The Public Committee Against Torture in Israel

Periodic Report – June 2014

Prosecutorial Indifference:

Systematic Failures in the Investigation of Soldier Violence against Detainees in the Occupied Palestinian Territory

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Preface: The "Rule of Law" and Complaint Examination Mechanisms

Ishai Menuchin

One of the ways a society retains its democratic character is in its adherence to the "rule of law" –the principle that every socially impactful action and decision is to be conducted in accordance with the laws of that society. Retired President of the Israeli Supreme Court, Justice Meir Shamgar (1984), once ruled: "the primary expression of the rule of law is that it is not the rule of individuals – in accord with their personal decisions, judgments and unlimited cravings – but rather rests upon the directives of stable norms which are equal for all and obligatory upon all in equal measure".[1] The "rule of law" as a comprehensive system of permissions and prohibitions is supposed to direct on a daily basis both our own actions and those of the public authorities. We, the citizens, are to obey the law, since "the law is a higher interest of the entire society, and a condition of its existence,"[2] as noted by former Attorney General and retired Supreme Court Justice Yitzhak Zamir. The public authorities, too, are supposed to conduct themselves thus.

The "rule of law" attempts to include within a single legal framework what is proper and what is prohibited in both Israel and the Occupied Palestinian TerritoryTerritory – where civilians have lived under conditions of occupation for over 47 years – and strives to incorporate a number of comprehensive legal systems. It is impossible to sustain an occupation – that is, to hold an occupied population under an oppressive regime devoid of equality before the law or participation in societal decision-making processes – without harming the democratic nature of the occupying society itself. The practices of prolonged, ongoing occupation and the essence of the "rule of law" contradict one another.

Yet, since the perception of a society as democratic is the basis of its national and international legitimacy, abundant resources are devoted to preserving it. When the democratic image of any society is damaged by occupation and settlement which last for over a generation, the perception of the concept of adherence to the "rule of law" becomes a weighty matter in both the national public sphere and the international realm. A regime of occupation exists, but is ostensibly conducted in a legal manner. Thus, even the security authorities, for whom

1 Labor Case (ע"ב) 2/84 – Neyman v. Chairman of Central Committee for Elections to Eleventh Knesset, published in Piskei Din 38(2) 225 [Hebrew].

2 Yitzhak Zamir and Avigdor Feldman (1985), *"The Limits of Obedience in the Occupied territory"* in Ishai Menuchin (ed.) **On Democracy and Obedience**, "Yesh Gvul" and Siman Kriah Books, p. 112 [Hebrew].

the maintenance of the conditions and limitations instructed in law are an obstacle to their duties, and which do not always consider themselves obligated to adhere to the law, invest significant resources not only in camouflaging their disobedience of the law, but also in constructing an image of themselves as ostensibly obedient to the "rule of law".

Alongside (patently selective) compliance with court rulings, one of the central tools for maintaining the façade of obedience to the "rule of law" is the creation of mechanisms for examining complaints of legal violations by security forces. Every security body in Israel has its own complaint examination mechanism: the GSS has a department for examining interrogee complaints (the Examiner of GSS Interrogee Complaints, or EGIC), the Police have the Police Investigations Division (PID), the Israel Prison Service has the National Prison Guard Investigation Division (NPGID) and the army has the Military Police Criminal Investigation Unit (CIU). Supposedly, for all those authorized to use force and having powers of enforcement, there is a mechanism to ensure that they act in accordance with the "rule of law" and will recommend that any interrogator, policeperson, prison guard or soldier who violates the law be brought to trial. Supposedly, but not in practice.

A glance at the activities of the EGIC, for example, reveals that since 2001 more than 800 complaints of torture during GSS interrogations have been filed without even a single criminal investigation being initiated.[3] As for activities of the Criminal Investigations Unit, a report published by "Yesh Din" reveals that, "three and half percent of complaints received by the Military Police Criminal Investigations Unit (MPCID) and the Military Advocate General's Corps (MAGC) of criminal offenses allegedly committed by soldiers against Palestinian civilians and their property in the West Bank ultimately lead to indictments."[4] In a report we published in June 2008, the affidavits of 90 detainees arrested between June 2006 and October 2007 were examined. We found that "all but one of the complaints filed since August 2006 are still pending at the time of writing of this report – no decision has been reached

3 For details on the means of examination of complaints against GSS interrogators, see details in, for example, Irit Ballas, et. al. (December 2009) **Accountability Denied – The Absence of Investigation and Punishment of Torture in Israel**, or Connie M Varela Pedersen and Irit Ballas (January 2012) **Accountability Still Denied**, the Public Committee Against Torture.

4 Lior Yavne (2011), **Alleged Investigation – The Failure of Investigations Into Offenses Committed by IDF Soldiers Against Palestinians**, Yesh Din, p. 8.

to prosecute offenders or even to close the case."[5]

So too the report before you, which studies the examination of 133 complaints filed by PCATI with the CIU regarding cases of soldier violence against detainees in the Occupied Palestinian Territory between 2007 and 2013 – "only two of which materialized into indictments against soldiers, for the crime of assault" – a rate of under two percent. Though the statistical data regarding PID is not open knowledge, Smadar ben Natan (2011: 36) quotes retired Justice Theodore Or, who argues that "as a rule, the Police Investigations Division did not collect evidence regarding the events in which civilians were killed, did not collect data in the field and did not attempt to identify, soon after the events, the Police servicepersons involved in the killings."[6] The appeals filed by PCATI in recent years also indicate that PID has of late "distinguished itself" in closing dozens of files against Police servicepersons without having carried out even minimal investigative action.

The data from these reports and appeals show that the complaint examination mechanisms in general and in particular the CIU – the subject of the report before you – are intended to obscure systematic violations of the law. As examination mechanisms they present the façade of adherence to the law, but in practice they systematically obscure violations by the various security forces – each force and its own mechanism for covering up and erasing complaints. Ostensibly, when malevolence occurs, there is someone to turn and file a complaint with, a mechanism to examine it, and a process which can provide legal remedy for victims of the security forces' actions. Yet in fact this place to turn is a mechanism and a process for covering-up and granting a false façade of legality and maintenance of the "rule of law" by the security forces – a systematic mechanism for denying legal remedy to victims.

Moreover, the false impression that complaints are investigated grants the individuals and institutions which violate the law a stamp of legal approval. The examinations, reports, recommendations

5 Noam Hoffstadter (June 2008), **No Defense – Soldier Violence against Palestinian Detainees**, the Public Committee Against Torture in Israel, p. 34.

6 Smadar ben Natan (2011), **The Accused, Part II: Failures and Omissions by the Attorney General in Investigating the October 2000 Events**, "Adalah" – The Legal Center for Arab Minority Rights in Israel, p. 36 [Hebrew; summary available in English].

and support of the complaint examination mechanisms have resulted not only in an almost complete absence of indictments for those against whom complaints have been filed, but also provided the latter with a stamp of legal approval. The complaint is examined by an official mechanism in a sophisticated "laundering" process and the suspects are proclaimed "guilt-free". The actions of an "examination mechanism" which approves of almost any sin, transgression or crime at the level of the individual interrogator, police serviceperson, commander or soldier, effectively enables the "laundering" of the occupation as well – creating a façade of security forces which adhere to the law. This deceitful image of the "rule of law" has weighty consequences in the national and international public spheres.

1. Introduction

The Supreme Court once ruled that "the importance of encouraging complainants to file their complaints must be emphasized."[7] While this specific case refers to a sex crime, the ruling should clearly be understood to apply to crimes of assault and violence as well. And yet, of at least 133 complaints filed by PCATI between 2007 and 2013 regarding soldier violence against detainees in the Palestinian Occupied territory, only two such complaints resulted in an indictment against a soldier, on assault charges.

To date, as of early 2014, 27% of the complaints are still pending at the offices of the Military Advocate General – some for more than six years – and no investigation conclusions have been reached yet. 73% of the complaints were closed, in most cases by decision of the Military Prosecutor Corps (MPC), and in several cases due to the clients' despairing after years of typically unsuccessful pursuit of an indictment. The rate at which indictments are filed stands at 1.5%, certainly a disturbing statistic.

This report surveys the systematic failures and deficiencies in the examination of cases of soldier violence against detainees, the vast majority Palestinians, in the Occupied Palestinian Territory. Its goal is to show that the military authorities rely on deficient and unacceptable investigation methods in fulfilling their duty to investigate cases of violence and bringing those responsible to justice.

Although the report does not focus on the violence against detainees in itself but rather the nature of its investigation, it must be emphasized that this violence, in both its physical and its verbal forms, is operating at full strength in the occupied territory today. The hundreds of complaints which have reached PCATI in recent years reflect an abominable situation of intentionally painful shackling, beatings, kicking, assault with batons and rifle butts, and curses and insults directed against the detainees, their family members, and the prophet of their faith. It is apparent that Israel Defense Force (IDF) soldiers consider themselves authorized to degrade Palestinian detainees' dignity and harm their physical well-being, even while the latter are shackled and helpless.

The body entrusted with investigating complaints in such matters is the Military Police Criminal Investigative Unit (CIU). The CIU has no bases in the territories and the

7 Permission for Criminal Appeal (רע"פ) 1881/11 – **Anonymous v. State of Israel**, published in "Nevo" database [Hebrew].

vast majority of its investigators do not speak Arabic. The complainant's interrogation at times consists of little more than being blatantly encouraged to abandon her or his complaint completely. Likewise – and herein lies one of the primary foci of this report – the investigations drag on for years and thus lose meaning. These facets and others will be illustrated in the report before you, based on dozens of cases handled by PCATI.

Special attention will be paid throughout to the conclusions of the second report of the public commission headed by Yaakov Turkel (the Turkel Committee) created to investigate the 31 May 2010 incident regarding the flotilla to Gaza. This second part of the Committee's report, published in February 2013, dealt with Israel's examination and investigation of complaints and arguments regarding violations of the laws of war under international jurisprudence. PCATI representatives appeared before the Committee on this matter, and a number of their recommendations were repeated in the conclusions of the Committee's own report.

"We must not ignore IDF soldiers' exploitation of their authority in committing severe assault against helpless persons. What we see here is beating and humiliation without any rationale at all. The black stain of prohibition rests over the sinful actions of the Respondent. We must not make peace with the behavior of soldiers as a group of unrestrained hooligans. The beatings and humiliations inflicted upon the local residents leave a stain upon the image of the military and on the image of its soldiers."

Military Court of Appeals (2002)

2. Investigation

Just as the very occurrence of a grave incident prompts the filing of a complaint on the matter, so too does the filing of a complaint precipitate an investigation to thoroughly examines it. Only then is proper force granted to the legal prohibitions violated. A complaint which is not properly investigated has been effectively belittled by the authorities – a belittling of the alleged crime committed in the territory under its control, in spite of the fact that control is first and foremost the enforcement of the law, not disregard for its violation. Such contempt for complaints results in the loss of public faith in the authorities, exacerbates the public's hatred of the authorities, and undermines public order. A proper investigation is first and foremost an expeditious one which uses a variety of the investigatory methods available to the investigative authority, and within which the complainants' various are respected. In what follows, this report describes I how far the CIU is from upholding these fundamental requirements.

A. Foot-dragging in the Investigation Process

The duty to investigate within the Israeli legal system rests, among other sources, on article 59 of the **Criminal Procedure Law [Consolidated Version] – 1982**, which requires that the Police open an investigation whenever it suspects the commission of a crime. In the case of suspected felonies, this duty is absolute. By syllogism, this rule can be extended to the military legal system based on the principle of unified interests of various official institutions. Underlying this approach is the rationale of deterrence, upholding the public order and preventing criminality and victimization, including protection of protected persons in territories under state control or supervision. International humanitarian law likewise mandates an independent duty to investigate cases of ill-treatment by the occupying power, as shall be illustrated below.

Yet the duty to investigate is not sufficient in and of itself. The investigation must be genuine and efficacious, and must be conducted within a reasonable time period and at a proper pace. An investigation which drags on for months or years, naturally, harms the chances of bringing the suspects to trial and of obtaining the necessary evidence to conduct a criminal trial – which is liable to bring about the unjustified closing of investigation files.

What transpires in practice is that, while the complaint is looked into, soldiers suspected of violence against helpless detainees continue their active duty in the field. Long investigation times, when the suspected soldiers frequently interact with the civilian population, including detainees in custody, raises significant dangers and exposes civilians to concrete danger – the soldier might tend behave violently or be acting on suspect motives. Therefore, the formula of a prolonged investigation while the soldier in question continues in her or his position significantly expands the circle of victims and fails to take responsibility for the human dignity and physical well-being of the individual in custody.

The time passed since commission of the crime can also influence the memory of the witnesses and the possibility of relying upon complete, credible testimony. Wherever justice frequently remains unfulfilled, public faith in the investigative system is damaged, which contradicts the public interest in the formation of an independent investigatory mechanism to educate and deter the security forces and encourage them to be merciful towards the individuals in their custody.

Attention must also be paid in this context to the limited applicability of the Military Adjudication Law upon reserve duty soldiers. Under article 6 of this law, its applicability expires after the suspect has ceased being a solider (enlisted or reserve), if within 180 days of leaving active duty no indictment has been filed; and with regards to a crime for which the punishment is two years or for a non-military felony – one year. Therefore, dawdling in the investigation process is liable to hurt the chances of bringing those responsible for the acts of violence to justice.

Relevant here are the conclusions of the Turkel Report (February 2013), which rules that an effective investigation must be conducted quickly. Page 132 of the report states:

> **"The principle of promptness dictates that an investigation should begin as soon as practically possible after the alleged incident and that unreasonable delays in the investigation must be avoided. The Commentary[8] on Article 146 of the Fourth Geneva Convention asserts that while dealing with serious violations, States should act as quickly**

8 The Commentary is a complementary legal addendum.

as possible, in order to ensure that an alleged perpetrator is arrested and brought to justice with all due speed […] Time is a major factor that affects the ability to collect and preserve evidence […] Thus, collecting evidence promptly complements the principle of effectiveness and thoroughness. Furthermore, conducting an investigation within a reasonable timeframe can contribute to the perception that the law is being enforced and justice is being done."

The Committee accordingly recommends that:

"The MPC, in coordination with the Attorney–General, should set a maximum period of time between the decision to begin an investigation and the decision to adopt legal or disciplinary measures or to close the case."[9]

Note in this context that ten months to conduct of an investigation is considered "unreasonable" according to the UN Committee Against Torture in the **Encarnación Blanco Abad v. Spain** matter.[10]

And yet, in Israel, of 133 complaints filed by PCATI between 2007 and 2013 against torture and cruel and inhuman and degrading treatment by soldiers during arrest – violence which, in the vast majority of cases, is carried out when the detainee is shackled and blindfolded – an average of **over two years** passed before investigation conclusions were received, if at all. The statistics reveal that the Military Prosecutor takes an average of 30 months – two and a half years – from the moment of the complaint's filing until notification is provided to the complainant or their representative regarding the closing or shelving of the investigation file. These following cases illustrate this troubling phenomenon:

On Aug 12, 2010 PCATI filed a complaint with MPC of a case of soldier violence against a detainee named A.S.[11] The detainee testified

9 **Second Report – Turkel Committee – Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law**, published February 2013 (hereafter – "Turkel Committee"), p. 428. Official English translation available at www.turkel-committee.com.

10 See para. 8.7 of ruling. Cited in **Turkel Committee**, para. 87.

11 In the interest of the victims' safety, their names in this report are provided as initials. PCATI has their full names on file.

that he was arrested late at night in his home and was taken outside with his hands shackled in an extremely painful manner. While being transferred by military jeep to the settlement of Ariel, he was punched and kicked continuously in the neck and legs by a soldier who sat next to him. When they arrived in Ariel, A.S. was forced to stand; every time he attempted to sit down from exhaustion, the soldiers would stand him back up. All of this was described in detail in PCATI's complaint of the above date, and two years later – on March 6, 2012 – the Military Prosecutor Corps informed PCATI that a CIU investigation had been ordered in the case and that "the investigation materials have yet to be received in our offices." Clearly, two years is an absolutely unreasonable timeframe for the conduct of an investigation in such a case, and a more businesslike approach and greater desire to reveal the truth and bring those responsible to justice would have led to the completion of the investigation long before.

An additional case of foot-dragging in investigation is that of Z.Z., who complained of prolonged painful shackling behind his back while being arrested on April 4, 2006. He was held outdoors in the rain and cold for 30 minutes to an hour before being brought into the clinic; afterwards he was held outside for another fifteen minutes before being placed in a room where he was abused by soldiers: they threw a stapler at his body, one soldier placed the heel of his boot on the detainee's head, and they even pulled on his hair. PCATI filed a complaint on June 22, 2006. PCATI sent a reminder in the matter on over a year later, on December 19, 2007, and an additional reminder on April 30, 2008. The Military Prosecutor responded on August 20, 2008, writing that the file remained unresolved. On February 17, 2010 an additional reminder was sent. On March 6, 2012 the MPC sent notification that the file had been forwarded for CIU investigation and the investigation materials had yet to be received at their office. Thus has so crucial an investigation dragged on for over seven (!) years.

M.J. was arrested by a military force at his parents' home in Hebron/al-Khalil on November 9, 2009 at 2:00 am. One of the soldiers tied the detainee's hands behind his back with plastic handcuffs and covered his eyes. The same soldier asked for his identity card, even though he had already presented it to another soldier named "Captain Tarek" – and the soldier began searching M.J.'s person for the card; when he did not find the identity card, he began screaming and

struck the complainant on the head and shoulder with his rifle. Then, two soldiers grabbed M.J. by the arms and pulled him to the military vehicle parked next to the house. One of the soldiers in the vehicle severely tightened the blindfold covering M.J.'s eyes; he says he felt strong pressure on his eyes. While in the military jeep, the soldiers subjected him to violence. They struck him on the head and back. One of the soldiers would place his fingers in M.J.'s eyes and push, causing scratches to his eyes. What's more, the soldiers played music in the jeep and began to brutally beat M.J. in the back and head in rhythm with the beat of the music. At times they would lie him down on the floor of the jeep and begin jumping on him and attacking him all at once. Atty. Nabeel Dakwar of PCATI attests that three weeks after the incident, when Dakwar took M.J.'s affidavit, he could still easily make out the scratches and scars on his forehead. Furthermore, throughout the journey the soldiers did not stop hurling vile and harsh curses at M.J. himself and about his sister and mother, all while he was shackled and blindfolded. After about half an hour, the vehicle stopped and the soldiers ordered M.J. to exit, but he was unable to get up due to the pain. So the soldiers pulled him out of the vehicle, and one soldier poured water on him, seated him in a chair and removed the blindfold from his eyes. They led him into a room, where he asked to drink water. One soldier brought him a cup, but when M.J. was about to drink from it, he was shocked to discover that the liquid in the cup was urine and not water. He refused to drink and the soldiers standing there laughed in ridicule. This series of grave abuses was described in detail in a complaint filed by PCATI in M.J.'s name of on January 21, 2010. About one month later the MPC for Operational Affairs gave notification that the MPC for Operational Affairs had ordered a CIU investigation into the matter. Months passed with no word on behalf of either the CIU or the MPC, in spite of several reminders sent by PCATI on the matter. On March 6, 2012, **three years after the incident in question**, the MPC sent an update: "the file was sent for finalization of the investigation by CIU. As of yet we have not received the investigation materials."

A.Sh., a detainee who alleged that the soldiers who arrested him on June 15, 2006 sent a dog who was with them to attack him; the dog bit him in the leg while his hands were cuffed behind his back. On August 30, 2006, PCATI filed a detailed complaint with the Attorney of the Central Command, but no

substantive response was received for years until, after a reminder sent by PCATI on the matter, a statement was received from the MPC, laconically stating: "The investigation file was closed on September 10, 2009" (without even citing the reasoning for the file's closure) – that is, more than three years after the incident.[12]

A further illustrative case is that of H.M., an Israeli activist in protests against the Separation Barrier who was arrested during a protest on July 31, 2009 adjacent to the villages of Ma'asara and Umm Salamuna in the Bethlehem region. H.M. objected to the soldiers using their rifles to push protesters, and at one point, in the heat of the moment, called them "shits". Immediately he was seized by three or four soldiers. These took him to the area of the army jeeps where, free of the gaze of the other protesters and the cameras, they twice slammed his head into the back door of one of the jeeps. In a medical examination undergone later that day, he was diagnosed with "a laceration under the right eyebrow." This was the basis for a complaint filed in his name by PCATI on Aug 17, 2009, and a CIU investigation was opened as a result. Over three years later, on April 11, 2013, PCATI received notification from the MPC for Operational Affairs that for the file in question, "the Assistant Prosecutor for Operational Matters recommended a process of reprimand within the command-structure for the soldier who slapped your client during the incident." Only a slow, sloppy investigation, it seems, could produce the distorted conclusion that a laceration below the eyebrow was the result of a "slap", and the more reasonable cause considering the circumstances – slamming the head into the door of a jeep – received a ridiculously light punishment of internal reprimand, three years after the incident when the offending soldier has almost certainly already been released from military service.

A single exceptional case of investigative efficiency which proves the rule of general ineptness is that of the violent outburst involving Lieutenant Colonel Shalom Eisner against participants in a bicycle ride held on April 14, 2012 under the sponsorship of Palestinian civil society organizations. A video clip documenting the violence clearly shows Lieutenant Colonel Eisner forcefully using his rifle-butt to strike activists doing nothing amiss; it was instantly distributed via the internet and media and had an

12 For more details regarding the use of dogs, see **No Defense – Soldier Violence against Palestinian Detainees**, PCATI Periodic Report, June 2008, pp. 10-13.

impressive public impact. This was most likely the reason why a CIU investigation was promptly opened (following a complaint filed by PCATI in the name of the victims and close oversight by PCATI after the indictment was served), and was even concluded within a reasonable timeframe – and indicates that CIU is certainly capable of operating efficiently when it so desires.

Sometimes the military authorities seize upon the existence of a separate judicial process regarding a victim as a pretext to avoid handling the victim's complaint of violence. For example, the case of M.A., arrested by soldiers around 10 pm on September 2, 2010, during the month of Ramadan, at a rolling checkpoint on his way to Bethlehem. Soldiers shackled his hands behind his back with tight plastic handcuffs, causing him pain to the point of numbness, and covered his eyes with a blindfold. After a long journey which included stops, he was brought to the "Etzion" military base in the early morning hours. His requests for permission to pray and to go to the restroom, or to eat and drink in preparation for the fast were refused. Soldiers struck, kicked, beat and verbally attacked him. While at "Etzion", after having been placed in a detention cell alone, two soldiers entered the cell and began to beat him with their fists for about twenty minutes. Later he was attacked by two prison guards, who struck his head and threw his body against the wall. Later, during his interrogation at "Kishon" Detention Center, the GSS interrogators employed torture and/or ill-treatment against him, and on December 29, 2010 a complaint on the matter was filed with PID in M.A.'s name regarding the soldier violence he was subjected to during his arrest. A reminder was sent on March 10, 2011. The response by Lieutenant Colonel Ronen Hirsch dated March 13, 2011 stated that, since the petitioner's case had yet to be concluded in Judea Military Court, a decision on the treatment of his complaint would wait until after the conclusion of his trial. On January 26, 2012 a collective reminder was sent in the complainant's name among others. Over a year passed before, on February 7, 2012 a letter from the Military Prosecutor Corps gave notification of the decision to open a CIU investigation. The complainant's PCATI representative responded welcoming the decision to open a CIU investigation, but also admonishing MPC regarding the time passed and the urgency for diligent conduct of an investigation. On February 21, 2012, First Lieutenant Ilona Savtani of the Military Prosecutor Corps responded emphasizing

that the delay in handling the complaint was the result of the legal proceedings against the petitioner and was not due to the conduct of the MPC. The response of the MPC for Operational Affairs dated March 6, 2012 read: "we ordered the opening of a CIU investigation. The investigation materials have yet to reach our office." In spite of First Lieutenant Savtani's firm response, about three years after the filing of the complaint, no substantive response has been received.

The same response from the MPC dated March 6, 2012 referred to the Israeli Supreme Court's ruling in the Aliwat case[13] which stated that, except in rare cases, complaints regarding violence during the taking of confessions should not be heard in two parallel legal forums – the court of justice trying the complainant-defendant and the Police Investigations Division. Yet the military authorities' pretense of relying upon Aliwat here is doubly mistaken – first, the Aliwat precedent focused on violence by policepersons, whose criminal activity is not under time limitations like the criminal content of soldiers' actions under the Military Adjudication Law which, as mentioned above, decrees itself irrelevant if 180 days have passed since the soldier's release and no indictment has been filed.

This would seem to make the investigation of violent soldiers doubly urgent relative to the investigation of violent policepersons, even in light of the Aliwat precedent (or to necessitate the amendment of the Military Adjudication Law to accord with international law, which does not allow a statute of limitations to apply to the crime of torture). Secondly, the Aliwat precedent deals with violence under interrogation in order to extract a confession while the matter here concerns violence during arrest – which can occur in parallel and in isolation from the legal process regarding the complainant's alleged crimes. This also gives proper expression to the fact that violence during arrest is unacceptable no matter the alleged crimes of the detainee.

A particularly conspicuous set of cases for which the investigation has been especially prolonged concerns those who underwent ill-treatment during arrest and detention during Operation "Cast Lead". Although more than five years have passed since the operation, no response has yet been received with conclusions from the investigation

13 HCJ 5413/03 – **Aliwat v. Director of Police Investigation Division**, published in "Nevo" database [Hebrew].

regarding various complaints; this severe omission continues to date.

For example, the case of H.A., taken from his home in Beit Lahiya in the Gaza Strip on the night of January 3, 2009 and ordered to march for some distance while shackled and blindfolded. While he walked, soldiers beat and cursed him. Later, when the blindfold was removed from his eyes, he discovered that he had been led along with dozens of others into a pit about four meters deep and five dunams wide. In this pit H.A. was held for three days with no food, drink or access to a toilet, despite his requests which went unheeded by the soldiers. H.A. slept without shelter in the open pit and suffered from extreme cold for three days. Thereafter he was transferred together with other detainees in a very crowded truck, while shackled and blindfolded, to another pit near the Israeli border. H.A. proceeded to spend the night in this pit in the bitter cold without receiving a blanket or any other covering, and without food. The soldiers continued to refuse him access to the toilet as well. The next day around 9 am, shackled and blindfolded H.A. was transferred by truck to the "Zikkim" military base. The soldiers who removed the detainees from the truck pushed them roughly and seated them on the gravel. There H.A. spent another night exposed in the cold and rain without a blanket, and later suffered further episodes of violence from soldiers and from GSS personnel during his interrogation.

On April 1, 2009 PCATI filed a complaint against the ill-treatment suffered by H.A. with the MPC and the Attorney General. On June 22, 2009 confirmation of receipt of the appeal by the MPC for Operational Affairs was received; after this, months passed without any substantive response. A reminder was sent on the matter on August 9, 2009, but to no avail. On April 26, 2010, PCATI was able to reach Investigations Officer Roee Sheesh by telephone to check on the status of the complaint, and was told that CIU was conducting a comprehensive investigation of all the complaints filed in the name of detainees arrested during Operation Cast Lead. Note that about a year later, over two years after the incident, the Examiner of GSS Interrogee Complaints (EGIC) at the State Prosecutor's Office sent a letter rejecting H.A.'s complaint solely in the matter of violence directed against him by GSS interrogators. The soldier violence continues to be "investigated", more than two years after the incident, as indicated in the letter of March 6, 2012 from the Assistant MPC for

Operational Affairs: "the CIU investigation file is ongoing."

We may appropriately conclude this section by quoting from the study of Dr. Amichai Cohen and Yuval Shany, "The IDF Investigates Itself: The Investigation of Suspected Violations of the Laws of War":[14]

"It is no secret that investigations into violations of international law take valuable time, whether they are carried out by CIU or as part of an operational inquiry. The element of time is doubly important in investigation of the violations. Every delayed investigation is necessarily a defective investigation. The ability to conduct an investigation months or years after the incident occurred effectively damages the conduct of the investigation. Moreover, a delayed investigation causes real damage to the public's faith in that investigation. An investigation which has been excessively delayed can become irrelevant from the perspective of the victims [. . .] IDF investigations are not conducted quickly. Today, over two years after the conclusion of Operation Cast Lead, there remain files which have yet to be resolved. This result is unreasonable and would not seem to meet the standard of proper expediency – this in spite of the fact that some significant portion of the delay is due to factors outside the control of the IDF. . ."

We cannot but support these logical words, which receive factual backing from the cases surveyed above. The problem of foot-dragging in the process of investigating soldier violence during arrests is concrete and widespread, and it cries out for a solution.

B. Poor Quality of Investigations

Investigations by the Criminal Investigations Unit of the Military Police are criminal investigations aiming to expose the truth. As such the criteria of a reasonable criminal investigation apply. As the gravity and severity of the crime increases, so too does the standard the investigative body must uphold in order to fulfill its duty to investigate. At the very least the investigative body must collect all the relevant materials, take initiative and be active, exhaust investigatory angles and carry out a comprehensive collection of relevant evidence.

A criminal investigation may include interviews of as many witnesses as possible

14 Amichai Cohen and Yuval Shani, **The IDF Investigates Itself: The Investigation of Suspected Violations of the Laws of War**, Policy Paper 93, The Israeli Democracy Institute, December 2011, p. 65 [in Hebrew].

immediately after the incident in question. The investigative body should, among other things, stage a line-up, identify all those involved in the incident, confront the various witnesses with each other, check the records, examine video footage and still photographs, locate evidence and perform other basic investigatory activities which may shed light on the truth. There are cases in which the CIU completely abstains from performing these actions, and thus does its job in a feeble manner incapable of exposing what actually happened.

A case illustrating this point is that of P.A. who, as a minor, was physically and verbally assaulted during his arrest and later seated in painful stress positions, kept in the cold, blindfolded, and shackled tightly and unlawfully for a prolonged period. The investigation log looking into the complaint filed on his behalf indicates that no fewer than eighty investigatory actions were taken, yet only five are at all significant: taking the complainant's testimony, examining his medical record, ordering the intake reports from the prison, the incomplete identification of the regiment of the arresting force, and the taking of an affidavit from the commander during the incident "Peter Savo". The remaining "investigatory actions" were primarily telephone calls made by the investigator in order to formulate these more meaningful actions. The Jerusalem Magistrate's Court has already addressed the distinction between the number of investigatory actions and their quality in Regular Legal Procedure Civil Case (א"תב) 7808/96 Butma v. State of Israel (published in "Nevo" database [Hebrew]) in its ruling from July 1, 1998: "There was indeed investigatory activity which included the performance of 38 actions; however, they all amounted to tilting at windmills – instead of performing several basic actions, the investigating officer repeated the same hopeless ones."

Now consider the case before us – no potential witnesses were interrogated, no line-up was conducted, no attempt was made to locate those involved in the incident, various witnesses were not confronted with each other, and in sum: a thorough and effective investigation was not conducted. Little wonder that after all of these oversights, the file was closed due to a lack of sufficient evidence…

Note too that P.A. recounted the incident lucidly and precisely, while the force commander's denial was sweeping and general, including repeated emphasis in his interrogation on his lack of memory of the

details of the specific case – the commander simply claimed that "to my knowledge my soldiers have never raised a finger against a Palestinian." Preferring the latter account over that of the complainant without interviewing other witnesses does not accord with the thoroughness requirement for investigations.

Moreover, in lines 25-26 of his testimony before CIU, P.A. noted that he had been assaulted again at the Etzion Detention Center by soldiers with batons. E-mail correspondence from May 4, 2011 between the CIU investigator and the Assistant Commander of the Etzion Territorial Brigade mentioned the following soldiers: A.H. was assigned to detainee intake at the time and S.Y. conducted the search of the appealer. Inexplicably, none of the known soldiers was questioned by CIU! What's more, P.A. mentioned in his complaint that a "Captain Tamir" from the GSS was present during his arrest, yet the CIU personnel did not bother to take his testimony. The same is true of P.A.'s family members and additional individuals who were present during his arrest: not one of them was interviewed by CIU.

The poor quality of the investigation was exemplified not only in its violation of the principles of efficacy and thoroughness, but also promptness: only five months after the filing of the complaint was P.A.'s testimony taken, and nine months after the filing of the complaint – about two years after the incident itself – passed before the testimony of the arresting commander was taken. About a year after the incident, CIU Investigator Supir had a discussion with a Captain Amir, who had signed the complainant's arrest warrant. In this conversation, the latter denied that he took part in the actual arrest operation, and did "not recall" who had been part of the arresting force because of the amount of time passed.

During the interview itself, the poor quality of the investigation was often illustrated by the directing of completely irrelevant questions, such as: "were you insolent towards the soldiers who arrested you?" Even if he was supposedly "insolent", this in no way gives authorization to beat him. Or another irrelevant question: "Did you throw stones before the arrest?" This question relates to the actual crime of which the detainee is suspected, and one must strictly separate between the allegations against the detainee and the prohibition against beating him while he is detained, no matter the allegations against him. Such a question also suggests the lack of independence of the investigatory body, and even more grave: it

signals an implied threat to the complainant encouraging him to abandon the complaint lest he encounter difficulties. Recall that such questions may only be asked a suspect after a lawful warning and clarification regarding the right to remain silent.

An additional instance of deficiencies in interrogation pertains to the severe violence directed against A.A. from the village of Beit Ummar during his arrest on March 25, 2011. First of all, CIU required a full nine months to begin taking testimony from witnesses other than the complainant, a time lag which certainly impacted their memories for the worse.

Secondly, the witnesses interviewed by CIU, from the regiment which carried out the arrest, testified that they did not remember the specific incident, but at the same time provided a sweeping denial of violence against any detainees. CIU ultimately preferred the sweeping denials of the suspected soldiers over the detailed account of the complainant, although the latter was backed and supported by the account of A.A.'s cousin, with whom he was arrested.[15]

Third, CIU failed to interview all the relevant witnesses of the incident and did not make any effort to locate all of the relevant soldiers who took part in the action. The identity of these soldiers remains an unsolved mystery. Moreover, none of the complainant's relatives or additional individuals present at the time of the incident were summoned to give testimony, nor was a line-up performed.

On account of these omissions, PCATI filed two complaints in this case – one against the violent arresting soldiers, and one against the negligent CIU investigators who handled the complaint of violence; the MPC chose to close both. To date, an appeal filed by PCATI against the decision to close the files remains unresolved.

C. Failure to Identify Incidents and the Names of Those Involved

In at least three cases of violence during arrest, PCATI was informed by the MPC that "the incidents could not be identified."[16] There is no denial of the fact that arrests were made, and according to the complaints these arrests

15 The case of A.A.'s cousin is described in the section "Laconic responses lacking any explanation" on page 30 below.

16 Correspondence of Major Dorit Toval, Assistant Military Prosecutor for Operational Affairs dated March 6, 2012 to PCATI.

were accompanied by severe violence; and yet the military authorities remain unable to carry out the most fundamental investigative action of identifying the incidents which the complaints concern – their dates, locations and the identities of the individuals who took part. There is no greater negligence in the conduct of an investigation, since it nullifies the entire investigation of meaning and thwarts *a priori* the possibility of revealing the truth and bringing those responsible for the crimes to justice.

Negligence on the part of the arresting forces, which do not bother to document the necessary details of the incident, would seem to be a contributing factor. Such an impression is strengthened by the case of P.A., for example. The investigation materials suggest that the identity of the regiment which participated in the operation was known and that the identity of the company commander and the officer who signed the arrest warrant were revealed as well. Yet inexplicably, it was decided that, since this was a reserve unit, there was no record of the names of the soldiers participating in the arrest operation and hence no possibility of locating the soldiers involved. Moreover, Battalion Commander "Raviv" informed the CIU investigator in a conversation on March 22, 2011 that, since the incident had occurred over two years previous, he had no operation log at hand, claiming that the battalion only keeps materials for the preceding two months. Such a response does not withstand the most basic judicial logic of the duty of documentation and record-keeping, especially records of military operations which have the potential to cost human lives. In light of the routine procedure of covering the eyes of detainees so to prevent them from recognizing those arresting them, the duty to document becomes ever more crucial.

D. Failure to Investigate at the Crime Scene

In a significant portion of the investigations, CIU investigators perform only the minimum duty of taking the complainant's testimony in a closed room without making any serious effort to examine this testimony in light of their own observations at the site of the incident. Furthermore, not only do CIU investigators rarely visit crime scenes themselves, they are loathe even to visit the bases of the units involved in the incidents, for example to search for documents relevant

to the case or to take testimony from those serving there – any actions which require the investigator to leave the office from time to time. Abstention from working in the field, and the passive approach which follows, severely damage the investigator's ability to fully delve into the matter and pursue those responsible for violating the law.

E. Preventing Accompaniment of the Complainant during Testimony

Allowing complainants to be accompanied by a person of their choice on their behalf while being interviewed in response to their complaint is of great importance. Considering that the complainant has suffered severe violence at the hands of military personnel and that other military personnel are now coming to investigate the related complaint, the complainant's fear of being harmed again if s/he agrees to undergo the interview process alone without a trusted companion is understandable. This matter is explicitly discussed in the official UN document the "Istanbul Protocol", a "manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment." Article 147 of the Protocol notes that, "the presence of psychological sequelae in torture survivors, particularly the various manifestations of post-traumatic stress disorder, may cause the torture survivor to fear experiencing a re-enactment of his or her torture experience during the interview, physical examination or laboratory studies."

Needless to say, there is an entire scholarly literature, as well as specific expert medical affidavits, regarding post-traumatic stress disorder (PTSD) in victims of torture and other ill-treatment,[17] and one needn't be an expert on this scholarship to understand that repeated contact with security forces is liable to reignite the trauma.

The complainant's right to their choice of companion during the taking of their testimony is based upon article 14 of the **Rights of Crime Victims Law – 2001**, which reads:

17 See for example the article by David Becker: "The Deficiency of the Concept of Post-traumatic Stress Disorder, When Dealing with Victims of Human Rights Violations" – in **Beyond Trauma, Cultural and Societal Dynamics** – edited by Rolf Kleber, Charles Figley and Berthold Gersons. See also the article by Hanna Kienzler "Debating war-trauma and post-traumatic stress disorder (PTSD) in an interdisciplinary arena" in **Social Science and Medicine** 67 (2008).

"Victims of sex crimes or violence may be accompanied by a person of their choice, who will be present during the interview with the investigatory body, unless the officer in charge believes this may harm the investigation."

The rationale behind the legislation of the Rights of Crime Victims Law, which aims to protect the victims of crimes, is laid down in article 1 of the law:

"The goal of this law is to dictate the rights of crime victims and protect their human dignity […]"

However, in article 2 the law defines "investigative body" as "Israel Police or the PID", thus ostensibly negating its application to cases handled by the military authorities. Such a limitation is unjustifiable. It is unfair that the rights of a crime victim whose case is being examined by the military authorities should receive less protection solely because those rights were violated by soldiers. On the contrary: in fact the authorities are obliged to provide heightened protection for the rights of those victimized under this law, thanks to the circumstances under which the violence was committed – while in custody, helpless, shackled and incapable of self-defense. Moreover, whenever suspicion arises of a conflict of interests due to identification between the victimizing body and the investigating body, the latter must be doubly cautious in upholding the criteria of reasonableness and in order to guarantee due process.

Lieutenant Colonel Jana Modzagavrishivili, the MPC for Special Affairs and an Assistant Military Prosecutor, wrote the following in correspondence dated December 14, 2008 to Atty. Lila Margalit of the Association for Civil Rights in Israel regarding the application of the principles of crime victims' rights to criminal proceedings in the military:

"Indeed […], according to the wording of the Rights of Crime Victims Law it does not apply to files or investigations being handled by the Military Prosecutor Corps. Nevertheless, in practical terms the Military Prosecutor has long conducted itself in accordance with the principles delineated in this law."

This declaration by a representative of the MPC does not withstand the test of reality. In a number of cases being handled by PCATI, the crime victim's insistence upon their right to be accompanied while giving testimony resulted in the collapse of the entire investigation.

PCATI filed a complaint in the case of H.S. for severe ill-treatment of a minor; arrested on March 15, 2011 around 3 am, his hands and legs were shackled tightly, his eyes were covered with a blindfold, and he was led a kilometer on foot while being struck on the head by the butts of the soldiers' rifles and kicked forcefully on the knees before being taken to a junkyard filled with car tires and shoved between the tires, receiving serious blows to the head and causing strong pains all over his body.

About three months after the filing of the complaint, CIU contacted PCATI summoning the minor (H.S.) to give testimony at the Hebron District Coordination Office (DCO), and stating that he could only be accompanied by a family member. The CIU woman investigator was told that H.S.'s parents and siblings were unable to accompany him, whether for health reasons or from fear of being harmed. Only after PCATI suggested that its own field worker, a trained social worker from the West Bank, accompany the victim was the interview made possible, after a substantial delay. Moreover, this option is not always accepted by CIU, unless the victim is a minor.

A.S., also a minor, was arrested on October 9, 2010 by soldiers from an Israeli undercover ["duvdevan"] unit who grabbed tightly around the neck causing a choking sensation. Three soldiers laid him down on the ground and kicked him all over his body for five minutes, causing severe pains. Afterwards, he was taken by car to the settlement of Karmei Zur; on the way one of the undercover soldiers cursed him the entire time, and he was painfully and tightly shackled with plastic handcuffs behind his back, leaving marks still visible when the complainant's testimony was given two weeks thereafter. From Karmei Zur he was taken in the same vehicle to the settlement of Kiryat Arba'a, where he was interrogated and forced to sign various documents he did not understand.

As in the previous case this minor, too, sought to be accompanied by PCATI representatives while giving his testimony to CIU, but the latter stipulated that he could only be accompanied by a family member. In this case, too, the CIU woman investigator was informed that the complainant's parents could not stand that burden. His mother was ill and unable to attend, his father worked around the clock, and all other adult relatives feared any form of contact with the Israeli security forces, including CIU: since these were known among Palestinians as

sites for potential arrest, harassment and violence, none would agree to accompany the complainant. In this case as well, PCATI's suggestion that the minor be accompanied by its field worker, a trained social worker, ultimately enabled him to give his testimony before CIU.

In October 2012, PCATI sent a collective complaint in the matter of three brothers, M.S., I.S. and A.S., who were subjected to cruelty and violence by IDF soldiers while sleeping in their parents' home on June 24, 2012. Around 2:30 am M.S. awoke to the sound of loud knocking at the door of the house. He rose to open it and spotted several soldiers standing there accompanied by an officer, who ordered M.S. to get down on his knees; when he refused, the officer ordered one of the soldiers to kick his leg. The soldier began beating M.S. strongly and aggressively, causing him to scream in pain. When, responding to his screams, M.S.'s brothers rushed to help him, the soldiers began to push and beat them as well. At this time additional soldiers joined in the violence, some of them even using their rifle butts. I.S. suffered a sudden blow to the head with a rifle butt, causing pain and bleeding. At some point M.S. actually lost consciousness and incurred a serious, visible injury to his right eye. The three complainants were taken by a "Red Crescent" ambulance to "Rafidiya" Hospital, where they were treated and released several hours later. The next day they went to "Huwarra" military camp due to the officer's threats that if they did not come there for questioning he would "demolish their home." At the "Huwarra" camp they were held in detention for two days without being interrogated at all, then transferred to "Salem" Camp and from there to "Megido" Prison.

In this case, PCATI and CIU discussed the matter of accompanying the complainants during the giving of their testimonies; PCATI suggested that its field worker accompany them to the interrogation room. CIU vehemently refused this solution, permitting the field worker to accompany them at most to the gates of the interrogation facility.

It is clear as day that complainants have in practice no right to accompaniment, whether they be minors or adults. CIU investigators are given exclusive discretion in the matter and are not forced to justify their stand, which is typically consistent refusal. Sometimes, the CIU allows an adult complainant to be accompanied only while giving testimony, which typically occurs in a space open to the

wider public – as opposed to accompaniment during the interview itself, and such a stance clearly empties the "accompaniment" of any actual significance. In the case of minor complainants, CIU investigators do sometimes permit accompaniment, but insist that the accompanier be a family member and refuse to allow the complainant to choose their accompanier.

F. Injurious Conduct of the Interview

In order to demonstrate just how crucial it is that the complainant's right to accompaniment by a person of their choice be realized, the following instances are cases in which PCATI got word of the injurious conduct of CIU investigators while taking complainants' testimonies. In these cases, the complainants are treated in a humiliating fashion, as if they were suspects and not victims. This severe phenomenon undermines the very foundation of the investigation's credibility, and paints a particularly bleak picture of the seriousness and responsibility with which CIU investigators approach their task of looking into complaints of violence against detainees.

A.A. was violently arrested on March 15, 2011 and filed a complaint on the matter with CIU. In his affidavit he stated: "in the first meeting with the CIU investigators, I was asked about my complaint. I was surprised to see how the soldier representing CIU began screaming, even tearing the pages in front of her, and she spoke to the interpreter with angry hand movements and a loud voice. Per her request I repeated my testimony again. She said that they would handle my complaint and deal with the soldiers involved, including bringing the soldiers to trial. As such, since they would handle the matter, she tried to convince me to recant my complaint and drop the case. Of course I refused to do so… In early 2012 I again met with CIU investigators who came to 'Ofer' Military Prison. There was a woman soldier and a Druze interpreter, and again they attempted to convince me to recant my complaint. In response I told them that I was being represented by an attorney and any demand on their part should be communicated to him."

An additional case is that of P.M., nineteen-and-a-half years old, who was detained at his home on August 31, 2009 and is held at "Ofer" Prison. A complaint for physical ill-treatment of a detainee at the hands of soldiers was filed in his name with the Military Prosecutor for Operational Affairs on June 6, 2010. Sometime

around November 2010, a man and a woman in military uniform took his testimony in an interrogation room at "Ofer" Prison. Throughout the interview – very much like an interrogation – the complainant's hands were shackled. A prison guard translated his words into Hebrew. The interrogators did not identify or introduce themselves to the complainant. At the conclusion of the testimony he was asked to sign documents in Hebrew, a language foreign to him, without having received proper translation of their meaning.

A further case: I.D., a detainee in whose name a complaint was filed with the MPC – Central Region on August 10, 2006 regarding physical abuse at the hands of arresting soldiers. Towards the end of 2009, while the complainant was being held at "Ramon" Prison, investigators visited him regarding this complaint. They demanded that he recant his complaint, even claiming that his imprisoned brother had recanted his own complaint and that he ought to do the same. However, the complainant stood up for his rights and refused to do so.

Such behavior on the part of CIU investigators contravenes the accepted principles under a civilized regime, contradicts the constitutional values of the State of Israel and also stands in opposition to the Rights of Crime Victims Law and fundamental human rights, including the right to due process. A collective complaint regarding the two above cases was sent by PCATI to the MPC for Operational Affairs on August 19, 2010, and no substantive response to it has been received to date.

G. Lack of Professional Interpreters

The second example in the previous section, described a prison guard, not CIU personnel, translating a complainant's words for an investigator. This is a particularly common phenomenon, because most CIU personnel are not Arabic speakers, and the testimonies they take are from detainees or prisoners in Israeli prison. Their dependence upon external interpreters harms the documentation and investigation process as well as the possibility of recording as full an account as possible from the complainant before them. The prison guards who assist CIU interrogators are not professional interpreters, and complainants report that they have difficulties translating into proper Arabic. Another element of the phenomenon is having complainants sign documents written only in Hebrew, which is liable to undermine the credibility of the

entire interview and deter complainants from initiating the process. The complainant has the right to understand the account recorded in their name as written down by the investigators, in order to prepare for the coming stages appropriately and to know which points it records accurately and which it does not – so that they can properly critique those points if need be.

H. Lack of Special Treatment for Minor Detainees

Whether during their arrest or throughout the treatment of their complaints against such violence, the military is clearly not punctilious in treating minors – those of the more sensitive soul upon whom any sign of roughness is liable to leave the indelible mark of trauma. The law directly addresses the taking of testimony from minors, dictating that for certain crimes this be done by special non-uniformed investigators, indicating the necessary sensitivity here.[18] The UN Convention on the Rights of the Child, which Israel has signed and ratified, and the United Nations' Rules for the Protection of Juveniles Deprived of their Liberty, also emphasize the importance of protecting the health and dignity of minors during detention. The following examples indicate that these values are, to say the least, not top priorities for the IDF in its interactions with minors in the territories.

In March 2012, PCATI complained in the name of the minor I.M. against violent abuse and humiliating treatment suffered during his arrest at the hands of soldiers and GSS personnel. Around January 2013, while I.M. was imprisoned at Megido, he was brought to a 2 meter by 3 meter room – supposedly for a visit – but he claims the room resembled an interrogation room. There a CIU investigator took his testimony with the assistance of a young interpreter. The investigator did not identify himself or announce his position, but simply questioned I.M.: had he had filed a complaint? The latter acknowledged he had. I.M. describes a short meeting and brief questions directed at him by the investigator: the actual taking of testimony lasted around fifteen minutes. For the remaining fifteen minutes, the investigator hurled threats at him and yelled at him. I.M. claims that the CIU investigator threatened that if he wouldn't recant his complaint, "things would be difficult for him and he, his parents, and

18 See for example the **Evidentiary Law (Child Protections) – 1955 [Amended]**, article 4.

his family would suffer." Nevertheless, I.M. insisted upon standing by his complaint, which only exacerbated the threatening and aggressive environment imposed by the investigator – to the point of causing real harm to I.M. At the end of the meeting, I.M. signed a document written in Hebrew stating his insistence that his complaint be investigated. The content of the document was translated for I.M., who is not proficient in Hebrew, by the interpreter who was present during the testimony.

The lack of special treatment for minors is especially apparent in a matter already discussed above: the prevention of an accompanier of the complainant's choice during the giving of testimony. As noted, CIU insists on refusing minors full freedom to choose an individual to accompany them while giving testimony – a refusal which at times ruins the entire testimony itself. We have already detailed several such cases in a special section on the topic, and here we add only the case of M.I.

M.I., a 17-year-old minor, threw rocks at the soldiers who were arresting him. Two soldiers standing behind him grabbed him beneath the arms and picked him up until his feet dangled in the air. They began running, placing his body in front of them exposed to blows from rocks, with the soldiers shielded themselves behind him. That is, the soldiers knowingly endangered the life of a minor and used his body as a human shield while he was handcuffed and completely subject to their arbitrary will, something **expressly forbidden in rulings of the High Court of Justice**.[19] During the treatment of the complaint filed by PCATI in M.I.'s name, the subject of his accompaniment during the interview arose. PCATI explicitly emphasized before CIU that the minor remained in a state of trauma from his arrest, and that all further interaction with military personnel would make him fear an additional arrest; but to no avail. CIU insisted on forbidding that the minor be accompanied by an individual of his choosing while giving testimony, echoing the policy that allows minors to be accompanied by family members only. This refusal led to the complete dismantling of the complaint process.

One of the most severe complaints filed by PCATI concerns a minor who, already arrested and in military custody, was shot

19 HCJ 3799/02 – "**Adalah" – The Legal Center for Arab Minority Rights in Israel v. Major General of IDF Central Command**, published in "Nevo" database [in Hebrew].

nevertheless. It is the case of A.S., in which the MPC abstained from sending the complaint to CIU for investigation at all, sufficing with an operational response of the forces in the field: that the firing took place during a struggle by a soldier who "felt he was in danger". On the basis of this response alone, the MPC decided to close the investigation file. The case demonstrates the failures of relying upon a body to examine its own afflictions, to report on the results of its examinations, and to do so in a supposedly "independent" and "unbiased" manner.

I. Failure to Provide Updates on the Progress of the Investigation

In another case, PCATI filed a complaint regarding violent abuse by soldiers against the detainee A.A. Suffering from a fracture in the groin region and from a right leg fracture after a car accident, which he reported to the soldiers, the detainee was placed, handcuffed and blindfolded, in a room with his brother, where he was beaten. The soldiers meanwhile beat his brother as well, having already stripped him of his clothes, including undergarments. They threatened to cut off his genitals with scissors they had at hand until he began screaming from terror and additional soldiers entered the room.

Two months after the filing of the complaint, on July 31, 2005 PCATI received a letter from the Prosecutor of the General Staff Lieutenant Colonel Sigal Meshal-Shahori, giving notice that the complaint had been transferred to her office for treatment and that a need for further investigatory actions had arisen. Seven years (!) passed before any further substantive response was received in the matter from the Military Prosecutor. After PCATI sent a collective reminder regarding open complaints against soldiers, the MPC's letter of March 6, 2012 included a table with status updates, which reported the following regarding this case: "the file's status remains under inquiry, [and] especially considering the date of the incident we will provide an update in due course."

And lo and behold: one month later, in a letter from the MPC dated April 1, 2012, PCATI was informed for the first time that an indictment had been served against one of the soldiers involved in the incident, who was convicted in March 2007 of the crime of abuse and sentenced to six months' community service. Here, without any apology or expression of sorrow for the oversight, notice of the conclusions of the CIU investigation reached

the legal representatives of the complainant more than five years after the injuring soldier had been convicted. This fact constitutes clear harm to his rights as a crime victim, the severity of which is increased many times over in light of the severity of the crimes themselves.

This example is typical of multiple cases in which the authorities fail to update both PCATI and the complainants in a timely fashion regarding the status of investigation processes launched at PCATI's initiative. To emphasize: when such complaints are filed by PCATI attorneys, this is not in fact a complaint from PCATI but one in the name of and on behalf of the complainant lodged by an attorney representing them. In many, indeed almost all cases, PCATI must send a reminder to the MPC in order to receive an update on the status of an investigation, and oftentimes even these reminders receive no prompt, substantive response. If the CIU investigation file is closed, there is no procedure for updating PCATI of the matter, thus impeding the organization from performing the crucial task of photocopying materials from the file after its closing.

The Turkel Commission Report of February 2013 notes on this issue:

> **"The procedures of the MAG [MPC] Corps, including the MAG Corps for Operational Matters, provide that when it receives a power of attorney from a suspect or defendant giving notice of legal representation, it is obliged to notify the attorney of the stages of handling the case. The material presented before the Commission showed that in many cases the MPC Corps tends to send the information about the stage of handling to human rights organizations, if they request the information, even if there is no power of attorney for legal representation in the file. However, it appears that sometimes a significant period of time passes until a response is given to the complainants or the human rights organizations."[20] (Emphasis added).**

Later, the Commission explicitly suggests:

> **"The Commission recommends that the arrangements provided in the Rights of Crime Victims Law relating to the receipt of information on criminal proceedings shall also be applied *mutatis mutandis* to persons injured by law enforcement activity by the**

20 Turkel Commission, p. 345.

security forces that are investigated by the [CIU]."21 (Emphasis in original).

I.M. describes a short meeting and brief questions directed at him by the investigator: the actual taking of testimony lasted around fifteen minutes. For the remaining fifteen minutes, the investigator hurled threats at him and yelled at him. I.M. claims that the CIU investigator threatened that if he wouldn't recant his complaint, "things would be difficult for him and he, his parents, and his family would suffer…" Nevertheless, I.M. insisted upon standing by his complaint, which only exacerbated the threatening and aggressive environment.

21 Turkel Commission, p. 400.

3. Investigation Results

The conclusion of an investigation without the filing of an indictment against the suspect at hand must be not only justified but properly reasoned. The complainant has a right to know why their complaint is being rejected and what for – this under the principle of transparency of public activities, which must not be carried out in secrecy and darkness but rather be carried out in the open and made comprehensible. The authorities are also obligated to provide the complainant, upon request, with all the documents necessary to attack the decision to close the investigation file, without any delay or partial concealing of the documents. The investigatory echelon must internalize the fact that it is not the ultimate adjudicator in these matters but is subject to judicial appeal, such that all of the complainants' rights to file a full and comprehensive appeal must be guaranteed. Just how far CIU is from internalizing these fundamental requirements will be illustrated in what follows.

A. Laconic Responses Lacking any Explanation

A.A., 20 years old, was arrested together with his cousin in his village of Beit Ummar on the night of March 15, 2011. The two were led out of the village by foot towards the settlement of Karmei Zur. A.A. testifies that:

> **"The soldiers began to beat us. First one of the soldiers struck me in the testicles with his knee before covering my eyes with a blindfold. Then they shackled me with plastic handcuffs behind my back, tightening them all the way and causing much pain – I felt it was slicing my flesh. Then, blows began raining down on me from every direction: punches, kicks, rifle butts, all over the body including the head, the eye, on the sides, the legs and the knees."**

A.A.'s affidavit subsequently describes a series of violent actions committed against him by soldiers during his arrest, which included verbal violence against his family members and the prophet Muhammad, all while he was shackled strongly with handcuffs. PCATI brought this severe case to the MPC's attention on August 6, 2011, from which date six months passed without any confirmation even of the complaint's filing. Only after a reminder was sent in February 2012 did the Military Prosecutor Corps confirm receipt of the request in this matter. It declared that the investigation of the incident had

been concluded and that the investigation materials had been sent for the MPC's review; "when a decision is reached, PCATI will be updated." More than a year has passed and still no update has been received from the MPC.

In response to a reminder notice sent by PCATI in May 2013, MPC was reminded to give notice that its handling of the file had been concluded in January 2013, "after the Assistant Attorney for Operational Affairs found no basis for launching legal proceedings against any military entity." Thus in a stroke – a single, general sentence, without any explanation or logical foundation for the decision to close the file – an entire complaint which painstakingly recounts severe violence against a detainee in the richest possible detail, is obliterated.

This case is typical of the MPC. Oftentimes, detailed complaints filed by PCATI are shoved aside with sentences such as: "there is no basis for launching legal proceedings," or, "no foundation for your complaint was found," without any substantive confrontation with the actual evidence bound up in the complaint, for example the complainants' own detailed affidavits. As such, the MPC violates the duty to provide an explanation applicable in administrative law, and places those appealing to it in a hopeless situation of seemingly "automatic" file closure devoid of any serious examination of the evidence.

The Turkel Committee Report from February 2013 emphasizes the duty to explain such decisions. Page 386 of the report reads:

"This is important from a public and legal perspective, as well as a practical perspective, because such reasoning enables appeal and review of the MPC's decision."

This of course applies even more strongly to decisions regarding files in which an investigation has already taken place.

B. File Closure on Peculiar Grounds

As noted in the previous chapter, the Military Prosecutor Corps often shelves investigation files solely because the complainant – the victim of violence – insisted on their right to choose an accompanier while giving testimony. This seems too paltry a reasoning, by itself unjustified, when the decision at hand is so sweeping as to imply that justice will not be brought down upon those who abused the complainant, especially when the complainant has just such a right to accompaniment.

The Military Prosecutor even admitted in a letter dated March 6, 2012 that it had closed two investigation files regarding violence during arrest without even opening a CIU investigation, "after receiving the response of the military field forces, which suggested that during the arrest operation, the complainant suffered an anxiety attack and was given medical treatment. No suspicion of the commission of a crime against the complainant was found to have arisen. In this light, the decision was made not to open a CIU investigation." One needn't employ an extreme imagination to assume with some certainty the nature of this "treatment" provided by the armed soldiers to the anxious detainee in their hands, especially considering that the symptoms of his anxiety, we can easily assume, only complicated the smooth conduct of the arrest and aggravated the captors. In other words, a detainee's anxiety attack is in itself no reason to close the file investigating violence against him, but rather the opposite – it should indicate the increased likelihood that violent acts were inflicted upon him, and that there is an even stronger reason to open a criminal investigation. These two cases also illustrate the problematic nature of relying upon the military entities who carried out the arrest, and the importance in the obligation to turn to an investigative body that is not dependent upon it – that is, the CIU – to handle each complaint of violence against detainees.

No less severe are the Prosecutor's decisions to close investigation files without any investigation in the matters of women who were victims of violent and humiliating treatment during their arrest. PCATI presented the Military Prosecutor with detailed complaints regarding these women, who were shackled in violation of procedures by the forces arresting them, subjected to nude searches in violation of proper procedures, cursed and verbally humiliated by the soldiers, and after all this the Prosecutor's response in the matter was: "according to the description in the complaint, no security checks were conducted in violation of the procedures. Under these circumstances and after so much time has passed (from one to three years – A.L.) between the occurrence of the incident and the filing of the complaint, there is no logical basis for the opening of a CIU investigation or launching an inquiry with the forces in the field."

A similar answer was also given in response to the complaint of R.A., who while waiting

for her interrogation in Kiryat Arba'a asked to go to the restroom and was initially refused before – when she was allowed to go, after some time – the woman soldier responsible for her confinement refused to remove the shackles from her hands; R.A. was forced to use the restroom with her hands shackled, subjected to the mocking of the soldier, who even refused to keep the door of the bathroom closed.

A similar answer was also given in the case of R.S., who complained of having her hands shackled in a single plastic handcuff behind her back and being yelled at and cursed severely. A similar answer was also given in the case of N.A., who complained that she was subjected to a full nude search conducted in the presence of a man soldier nearby who did no more than turn his back. All of these actions **contravene the proper procedures** as they are laid out by the Military Prosecutor itself, and it is rather galling that the Prosecutor can dare to argue that the complaints do not require examination for veering from its own procedures. And as to the reasoning of time passed: some sensitivity to the injustices described in the complaints would seem to outweigh the time passed as a barrier to launching an investigation. What's more, the claim is sometimes imprecise: regarding the complaint of the woman whose handcuffs were kept on in the restroom, the Military Prosecutor wrote that "over a year and two months" had passed from the date of her arrest to the day her complaint was brought before PCATI, when in actual fact less than two weeks had passed between these dates, as the Prosecutor's own letter noted elsewhere.

C. Foot-dragging in Provision of Investigation Materials

After copies were requested of the investigation materials in the matter of P.A. described above, six months passed before a response was received permitting the photocopying of the file. The same is true in the case of A.G., who was struck in the legs, stomach and head by the soldiers arresting him at his home on September 3, 2007 after he was already shackled, and regarding whom a CIU file was opened: more than six months and many reminders were needed in order to be granted permission to examine and photocopy the CIU file. Almost a full year passed in the case of Z.D., also a victim of soldier violence during his arrest – which caused blood to gush from his ear.

This conduct severely damages the right of victims of violence to file an effective appeal of decisions rejecting their complaints and closing the files in their matters. It seems unlikely that, were the bases for the closing of files truly comprehensive and solid and in compliance with the requirements of a thorough, efficacious and prompt investigation, so many obstacles would be raised to the launching of effective appeals by complainants. The obvious foot-dragging in transferring the investigation materials for photocopying is as clear an indication as any of the seriousness with which their cases are handled from the outset.

In this context the provisions of article 539a of the Military Adjudication Law are relevant: it states that the materials from the operational investigation shall be kept confidential from all individuals, but allows a summary of the findings to be transferred to "a concerned individual," alongside other exceptions to the confidentiality. The decision to divulge investigation materials rests with the IDF Chief of Staff, who must enact his own discretion fairly, reasonably, equally, in good faith, and not arbitrarily, while considering all of the relevant considerations and exclusively these. These decisions are subject to judicial review, but the courts avoid challenging the Chief of Staff's discretion and will tend not to intervene.[22]

D. Inadequate Medical Documentation in the Detention File

One of the factors contributing to the disruption of efficacious investigations into violence against detainees is the partial and omitted medical documentation by the military authorities, which fails to represent the detainee's actual medical status. Through negligence and, thanks to the large number of cases, we may perhaps add malice, medical documents relating to the detainee's condition "disappear" from the medical records. As a result, requests to photocopy medical records of detainees or for the provision of specific medical documents are not granted. Herein lies a cause of severe evidentiary harm which is liable to strip the entire investigation of meaning. Meanwhile, the significance of the right to peruse the patient's medical record under article 18 of the **Patients' Rights Law – 1996** dissipates. Several cases illustrate this:

22 See HCJ 2366/05 – **Atwa Elnabari v. IDF Chief of Staff,** published in "Nevo" database [Hebrew].

The case of the minor H.S. was already described above. He was arrested on March 15, 2011 and was struck numerous times by the soldiers who arrested him. PCATI initially requested his medical record on July 4, 2011; since then, more than two years (!) have been necessary for the request to be granted. This failure is especially grating because the detainee complained before the military physician regarding this beating. The latter expressed her shock at the injury marks she saw on his body, though she abstained from complaining to the officer responsible.

An additional case is that of D.J., who was arrested on Jan 19, 2010 around 11 pm. Soldiers stationed at a checkpoint next to the Cave of Patriarchs and Haram al-Sharif complex in Hebron/al-Khalil asked D.J. to show them his identity card. The latter did not have his identity card on him at the time, and when he told them so, they began to curse and shove him. When he tried to defend himself, several soldiers pounced upon him, lay him on the ground and struck him all over his body with their feet and their rifle butts. As a result D.J. suffered from severe pains all over his body; when he was able to free himself of the soldiers he ran towards the nearby Police Station. The soldiers fired at him in response and, fortunately for him, the rounds missed.

The soldiers chased after him and surrounded the Police Station, which was closed at the time. They called after him and he responded. When they saw him approaching, the soldiers pounced on him once again and lay him on the ground, all the while beating and kicking him in the stomach and legs. He explained to them that his right leg had been broken and that the blows and kicks were causing him unbearable pains, but the soldiers continued to strike and kick him very forcefully. The series of abuses described here continued for fifteen minutes, until a[n Israel] Police jeep arrived.

D.J.'s hands were shackled behind his back with very tight plastic handcuffs. According to his complaint, he was held in these tight, painful handcuffs until the early morning hours, and as a result he almost lost sensation in both hands. When D.J. was loaded onto the jeep, he was told to "sit and not raise your head." He was brought to "Jaber" Station in the settlement of Kiryat Arba'a. When he arrived at the station he was left in a room with a soldier, until around 8:00 am when

was brought to another room, where an interrogator in military uniform waited, introducing himself as "Solomon". "Solomon" told D.J. that people had informed on him, that there was evidence he was dangerous to the security of the State of Israel, and that he should admit to the allegations against him. D.J. refused to sign the confession and the interrogator responded by hurling obscene curses at him and threatened him an intensive beating. D.J. was overcome with fear and was coerced into signing the confession. When he signed it, he was transferred by military jeep to "Etzion" Detention Center.

During this journey, D.J. was subjected to a series of even more severe abuses by the soldiers who accompanied him. During the drive to "Etzion" his hands were shackled in metal handcuffs behind his back. One of the soldiers told him to sit and not to raise his head. Every time slightly raised his head slightly, the soldier pulled D.J.'s hat over his face, and did so a number of times. During the journey, D.J. requested a drink of water; in response the soldier pulled his hat roughly over his face, ordering him again not to raise his head. D.J. testifies that during the drive to "Etzion" the jeep stopped in an unknown place where he was examined by a physician. D.J. notified the physician that he had an earlier leg fracture and that the soldiers had struck him in that place. He also reported that the swelling in his left hand and leg had been caused by the soldiers' blows. Upon completing the examination the accompanying soldier blindfolded him and ordered him to walk quickly towards the jeep. D.J. told him that he could not see and so it was difficult for him to walk quickly. The soldier responded by hitting him in the legs, almost causing him to fall. D.J. was held for 14 days at Etzion and later transferred to "Ofer" Military Prison.

The series of violent abuses suffered by D.J. prior to his arrival at Etzion has been described here in such detail because, in response to PCATI's document request, on April 4, 2011 partial medical records were received – missing the records from his period of detention at Etzion such as the report on his medical condition made on his way to the detention center, so that there is in effect no proper medical documentation of the injuries caused to him by the soldiers' prolonged violence. PCATI has been seeking access to the relevant medical documents since, but to no avail.

Another disturbing case is that of J.H., arrested on Nov 26, 2008 around 8 pm on his way

to a friend's home in the village of Abud. Soldiers stopped the vehicle that J.H. was travelling in, surrounded the vehicle and pointed their weapons at him. J.H. was forced to leave the vehicle together with two other friends who were travelling with him. He claims the soldiers pounced on them and began raining blows and strikes down upon them. Then the soldiers shackled his hands behind his back with tight plastic handcuffs, blindfolded him, shackled his legs and led him to a military jeep.

When the soldiers placed J.H. in the jeep, they lay him down on the floor of the vehicle. The soldiers who accompanied him kicked him with their legs and rested their feet on his back, until they arrived at "Halamish" Station. There, J.H. says he was taken to the clinic where he was examined and subjected to a series of X-rays. The soldiers accompanying him mocked him and struck him. Four hours later J.H. was returned to the military jeep, blindfolded with his hands shackled behind his back with plastic handcuffs and legs shackled. The soldiers inside the jeep began to rain blows down upon him with their hands and legs and with their rifle butts, striking him all over until they arrived at the "Russian Compound" Detention Center. Upon arrival, J.H. was brought directly to the interrogation room. Upon the completion of his interrogation, two months later, he was transferred to "Ofer" Military Prison, where he was held being held at least until a complaint was filed in his name by PCATI.

PCATI requested J.H.'s medical record, and the record which was sent in response was missing documents from the date of the complainant's arrest through May 31, 2009 – that is, from the period during which he says he was examined at "Halamish" and administered a series of X-rays. PCATI's attempts to receive the relevant documents, which are of such crucial importance, have been of no use.

On the topic of inadequate medical documentation it must also be noted that the presence of the arresting soldiers in the room during the medical examination of the detainee is a severe matter. This situation may cause obvious and improper pressure on the physician not to document in full the injuries observed. And indeed, many of the physicians do not fulfill the requirements of the "Istanbul Protocol" to document the injuries they discover using visual photographs; some physicians suffice with a description in words, in virtually illegible writing, in effect making it impossible to fully scrutinize the medical documentation of the case.

Oftentimes, detailed complaints filed by PCATI are shoved aside with sentences such as: "there is no basis for launching legal proceedings," or, "no foundation for your complaint was found," without any substantive confrontation with the actual evidence bound up in the complaint, for example the complainants' own detailed affidavits.

4. A Legal Lens on Soldier Violence against Detainees

Detainees in military custody are entitled to humane and dignified treatment by the arresting soldiers, upon whom there is a severe injunction against physically or verbally assaulting the detainee, no matter the allegations under which they have been arrested. The arresting force is not a punitive force, certainly not for such cruel and humiliating punishments as blows, curses, and biting dogs. Such phenomena must be immediately, thoroughly and impartially investigated as soon as a corresponding complaint is filed. This perspective is the estate of well-civilized judicial systems, including Israel's, despite several gaps in the Israel judicial system which shall be detailed below.

A. Treaties and International Jurisprudence

The prohibition against soldier violence inflicted upon detainees is present with more force, more focus and more detail in international jurisprudence than in Israeli law, due to a series of international treaties which Israel has signed and ratified. In what follows, we describe the prohibitions in these various treaties, in chronological order.

First, **The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War** of 1949, which Israel ratified in 1951. Article 3 obliges humane treatment of every individual not taking active part in the hostilities[23] – in which category all those detainees discussed in this report can be categorized, especially considering that most of them were arrested in their sleep or other completely non-belligerent situations. The aforementioned article 3 continues, declaring regarding such persons:

> **"[T]he following acts are and shall remain prohibited at any time and in any place […]:**
> **(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture […]**
> **(c) outrages upon personal dignity, in particular humiliating and degrading treatment."**

Article 32 of the same treaty is also apt. It states as follows:

"The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to

23 This provision includes soldiers who have laid down their arms.

cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents."

Also worthy of mention is article 33, which prohibits collective punishment and the causing of any harm to a civilian person for a crime not committed by them personally, which is relevant here because at the time of arrest the soldiers can at most suspect that a crime was committed, but can have no certain knowledge.

Note, too, that this convention has been entered into Israeli military law.[24]

Another treaty important here is the **International Covenant on Civil and Political Rights** of 1966, which Israel ratified in 1991. It rules in article 7 that, "**No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment**," and in article 10 that, "**All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.**" These two important provisions are included in the covenant without any limitations. They correspond to the instructions of article 16 of the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** of 1984 (which Israel ratified in 1991), obliging States Party to the Convention to prevent acts of cruel, inhuman or degrading treatment.

To emphasize: these duties are absolute, and apply even if the circumstances are of the most severe allegations against detainees. These are also conventional obligations, to which Israel is beholden even if it has not ratified the treaties which contain them. And the European Court of Human Rights, whose rulings have interpretive force in the application of treaties, has ruled on the Convention Against Torture that, "even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."[25]

24 See **General Staff Ordinance No. 33.0133** determining with regards to the four Geneva Conventions for the protection of war victims, that "IDF soldiers must conduct themselves in accordance with the instructions included in the aforementioned treaties."

25 **Aksoy v. Turkey**, para. 62.

The Convention Regarding the Rights of the Child of 1984 (which Israel ratified in 1991) regulates the treatment of detainees who are minors. Article 37 of this treaty, other than forbidding the subjection of a child to torture or other cruel, inhuman or degrading treatment or punishment, also explicitly states that, "**Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.**"

Neither the Fourth Geneva Convention nor the Convention Against Torture, quoted above, suffice with stating that violence against detainees is prohibited; rather, they detail a number of enforcement clauses which mandate the pursuit of justice against those responsible for the prohibited actions. Thus for example, article 146 of the Fourth Geneva Convention imposes the duty to seek out and bring to court those responsible for torture or cruel treatment, and article 12 of the Convention Against Torture states: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committee in any territory under its jurisdiction."

The importance of the investigation's being **independent and impartial** has already been emphasized a number of times in the rulings of the European Court of Human Rights.[26] In the matter of **Mikheyev v. Russia**, the court ruled that an investigation "lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation,"[27] an important ruling in light of the "examining officer" practice favored by the Military Prosecutor, which returns the examination of wrongdoing to the unit which itself caused it.

The importance of the investigation's **immediacy**, too, is emphasized in a number of the European Court of Human Rights' rulings, referring in this context both to the timing of the launch of the investigation and the investigation's length, including various delays in taking testimonies.[28] Of prime importance here is the recommendation of the UN Committee Against Torture in the

26 See for example the court's rulings in the matter of **Bati and Others v. Turkey** and the matter of **Kelly and Others v. the United Kingdom**.

27 **Mikheyev v. Russia**, para. 110.

28 See for example this court's rulings in the matter of **Çiçek v. Turkey**, the matter of **Assenov & Others v. Bulgaria** and the matter of **Labita v. Italy**.

matter of **Encarnación Blanco Abad v. Spain**, which considered a timeframe of ten months' duration for an investigation of torture to be an "unreasonable" period of time. There the court emphasizes the importance of the investigation's immediacy "to ensure that the victim cannot continue to be subjected to such acts,"[29] and since, "the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear."[30]

Noteworthy in this context is the ruling of the Inter-American Court of Human Rights, which stated the importance of immediately presenting the torture victim before a judge.[31] The court anchored this right in the right of *habeas corpus*, which is protected under the European Convention on Human Rights and appears in Israeli jurisprudence as well. Initially this order was meant to prevent unlawful arrests, but in the context of torture it can expedite the initiation of an investigation at a time when the marks of the violence remain visible to a judicial eye.

The European Court of Human Rights also often emphasizes the importance of an investigation being **effective and thorough**, noting in this context steps such as taking fingerprints; carrying out an exhaustive medical examination to provide comprehensive documentation of the possible symptoms of ill-treatment; and arrival at the scene of the incident in order to collect evidence. The Inter-American Court of Human Rights has already ruled in one case that: "The fact that the State did not investigate the acts of torture effectively and allowed them to remain unpunished, means that it has omitted to take effective measures to avoid acts of this nature being repeated within its jurisdiction."[32]

Another ruling of the Inter-American Court of Human Rights stated that the abstention from an effective investigation of the torture or cruel and degrading treatment is liable in and of itself to constitute cruel and degrading treatment.[33] This becomes clear when examining the repercussions of this failure for the victims' mental state, including anxiety and anguish at the injustice.

B. Israeli Jurisprudence

Israeli jurisprudence denounces soldier

29 **Encarnación Blanco Abad v. Spain**, para. 8.2.

30 Ibid.

31 **La Cantuta v. Peru**, para. 111.

32 **Maritza Urrutia v. Guatemala**, para. 129-130.

33 **Mapiripan massacre v. Colomia**, para 145-146.

violence against detainees completely, without any exceptions or *a priori* reliefs. It states as much in several locations:

At the constitutional level is article 4 of the **Basic Law: Human Dignity and Liberty**, which sets down the right of every individual, including a detainee, "to protection of their life, body and dignity."

At the level of general criminal law are articles 379, 380, 382 and 280(1) of the **Penal Code – 1977**, which prohibit, respectively: assault, assault occasioning actual bodily harm, aggravated assault, and abuse of the powers of office. Additional relevant instructions in the Penal Code are those set down in articles 227 and 427 prohibiting physical coercion in general and in particular physical coercion by a public official in order to extract a confession to a crime from another individual. All the provisions of this law are also completely applicable to IDF soldiers.

At the level of military law stands article 65 of the **Military Adjudication Law – 1955**, which sets at three years' imprisonment the punishment for a soldier who strikes or otherwise abuses an individual in their custody and with which they are entrusted; and if the crime was committed under aggravated circumstances, the punishment is seven years. A punishment of three years' imprisonment is set in article 72 of this law for "**a soldier who exceeded authority, and in his actions caused or may have caused harm to the body or health of another individual**." Further relevant articles of the Military Adjudication Law are article 114 (unlawful arrest), article 85 (unlawful use of firearm), article 124 (negligence), article 130 (unbecoming conduct) and article 115 (crimes relating to arrest).

Thus, while there are a number of sites in Israeli legislation from which one may glean the prohibition of soldier violence against detainees, the lack of any unique legislation – which does exist in international jurisprudence – to express the absolute prohibition against cruel and/or inhuman and/or degrading treatment by any representatives of the authorities should be noted. The Turkel Committee expresses its unease at this absence in its special report published in February 2013 as follows:

> **"The Ministry of Justice should initiate legislation wherever there is a deficiency regarding international prohibitions that do not have a 'regular' equivalent in the Israeli Penal Law, and rectify that deficiency through Israeli**

criminal legislation. Thus, for example, the Ministry should ensure that there is legislation to transpose clearly into law and practice the absolute prohibition in international law of torture and inhuman and degrading treatment. This is in order to enable 'effective penal sanction' for those committing war crimes, as required by international law."[34]

Apart from Israeli legislation, the invalidation of violence against a detained person can be ascertained from Israeli case law as well. The Supreme Court, in HCJ 7195/08 – Ashraf Abu Rahme v. Chief Military Advocate General and others (published in "Nevo" database [Hebrew]),[35] rules as follows:

"Harming a detained, bound and helpless person has always been deemed a heinous and cruel offense requiring suitable punishment. In the words of President Shamgar in HCJ 253/88 Sajadiya v. Minister of Defense, PD 42(3) 801, 823 (1988): 'If an unacceptable and prohibited practice occurred as is alleged, it represents harm not only to the prisoner, and humiliates not only him, but also the person who treats him violently or degradingly; Harming a bound and helpless person is a shameful and cruel act, and it requires a response that is appropriate to the act's gravity.' This approach, which completely rejects the harming of a bound and helpless person, conforms to the general approach of Israeli law regarding the duty to defend the basic rights of people held in custody, even when they are suspected of heinous acts and of endangering lives."

And the Military Appeals court has ruled that:

"We must not ignore IDF soldiers' exploitation of their authority in committing severe assault against helpless persons. What we see here is beating and humiliation without any rationale at all. The black stain of prohibition rests over the sinful actions of the Respondent. We must not make peace with the behavior of soldiers as a group of unrestrained hooligans. The beatings and humiliations inflicted

34 Turkel Committee, p. 365.

35 Quote is from an English translation of the ruling available at the website of HaMoked: http://www.hamoked.org/files/2012/110871_eng.pdf.

upon the local residents leave a stain upon the image of the military and on the image of its soldiers."[36]

Nevertheless, the level of punishment reflected in military courts regarding soldier violence against detainees is too light and forgiving. For example, in the matter of the ruling against Sergeant Avichai, an extremely severe case of prolonged beating lasting between one and two hours and including punches, kicks to the stomach and blows with the butt of the rifle, the Military Appeals Court sufficed with only five months' actual imprisonment and demotion to the rank of private – and this was decision made the b punishment harsher – in Regional Military Court he had been sentenced to only 45 days and the demotion.

In another case, in which a soldier was photographed striking a Palestinian detainee shackled on the legs and feet, and another shackled Palestinian in the face in front of his wife and small children, the Regional Military Court – Central Region sufficed with a punishment of only six months' actual imprisonment and demotion to the rank of private.[37] And in yet another case, a soldier who forcefully kicked a shackled and blindfolded Palestinian was sentenced to three months' actual imprisonment, although the military court itself defined the action as "abuse."[38] Recall that the maximal penalty existing in the law for this crime is seven years imprisonment.

A report by the "Yesh Din" organization examined the convictions of soldiers for these violent crimes committed against Palestinian detainees between 2000 and 2007, and found that they led at most to prison sentences of several months, even when the crime is designated with a punishment of years' imprisonment.[39]

The gap between the exalted tone prohibiting abuse and the low level of punishment against abusers, between norm-setting and enforcement, is not the only troublesome gap in this context: a General Staff Ordinance

36 Military Appeal 27/02 – **Chief Military Prosecutor v. Sergeant Avichai**, published in "Nevo" database [Hebrew].

37 Center Regional Military Court 300/04 – **Military Prosecutor v. Corporal B.S.**, published in "Nevo" database [Hebrew].

38 Appeals – Southern Region – **Military Prosecutor v. Basion Tatruashvili**, published in "Nevo" database [Hebrew].

39 **Exceptions: Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007**, "Yesh Din", September 2012, pp 39-41.

lists those crimes of abuse which – if there is reason to suspect they have been committed – are to be transferred directly to the Military Police Criminal Investigation Unit (CIU).[40] In practice, the Military Prosecutor's policy is to distinguish between cases of abuse which occurred in the course of a military operation and those that did not. Those in the first category, of which there are many, are first examined not by CIU but as part of an "operational inquiry."

This "operational inquiry" is typically conducted at the level of the unit which committed the abuse, usually lack any hearing of the complainant, use no professional investigational tools such as confronting between witness accounts, staging line-ups, or the various stratagems employed by investigators to glean information from interviewees. Furthermore, the operational inquiry is conducted with a good deal of partiality and bias towards the abusers, even if only thanks to the institutional proximity between them and the examining officer investigating them. This closeness is liable to enable the abusers to coordinate their accounts of the incident and thus damage evidence, thwarting a later impartial investigation. Moreover, the operational inquiry causes significant delays in the complaint examination and conclusion formation processes. Here we observe all the expected failures of an institution examining its own crimes.

Note that this defective policy of the MPC is in fact protected under the instructions of the Military Adjudication Law, which leaves to the discretion of the Military Prosecutor the choice to forward complaints regarding violence against detainees on to an "examining officer" – who does not have to be a CIU officer.

An additional legislative oversight in this matter is the lack of a fixed process for appealing decisions of the Chief Military Prosecutor. This stands in contravention of the perception, already expressed in Israeli case law, that the Attorney General is the professional supervisor of the Chief Military Prosecutor, whose decisions are therefore subject to the former's oversight.[41]

There is a further legislative omission in this context: the inapplicability of the **Rights of Crime Victims Law – 2001**, to crimes committed under the Military Adjudication

40 **General Staff Ordinance 33.0303 – CIU Examination and Investigation**, article 62(a)

41 HCJ 4723/96 – **Attiah v. Attorney General**, Piskei Din 51(3) 714.

Law. The rights granted to the victim of a violent crime under the Rights of Crime Victims Law are numerous and important: they include the right to be accompanied by a person of their choice when meeting an investigative body, unless the officer in charge believes that this may harm the investigation; the right to receive updates on the investigation process; to peruse the indictment; to be protected from the suspect; to have the investigation conducted in a reasonable timeframe; and more. Yet the list of investigative bodies to which the law applies consists solely of the Israel Police and the PID, and we have seen above how severe the consequences of this fact are.

We began this chapter with the provisions of international humanitarian law which form the foundation for the rights of protected persons in occupied territory, and continued with the provisions of Israeli jurisprudence, on which are founded the duties of the soldiers who interact with these protected persons. We illustrated that according to both of these legal systems, the phenomena described in this report are fundamentally flawed. The root of the problem, then, does not lie in the law, but rather in the law enforcement system, first and foremost the body which investigates the complaints brought before it.

"The Ministry of Justice should initiate legislation wherever there is a deficiency regarding international prohibitions that do not have a 'regular' equivalent in the Israeli Penal Law, and rectify that deficiency through Israeli criminal legislation. Thus, for example, the Ministry should ensure that there is legislation to transpose clearly into law and practice the absolute prohibition in international law of torture and inhuman and degrading treatment. This is in order to enable 'effective penal sanction' for those committing war crimes, as required by international law."

Turkel Committee, p. 365

5. Conclusion and Recommendations

This report has presented a number of failures in the military authorities' handling of complaints of violence against detainees in the Occupied Palestinian Territory. In none of the cases described was there violent resistance by the detainees preceding the violence against them, so we may easily define the violence as abuse as understood in the Military Adjudication Law or torture as understood in international jurisprudence. And yet, in spite of the great gravity of these cases, CIU (Military Police Criminal Investigation Unit) and the MPC (Military Prosecutor Corps) obviously belittle the complaints against such violence. They are in no hurry to launch an investigation into the complaints and in no hurry to complete the investigation if and when one is launched, and for the most part this investigation consists of preferring the sweeping denials of those implicated over the detailed account of the complainant. No line-ups or confrontation of witnesses are staged, and in many cases the arresting soldiers are not located.

The protection of the complainant's rights is also rife with shortcomings: s/he is not permitted to be accompanied by a third party of their choice during the interview, which often includes mocking and humiliation and the pressuring of the victims to drop their complaint; s/he is not updated on the progress of the investigation, is subjected to prolonged foot-dragging before the investigation material is transferred, and is informed only years after that the file has been closed, in a laconic notice devoid of detail or reasoning. We must recall that a serious approach to complaints of soldier violence also means respecting the rights of the complainant, who must sense a real desire among the authorities to discover the truth by engaging in constructive dialogue rather than conceiving of the complainant as a suspect whose complaint is itself a frivolous one.

Ultimately, the message being communicated to the residents of the Occupied Territory is that their blood is cheap. Two indictments filed out of 133 complaints cannot provide civilians proper protection from arbitrary violence during arrest. And indeed, as we have seen, the reality is even grimmer. Violent soldiers are released from service without having borne the consequences of their actions, oftentimes without even having been investigated.

In order to eradicate this phenomenon at its foundations, the following steps must be taken immediately:

A clear directive must be given by the Military Prosecutor ordering that a CIU investigation be opened immediately and with no delay regarding every complaint of soldier violence against a detainee.

A clear directive must be given by the Military Prosecutor determining the maximum period of time an investigation may last. Our recommendation, following a survey of the international case law mentioned in the report, is that no more than 10 months should pass between the opening of an investigation and the reaching of a decision on whether to take legal or disciplinary measures or close the file.

A clear directive must be given by the Military Prosecutor ordering CIU to conduct a thorough and comprehensive investigation into every single complaint, which will utilize the widest range of investigatory methods at CIU's disposal.

The Military Adjudication Law must be amended so as to prevent the possible use of "operational inquiries" internal to the suspected units themselves as a replacement for criminal investigations by CIU. This will prevent the unacceptable phenomenon by which an official body investigates itself.

The legislation must be amended so as to make the **Rights of Crime Victims Law – 2001** explicitly apply to crimes committed according to the Military Adjudication Law. Complainants will thereby be able to undergo their interview with CIU in the company of a person of their choice, and be updated regarding the progress of the investigation.

Army units must be obligated to keep organized records of the soldiers involved in arrest actions in the Occupied Territory, which will be documented in a manner easily accessible to CIU investigators later on.

A clear directive must be given to military physicians to fulfill the requirements of the "Istanbul Protocol" by comprehensively documenting suspicious injuries discovered in bodily examinations of complainants, including photographic documentation.

A clear directive must be given to CIU to conduct the taking of testimonies from complainants in a manner which will maintain their dignity, abstain from encouraging them to withdraw their complaints or any of various threats accompanying this encouragement. This should be especially true with regard to taking testimony from minors.

A clear directive must be given to CIU ordering that it employ professional interpreters

during the taking of affidavits from residents of the Occupied Territory, so as to enable the most direct dialogue possible between investigator and interviewee.

A clear directive must be given to CIU that decisions to close files be detailed and reasoned, leave no room for doubt regarding the underlying rationale which may be attacked in an appeal process.

The fixing in legislation of an appeal process of the decisions of the Military Prosecutor before the Attorney General. This will clarify the perception that the Chief Military Prosecutor is subject to the Attorney General and will increase the sensitivity of the Military Prosecutor to the points of emphasis discussed herein.

A clear directive must be given to CIU ordering it not to delay the transfer of investigatory materials to complainants' representatives for the purpose of appealing decisions to close investigation files.

The principle of promptness dictates that an investigation should begin as soon as practically possible after the alleged incident and that unreasonable delays in the investigation must be avoided. The Commentary on Article 146 of the Fourth Geneva Convention asserts that while dealing with serious violations, States should act as quickly as possible, in order to ensure that an alleged perpetrator is arrested and brought to justice with all due speed [...] Time is a major factor that affects the ability to collect and preserve evidence [...] Thus, collecting evidence promptly complements the principle of effectiveness and thoroughness. Furthermore, conducting an investigation within a reasonable timeframe can contribute to the perception that the law is being enforced and justice is being done.

From the Turkel Committee Report, February 2013

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