as an integral part of TIDT and denial of fair trial, bringing the entire conduct within the Court's jurisdiction.

²⁵⁵ Israel also systematically transfers the vast majority of Palestinian prisoners and detainees from the oPt to Israel for the purpose of imprisoning them, as documented and acknowledged in HCJ, 2690/09 *Yesh Din v. Commander of the IDF Forces in the West Bank* (28.3.2010). This systematic displacement is also a crime within the jurisdiction of the court; however, it falls beyond PCATI's mandate which focuses on TIDT.

- (iii) As recognised by ICC judges,²⁵⁶ the war crime deportation is an inherently ‘trans-border’ crime – where, by definition, at least part of the *actus reus* takes place on the territory of the oPt.

Material Actus Reus Elements of TIDT are Perpetrated, in Part of in Full, in the Territory of Palestine

147. As described in the factual arguments, arrests and detention in the oPt involving inhuman and degrading treatment – including systematic beatings, threats to detainees and family members, humiliation of detainees and family members, blindfolding for long hours and uncomfortable or stress positions – amount to TIDT. Further, the brutal arrests and transfers of victims mark the beginning of an ordeal that cumulatively amounts to torture and other forms of inhuman and degrading treatment. The violence and threats during arrests and transfers serve to instil a sense of fear, powerlessness and subordination and signal the violence that awaits the detainees, with the aim of breaking them down as part of the process of interrogations under torture.

148. In some cases, detainees are taken back and forth between Palestine and Israel in a sequence of events designed to break down their spirit and humanity. In at least one case, a detainee was deported from Palestine for the purpose of interrogation, then brought back to a facility in Palestine for a particular kind of cruel treatment that was available there, and then deported again.²⁵⁷

149. Following an indeterminate time in what can only be described as a living hell, detainees are released back into the oPt, and are forced to carry their physical and mental injuries, which ripple out to their families and wider communities. Thus, the victims’ ordeal forms a seamless chain of events which must be seen as a single criminal episode, in which material elements of crimes take place in the oPt.

The Unlawful Deportation Facilitates Subsequent Crimes, Determining Jurisdiction

150. The conduct of the arrest in the oPt and transfer to Israel enable the subsequent TIDT and denial of fair trial.

256 ICC-01/19, Pre-trial Chamber III, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, 14 November 2019, available at <https://tinyurl.com/mtk2mpwx>.
257 Victim No. 14.

151. In terms of the organisational and physical conditions, interrogation under the ‘necessity procedure’ requires that it takes place in ISA facilities, which are located in Israel, where there are enough interrogators; additional personnel including superiors responsible for the interrogation, and doctors that are part of the procedural routine are present; detention cells and interrogation rooms are in close proximity allowing the transfer of detainees from one space to another, where interrogation rooms are equipped with instruments. The transfer of detainees into ISA detention facilities is therefore an integral and essential component of the torture process, as a *sine que non*.
152. Accordingly, in all of the cases where the ‘necessity procedure’ was employed, victims were transferred to one of these facilities. It is far from coincidental that detainees are systematically transferred into Israel as part of the interrogation process, because the transfer creates the conditions that are necessary to commit torture in the form institutionalised by the ISA.
153. Similarly, the transfer enables the victims’ removal from regular civilian judicial oversight and other protections of the rule of law facilitating flagrant denials of fair trial rights and other abuses, including TIDT. Notably, the transfers cut victims off from their legal representatives and therefore hamper lawyers’ oversight over the interrogation and remove other basic procedural guarantees that would have been available if they were not forcibly removed to Israel.
154. As a matter of ICC policy, the intentional and illegal transfer of detainees and prisoners to a location outside the jurisdiction of the Court, by the perpetrators of crimes, their organisation, or their state, should not have the intended effect of excluding crimes from the Court’s jurisdiction. Such a result would enable perpetrators of war crimes to escape criminal liability for grave crimes by simply transferring the victims - and the location of the crimes - from occupied territory or other area of armed conflict to a location outside the jurisdiction of the Court. If individuals are arrested in occupied territory within the jurisdiction of the Court, IHL demands that they remain in the occupied territory. Therefore, if they remain within exclusive control of the occupying power for the entire duration of the crime while being transferred to an area outside of the Court’s jurisdiction, the transfer should be seen as an integral part of the alleged crimes and should not have the legal effect of removing the act from the Courts’ jurisdiction.

155. This situation is analogous to that decided by the U.S. Supreme Court in *Boumediene v. Bush*.²⁵⁸ The U.S. government intentionally transferred civilian detainees to its military base at Guantanamo Bay, Cuba, in order to exclude them from the jurisdiction of U.S. courts. Referring to the suspension of the writ of Habeas Corpus in relation to Guantanamo detainees by placing them outside the formal sovereign territory of the U.S. (but under its complete control and de-facto jurisdiction), the court stated:²⁵⁹

‘The test for determining the scope of this provision [Habeas Corpus suspension clause] must not be subject to manipulation by those whose power it is designed to restrain.’

156. Drawing further on the rendition argument discussed above, the removal of persons from the oPt to designated torture facilities in Israel is an integral element of the crime of torture, regardless of the geographical area where the victim’s pain and suffering is determined to have reached the requisite threshold of severity.²⁶⁰

Unlawful Deportation of Population as War Crime Establishes the Court’s Jurisdiction

157. As set forth in ICC jurisprudence on the situation in Bangladesh/Myanmar, the war crime of deportation is an inherently ‘trans-border’ crime, meaning that, by definition, at least part of the *actus reus* takes place on the territory of the oPt.²⁶¹ According to PTC-III: ‘It would be wrong to conclude that States intended to limit the Court’s territorial jurisdiction to crimes occurring exclusively in the territory of one or more States Parties’.²⁶² In the same way, it would be wrong to conclude that the Court’s jurisdiction in the Situation in Palestine is limited to crimes occurring *exclusively* in Palestine.

258 U.S. Supreme Court, *Boumediene v. Bush* (Nos. 06-1195 and 06-1196) 476 F. 3d 981, 12 June 2008 available at <https://www.law.cornell.edu/supct/html/06-1195.ZS.html>. See also Messineo, *supra* note 13, at 1035.

259 *Id.*, part IV B (page 36), available at <https://www.law.cornell.edu/supct/pdf/06-1195P.ZO>.

260 See Messineo, *supra* note 13, at 1035: ‘[T]he conduct that is the object of the indictment (abducting Abu Omar) is precisely that which would constitute “complicity in torture” on the part of those who are accused thereof. By eschewing the indictment for *concorso* in any of the Convention-implementing crimes, Italian prosecutors are addressing only one element of a complex series of events leading to the torture of Abu Omar. In a sense, it is as if Italy was seeking the trial of someone for stealing the keys of a car, but not for stealing the car itself.’

261 ICC-01/19, Pre-trial Chamber III, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, 14 November 2019, available at <https://tinyurl.com/mtk2mpwx>.

262 *Id.*, para. 59.

158. All the victims in the cases referred to in this communication are residents of the oPt and are thus part of the population of occupied territory; they are deported from the oPt to Israel; the transfer is committed while they are under arrest and hence it is unlawful since it constitutes a grave violation of International Humanitarian Law, as specified in Articles 49 and 76 of the Fourth Geneva Convention.²⁶³

Jurisdiction – Conclusion

159. For all of the above-stated reasons, the war crimes of TIDT, unlawful deportation and denial of fair trial fall within the jurisdiction of the ICC. The Court must not deny justice to victims because the perpetrator has the means and sophistication to inflict parts of the crimes against them on territory that escapes international legal scrutiny. All three categories of war crimes – in the context of the cases presented in this communication – should be regarded as unbroken chains of events that begin in oPt, continue in Israel, and often end in oPt. Consequently, all crimes alleged in this communication meet the Court’s jurisdictional criteria.

Part VI: Admissibility

Gravity

160. The conduct described in this communication is of sufficient gravity, as per Articles 17(1)(d) and 53(1)(c) of the Rome Statute, to justify the Court’s intervention in this matter. The nature and scale of the crimes at issue are of such severity, in both quantitative and qualitative terms, that they urgently require deterrent action by the Court.

161. The OTP has summarised the criteria for gravity as ‘relating to the scale, nature, manner of commission and impact of the crimes’.²⁶⁴

263 Article 49, titled *Deportations, Transfers, Evacuations*, states: ‘Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.’ Article 76, titled *Treatment of Detainees*, states: ‘Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.’

264 ICC OTP, POLICY PAPER ON CASE SELECTION AND PRIORITISATION 32 (15 September 2016). See also ICC OTP, POLICY PAPER ON PRELIMINARY EXAMINATIONS 59-66 (November 2013), https://www.legal-tools.org/uploads/tx_ltpdb/OTP - Policy Paper Preliminary Examinations 2013-2.pdf; Pre-trial Chamber I, ICC-01/15, Decision on the Prosecutor’s request for authorization of an investigation, 51 (27 January 2016), https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF.

Scale

162. PCATI does not know the total number of victims of torture, but it has over the years received thousands of complaints. While this complaint is based on 17 selected particularly egregious cases within the Court's jurisdiction *rationae temporis*, it is likely that there are many other victims who have not lodged their complaint with PCATI, or have not lodged complaints at all.

Nature

163. Importantly for the present case, the Court and the OTP have found high-level systematic planning to be a factor in gravity analysis.²⁶⁵ The ISA interrogators' conduct, amounting to torture, was committed systematically against a civilian population, as part of 'a pattern or methodical plan'.²⁶⁶ Such a pattern and methodical plan has historically been solidified by the Rubinstein memorandum. As described above, that memorandum – applied from 1999 to the present – created a pattern and method of torture with pre-approval from high-ranking officials.

Within the temporal scope of the present investigation, re-emergence of the pattern according to a methodical plan appears clearly in the victims' testimony. The pattern even has a name and is referred to as 'military interrogation'. As detailed above, the pattern and plan do not only refer to the bureaucratised nature of torture. The pattern reappears in the very acts of violence, their repetitive and cyclical application. It is not by chance that the testimonies received by PCATI all invoke similar methods of torture. They are applied upon detainees by protocol.

As the Court has explained, the term 'systematic' refers to 'the organised nature of the acts of violence and the improbability of their random occurrence.'²⁶⁷ Accordingly, ISA torture is clearly not random, a fact that is reflected by the role of doctors in pre-torture examination; and recognised by military judges who have apparently asked for torture approvals.

The granting of approval for torture in ostensible conditions of 'necessity' is orchestrated at the highest levels of government, often with the direct involvement of the Head of the ISA or the Prime Minister. It is carefully considered and involves bureaucratisation and legal advice. All these clearly indicate the systematic nature of perpetration.

265 ICC OTP, POLICY PAPER ON CASE SELECTION AND PRIORITISATION 40 (Sept. 15, 2016).

266 *Tadić*, TJ646 and 648

267 *Kordić AC*, 94; *Blaškić AC*, 101; *Situation in Kenya (Authorisation Decision)*, 96; *Gbagbo (Confirmation Decision)*, 223.

With regard to the situation in Palestine, the OTP has already decided to investigate alleged crimes, among them crimes that are of equal or lower gravity compared to the crimes described in Part III. The number of instances described in this communication, and especially their systematic nature, indicate that they reach the threshold of gravity within this situation. The facts point to the systematic violations of *jus cogens* described in this communication. The Prosecutor should consider gravity ‘against the backdrop of the likely set of cases or “potential cases”, that would rise from investigating the situation’,²⁶⁸ evaluating a) the qualitative and quantitative elements of the alleged crimes; and b) those who bear the greatest responsibility for the crimes alleged.²⁶⁹

As a flexible test,²⁷⁰ gravity analysis should not be ‘overly restrictive’ and ‘hamper the deterrent role of the Court’,²⁷¹ but should prevent the court from adjudicating ‘peripheral cases’²⁷² and ‘insignificant’²⁷³ crimes. The crimes described in this communication are neither peripheral nor insignificant. Indeed, the infrastructure for torture interrogations has been a central aspect of an indeterminate occupation that Israel has imposed upon the Palestinian people, in violation of their right to self-determination, recognised under international law.

Manner of Commission

164. By torturing them, ISA interrogators, as well as those in charge of them, severely deprived the victims of their fundamental rights. Further, the victims of ISA acts of torture were targeted by reason of their identity as members of the Palestinian people residing in the oPt, not holding Israeli citizenship. Such targeting was based

268 Pre-trial Chamber II, ICC-01/09, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 58 (31 March 2010), https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF.

269 Pre-trial Chamber II, ICC-01/09, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 56-58 (31 March 2010), https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF.

270 See, e.g., *Prosecutor v. Abu Garda*, ICC-02/05-02/09, *Decision on the Confirmation of Charges*, 28-34 (8 February 2010), https://www.icc-cpi.int/CourtRecords/CR2010_00753.PDF; Pre-trial Chamber II, ICC-01/09, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 55-62 (31 March 2010), https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF.

271 Appeals Chamber, ICC-01/04, *Decision on the Prosecutor’s Application for Warrants of Arrest*, Article 58, 69-79 (13 July 2006), https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF.

272 Pre-trial Chamber II, ICC-01/09, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 56 (31 March 2010), https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF.

273 Appeals Chamber, ICC-01/04, *Decision on the Prosecutor’s Application for Warrants of Arrest*, Article 58, 40 (13 July 2006), https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF (Judge Pikis, partly dissenting).

on political, racial, national, ethnic or religious grounds, amounting to a form of persecution, which once again highlights their gravity.

For the analysis of their manner of commission, it is particularly important to note that the crimes addressed in this communication are committed in reliance on *de jure* discrimination against Palestinians within the territory of Palestine. As the Association for Civil Rights in Israel (ACRI) stated in 2014, ‘One of the most prominent and disturbing characteristics of Israeli military rule in the West Bank is the creation and development of an official and institutionalised legal regime of two separate legal systems, on an ethnic-national basis.’²⁷⁴ The system of torture described in this communication rests on this *de-jure* distinction. ACRI’s conclusions should thus be considered by the OTP as a significant aggravating factor in the gravity analysis applicable to this communication. These conclusions speak volumes:²⁷⁵

‘...[C]riminal law is an area in which the discrepancies between the two legal systems in the West Bank are highly apparent, and their implications on basic rights, and the right to liberty in particular, are the most significant. The national identity of the suspect or defendant determines which law will apply to them and who will have legal authority over them. In every stage of the procedure – starting with the initial arrest, through the indictment and ending with the sentence – Palestinians are discriminated against compared to Israelis. This holds true for both adults and minors.’

Impact of the crimes

165. As explained above, the crimes described in this communication have had egregious effects on individuals, harming both physical and mental health, by way of extreme trauma. Further, the OTP should not ignore the effects the crimes have had on Palestinian families and communities. The regime of torture and inhuman and degrading treatment imposed on Palestinians in the oPt is a fundamental part of the negation of the Palestinian right to self-determination, which the Court has found to be a basis for its jurisdiction.²⁷⁶

Complementarity

166. The ICC is a residual mechanism, a court of last resort, complementary to national jurisdictions,²⁷⁷ which only operates when domestic courts have not responded, or

²⁷⁴ ACRI, *supra* note 246.

²⁷⁵ *Id.*, 75.

²⁷⁶ See Pre-Trial Chamber I, *supra* note **;Error! Marcador no definido.**, at paras. 122-123.

²⁷⁷ See Rome Statute, Preamble para. 10 (‘...[T]he International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.’).

have not responded genuinely, to crimes by way of investigating, prosecuting or trying alleged perpetrators. This is so in the instant case.

167. Articles 53(1)(b) and 17(1)(a-c) of the Rome Statute set out the principle of complementarity. As a court of last resort, the ICC works in tandem with states, only investigating criminal claims when states with primary jurisdiction are unwilling or unable to genuinely do so. The assessment is ‘case-specific’ and determines whether potential case(s) related to the situation are being investigated or prosecuted by states. At the level of preliminary examination this necessarily concerns *potential* cases.²⁷⁸

168. Article 17’s test also applies to the preliminary examination level. A case is ‘inadmissible’ in front of the Court when: a) ‘the case is being investigated or prosecuted by the state which has jurisdiction over it’;²⁷⁹ b) ‘the case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned’;²⁸⁰ and c) the person concerned has ‘already been tried for conduct which is the subject of the complaint’.²⁸¹ Each of these inadmissibility standards, however, has exceptions. For (a) and (b), the ICC may intervene when ‘the state is unwilling or unable to genuinely carry out the investigation,’²⁸² or ‘the decision resulted’²⁸³ from this inability or unwillingness. And the ICC may intervene under (c) if the earlier proceedings were ‘for the purpose of shielding the person concerned from criminal responsibility,’ or were not ‘conducted independently or impartially in accordance with the norms of due process recognised by international law’ and ‘inconsistent with an intent to bring the person concerned to justice’.²⁸⁴

169. As described throughout this communication, the Israeli judicial system provides absolute impunity to ISA interrogators and other state officials from accountability for TIDT, despite multiple cases arguing and pursuing such accountability. In only one case (in 1991) have ISA interrogators been charged and convicted for their role in torture, after killing a Palestinian detainee from Gaza. Since 1994, not a single case in Israeli history has upheld criminal charges against ISA interrogators, even when detainees suffered physical and mental disabilities following their interrogations.²⁸⁵ The most extreme case is perhaps that of the detainee named Abd

278 ICC OTP, POLICY PAPER ON CASE SELECTION AND PRIORITISATION 46 (Nov. 2013).

279 *Rome Statute*, Art. 17(1)(a).

280 *Rome Statute*, Art. 17(1)(b).

281 *Rome Statute*, Art. 17(1)(c).

282 *Rome Statute*, Art. 17(1)(a).

283 *Rome Statute*, Art. 17(1)(b).

284 *Rome Statute* Art. 20(3).

285 Hajjar, *supra* note 240, 73; PCATI, Flawed Defense, Torture and Ill-Treatment in GSS Interrogations Following the Supreme Court Ruling, 6 September 1999 - 6 September 2001 (2001), p. 24.

al Samed Harizat, who died of torture by shaking in the 1990s. The probe into that case blamed the death on Harizat's increased vulnerability and cleared the interrogators from criminal liability. In a 2002 decision, after the 1999 *Public Committee* decision appeared to prohibit torture, the HCJ upheld the Attorney General's decision not to press charges against the interrogators that caused Harizat's death or their commanders.²⁸⁶ Another, more recent, example is that of Samer Arbeed, described above, in which the Attorney General decided in 2021 to close the investigation file without indictments, despite the fact that Arbeed was hospitalised in critical condition three days after his arrest and interrogation by ISA.

170. As stated above, over 1,300 complaints of torture by Israeli authorities have been filed with Israel's Justice Ministry, since the establishment of the IIC, between 2001 (following the 1999 court decision) and June 2021. These have resulted in the opening of two criminal investigations and no prosecutions. PCATI has received answers from the Israeli Ministry of Justice, following complaints it has submitted in the names of former detainees. The Israeli Ministry of Justice has almost invariably used these answers to deny the allegations of torture. However, the Ministry of Justice has indicated on multiple occasions that ISA interrogators do in fact employ 'necessity interrogations'.²⁸⁷ Furthermore, Israel has not adopted legislation prohibiting torture, despite numerous promises to do so in UN treaty review procedures.

171. The systematic lack of accountability resulting from the conduct of the state organs tasked with probing and investigating allegations of torture has also been recognised by international human rights mechanisms. As mentioned above, in its recent concluding observations on Israel, the UN Human Rights Committee expressed its 'deep concern' about reports of:

'...widespread and systematic practice of torture and ill-treatment by the Israeli Prison Service guards and the Israeli Security Forces against Palestinians, including children, at the time of arrest and in detention. It is particularly concerned about the use of physical and psychological violence, sleep deprivation, stress positions and prolonged solitary confinement, including against children and detainees with mental or psychosocial disabilities. It also notes with concern a very low rate of criminal investigations, prosecutions and convictions concerning allegations of torture and ill-treatment (arts. 7, 9, 10 and 24).'²⁸⁸

286 HCJ, 2150/96 *Harizat v. The Attorney General* (26.3.2002) (unpublished, on file with the authors); *id.*

287 Victim No. 8

288 *Supra* note 48, Article 30.

The Committee went on to recommend that Israel –

‘...should ensure that all allegations of torture and ill-treatment are promptly, impartially, thoroughly and effectively investigated, that perpetrators are prosecuted and, if found guilty, are punished with sanctions commensurate with the severity of the crime, and that victims are provided with full reparation, including rehabilitation and adequate compensation.’²⁸⁹

172. Not only has the Ministry of Justice denied accountability for torture, the HCJ has also issued dozens of decisions denying petitions for accountability. In rulings on petitions filed by PCATI regarding cases of torture and ill-treatment in ‘necessity procedure’ interrogations, decided since June 2014, the HCJ has, for the first time, directly upheld the legality of the ISA guidelines regarding the ‘necessity procedure’. While these legal challenges refer to instances of torture that took place prior to the ICC’s jurisdiction with regard to the Situation in Palestine, they are nevertheless crucial for establishing the factual basis for the admissibility requirement in this communication. The reasoning of the HCJ shows that even when it comes to its highest court, Israel is unwilling to prosecute and hold perpetrators of torture accountable.

173. In the *Abu Ghosh* case (2017), the HCJ stated ambiguously:

‘Even assuming that internal ISA guidelines do exist [...] and even if the interrogators acted in compliance with such guidelines, the application of the [necessity] defense was impeccable.’²⁹⁰

174. In this case, the HCJ eased the immediacy requirement of ‘necessity’, and rejected the claim that Abu Gosh was tortured. Abu-Gosh alleged that he had been subjected to physical violence including beating and slamming against the wall; prolonged high shackling applying extreme pressure to the arms; painful stress positions including ‘frog squat’ and ‘banana position’; sleep deprivation; and psychological abuse, including threats and misrepresentations concerning his family. He argued that those measures cumulatively amounted to torture. This claim was supported by an expert opinion by prominent international experts on the law of torture – the late Professor Sir Nigel Rodley, Professor Peter Burns, Professor Malcolm Evans and Professor Manfred Nowak – which unanimously supported *Abu Ghosh*’s claim that he was tortured, stating that the measures amounted to the severity required

289 *Id*, Article 31.

290 H CJ, 5722/12 *Abu Ghosh v. The Attorney General* (published in Nevo 12.12.2017), p. 34. For a review of the case see: <https://www.lawfareblog.com/pressure-techniques-and-oversight-shin-bet-interrogations-abu-gosh-v-attorney-general>.

for torture, and that such severity is relative to the situation.²⁹¹ The expert opinion was rejected due to its factual basis and the HCJ's rejection of Abu-Gosh's allegations.

175. On the immediacy requirement of 'necessity', the court expanded the scope of cases where torture would have official 'authorisation':

'It should be made clear that even if the petitioner's interrogators were not convinced, at the time, that the petitioner possessed information about the particular explosive vest that was smuggled into Israel, they would have been allowed to apply the exceptional interrogation methods.'

176. The *Tbeish* decision (2018) was the first to both openly acknowledge the existence of the ISA guidelines on the initiation, authorisation, and means in 'necessity' interrogations and to uphold them.²⁹² Although the decision in *Public Committee* has already been eroded *de facto*, partially due to its own weaknesses, the *Tbeish* case introduces a *de jure* change that marks a new age of legal authorisation for torture and ill-treatment.²⁹³ Responding to allegations about the unlawfulness of a 'necessity procedure' interrogation that amounted to torture and of the ISA guidelines more generally, the state admitted that due to the prospect of future danger, Tbeish was interrogated using 'special means of interrogation'. However, the state argued that the 'special means' did not constitute torture, and that in light of the future risks, his interrogation was reasonable and proportionate. For the first time, government representatives explicitly admitted the existence of the ISA guidelines and submitted them for review by the Court *ex parte*. The court affirmed the legality of the *necessity procedure* laid down by the ISA, stating:

[T]he Guidelines detail the system of consultation in a specific case for all those involved therein; the limitations upon discretion in deciding upon adopting special means in specific circumstances; and the required manner for memorializing [documenting] such interrogations.

As opposed to the Petitioners' claims, I find no flaw in establishing clear rules as to the manner of consulting within the ISA prior to reaching a decision upon adopting 'special means' in a particular interrogation [...].²⁹⁴

291 Sir Nigel Rodley, Peter Burns and Malcolm Evans, *Expert Opinion on the Interrogation of Mr. As'ad Abu Ghosh, in the case of HCJ 5722/12 As'ad Abu Ghosh et al. v the Attorney General et al.* (on file with PCATI).

292 HCJ, 9018/17 *Tbeish v. The Attorney General* (published in Nevo 26.11.2018). English Translation available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Tbeish%20v.%20Attorney%20General.pdf>.

293 For further analysis see Ben-Natan, *supra* note 8.

294 *Tbeish*, *supra* note 292.

177. Regarding the necessity requirement the court ruled:

[T]he requirement [of necessity] is met even when the danger may be realized days or even weeks after the interrogation. [...] Even if the exact date for actually realizing the terrorist plan was unknown at the time of the interrogation, the intention of the Petitioner and his accomplices to perpetrate terrorist acts by means of that collection of hidden arms suffices to meet the immediacy requirement and to justify the use of ‘special means’ in the framework of the interrogation.²⁹⁵

178. These passages make clear, first, that the ISA has adopted guidelines that establish *ex-ante* decision rules:²⁹⁶ the procedure by which interrogators make such a decision prior to using these means, on a case by case basis. A decision to employ the ‘necessity procedure’ is made following consultations between several office holders (interrogators and their superiors), and the guidelines seem to set out factors to be considered (‘limitations upon discretion’). The systematic application of such means is evident not only indirectly, from the patterns in the individual cases, but also directly, from the existence and application of the guidelines.

179. Even more importantly, these passages evidence the existence of a state policy to accept torture during terrorism interrogations, and the courts’ unwillingness and inability to hold perpetrators to account.

Part VII: Interests of Justice

180. Under Article 53 of the Rome Statute, the interests of justice test is ‘a potential countervailing consideration that might produce a reason not to proceed’ even when jurisdiction and admissibility are satisfied.²⁹⁷ As the OTP has explained, ‘only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice.’²⁹⁸ With regard to the Situation in Palestine, the OTP has already found that ‘[t]here are no substantial reasons to believe that an investigation would not serve the interests of justice’.²⁹⁹ The question of the interests of justice relevant to this communication is therefore limited: would it be in the interests of justice not to investigate the

²⁹⁵ *Id.*

²⁹⁶ Meir Dan-Cohen, *Decision Rules and Conduct Rules: an Acoustic Separation in Criminal Law*, 97 HARVARD LAW REVIEW 625–677 (1984).

²⁹⁷ ICC OTP, POLICY PAPER ON THE INTERESTS OF JUSTICE 2 (September 2007), available at <https://tinyurl.com/ycx7uv9w>.

²⁹⁸ *Id.*, 3.

²⁹⁹ ICC-01/18-12, 22 January 2020, para. 2, available at <https://legal-tools.org/doc/clur6w>. See also Pre-trial Chamber I, *supra* note **Error! Marcador no definido.**, para. 64.

crimes specified in this communication *in particular*. The answer to that question is no.

181. To the contrary, investigating crimes of torture and related crimes in the Situation in Palestine is an imperative of justice for the victims of torture, and for all the residents of Palestine and Israel in general. Severing these crimes from the other allegations related to the Situation in Palestine would result in an unfair and to some extent even arbitrary investigation, in which some victims are recognised as such by the Court and by the international community, and others are ignored and silenced.
182. In paragraph six of the Preamble to the Rome Statute, the States Parties recognise that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. As emphasised above, PCATI has tried, time and time again, to ensure that Israel fulfils this duty, by appealing to Israeli authorities and Israel’s own domestic courts. The authorities’ failure to ensure that Israel respects its international obligations and exercises criminal jurisdiction is not only evidence that Israel is unwilling to do so, under the rules of admissibility. The failure to prevent torture and exercise criminal jurisdiction over torturers and their aids demonstrates that it is in the interests of justice that the ICC ensures their criminal accountability.
183. Expanding the investigation in the Situation in Palestine into issues of torture and violent interrogation, including deportations designed to facilitate torture, may contribute to achieving lasting respect for international law and criminal justice. An investigation, and potentially a trial, would send a deterrent message to Israeli authorities. When it wants to pursue criminal justice, the Israeli justice system is fully capable of investigations. What prosecutorial authorities, as well as Israeli courts, are currently lacking, is the will to do so and the knowledge that if they do not fulfil their own duties, they will be held accountable before the international community. The Court may thus have a key role in triggering the domestic processes which are necessary to protect the rule of law in Palestine and Israel.
184. PCATI is in contact with the victims whose testimony form the factual basis for this complaint. These anonymous victims have expressed to PCATI their desire to pursue justice before the ICC in an attempt to exercise their most fundamental rights, which have so far been ignored. We invite the OTP to engage in dialogue with the victims, as well as with PCATI and other similar organisations, including Palestinian organisations, who are the victims’ representatives within the local community.³⁰⁰

300 Cf. *Id.*, 6.

Part VIII: Groups and Individuals Likely to Form the Focus of an Investigation

185. Groups and individuals likely to form the focus of an investigation include the entire vertical and formal chain of command: from interrogators directly perpetrating acts of torture (Article 25(3)(a) of the Rome Statute), their direct superiors (Article 25(3)(a), 25(3)(b), 25(3)(d)) up to the Head of ISA (Article 25(3)(b), 25(3)(d) and Article 28(a)), key members of the Israeli Government and the Israeli Prime Minister (Article 25(3)(b), 25(3)(d) and 28(b)). The investigation should also include other horizontally related groups and individuals who facilitate torture either by direct involvement or by providing indirect assistance to perpetrators (Article 25(3)(b) and 25(3)(d)). These groups include members of the IDF, medical doctors and their commanders.

The officials involved in the periphery of torture incidents provide implicit or explicit approval of torture, where they could have prevented it by not approving the ISA's requests either for medical 'clearance' (in the case of doctors) or for extension of a remand detention (in the case of military judges), which facilitate violent interrogations.

186. The formal chain of command and approval includes the following:

- a. The *Israeli Prime Minister* is directly responsible for the ISA, and the agency is subject to the Prime Minister's Office, pursuant to Article 4(b) of the General Securities Law 2002 (ISA Law). The Prime minister also heads the Ministerial Committee for ISA, according to Article 5(b).³⁰¹
- b. *Members of the Ministerial Committee for ISA* established pursuant to Article 5 of the ISA Law. The ISA Law provides that the *minister of defence, minister of internal security, and the minister of justice* (which in Israel is not the same as the Attorney General) shall be permanent members of the Committee. The Committee includes five or six ministers and therefore additional ministers take part in it, on individual appointment by the government.³⁰²
- c. *Members of the Knesset* (Israeli Parliament) who serve in the Knesset Subcommittee for Intelligence and Secret Services, operating pursuant to Article 6 of the ISA Law. The Subcommittee operates under the Knesset Committee for Foreign Affairs and Security, and its members

301 The Israeli Prime Ministers since 2014 have been Benjamin Netanyahu and Naftali Bennet.

302 Members of the Committee since 2014 have been: Israeli ministers of defence: Moshe Ye'elon (2013-2016), Avigdor Liberman (2016-2018), Binyamin Netanyahu (2018-2019), Naftali Bennet (2019-2020), Benny Gantz (2020-present); Israeli ministers of internal security: Yizhak Aharonowitz (2009-2015), Gil'ad Ardan 2015-2020, Amir Ohana (2020-2021), Omer Bar-Lev (2021-present). Israeli ministers of justice: Ayelet Shaked (2009-2015), Amir Ohana (2019-2020), Avi Nisankorn (5-12/2020), Benny Gantz (4-6/2021), Gideon Sa'ar (2021-present). Other members of the committee have been the ministers of intelligence Israel Kat'z (2015-2020), and Elazar Stern (2021-present).

are appointed from among the Foreign Affairs and Security Committee members. In the secret sessions of the committee, its members provide oversight of the operations of ISA.

- d. The head of ISA, appointed by the government pursuant to Article 3 of the ISA Law commands the entire organisation, and he is the only official in the ISA whose identity is released to the public.³⁰³

The subsequent chain of command within ISA is not made public and is not entirely known to PCATI. It is known that there are heads of departments and commanders with regional responsibility (for example: Nablus area). Investigation teams in the ISA are comprised of individual interrogators and a higher-ranking official who serves as the team head, titled 'Responsible for the Investigation' (*Ha'ahkra'i al Hahakira*). Authorisations for specific 'necessity interrogations' pass through the chain of command from a superior to the Responsible for the Interrogation and down to interrogators.

187. ISA interrogators use pseudonyms that appear in memoranda that interrogators write to document the interrogations, identifying the participating agents (ISA memoranda).³⁰⁴ An agent or interrogator uses the same pseudonym in the course of their ISA careers, and it thus serves to identify them. The use of pseudonyms in general, as well as specific names, are a formal component of the ISA operation that is not denied by the Israeli Ministry of Justice in its replies to PCATI complaints. Interrogators in the cases about which Justice Ministry authorities have corresponded with PCATI include 'Dov', and 'Yasmin.' Victims of torture often remember the pseudonyms that their interrogators use during interrogations. The pseudonyms of interrogators involved in torture in the cases of the present communication, according to victims' memories, include 'Azri', 'Artsi', 'Been', 'Oscar', 'Noura', 'Indy', 'Gil', 'Lyon', 'Colonel Soli', 'Gabriel', 'Yehia', 'Miguel', 'Hezi', 'Hiza', 'Hizi' (these may be one person or more), 'Shimon', 'Niso', 'Major', 'Elbaz', 'Abu Omar', 'Elisha', 'Shimshon', 'Roy', 'Abu Habib', 'Landoy', 'Marco', 'Abu Shibl', 'Major Doron', 'Jack', 'Roso', 'Aron', 'Diego', 'Johnny', 'Avi', 'Itzik', 'Amnon', 'Dennis'. Multiple interrogators' names appear repeatedly in several complaints. One victim mentioned the name Noam Cohen, who was presented as 'responsible for ISA in the West Bank.'

303 Heads of ISA during the relevant period include Yoram Cohen (2011-2016), Nadav Argaman (2016-2021), and Ronen Bar (2021-present).

304 ISA memorandums can be, and often are disclosed to defendants and their legal counsel when the detainee is charged after interrogation. They are typically not disclosed, as a matter of course, in proceedings relating to administrative detention. PCATI obtains ISA memorandums relating to interrogations of victims represented by the organisation.

188. Other groups of public officials that provide the encompassing apparatus that facilitates and shields the operation of the ISA include:

- a. IDF Commanders, specifically the Commander of the Central Region who is responsible for the West Bank and the chain of command responsible for arrest operations.³⁰⁵
- b. The Chief Medical Officer of the Israeli Prison Service (IPS) and physicians employed by the IPS. The IPS is responsible for the management of ISA detention facilities where interrogations take place, and physicians take an active role in interrogations by examining detainees and either ‘clearing them’ for torture interrogations or turning a blind eye to torture when examining tortured detainees.³⁰⁶

Part IX: Conclusion

189. Since its founding, PCATI has fought all forms of torture in Israel and the oPt. As an Israeli organisation, we do not take communication with the Court lightly. We are well aware of and fully intend the communication’s underlying message: the Israeli legal system, including its judicial system, is actively foiling all existing attempts to hold torturers accountable. With this in mind, we are turning to the ICC as a court of last resort.

190. Torture should not be regarded as a secondary issue in the general investigation into the Situation in Palestine. PCATI and FIDH are certain that, once officers of the Court begin their investigation, they will find that it forms a central set of issues in the broader picture of war crimes, which have reached a systematic level. The present communication should therefore not be regarded as a request to expand the Court’s jurisdiction or to widen the OTP’s existing lens. The crimes we have brought to the OTP’s attention in this document are at the heart of its existing and present mandate. Disregarding them would amount to granting an artificial form of immunity to certain actors in the Situation, thereby running the risk of generating further impunity.

191. This communication presents evidence of the following crimes: (a) crimes of torture and other inhuman acts of a similar character, in violation of Article 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(b)(xxi) of the Rome Statute; (b) unlawful deportation or transfer of an occupied population, in violation of Article 8(2)(a)(vii), 8(2)(b)(viii) of the Rome Statute; and (c) denial of fair trial, in

305 IDF commanders of Central Region since 2014 are: General Nitzan Alon (2012-2015), General Roni Numa (2015-2018), General Nadav Padan (2018-2020), General Tamir Yad’i (2020-2021), General Yehuda Fuchs (2021-present).

306 The Chief Medical Officer of the IPS is Liav Goldstein.

violation of Article 8.2(a)(vi) of the Rome Statute. All crimes alleged herein were perpetrated in the context of and were associated with the occupation, and therefore, were associated with an international armed conflict and constitute war crimes.

192. PCATI and FIDH request that the OTP investigate the crimes presented in this communication. We remain at the OTP's disposal for any request concerning access to evidence. For reasons explained above, namely the protection of PCATI's clients, at times general language has been used in this communication rather than detailed descriptions. Should the OTP decide to open an investigation into the crimes alleged in this communication, the Filing Parties will provide all the necessary details to the OTP, in order for the OTP to be able to fulfil its task, thereby bringing a measure of justice to a context of intense, solidified, and bureaucratised criminality.

Annex I: The Rubinstein Memorandum of 1999 (PCATI translation)

Jerusalem, 18 Heshvan, Tashas
18 October 1999
Letter No.: 99-04-12582
Archive No.
(In reply, please indicate letter no.)

**GSS Interrogations and the Necessity Defense – Framework for Attorney
General Discretion (Following HCJ)**

‘Then you shall inquire and make search and ask diligently.’
Deuteronomy, 13, 15 (sic)

‘I the Lord search the heart and examine the mind, to reward each person according to their conduct, according to what their deeds deserve.’
Jeremiah 17, 10

A. In its judgment in HCJ 5100/94 *Public Committee Against Torture and others v. The Government of Israel and others*, the Supreme Court decided, *inter alia*, as follows (Sec. 35):

‘Our conclusion is therefore the following: according to the extant legal condition, the government and the directors of the security services lack the authority to provide instructions, rules, and authorizations with regard to the use of physical measures during the interrogation of suspects for hostile terrorist activities, which violate their freedoms, beyond violations implied in the very concept of an interrogation. Similarly, an individual GSS interrogator – like any police officer – lacks the authority to engage in physical measures that violate the freedom of an interrogated person during an interrogation, which must be fair and reasonable. If an interrogator is about to engage in such measures, or actually engages in them, he is acting beyond his authority. His liability will be examined under general law. His criminal liability will be examined in the framework of the necessity defense, and as we assume (see Sec. 35 above), if the circumstances meet the requirement of the defense, the interrogator may enjoy it. Just as the existence of the necessity defense does not constitute an authority, so the lack of an authority does not, in itself, negate the necessity defense or other defenses under criminal law. The Attorney General may guide himself with regard to the circumstances under which interrogators will not be tried, if they are claimed to be protected under the

necessity defense. Of course, in order to allow for the government to be authorized to instruct the use of physical measures during interrogation beyond what is allowed under ordinary interrogation law – and in order to grant the individual GSS interrogator authority to engage in such measures – there is need for a statute to grant such authority. The necessity defense cannot provide a source for such authorities.’

- 1) In another context I have previously stated (see ‘On Basic Law: Human Dignity and Liberty and the Security System,’ *Iyunei Mishpat* 21(1), 1997, 21. 22):

‘The relationship between questions of human rights, and the security challenge and security necessity, will remain in the foreseeable future on the agenda of the Israeli society and of Israeli courts. The peace negotiation that the Israeli government is involved in is ongoing, but even the most optimistic people do not expect that it will bring us to a complete solution in the foreseeable future. The inherent tension between security issues and human rights will therefore remain, and will find its principal legal expression in the interpretation of Basic Law: Human Dignity and Liberty; the discussion will continue, with regard to the question when must rights be compromised for security needs, and what the right balance between protecting human lives and protecting the human image – a formulation that captures the dilemma completely. We will continue to ponder what is the gap between the imperative “watch yourselves very carefully” (Deuteronomy 4, 15) in its meaning for us as a group, and in the image of God created He him (Genesis 9, 6) and “Great is the dignity of humans that it even overrides prohibitions in the Torah” (Berachot 19b). The Court will look for the balance between security and rights, so that the name of security will not be used for naught, but also so that security will not be abandoned.’ These dilemmas are discussed in the Judgment above.

B.

- 2) The purpose of this document is to constitute the “self-guidance” by the Attorney General which the Court discussed in the aforementioned case, through a search for the balance between the security needs and human rights and human dignity, while taking into account the public sensibility and the human sensibility.
- 3) And it should be emphasized: at question are circumstances in hindsight, when interrogators claimed to have acted, in a particular case, out of a feeling of necessity. The Attorney General cannot guide

himself and the interrogators ahead of time to exceed their authorities and pursue physical measures during interrogations. As the judgment provides in sections 35-36, the necessity defense does not provide a source of authority for the GSS interrogator to use physical measures. However, the Attorney General can guide himself ahead of time as to the kind and character of actions which he may see in hindsight as falling under the “necessity defense.” Clearly this instruction is not an authorization for an interrogator to use a physical measure.

C.

1) And this is the language of the Penal Code of 1977, Sec. 34(11) –

‘A person shall not be criminally liable for an act that was immediately required to rescue life, liberty, body or property, his or another’s, from an imminent danger of severe injury stemming from a condition that is given during action, and which he didn’t have another way to perform.’

2) Furthermore, Section 34(16) provides that the aforementioned provision, *inter alia*, ‘will not be applicable when the action was not reasonable within the circumstances to prevent the injury.’

3) This is therefore the fundamental normative basis for the interrogator’s defense in hindsight.

D. This guideline is premised on the assumption that the State of Israel is still within ‘a ceaseless struggle for its own existence and security. Terrorist organizations have made it their goal to destroy the state. Terrorist acts and disturbances of normal life are the measures they use. They do not differentiate between civilian and military targets. They carry out terrorist plots of mass murder...’ (see Section 1 of the judgment as well as Report of the Committee Regarding the Methods of Interrogation in the GSS in matters of Hostile Activities (Landau Commission). The guideline is also premised on the assertion, that the main agency responsible for combating hostile activities is the GSS (see judgment). Another premise is that GSS interrogators are agents of the State of Israel, and as they act on its behalf under the collar of law they are entitled to have an appropriate level of legal certainty. They are not acting in a different place; they are an agency among state agencies, for good or for better, with obligations and rights in their special work and in collecting intelligence in order to foil terrorist activities, they must always bear in mind the existence of the law and the rights of those interrogated under the law; but their need for appropriate protection when acting within the law should not be ignored.

E. As aforementioned, the judgment found that the necessity defense cannot be a source of authority for the purposes of using physical measures during

interrogation, as it ‘pertains to an the decision of an individual responding to given factual circumstances... the character of the defense does not allow it to be the source of a general administrative authority’ (Sec. 36 of the judgment); the fate of a democracy is that ‘not all means are acceptable in its view’ (Sec. 39 of the judgment). However, the Court also found that if one accepts ‘a position according to which the security difficulties are too many, and that an authority is needed to use physical measures during interrogation... then the decision on the question... must be done be the legislative branch, which represents the people.’ The Attorney General cannot replace the legislative branch. Therefore, his guidelines to himself can only be within the law and its interpretation by the Court.

F. So long as the current law – as interpreted by HCJ – remains as it stands, the authorities GSS interrogators have are the same as police officers’ authorities (Sec. 20 of the judgment). They do not have legal authorities or permissions to engage in measure going beyond those police officers may pursue during a regular police interrogation. This is the legal basis of the interrogation, and the GSS must study the modes of interrogation within the police and teach them to its interrogators, and incorporate it within the professional doctrine within the GSS, albeit the fact that the main purpose of interrogations within the GSS is foiling, that is, there is no absolute ‘purposive’ identity between them and between police interrogations. The authorities, as mentioned above, are the same as police officers’.

G.

1) When an interrogator pursues during an interrogation a measure that is immediately needed in order to obtain crucial information in order to prevent an imminent danger of harm to national security, to human life, to a person’s liberty or bodily integrity, and there is no other reasonable way within the circumstances to immediately obtain the information, and pursuing the measure of interrogation was reasonable in order to prevent the harm, the Attorney General will consider not pursuing criminal charges. The Attorney General’s decision will be given in each case individually, by way of specific examination of all the details above, namely, the proportionality of the need and its immediacy, the severity of the danger and harm that was prevented and its concreteness, the alternatives to the act and the proportionality of the measures, including the interrogator’s perception of the situation during the interrogation. The levels that confirmed the act, their involvement in the decision and discretion during its execution, as well as the conditions in which the act was performed, its oversight, and its record. The aforementioned will not be applicable to interrogation measures that fall under the definition of ‘torture’ under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Sec. 1 of the Convention refers to an act in which

intentional pain or suffering is caused to a person, whether physical, whether mental. See also Sec. 277 of the Criminal Code, which refers to pressure applied by a state employee on another, for the purpose of coercing an admission of a crime, or information regarding a crime.

2)

a. Interpreting the immediacy of necessity concerns the need for urgent and immediate action, even if the concrete danger is not immediate but is expected within some time. Naturally, when the temporal gap between the act and the expected and possible date in which danger is realized grows, so does the burden of proof that indeed necessity was immediate – and *vice versa*.

b.

1. On this issue, the Court says in its judgment that ‘immediacy exists even if the bomb may explode after several days or even several weeks, as long as there is certainty that the danger will be realized and its impossible to prevent its realization otherwise; that is, that there is a level of concrete and imminent danger that the explosion will occur’ (emphases added).

2. The upshot regarding the concreteness of the danger, is that routine and ongoing collection of information about terror organizations and their actions in general, cannot on its own be perceived as action anticipating ‘immediate danger’.

3. As for the present issue, the danger of harm to human life must be certain and particular in its character and quality. Naturally, the clearer the information, and the more it pertains to a particular danger, so rises the certainty that an interrogator will feel that danger will be realized. Furthermore, an interrogated person that is not concretely suspected, is not the same as an interrogated person that is suspected based on reliable information regarding his involvement in dangerous activity or knowledge thereof.

4. The GSS should have internal guidelines, *inter alia*, about the system of consultations and confirmations within the organization, which is needed for this matter.

5. The necessity defense is therefore to be applicable only in very exceptional circumstances, and cannot be included in the routine of interrogation work. The reasoning at its basis does not allow the formulation of exact rules of behavior with regard to particular conditions ahead of time. And yet, such conditions may arise within Israel’s security circumstances, and they will be considered in hindsight, as mentioned in the small-section 1 above.*

- c. The content of small-section 1. and small-section 2. above should therefore be the framework for the Attorney General's discretion in cases where a question of the necessity defense will arise following an interrogation that has taken place. It is understood that the entire set of circumstances will be laid out before the Attorney General, and that he will take into account the different and special conditions regarding the issue.

Elyakim Rubinstein
(signature)

* For background, see the document about the necessity defense, prepared by Ms. Ben-Or, Director of the Criminal Division at the State Prosecutor's Office.