WAR CRIMES IN THE INTERROGATION ROOM:

PCATI's case for the ICC concerning Tortutre and ill treatment of Palestinian detainees in Israel

הוועד נגד עינויים בישראל
THE COMMITTEE AGAINST TORTURE
اللجنة لمناهضة التعذيب

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TABLE OF CONTENTS

GLOSSARY

FIDH	the International Federation for Human Rights
HCJ	the Israeli High Court of Justice
ICC	the International Criminal Court
IDF	Israel Defense Forces
IHL	International Humanitarian Law
IIC	Inspector of Interrogee Complaints (aka Mavtan)
ISA	Israeli Security Agency (aka GSS, Shin Bet or Shabak)
oPt	occupied Palestinian territory
PCATI	the Public Committee Against Torture in Israel
SPO	Security Provisions Order
TIDT	torture and inhuman and degrading treatment

EXECUTIVE SUMMARY

In 2022, the Public Committee Against Torture in Israel (PCATI) and the International Federation for Human Rights (FIDH), submitted a report to the Office of the Prosecutor of the International Criminal Court (ICC) in the Hague, requesting it investigates the crimes of torture, inhuman and degrading treatment as part of its ongoing investigation into the Situation in the State of Palestine. This report carefully documents the use of torture and inhuman and degrading treatment (TIDT) in Israeli Security Agency (ISA) interrogations, and analyzes how such acts are sanctioned by the Israeli judiciary.

Although Israel has ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment back in 1991, it continues to practice widespread torture in flagrant violation of its legal obligations and international law. For many decades and up to the present day, agents of the ISA have been systematically subjecting Palestinian individuals to TIDT, unlawful deportation from the Palestinian territories into Israel for the purpose of such treatment, and denial of their fundamental right to a fair trial. ISA torture methods include physical violence, stress positions, painful shackling, sleep deprivation, incommunicado detention, threats – also involving family members – humiliation of detainees for their religion and beliefs, and depriving detainees of access to basic needs (e.g. food, shower, using the toilet, clean clothes). In our analysis, such acts amount to war crimes and other violations of International Human Rights Law and International Humanitarian Law (IHL).

The incarceration, torture and maltreatment of Palestinians living under Israeli military rule in the West Bank and the Gaza Strip are some of the fundamental traits of Israel's occupation, and are constitutive elements of Israeli subordination of this civilian population, which is entitled to special protection under IHL. These practices must therefore be understood as part and parcel of Israel's systematic violation of the basic rights of the occupied Palestinian population, and as integral to the repression of the Palestinian people as a whole.

This report further demonstrates how the Israeli legal system effectively authorizes torture and shields the torturers from prosecution. Over 1,400 complaints of torture by Israeli

officials have been submitted to Israel's Justice Ministry between 2001 and 2022. Yet they have resulted in a mere three criminal investigations, and not a single indictment.

Notwithstanding a much-lauded 1999 Israeli High Court of Justice (HCJ) ruling putatively prohibiting torture, Israel's legal system has repeatedly proven itself not only unable, but also unwilling, to curb such practices. Israeli torture practices are hence systematic, politically motivated, and effectively sanctioned by a legal system that protects torturers from prosecution.

The ICC submission is based on 17 emblematic cases in which individuals that PCATI represented as of 2014 were abducted from the occupied Palestinian territory (oPt), tortured, and treated in a degrading manner, and denied access to a fair trial. Together, these 17 cases reflect a clear pattern of illegal Israeli practices, which are consistent with those observed in hundreds of other cases of individuals PCATI has represented over the course of 30+ years. They are also congruent with statements made by Israeli officials themselves, including members of the intelligence services and legal officials. According to the Rome Statute, the treaty which established the ICC and guides its work, such practices amount to war crimes, namely (a) crimes of torture and other inhuman acts of a similar character; (b) unlawful deportation or transfer of an occupied population; and (c) denial of fair trial.

ABOUT THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL

The Public Committee Against Torture in Israel is an Israeli human rights organization established in 1990 that is dedicated to the elimination of torture and cruel, inhuman, and degrading treatment. We protect any individual who was harmed during interrogation, demonstration, detention, or incarceration. We represent Israelis, Palestinians, refugees, and immigrants who were subjected to torture, or to cruel, inhuman or degrading treatment at the hands of Israeli authorities, including the Military, the Police, the ISA, and the Prison Service. PCATI has extensive experience representing victims of torture in Israel and has documented thousands of cases of torture and ill-treatment since 1990.

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CHAPTER 1: WHY PCATI TURNED TO THE ICC

Despite a celebrated 1999 ruling by the Israeli High Court of Justice (HCJ) that ostensibly prohibited torture categorically and the existence of a dedicated department within the Ministry of Justice to investigate claims of abuse at the hands of the Israel Security Agency (ISA), today torture of Palestinian detainees by Israeli security forces is endemic, widespread, and systemic.

Since its establishment in 1990, the Public Committee Against Torture in Israel (PCATI) has been fighting tirelessly to deliver justice to victims of torture and has sought to hold Israel accountable for its systemic abuse of detainee rights. However, the continuous and relentless attempts to hold Israeli perpetrators of torture and ill-treatment to account in Israeli national courts over three decades have shown that victims of torture cannot expect to see justice in the Israeli legal system.

As explained throughout this report, Israeli security services have for decades subjected Palestinian individuals to torture and inhuman and degrading treatment (TIDT), unlawful deportation from the occupied Palestinian territory (oPt) into Israel for the purpose of such treatment, and denial of their fundamental right to a fair trial. In the case of Israeli torture of Palestinian detainees, the crimes are not only particularly atrocious, but they are also sanctioned in advance by high-level members of the security services, orchestrated by a network of ISA agents, military officers, and legal advisors, and whitewashed by the country's judicial system, including the land's highest court, the HCJ. Thus, while 1,400 complaints of torture were submitted to the Justice Ministry between 2001 and 2022 by PCATI and others, only three criminal investigations have ever been conducted, and not a single case led to an indictment against an agent of the ISA.

Considering this dire reality, in 2022, PCATI, together with the International Federation for Human Rights (FIDH), submitted a report to the Office of the Prosecutor of the International Criminal Court (ICC), requesting it investigates these crimes as part of its ongoing investigation

into the Situation in the State of Palestine.

Formally established in 2002 following the ratification of the Rome Statute by 60 nation-states, the ICC is the sole permanent international court with jurisdiction to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression. An international tribunal seated in The Hague, Netherlands, the ICC may exercise jurisdiction in instances where such crimes were committed by a State Party national, in the territory of a State Party, in a State that has accepted the jurisdiction of the Court, or by referral from the United Nations Security Council. It can prosecute cases solely when the states in question have proven unwilling or unable to genuinely prosecute such grave offenses.

The ICC's mandate and established practice is not to investigate, indict and pursue low-level offenders, nor is it to address sporadic crimes that are limited in scope or duration. Rather, the ICC is intended to investigate and prosecute severe, ongoing, and systematic crimes in instances where nation states are unable or refusing to hold the architects and chief perpetrators of heinous crimes accountable. The ICC has the mandate to investigate violations of international law only when a state has proven itself unable or unwilling to pursue such cases in earnest. Before the ICC opens an investigation, it must be clearly shown that the relevant states or other pertinent actors have consistently failed to address severe grievances, in what is referred to as the principle of complementarity.

It is worth noting that in 2023, a bill was tabled which would make communicating or cooperating with the ICC (among other international organizations and bodies) a criminal offense for Israeli persons and organizations has been tabled at the Israeli Knesset.

The Bill to protect Israeli Citizens from Hostile International Institutions – 2023 (P/25/1545) (MK Sharon Nir et. al., Yisrael Beiteinu) states that it aims "to protect Israeli security forces personnel and residents from personal harm due to hostile international institutions who seek to persecute them for actions performed on Israeli territory or outside of it on behalf of Israel, regardless of these actions' criminal status in Israeli law" (article 1). The Bill defines a "Hostile International Institution" as "The International Criminal Court or another international institution defined by the Minister of Justice in a decree after consulting the Knesset's Foreign Affairs and Security Committee" (article 2). It further states that Israeli state bodies shall neither collaborate directly or indirectly with such institutions (article 3a), shall not comply with extradition orders issued by such institutions (article 5) and will act to

release Israeli citizens detained in relation to such international proceedings, by "any means it deems necessary" (article 3c). The Bill further declares that "No person will be allowed to engage, directly or indirectly, with a hostile international institution, asking to commence a procedure against the state of Israel" (article 3f), and that such acts shall be punishable by seven years of imprisonment (article 4).

In its explanatory notes, drafters of the Bill argue that "Senior officials of Israel and security forces personnel are subject to threats of persecution by the International Criminal Court in the Hague… [which] takes a hostile stance against Israel, its soldiers, leaders, and citizens, and is subject to political pressures by those seeking to harm Israel." The explanatory notes further state that "The law protects security forces personnel or those working on behalf of Israel anywhere, whether within the borders of the State of Israel or in territories under its control, including the Judea and Samaria region [the West Bank], and whether outside of Israel… Provided that crimes are committed by such persons, Israel will prosecute them via the Israeli law enforcement system."

For different political reasons, the legislation process of the Bill to protect Israeli Citizens was finally not completed. Nonetheless, this bill, along with other anti-democratic legislation currently discussed and enacted in the Israeli parliament, clearly signals the contempt some Israeli decision makers hold toward the ICC and similar international mechanisms. Such initiatives further show that Israeli legislators are intent on deterring anyone who wishes to hold State officials accountable for human rights violations perpetrated within Israel or in the territories under its control, to the extent that they intend on threatening anyone wishing to appeal to international courts with prosecution.

Against this backdrop, the decision to address the ICC was not taken lightly. As an Israeli organization, PCATI is well-aware of the price it may pay, publicly and otherwise, for even approaching the ICC – an action which is highly controversial in the mainstream Jewish-Israeli discourse. Nonetheless, due to the systemic nature of the heinous crimes in question, and as the Israeli legal system, including its judiciary, has proven unwilling and unable to hold torturers accountable, we turned to the ICC as a last resort. As a human rights organization, our aim in approaching the ICC is first and foremost to secure justice for torture victims, to ensure that high-level perpetrators of human rights abuses are held accountable, and to prevent the continuation of such crimes.

CHAPTER 2: TORTURE IN ISRAEL TODAY

TIDT of Palestinians at the hands of ISA is prevalent, authorized in advance by the agency's upper echelons, and effectively whitewashed by the Israeli legal system– from the Inspector of Interrogee Complaints (IIC) to the HCJ.

As is elaborated in the next pages, Israeli practices of TIDT constitute three distinct yet interrelated war crimes: (a) crimes of torture and other inhuman acts of a similar character; (b) unlawful deportation or transfer of an occupied population; and (c) denial of fair trial.[1]

Methodology

This chapter summarizes information received from victims that PCATI represents. They have all given their expressed consent to be included in the ICC submission. Nonetheless, to maintain the safety of our clients, who may face repercussions by Israeli State agencies, we have anonymized the information and removed some identifying details to conceal their identity. The evidence obtained independently by PCATI includes testimonies by detainees, medical, physical, and mental evaluations in accordance with the Istanbul Protocol,[2] and statements by the IIC, a department of the Justice Ministry dedicated to ISA oversight, in response to PCATI's complaints.

While PCATI retains detailed affidavits of each instance, they are summarized here collectively to establish the facts of the crimes and to demonstrate well-established patterns. While not identical, there are significant commonalities between documented cases that must be highlighted. Based on the information PCATI has gathered through representing thousands of torture victims since 1990, we have ample evidence to conclude that these commonalities

1 (a) crimes of torture and other inhuman acts of a similar character, in violation of Articles 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(b)(xxi) of the Rome Statute; (b) unlawful deportation or transfer of occupied population, in violation of Article 8(2)(a)(vii), 8(2)(b)(viii) of the Rome Statute; and (c) denial of fair trial, in violation of Article 8(2)(a)(vi) of the Rome Statute.

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

reflect continued practices that have been in place for decades, and that the practices applied in those cases have been employed in many other cases as well.

A. INTERROGATIONS AMOUNTING TO TIDT

The Rome Statute and ICC Elements of Crimes[3] define the war crime of torture as a situation where, in the context of and was associated with an international armed conflict, the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons, for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

The pain and suffering threshold for the crime of torture is a question of fact that must be decided on a case-by-case basis. Consistent jurisprudence by national and international criminal courts as well as human rights bodies and experts has established that certain acts are recognised as torture in and of themselves as their application, even on their own, is enough to occasion severe pain or suffering. These include *inter alia* placing victims in excruciating positions,[4] interrogations under threat to life,[5] rape and sexual assault,[6] hitting with canes and sticks,[7] knocking unconscious,[8] mock executions,[9] and psychological abuse.[10] However, more often than not, torture is inflicted through a combination of acts or methods, each one not necessarily inflicting severe pain or suffering either instantly or on its own.[11]

3 Elements of Crimes, International Criminal Court 2013, available at: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf

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

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

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

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

8 Ibid.

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

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

11 Human Rights Committee, *Ann Maria Garcia Lanza de Netto v Uruguay*, Communication No. 8/1977 (3 April 1980), UN Doc CCPR/C/OP/1 at 45 (1984), para. 9

As detailed below, ISA interrogators – which are state agents - routinely use methods which cause severe pain and suffering as defined above, for the purpose of obtaining confessions or other information; all of which amounts to the war crime of torture as defined in the Rome Statute.

According to the testimonies at hand, the initial phase of a regular ISA interrogation is aggressive and includes practices amounting to TIDT, such as slapping, painful tying of hands, cursing, beatings by multiple interrogators simultaneously, and threats to harm the detainee and their family members. Threats include rescinding family members' work permits, a policy whose existence appears to be confirmed. In other cases, family members are arrested in order to pressure detainees during interrogation.

In most cases, at a certain point in the interrogation, ISA officers suspend the interrogation and inform the detainee that, from that point onward, they will be subject to a 'military interrogation' ('*hakira tsva'it*'). "Military interrogation" is a euphemism for the imposition of torture. The dire prospect of a military interrogation is also used, during interrogations, as a threat in and of itself.

Before commencing with the military interrogation, detainees are searched, often naked and with the use of search tools, which can entail sexual humiliation. Detainees are subject to inspection by a medical doctor, sometimes consisting of a few basic questions. The medical inspection, which records pre-existing conditions, reflects the authorities' knowledge that the interrogation may be physically risky and damaging.

Among the methods used during such 'military interrogations' are those that the HCJ has specifically deemed illegal in the PCATI ruling (see chapter 3, below). These include shackling detainees to chairs in various stress positions e.g., the 'banana' position and the 'frog' position, sometimes while slapping or beating them, or pulling their limbs in unnatural directions. Detainees have testified that they have been tied in such positions for a period ranging from twenty minutes to one hour, but the pain they cause lasts long after the contorted position is no longer imposed on detainees. Detainees have also described being tied to a chair, while their arms are pulled powerfully in an unnatural direction. A stress position without the use of a chair consists of crouching on tiptoes, tied, for prolonged periods, and is referred to as the "frog" position.

ISA interrogators have also used a technique of shaking, including while shackled and tilted in a chair. Shackling is sometimes accompanied with applying bandages on arms, apparently so as to minimize evidence of violence on the flesh. Detainees described how interrogators shouted at them from very close up as they were tied in a stress position. Testimony also indicates ISA has tied a detainee to a 'cement bed/bunk' in at least one case. Strangling has also occurred during military interrogations.

A 2017 news article cites a former senior interrogator, identified only as "N", who was authorized to approve "special means."[12] Notably, N described stress positions that also appear in victims' statements, detailed below.[13] The article, which focuses on events that occurred after 2014, states:

> *N discussed some of those methods as well. For instance, he said, sometimes the interrogator needs to grab the suspect's shirt, pull him close and scream at him. He also described forcing a suspect to raise his hands to shoulder height while they're handcuffed behind his back.*
> *The conversation revealed that all the interrogators were well aware of the pain these methods cause the suspects. Some had even tried out the uncomfortable positions for themselves to determine how hard it was to maintain them.*[14]

ISA interrogators who testified before the Israeli judiciary have also confirmed that they have used practices that may amount to torture. For example, one interrogator under the pseudonym of Miguel (a name that has also appeared in victims' testimonies) explained: "a great part of the power of the necessity defense is its mental effect on those who are interrogated, who are put under great tension and opaqueness, and do not know how far the violent behavior of the interrogators may take them."[15] Miguel further clarified that the means employed are "painful and perhaps very painful," having tried them on himself in the past. He also confirmed that "the necessity interrogation includes humiliating statements, which are not used in a regular interrogation."[16]

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

13 *Id.*

14 *Id.*

15 See Criminal Case 932-01-16 State of Israel v Anonymous (detainee), 19 June 2018, available via 'Nevo'. See also PCATI, SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE LIST OF ISSUES PRIOR TO REPORTING CONCERNING THE SIXTH PERIODIC REPORT OF ISRAEL, 25 June 2018, available at https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ISR/INT_CAT_ICS_ISR_31652_E.pdf.

16 *Id.*

Other methods that PCATI has recorded include beatings of detainees, often when tied to a chair and in particular areas of the body such as the thighs, knees, and legs, or intimate parts; extended periods of sleep deprivation; interrogation or accommodation in extremely cold temperature; detention in filthy, insect-infested cells, with constant artificial light (sometimes red, orange, or yellow);being interrogated while nude; denying access to toilets; shouting threats, using abusive language, as well as threats of home demolition or deportation; and playing recordings that are presented as those of relatives being tortured. Detainees describe being blindfolded and beaten, even after they had fallen to the floor, and being strangled by a piece of cloth. As documented in a HCJ petition, a detainee described having his injuries shown to another detainee in order to intimidate him. [17]

These different methods are often used simultaneously or in cyclical repetition, over several days. Detainees describe being tied in a stress position, interrogated, and then tied in another stress position for further interrogation. Such cycles can be long, and in one example a victim estimated that it lasted 10-15 hours. The cyclical pattern of contorted seating, sleep deprivation, agitation, and beatings, when taken together, appears to be the most common.

Testimony shows that during the days of military interrogation detainees are typically given around three hours to sleep, shower, and use the toilet each day. Testimonies further show access to showers being delayed for days. Consecutive harsh interrogation has at times lasted several days. At other times it has lasted for nearly a month, and in one case of the 17 examined in the submission, for 45 days. During this period, detainees receive an insufficient amount of food and/or water, or are given food and water of very poor quality.

In some cases, during torture interrogations detainees were prohibited from praying or were interrupted in degrading ways while praying. Detainees have further been scolded and/or humiliated based on their religious practices and customs. Torture interrogations have included cursing and blasphemous or vulgar language, directed towards detainees or women in their families, including threats directed at family members. One detainee testified that interrogators threatened to demolish their family's home (an illegal practice that Israel has employed to allegedly 'deter' terrorism). Such language has been used during physically violent interrogation as well as separately.

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

The Role of Physicians in TIDT

According to testimonies, Israeli medical doctors have been involved in interrogations, and sometimes necessary medical intervention was delayed. Doctors have examined interrogated individuals not only before but also during interrogations, and have communicated with them in a way that indicates knowledge of TIDT. During these interventions, doctors have shown a lack of independence, their actions determined not by medical needs but by interrogation needs. Detainees reported having been sedated or given pain killers and then sent back to interrogation. According to victim testimony, a doctor refused to treat them when they were sent to a clinic with severe facial bruising. PCATI has also obtained evidence of a detainee who was slapped in a medical clinic. In one case, the medical staff allegedly administered shots to a detainee without consent and without informing them of the substance being injected.

Medical records are often partial and lack essential details of the treatment given to detainees. In certain cases, medical staff seemingly proposed minor amendments to the interrogation protocol in order to relieve some of its physical or mental harms. In one case, the medical records of a detainee who underwent a violent interrogation indicated that he suffered from PTSD.

The long-term consequences of Torture

Detainees have experienced both physical and mental injuries and symptoms during torture sessions and long after. Among the physical injuries directly resulting from the interrogations, PCATI documented the loss of consciousness, sometimes multiple times during an interrogation, broken teeth, a bloody mouth, bloody eyes, hematomas, tears of muscle tissue, inability to eat independently, and insect bites from filthy cells requiring medical attention. Multiple detainees reported being unable to walk after torture sessions, in which case they were carried to the shower, or taken using a wheelchair.

Longer term harm includes damaged hearing and eyesight. Among the mental harms sustained during interrogations, a detainee experienced anxiety attacks; another lost the ability to distinguish between day and night. Another detainee was tortured despite a documented pre-existing mental disability. Torture at the hands of ISA has also caused sustained damage to health. Evaluations conducted in accordance with the Istanbul Protocol consider mental and physical harm that torture inflicts upon its victims. Among the psychological symptoms observed by experts during such evaluations were

depersonalization (a sense of acute detachment from oneself and inability to recognise thoughts and feelings as one's own), flashbacks, nightmares, anxiety, and depression. Long term physical symptoms included injuries to the legs and/or back, corresponding to techniques of tying detainees in contorted positions, and hair loss.

Taken together, the 17 testimonies on which the ICC submission is based, as well as their evaluation by legal, medical, and psychological experts, reflect a clear pattern of systematic abuse of Palestinian detainees in the hands of ISA agents. As we shall see in the next chapter, Israeli TIDT is not merely overlooked by the country's legal authorities, but is also tacitly sanctioned.

B. UNLAWFUL DEPORTATIONS OF PALESTINIAN DETAINEES FOR THE PURPOSE OF TIDT

Palestinians arrested in the oPt are frequently deported to detention locations outside the oPt, within Israeli territory [notably: Kishon ('Jalameh'), Petach Tikva, Jerusalem ('Russian Compound'), Ashkelon ('Askalan'), and Beer Sheva]. These unlawful deportations, constituting extraordinary renditions, run contrary to Article 76 of the Fourth Geneva Convention, which stipulates that an occupying power may not detain residents of the occupied territory in prisons outside of the occupied territory.

All the testimonies of TIDT on which PCATI's ICC submission is based were given by individuals arrested in the oPt. These arrest operations take place during the night or around dawn, in victims' homes, and are conducted by masked IDF soldiers accompanied by one or more ISA agents (referred to as 'captain') and occasionally by attack dogs.[18] During the arrests, the homes of detainees', often multi-generational households, are raided with alarming noise, including banging on doors with soldiers' weapons and shouting. The suspect is arrested and taken into custody in front of their family members. During the arrests, detainees are often beaten, as are at times other family members.

The transfer of detainees from the oPt into Israeli territory, which is prohibited under IHL,[19] is often carried out without informing the detainee that they are being removed from the

18 All factual information detailed hereinafter is based on affidavits and testimonies of Palestinian detainees taken by PCATI between 2014 and 2022. Though generalized, information nonetheless appears following the victims' explicit consent.

19 Fourth Geneva Convention, Articles 49, 76

oPt. Detainees reported being blindfolded and painfully handcuffed using plastic restraints, and laid down on the floor of a military vehicle, with soldiers kicking and stepping on them with their boots. While transported, detainees may again be subjected to threats and verbal abuse. On the way to the site of interrogation, soldiers may stop, leaving the detainee to spend hours handcuffed and blindfolded.

Being painfully shackled and blindfolded for lengthy periods of time during the transfer, and often while waiting for the interrogation to start, detainees suffer not only direct violence but prolonged disorientation, induced helplessness, and fear of additional violence they cannot see, avoid, or respond to. The violence during deportation, from the moment of arrest to the moment of arrival at the final interrogation site, establishes a continuum of TIDT, which lasts for the entire duration of the transfer.

The deportation of detainees by ISA and the Israel Defense Forces (IDF) have a specific purpose: to remove Palestinian detainees from the oPt to designated detention facilities in Israel where TIDT takes place. They are thus orchestrated acts of "extraordinary rendition", defined as a situation in which after being captured, the rendered person is transferred to a detention facility in a different territory where they are interrogated, and, in many cases, tortured or subjected to other forms of inhumane treatment.[20]

The unlawful deportation of Palestinians from the oPt facilitates ISA interrogations, which takes place in special facilities, located exclusively inside Israel,[21] where interrogators and doctors are present. Detention cells are in close proximity to interrogation rooms, which are equipped with interrogation instruments such as small chairs, shackles, speakers for music, etc., enabling the efficient transfer of detainees from one space to another. The transfer of detainees into ISA detention facilities is thus intended to subject them to harsh interrogations and deprive them of IHL protections.

Knowingly and intentionally, Israeli authorities have been unlawfully deporting Palestinian subjects from the occupied territory into Israel for the purpose of detention and interrogation under TIDT. Consequently, Israeli authorities are responsible for the war crime of unlawful deportation or transfer of a population under the Rome Statute.

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

21 In Kishon ('Jalameh'), Petach Tikva, Jerusalem ('Russian Compound'), Ashkelon ('Askalan') and Beer Sheva.

C. DENIAL OF FAIR TRIAL

Willfully depriving prisoners of war, or civilians living under military occupation, of the rights of fair and regular trial is in itself a war crime according to the Rome Statute. In parallel, the Geneva Convention demands that military courts of an occupying power shall be properly constituted, non-political, sit in the occupied territories (Article 66) conduct a regular trial (Article 71); that accused persons shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defense (Article 72), all without adverse distinction or discrimination (Article 75).

In what follows, we focus on the connection between the denial of fair trial and TIDT, namely: (1) The military court system in charge of detention and trials does not satisfy the requirements of impartiality, regular trial proceedings, and non-discrimination; (2) Detention proceedings keep the detainees in custody for protracted periods during which they can be subjected to torture and ill-treatment. Both administrative detention and pre-(military) trial detention proceedings are physically conducted outside the oPt, and do not afford required judicial guarantees; (3) The evidence presented in those proceedings is tainted by torture, resulting in unfair convictions and sentences.

Partial and discriminatory military Court system

Detention and TIDT of Palestinians are followed by one of two courses of action: either they are detained administratively – known in IHL as "internment" – without charging the person before a court of law, or they are charged in a military court. Both courses are processed by the Israeli military court system which governs the oPt.[22]

Denial of fair trial is committed by Israeli authorities in systemic ways, as evidenced by the fundamentally prejudicial system to which detainees are subjected and the legal structures that enforce them.[23] As has been extensively demonstrated, the Israeli military courts fall

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

23 Jennifer DePiazza, *Denial of Fair Trial as an International Crime: Precedent for Pleading and Proving it under the Rome Statute*, 15 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 257–490 (2017).Describes this type of denial of fair trial as 'category two' cases, p. 65.

short of fair trial guarantees as required by international standards, and do not comply with the standards applied in Israeli civilian courts.[24]

Compared with the Israeli civilian procedure, the military criminal procedure sets harsher maximum punishments, provides fewer procedural guarantees (including longer detention periods and denial of access to counsel), and defines offenses in extremely broad terms, violating the principle of legality. Additionally, practical violations of defendants' rights are abound: essential evidence material (such as ISA memorandums) is not provided to defense lawyers in full and is not translated into Arabic; interrogations are not documented by audio-visual recordings, as they would be under Israeli civilian procedure; lawyers often do not have proper meeting rooms to meet with their clients; and court decisions and precedents are not translated into Arabic, impeding the ability of Palestinian lawyers to provide adequate defense.[25]

Moreover, and non-coincidentally, the military court system in the West Bank is used by Israel exclusively to detain and prosecute Palestinian protected persons who are residents of the oPt, even though Israeli Jewish citizens are also subject to the same de-jure jurisdiction as residents of these territories.[26] The Israeli military also operates a separate martial court system for IDF soldiers. The military court system is therefore operated by Israel in a discriminatory manner whereby military courts apply reduced versions of procedural guarantees to Palestinians, as opposed to Jewish Israeli settlers and Israeli soldiers.[27]

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24 B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, *The Military Judicial System in the West Bank* (Report) (1989); Amnesty International, *The Military Justice System in the Occupied Territories: Detention, Interrogation and Trial Proceedings* (Report) (1991); Lawyers' Committee for Human Rights, *Lawyers and the Military Justice System* (Report) (1992); Yesh Din: Volunteers for Human Rights, *Back Yard Proceedings* (Report) (2007); ACRI, ONE RULE, TWO LEGAL SYSTEMS: ISRAEL'S REGIME OF LAWS IN THE WEST BANK 5 (2014), available at https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf; Hajjar, *supra* note6; Viterbo, *supra* note6.

25 Yesh Din: Volunteers for Human Rights, BACK YARD PROCEEDINGS (Report) (2007); HCJ, 3326/10 *Palestinian Ministry of Prisoners v. Commander of IDF forces (6.4.2014) available at* https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ministry%20of%20Palestinian%20Pris oners%20v.%20Minister%20of%20Defense.pdf.; Smadar Ben-Natan, *The Application of Israeli Law in the Military Courts in the Occupied Territories*, 43 THEORY AND CRITICISM 45–74 (2014).

26 Amnon Rubinstein, *Israel and the Territories: The Jurisdiction of the Courts*, 13 TEL AVIV UNIVERSITY LAW REVIEW 415 (1989); Hajjar, supra note 6, 58-61; Smadar Ben-Natan, *Citizen-Enemies: Palestinian Citizens and Military Courts in Israel and the Occupied Territories, 1967-2000*, *in* THE POLITICS OF INCLUSION AND EXCLUSION IN ISRAELI-PALESTINIAN RELATIONS (Amal Jamal ed., 2020); Smadar Ben-Natan, *Citizen-Enemies: Military Courts in Israel and the Occupied Palestinian Territories 1967-2000*, (2020); Smadar Ben-Natan, *The Dual Penal Empire: Emergency Powers and Military Courts in Palestine/Israel and Beyond*, 23 PUNISHMENT & SOCIETY 741–763 (2021).

27 ACRI, *supra* note 8.

Administrative detention

Administrative detention proceedings and remand proceedings violate Geneva Convention guarantees in the following ways: (1) detention periods under military law are extraordinarily long, enabling protracted interrogations and TIDT and violating detainees' rights to be brought to trial in a timely manner; (2) the ISA deprives detainees of their right to counsel during interrogations; (3) holding the detainees themselves and the detention hearings in Israel violates the detainees' right for legal counsel of their choice and impedes them from meeting freely with a lawyer, since Palestinian lawyers from the oPt are not allowed to enter Israel. Lawyers' visits are an important safeguard against TIDT, and therefore the inability of freely chosen lawyers to visit their clients removes this safeguard, thus perpetuating torture.

The period of initial detention before judicial review, and subsequent periods in pre-trial detention and administrative detention, are disproportionately long. Detention lasts up to eight days before the first judicial review, 15 days between remand hearings, and up to 75 days before indictment, according to the Security Provisions Order (SPO).[28] The cases discussed in the ICC submission, and typically all cases of TIDT, are cases of suspected security offenses and are therefore subject to longer detention periods.

Long detention periods, as well as administrative detention orders, reduce judicial scrutiny and defense rights in criminal proceedings. The use of long detention periods against Palestinians in suspected terrorism cases reflects a state policy that facilitates the torturing of detainees.

Denial of access to lawyers and torture-tainted confessions

During the duration of ISA interrogations, detainees are denied access to lawyers, and are held in incommunicado detention that impedes their ability to withstand violent treatment. Restrictions on meeting counsel are legalized by the SPO, which authorizes the ISA officer overseeing the interrogation to issue an order denying meetings with counsel. Moreover, administrative detention and remand proceedings, either during or after interrogation, as well as trial proceedings, may rely on confessions obtained through TIDT.[29]

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

29 Hajjar, supra note6, 68-75.

Military law provides, in principle, a procedure to challenge torture-tainted confessions ('a trial within a trial'); it does not provide any such mechanisms for witnesses' incriminating testimonies. In practice, however, as the Landau Commission[30] documented decades ago, the military court accepts the testimonies of ISA agents which deny torture, or the prosecution's argument that the TIDT of the detainee was lawful and based on the necessity procedure.

Of the hundreds of cases that have been dealt with and reviewed, PCATI is aware of only a single case - that of Ayman Hamida - in which a torture-obtained confession was declared inadmissible by a military court.[31] This single case is the exception which proves the rule: arguments of inadmissibility due to torture are routinely denied, which speaks volumes when compared to the hundreds of complaints of TIDT submitted by PCATI alone.

The admission of torture-tainted evidence in support of administrative detention, remand, or conviction, translates to unfair detention and sentencing. Consequently, by subjecting Palestinians to inherently discriminatory legal processes, systematically violating their procedural rights, and relying on evidence extracted by torture, Israeli authorities have been knowingly depriving Palestinian prisoners of the right to a fair and regular trial, which amounts to a war crime under the Rome Statute.

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

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

CHAPTER 3: THE DE-FACTO LEGALIZATION OF TORTURE BY THE ISRAELI JUDICIARY

As the previous chapter made clear, TIDT of Palestinians is widespread and commonplace in Israel. This is the case despite a seemingly categorical prohibition of torture, as was stipulated by the HCJ ruling in its landmark 1999 case: *Public Committee against Torture in Israel v. The State of Israel et al.*[32] In that case, the Court prohibited previously approved physical interrogation techniques, which amount to TIDT. This was viewed by many, including by PCATI at the time, as a major victory for the rule of law and for human rights in Israel. Yet, it soon became clear that the ruling left a loophole which allows TIDT to persist. This loophole pertains to the way the HCJ interprets the "defense of necessity," in accordance with Israeli Penal Law.[33]

In his ruling, then Chief Justice Aharon Barak stated that "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever." The "prohibition on the use of 'brutal or inhuman means' in the course of an investigation," to which Israel is bound, as a signatory to relevant international treaties on the matter, added Justice Barak, is "absolute." Accordingly, there can be "no exceptions to [such prohibitions] and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable."[34]

The HCJ went on to rule that violently shaking a detainee is a strictly prohibited investigation

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

33 Penal Law – 5737-1977, LSI: Special volume (1977) (hereafter: Penal Law), Article 34K: 'A person shall bear no criminal liability for an act required to have been done immediately by him to save his or another's life, freedom, body or property from an imminent danger of serious injury deriving from the circumstances at the time of the act, and for which no alternative act was available.' https://tinyurl.com/4wt79bb4.

34 Supra, note 32

method, as it "harms the suspect's body" and "violates his dignity." Similarly, the Court ruled that intentional, prolonged sleep deprivation for the purpose of exhausting or "breaking" a suspect, "is not part of the scope of a fair and reasonable investigation" as it harms "the rights and dignity of the suspect." In the same vein, Justice Barak in his decision categorically prohibited the use of other ISA interrogation methods that were commonplace at the time, including holding detainees in various contorted stress positions – typically tilted, painfully handcuffed, head-covered, or blindfolded with loud music playing. Such abusive methods, concluded Justice Barak, "infringe the suspect's dignity, his bodily integrity and his basic rights in an excessive manner," and should therefore be banned outright, as should other methods that, although do not amount to torture as such, subject "the suspect to 'inhuman and degrading' treatment…"

There was a crucial caveat in the PCATI ruling, however. Even though Justice Barak recognized the absolute prohibition of TIDT according to international law, the HCJ determined that interrogators who employed physical force and other methods of interrogation that would normally be considered illegal, could be exempt, after the fact, in exceptional cases and on an ad-hoc basis, from criminal liability under the "necessity defense" in so-called "ticking bomb" scenarios.[35] Thus, interrogators would be shielded from criminal liability if and when they use TIDT in situations of immediacy and certainty provided they reasonably believe they have no other recourse to save lives. This form of justification is the same as in cases of self-defense.[36]

In fact, this controversial ruling shields interrogators who use torture from criminal prosecution. The decisive matter appears in one sentence that had dramatic influence in the years to come: "The Attorney General can instruct himself regarding the circumstances in which investigators shall not stand trial if they claim to have acted from a feeling of 'necessity.'" In other words, writes Justice Barak, "if a GSS [ISA] investigator —who applied physical interrogation methods for the purpose of saving human life —is criminally indicted, the 'necessity defense' is likely to be open to him in the appropriate circumstances." However, he added, the necessity defense *does not* give interrogators a *carte blanche*, or an *a-priori permission* to "use physical means during the course of interrogations." Rather, it could,

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

36 See e.g., The Use of Deadly Force: Comparison, in Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law* 48 AM. J. COMP. L. 661 (2000).

at least in theory, only be used as an after-the-fact exceptional exemption from criminal responsibility, not as a categorical justification for such practices as a matter of course.

The Rubinstein Memorandum

One month after the PCATI decision was published, then Attorney General (who later became a Supreme Court Justice) Elyakim Rubinstein issued a memorandum (the '*Rubinstein Memorandum*')[37] reflecting the Israeli government's new position. Citing the above mentioned sentence, Rubinstein enumerated the circumstances in which he will consider not pressing charges against an interrogator. Rubinstein explains that the Attorney General will decide whether to press charges according to the following criteria: "the proportionality of the need and its immediacy, the severity of the danger and harm that was prevented and its concreteness, the alternatives to the act and the proportionality of the measures, including the interrogator's perception of the situation during the interrogation. The levels that confirmed the act, their involvement in the decision and discretion during its execution, as well as the conditions in which the act was performed, its oversight, and its record." ISA interrogators are hence expected to consult with officials above them, potentially spreading responsibility up the administrative ladder.

Crucially, the HCJ ruling clearly stipulated that the use of TIDT should never be authorized in advance. It referred to the Attorney General guidelines in relation to post-facto criminal liability of interrogators while including a statement on prohibition of regulation of violent interrogation methods. The Rubinstein guidelines, by contrast, authorized the prospective decision to apply so-called "special means"' in interrogations. The legal framework of necessity thus allowed acts, which would otherwise be illegal, to be approved in advance.[38]

Indeed, in some cases, testimonies indicate that ISA officers announced to detainees that they have obtained pre-approval from responsible authorities to impose a "military interrogation." On some occasions they mentioned that the approval was granted by the Prime Minister. The ISA itself similarly confirmed that TIDT was authorized in advance by stating that "the authorization to use special means in interrogation can be given only by

37 an English translation of the Memorandum is attached as Annex I to PCATI's submission to the ICC, available at: https://stoptorture.org.il/wp-content/uploads/2022/06/FIDH-PCATI_Art.-15-communication-June-2022.pdf

38 Smadar Ben-Natan, *Revise Your Syllabi: Israeli Supreme Court Upholds Authorization for Torture and Ill-Treatment*, 10 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 41–57 (2019).

the head of ISA." When brought before judges in remand hearings that take place in military courts within the oPt, military judges have reportedly asked ISA interrogators whether a military interrogation has been approved. This question by the judges reflects their acquaintance and complicity with this practice.

The legal framework of necessity hence shifted from criminal law and individual prosecutorial decisions, which are always post-facto, into a principle of governmental actions. As such, it is prospective, institutionalized, and subject to bureaucratic regulation, creating a legal sanctioning of unlawful acts.

CHAPTER 4: TORTURING WITH IMPUNITY

The previous chapters demonstrated how Israel continues to systematically employ TIDT against Palestinians, and how the HCJ's ruling and the Attorney General's guiding principles effectively paved the way to the continued use of torture by the ISA. In this chapter, we will show how, with respect to the 17 cases included in the ICC submission, in a manner consistent with 1,400 similar cases, Israel's Ministry of Justice excuses ISA torturers from criminal liability – with the approval of the HCJ.

No Law Against Torture, No Documentation, No Accountability

Despite its repeated promises and commitment to legislate a ban on torture, to date, Israel has refrained from introducing such a law. Consequently, Israeli law contains no formal legal definition of what constitutes torture, and which forms of physical, environmental, or psychological pressures are legal, and which constitute a violation of basic human rights. One of the consequences of this reality is that while the ISA readily admits that in many cases "special means" were indeed used against a detainee, it never reveals what exactly those means are, nor is there ever an admission that such acts constitute TIDT.

In the hundreds of complaints PCATI has filed with the IIC and at the HCJ on behalf of Palestinians who were subjected to TIDT, the State usually argues that the use of such unspecified "special mean" is legal because of the necessity defense, but that those special means do not constitute TIDT. In this manner, ISA agents, IIC personnel and HCJ judges all claim that no "real" torture was committed, and that whichever acts were committed were in any event legally sanctioned.

IIC investigators often rely on the testimony of ISA agents, which they by and large view as more reliable than the testimonies of Palestinians. Israeli law excludes ISA interrogations from the legal requirement of audio-visual documentation (purportedly for security reasons). This, together with detainees' lack of access to independent medical providers (i.e.

not those working in the Israeli Prison Service) who can document injuries or other signs of abuse, means that in cases involving ISA, TIDT are extremely difficult, if not impossible to prove in legal proceedings in the Israeli judicial system.

PCATI lawyers, like other legal representatives of Palestinian detainees, have only limited access to censored versions of ISA agents' affidavits. If ISA's conduct during interrogations is revealed at all, it is don , *ex-parte*, behind closed doors. In the absence a domestic law clearly defining what constitutes torture, when interrogations are not documented, when court proceedings are conducted ex-parte, and where so-called "special means" are excused as necessary, it should come as no surprise that the HCJ has never overturned an IIC decision to close a Palestinian detainee's TIDT complaint.

The Israeli Judicial System is Unable and Unwilling to Address Torture

Following the 1999 ruling, in 2001 PCATI began filing cases to the IIC, with the hope that the IIC will serve as a legal check on ISA's use of TIDT. To our dismay, this was not the case. As mentioned above, no indictments against perpetrators of torture were brought in over 1,400 cases submitted to IIC since 2001, and only in three cases was a criminal investigation – rather then a "preliminary examination process" – even conducted before the decision to dismiss a victim's complaint.

Indeed, in every single case that forms the basis of the ICC submission, complaints were filed by PCATI to the IIC, but all were closed without any criminal proceedings. It is notable that in their responses to PCATI's charges against ISA agents, IIC and other Ministry of Justice officials often openly admit that detainees were interrogated under a procedure ostensibly authorizing the ISA to apply the necessity defense. Alternatively, they acknowledge that detainees were interrogated using "special means."

This decisive evidence is consistent with formal and informal statements by Israeli officials throughout the years. In their responses in court and to PCATI petitions and complaints, Israeli security and legal officials do not deny the use of so-called "special methods" but argue that they do not amount to torture. To the contrary, they by and large confirm the use of special means and argue that they are legally permitted under the necessity defense due to the danger these detainees allegedly pose to Israeli security. As previously shown in this report, these practices are part and parcel of a well-organized judicial and bureaucratic

system, and are repeatedly defended and authorized not just by the ISA's legal advisors and directors and the Israeli Ministry of Justice, but also by Israeli courts, including the HCJ.

The existence and legality of the necessity procedure is rarely dealt with in criminal cases, even when the admissibility of confessions is challenged. However, in multiple cases argued before the Jerusalem District Court, the procedure was acknowledged and upheld. One case on which this procedure left a particularly visible mark is *State of Israel v. Amro Al Aziz*.[39] In the Al Aziz verdict, Justice Zvi Segal expressly stated that:

> *[The interrogators] implemented in the case of Ahmad an interrogation procedure that is supposed to grant immunity by virtue of the necessity defense according to paragraph 34(11) of the Penal Law 5737 (1977), which the ISA interrogators call the 'necessity interrogation' procedure. In court, Ahmad detailed the interrogatory means implemented against him, including physical pressure and threats (pp 113, 114–135), and in the primary examination and the cross examination, the interrogators even clarified the import of the means implemented including physical pressure'*[40]

Although "granting immunity" seemingly contradicts Justice Barak's holding in the PCATI decision, the procedure was upheld and the statement in question was deemed admissible. Justice Yoram Noam, who also presided in the case, concurred: "the interrogators viewed the means that they implemented, which they called 'necessity interrogation,' as protected by virtue of the necessity defense according to paragraph 34(11) of the Penal Code."[41]

In 2008 PCATI challenged state practices of interrogation in a motion for contempt of court's initial decision from 1999. Justice Dorit Beinisch, then Chief Justice of the Israeli Supreme Court, summarily dismissed the case by stating, inter alia, that institutionalized torture, euphemistically referred to as *enhanced interrogation techniques*, was in fact consistent with the court's prior ruling in the 1999 PCATI case. The decisive paragraph from that ruling

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

40 *Id*, testimony labeled 'Dotan' on pp. 142, 143, and 157.

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

invoked by Justice Beinisch includes the following statement: "We do not exclude the possibility that the protection of 'necessity' will be awarded to an ISA interrogator, through the discretion of the Attorney General in his decision whether to prosecute, or, if he stands trial, through the discretion of the court."[42]

In other words, according to Justice Beinisch, despite the general prohibition of torture, the necessity defense safeguards interrogators exercising violence against detainees from criminal liability and shields perpetrators of TIDT from prosecution and conviction. In light of this de facto legal justification of TIDT, it is therefore not surprising that since the landmark decision in 1999, no criminal charges have ever been filed against ISA interrogators, even when detainees suffered physical and mental disabilities As a result of their interrogations.[43]

The Tbeish and Abu-Ghosh Rulings

Ten years later, the HCJ continued to condone the use of torture in interrogations, in the two cases adjudicated at the Supreme Court, *Tbeish* (2018)[44] and *Abu-Ghosh* (2017).[45] The interrogations in the two cases included physical violence such as forcing the victims into painful, contorted positions (including the banana and frog positions), slapping, beating and slamming against the wall, and prolonged painful shackling that applied extreme pressure on the arms. The detainees in these cases also endured sleep deprivation, psychological abuse, cursing, and humiliation, all while being held incommunicado. The Court, however, ruled that these methods did not amount to torture, despite the fact that some of them were explicitly forbidden already in the 1999 HCJ ruling.

In the *Abu Ghosh* case, the HCJ stated unambiguously: "Even assuming that internal ISA guidelines do exist […] and even if the interrogators acted in compliance with such guidelines, the application of the [necessity] defense was impeccable."[46] In this case, the HCJ eased the immediacy requirement of "necessity," and ruled that the physical measures used against

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

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

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

45 *Abu Ghosh*, supra note 25.

46 *Id*,p. 34. For a review of the case see: https://www.lawfareblog.com/pressure-techniques-and-oversight-shin-bet interrogations-abu-gosh-v-attorney-general.

Abu Gosh did not amount to prohibited torture. Regarding the immediacy requirement of necessity, the court expanded the scope of cases where de facto torture would have official authorization:

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

In the Tbeish decision, the court openly acknowledged the existence of the ISA guidelines on the initiation, authorization, and means in necessity interrogations for the first time, as it upheld them.[47] Although the HCJ decision in 1999 had already been eroded de facto by the Rubinstein guidelines, partially due to its own weaknesses, the Tbeish case introduced a de jure change that marked a new age for the legal authorization of torture and ill-treatment.[48]

Responding to allegations regarding the unlawfulness of a necessity procedure interrogation that amounted to torture, and of the ISA guidelines more generally, the State admitted that due to the prospect of future danger, Tbeish was interrogated using "special means of interrogation." The State also claimed that these means did not constitute torture, and that in any event, they were reasonable and proportionate under the circumstances. For the first time, government representatives acknowledged the existence of ISA guidelines for the use of force in interrogations, and submitted them for review by the Court *ex parte*.

The court affirmed the legality of the necessity procedure guidelines laid down by the ISA, stating:

> *[T]he Guidelines detail the system of consultation in a specific case for all those involved therein; the limitations upon discretion in deciding upon adopting special means in specific circumstances; and the required manner for memorializing [documenting] such interrogations.*
> *As opposed to the Petitioners' claims, I find no flaw in establishing clear rules as to*

47 *Tbeish*, supra note 34.

48 For further analysis see Ben-Natan, supra note 23.

the manner of consulting within the ISA prior to reaching a decision upon adopting 'special means' in a particular interrogation […].[49]

Additionally, and crucially, the Court substantially expanded the scope of necessity to include scenarios wherein the purported danger is not immediate, nor is the harm necessarily imminent. The court ruled that:

[T]he requirement [of necessity] is met even when the danger may be realized days or even weeks after the interrogation. […] Even if the exact date for actually realizing the terrorist plan was unknown at the time of the interrogation, the intention of the Petitioner and his accomplices to perpetrate terrorist acts by means of that collection of hidden arms suffices to meet the immediacy requirement and to justify the use of 'special means' in the framework of the interrogation.[50]

These passages make clear that the ISA has adopted guidelines that establish *ex-ante* decision rules for deploying torture.[51] A decision to employ the necessity procedure is established following consultations between several office holders (interrogators and their superiors), and the guidelines seem to set out factors to be considered ("limitations upon discretion"). Importantly, these decisions reflect the existence of a state policy that accepts torture in interrogations, and the courts' unwillingness and/or inability to hold perpetrators accountable.

The Case of Samer Arbeed

The persistent pattern of Israeli abductions and subsequent torture was further confirmed in the high-profile 2019 case of Samer Arbeed, as published in numerous open sources.[52] ISA initially arrested Arbeed on August 26th due to his suspected involvement in the murder of the Israeli citizen Rina Shnerb. On September 2nd, an Israeli military court issued an administrative detention order against him, but during a later hearing the court ordered his release. On September 25th a special unit of Israeli forces rearrested Arbeed. According

49 *Tbeish*, supra note 34.

50 *Id.*

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

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

to testimony, he was badly beaten during his arrest.[53] He was then deported from the oPt and taken to the ISA's interrogation center at the Russian Compound in Jerusalem, where he was denied access to his lawyer. The ISA then apparently received permission to "use exceptional measures to investigate" his case, i.e., to employ the necessity procedure. Shortly after, Arbeed was rushed to hospital in critical condition. He was unconscious, had several broken ribs, required resuscitation, and and suffered from kidney failure, therefore requiring dialysis.[54]

The Ministry of Justice announced on September 29th, 2019 that it had opened an investigation into the circumstances leading to Arbeed's hospitalization. Yet, on October 2nd, a military court extended Arbeed's detention, noting that his condition had improved, and allowed the ISA to resume his interrogation. In anticipation of this interrogation, security authorities reinstated a temporary ban on Arbeed's access to his legal representatives.[55] On January 24th, 2021, the then Israeli Attorney General, Avichai Mandelblit, closed the investigation against the ISA.[78] As Prof. Yuval Shany argues:

> *This case provides another illustration of the inadequacies of Israel's laws and procedures […] It also underscores the significant gap between Israeli law and international law relating to coercive interrogations. […] the dire consequences of the Arbeed interrogation—resulting in the detainee's almost dying—raise serious questions about whether the legal distinction between special interrogations constituting and not constituting torture, as detailed by the 1999 guidelines, was observed in the case. This case again underscores the lack of a real dividing line between torture and other forms of intentional infliction of pain and suffering.*[56]

Alongside the testimonies in court proceedings described above, Arbeed's case demonstrates that ISA practices of torture are effectively normalized in Israel.[57]

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

54 *Id.*

55 *Id.*

56 *Id.*

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

CONCLUSION

As is carefully documented in this report, Israel has failed in its basic obligation and commitment to refrain from torture. It has similarly failed in its basic obligation and commitment to prosecute offenders, and to provide real and effective safeguards against torture or ill-treatment of Palestinian detainees.

The pattern of systemic abuse is abundantly clear, as is the complicity of Israel's legal system. The facts speak for themselves: of the 1,400 complaints of torture by Israeli authorities which were submitted to Israel's Justice Ministry in the two decades between 2001 and 2022, a mere three criminal investigations were ever opened, and not a single indictment was ever filed against an ISA interrogator.

It is this egregious violation of the right not to be subject to torture and ill-treatment, together with the impunity enjoyed by perpetrators of these horrendous crimes, that have led PCATI to turn to the ICC. While we are committed to continue our fight for justice for our clients via the Israeli courts and will continue to lobby for anti-torture legislation domestically, the systemic nature of Israeli war crimes, and the categorical refusal of Israel's legal authorities to prevent their reoccurrence, have left us no recourse but to appeal to the ICC in search of accountability for architects and perpetrators of TIDT in our country.

RECOMMENDATIONS

For Israel:

- Cease The use of all acts of torture with immediate effect.
- Criminalize torture and ill-treatment without exception, and ensure a timely and transparent investigation of all complaints concerning torture or inhumane and degrading treatment of detainees.
- Halt the practice of unlawful deportation of Palestinian detainees from the occupied territories into Israel, with immediate effect.
- Conduct thorough, sincere, and exhaustive investigations into allegations of torture and, where appropriate, press charges against state officials who have been involved in the execution, order or approval of torture, regardless of their rank and position.
- Abandon the use of the illegitimate "necessity defense" doctrine when examining allegations of torture;
- Recognize the Istanbul Protocol as valid evidence in court to prove the use of means of torture and ill-treatment against a person.
- Mandate the audio-visual recording of all interrogations; allow complainants full access to such recordings when alleging they have been subjected to torture or ill-treatment.
- Amend the Evidence Act so that evidence obtained using coercive and illegal means would not be admissible in any court of law. Such evidence should be categorically disqualified, and should not be left to the discretion of judges or "balanced" against other interests. This should apply both to confessions and to recriminations of other parties, with no exception.
- Cooperate fully with the investigation currently conducted by the ICC into the Situation in Palestine, including granting access to its territory to Office of the Prosecutor personnel.

For the International Community:

- Ensure that perpetrators of torture are held accountable under the ICC or any other form of international or universal legislation;
- Call on Israel to immediately cease the use of torture, and abide by its international obligations as signatory to the UN Convention against Torture;

For the ICC:

- Fully investigate the most serious crimes described in PCATI's submission;
- Hold perpetrators of these crimes accountable for their acts;
- Ensure that the investigative process is completed in a timely manner, and enable the investigative team to complete its work.

הוועד נגד עינויים
THE COMMITTEE AGAINST TORTURE
اللجنة لمناهضة التعذيب