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Israel Should Ratify the Optional Protocol to the UN Convention Against Torture as an Effective Means of Eliminating Torture

Position Paper
April 2010

Introduction

The Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) entered into force on 22 June 2006, as the culmination of decades of negotiations over the establishment of a worldwide system of torture prevention based on regular visits to places of detention.[1] To date, as many as 64 states have signed and 50 states have ratified or acceded to the OPCAT.[2]

Torture and various forms of ill-treatment continue to be practiced against detainees held on security charges in Israeli detention facilities, the vast majority of whom are Palestinians from the Occupied Palestinian Territory (OPT).[3] However, in response to hundreds of complaints, no criminal investigation has been opened into suspected incidents of torture and ill-treatment by Israel Security Agency (ISA) interrogators and not a single indictment has been filed.[4] In parallel, Israel currently lacks a system of regular, unannounced visits to ISA detention centers by qualified, independent professionals for the purposes of preventing torture and ill-treatment, or indeed any preventative mechanism.

The OPCAT aims to help states to enforce the absolute prohibition on torture, as enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Israel ratified on 3 October 1991. It has the potential to be a key tool for the elimination of torture and other forms of ill-treatment in detention centers in Israel. By signing and ratifying the OPCAT, Israel would join the growing ranks of States Parties that have embraced this new approach and committed to a culture of greater openness, cooperation and dialogue in the fight against torture.[5]

The Optional Protocol as a means of preventing torture

In its preamble, the OPCAT sets out to "establish a preventive system of regular visits to places of detention." It creates an innovative dual system of regular monitoring of places of detention by independent, expert national and international visiting bodies through unrestricted visits, for the purpose of preventing incidents of torture and improving conditions of confinement for persons deprived of their liberty.

The main aims of the OPCAT are to contribute to creating a culture of torture prevention within places of detention, based on the premise that ongoing engagement with state authorities responsible for detention will lead to the generation of an environment in

which torture and ill-treatment are less likely to occur. Moreover, it works on the assumption that the more open and transparent places of detention are, the less likely that torture and ill-treatment are to take place in the first place. Persons deprived of their liberty are at highest risk of torture and ill-treatment as they are isolated from the outside world and almost completely dependent on officials for the exercise of their rights.

The Subcommittee on the Prevention of Torture ("the Subcommittee") constitutes the international component of the preventive mechanism. Its members are twenty-five interdisciplinary experts selected by the States Parties. The mandate of the Subcommittee includes conducting visits to places of detention within States Parties to the OPCAT, making recommendations (in confidence) for strengthening state protections against torture and ill-treatment in places of detention, and co-operating with UN and other regional, national and international bodies. The Subcommittee carries out unannounced visits.[6] States Parties are required to allow full access to all areas, provide all relevant information, encourage and facilitate contact between the Subcommittee and the National Preventive Mechanisms (NPMs), examine the Subcommittee's recommendations, and implement associated measures.[7] The Subcommittee's reports remain confidential unless individual States Parties agree to their publication. The system is modeled on the European Committee for the Prevention of Torture (CPT), established by the European Convention on the Prevention of Torture, which has been conducting visits to detention centers for over twenty years.[8]

The Subcommittee is also mandated to work in cooperation with and provide advice and support to NPMs, which constitute the domestic tier of the OPCAT system. It may offer NPMs assistance in the form of training, technical support and implementing recommendations. The NPMs are primarily intended to engage in constructive dialogue with states. They also undertake their own visits to places of detention and report their findings and recommendations to the State Party. The NPMs must publish an annual report and have the additional authority to comment on draft legislation. The OPCAT stresses that visits made to places of detention by the national and international mechanisms must be both unannounced and unrestricted. The OPCAT does not prescribe any particular form or structure for NPMs, granting leeway to states to designate a body or bodies that they deem most appropriate and effective, ideally in consultation with civil society.[9] However, it stipulates that the membership of the NPMs be independent, professionally competent, provided with adequate resources and representation from relevant minority groups and to both sexes, and be given the authority to carry out their visits without obstruction.

Thus the focus of the OPCAT is firmly on the prevention of torture rather than on reacting to allegations of abuse after they have occurred, *a posteriori*. In addition to its preventive nature, the system established by the OPCAT is founded on ongoing dialogue, consultation and collaboration between the national and international mechanisms and States Parties in a common endeavor to prevent torture, and not on condemnation of incidents of torture or ill-treatment. The visits, reports and recommendations of the national and international mechanisms are intended to feed into an ongoing dialogue between them and the State Parties. The high degree of cooperation and constructive dialogue involved in the process aims to assist States Parties in resolving any problems identified and preventing abuse over the long-term.[10] The OPCAT aims to identify gaps in protection in the system, rather than identifying and investigating individual cases of abuse.

Torture in Israel and Visits to Places of Detention
While the absolute prohibition on torture is enshrined in international legal instruments, incidents of torture continue to occur in places of detention, and no State Party to the CAT can claim to have completely eradicated torture and ill-treatment. In Israel, complaints of torture and ill-treatment in places of detention continue to be made on a regular basis.[11]

Israel has not incorporated its international human rights treaty obligations, including those that arise from the CAT, into Israeli domestic law. Thus the CAT is considered a persuasive rather than binding authority in the Israeli courts. Nevertheless, some improvements have been made to the legal framework at the domestic level, most notably by the Israeli Supreme Court's 1999 ruling in *The Public Committee Against Torture in Israel v The State of Israel*.[12] In its decision, the Supreme Court ruled that the certain kinds of practices of torture were prohibited, but left open the possibility that an Israeli official charged with torture may escape criminal liability by virtue of the "necessity defense" contained in Section 34(1) of the Israeli *Penal Law* – 1977. The decision gives the Attorney General (AG) discretion not to indict interrogators who put forward this defense. This aspect of the ruling contradicts the absolute prohibition on torture contained in Article 2(2) of the CAT and therefore falls short of the full incorporation of the prohibition of torture and ill-treatment into Israeli domestic law. Following its periodic review of Israel in 2009, the Committee Against Torture shared this conclusion, and accordingly "reiterate[d] its previous recommendation that a crime of torture as defined in article 1 of the Convention be incorporated into the domestic law of Israel."[13] The Committee also stated that it was "concerned that ISA interrogators who use physical pressure in "ticking bomb" cases may not be criminally responsible if they resort to the necessity defense argument," and reiterated its previous recommendation that Israel "completely remove *necessity* as a possible justification for the crime of torture."[14]

The retroactive supervision allowed under Israeli domestic law amounts to a major legal loophole, and the deliberate legal ambiguity regarding the prohibition on torture within Israeli law creates a culture of impunity among ISA interrogators and makes the perpetration of torture and ill-treatment more likely. Thus, since the 1999 Supreme Court ruling *not one* criminal investigation has been launched into an ISA interrogator suspected of torture. According to the State of Israel, between 2001 and 2007, the Inspector for Complaints within the ISA initiated 583 complaints alleging the use of unlawful investigation techniques and/or torture, and that four cases resulted in disciplinary measures (0.6%) and several in "general remarks" to ISA interrogators; in no case was a criminal investigation or prosecution opened.[15] The Inspector for Complaints within the ISA Israeli Department is an ISA agent and subordinate to the Head of the ISA, and therefore does not meet the requirements of independence, impartiality and objectivity.[16]

Moreover, a comprehensive system of laws and regulations that govern the detention of persons suspected of security offenses operate in unison to create conditions that may facilitate the torture or ill-treatment of individuals under interrogation. Security suspects may be detained for up to 96 hours (and 8 days in military courts) before being brought before a judge,[17] as opposed to a maximum of 48 hours in other cases.[18] Security suspects can concurrently be denied access to a lawyer for up to 21 days (90 days in military

courts),[19] as opposed to a maximum of 48 hours in other cases, in exceptional circumstances.[20] In addition, the ISA and the police are exempted from making audio and video recordings of security suspects in their interrogations.[21] Compounding the isolation of security detainees, they are not permitted to use the telephone, there is a strict limitation on the number of letters they can send and receive, and since June 2007, Israel has imposed a blanket ban on residents of Gaza from visiting their relatives held in Israeli prisons and detention centers. In its Concluding Observations on Israel issued in 2009, the Committee Against Torture emphasized that Israel must ensure the basic safeguards for detainees, including that detainees must be "promptly brought before a judge, have prompt access to a lawyer, independent doctor, and family member," and that Israel extend the legal requirement of video recording of interviews of detainees to those accused of security offenses."[22]

In addition, detainees classified as security detainees are held in inhuman, degrading and humiliating physical conditions in between interrogations by the ISA, including foul smelling, cramped cells with poor ventilation, constant air-conditioning set to very low temperatures, or no air-conditioning in the summer months, no natural light, no toilet or shower facilities and restricted access to outside toilets and showers, rough, dark-colored walls that are impossible to lean on, and lit with faint lighting that may be turned on at all times, and thin, filthy and soiled mattresses in place of beds.[23] These conditions are designed to create discomfort and disorientation in terms of time and space and are a routine part of the process of pressurizing security detainees and obtaining information and confessions from them.[24] These conditions, the systematic lack of transparency surrounding the detention and interrogation of security suspects by the ISA, and the absence of safeguards against torture and ill-treatment, make Israel's adoption of the OPCAT all the more imperative.

Another clear gap in the system of torture prevention in Israel is the lack of an effective mechanism for official visits to detention facilities under the responsibility of the ISA. While a visiting mechanism does exist, it is neither independent nor ad hoc.[25] Section 71 of the *Prisons Ordinance (1972)* establishes rules for official visitors in prisons, who are appointed by the Minister of Public Security and comprise lawyers from the Ministry of Justice and other ministries. Section 72 grants official visitor permission to the judiciary and AG. Representatives of the Public Defender's Office and the Israeli Bar Association have on several occasions been denied permission to visit ISA detention cells, and have therefore never been able to conduct a visit to detainees held in such cells. These representatives do conduct visits to other cells in prisons and often issue severely critical reports about prison conditions as a result. According to guidelines of the Israel Prison Service (IPS),[26] the Minister of Internal Security has the discretion to authorize entry to certain areas of the prison, while restricting access to other areas. The ISA is behind the refusal to allow the Public Defender's Office to visit ISA detention cells, and the Public Defender's Office, which is officially part of the Justice Ministry, has not challenged this refusal legally.[27] In addition, Israel has entered a reservation to Article 20 of the CAT, thereby denying the Committee Against Torture the authority to visit Israel in order to investigate any evidence it receives about the systematic practice of torture.

PHR-IL has made numerous requests for its physicians to take part in the official visits to prisons; all of their requests were rejected. In 2008, representatives of PHR-IL met the IPS Commissioner to repeat its request for physicians affiliated with the

organization to conduct regular inspections of prisons. At the meeting the commissioner rejected PHR-IL's request, stating that such visits would create an unnecessary burden on the IPS.

Thus no regular visits are currently being conducted by qualified and independent lawyers, doctors or other professionals to places of detention in Israel, either for the purpose of investigating individual allegations of incidents of torture, or, as provided under the OPCAT regime, to examine the system as a whole in order to remedy weaknesses in torture prevention. Further, a request to conduct a visit to Israel by the UN Special Rapporteur on Torture has been pending since 2002.[28] Moreover, there is a lack of an ongoing constructive dialogue on torture between the state of Israel and independent actors with professional expertise. These gaps represent serious weaknesses in Israel's system of preventing torture and ill-treatment.

Conclusion

The OPCAT constitutes an effective mechanism in the fight against torture in places of detention worldwide. It has established a novel system of national and international visiting and reporting mechanisms that are intended to work in cooperation with State Parties and engage them in dialogue in order to improve the systems and structures that govern detention and the conditions of confinement of detainees. The focus of the OPCAT is firmly on the prevention of torture rather than on reacting to allegations of abuse after they have occurred, a posteriori.

The OPCAT offers assistance to Israel and other states in combating torture and ill-treatment in detention facilities, and seeks to promote compliance with the international standards established in the CAT at the national level. It can help to fill the current lack of transparency and effective monitoring and supervision in places of detention and to prevent incidents of torture and ill-treatment before they occur. As a State Party to the CAT, signing and ratifying the OPCAT is a major step that Israel can take in fulfillment of its obligations under Article 2(1) of the CAT to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Israel would also send a clear message to Israeli and Palestinian society and to the international community that it is dedicated to the complete elimination of torture and ill-treatment, in accordance with international human rights law. In support of this important step, members of the international community, and in particular States Parties to the OPCAT, should call on Israel to sign and ratify the OPCAT without delay.

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[1] A preventive system of this nature was foreseen in the discussions from the 1970s over the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984, which entered into force on 26 June 1987, and which was ratified by Israel on 3 October 1991.

[2] Information accurate as of 7 April 2010. See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en

[3] As of March 2010, 6631 Palestinians were imprisoned in Israeli prisons, of which 8 were detained under the Illegal Combatants Law (7 of whom are from Gaza) and 237 were administratively detained. 35 were women; 337 were child prisoners, including 39 under the age of 16; and 773 were from Gaza. See Addameer, *Quarterly Update on Palestinian Prisoners*, April 2010, and B'Tselem, *Statistics on Palestinians in the custody of the Israeli security forces*, available at: http://www.btselem.org/English/Statistics/Detainees_and_Prisoners.asp

[4] This is a clear breach of Article 12 of the CAT, as well as Article 14, which the Committee Against Torture has interpreted to include guarantees of non-repetition. See The Committee Against Torture, *Concluding Observations on Israel*, CAT/C/ISR/CO/4, 23 June 2009, para. 21 & *Urra Guridi v. Spain*, para. 6.8, decision delivered 17 May 2005; available at: http://sim.law.uu.nl/SIM/CaseLaw/CATcase.nsf/17c23356d66b13c8c125685e004a9525/aa7b55baee029312c125703400509deb?OpenDocument

[5] The Committee Against Torture also encouraged Israel to ratify the OPCAT in its 2009 Concluding Observations on Israel. The Committee Against Torture, *Concluding Observations on Israel*, CAT/C/ISR/CO/4, 23 June 2009, para. 35.

[6] See the second annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 7 April 2009, para. 22. Available at: http://www.unhcr.org/refworld/category,REFERENCE,CAT,,,49f57b452,0.html

[7] States Parties can only object to a visit in a limited number of circumstances, which are regarded as permitting postponement but not the prevention of visits.

[8] Article 1 of the European Convention on the Prevention of Torture states as follows, "The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." See, http://www.cpt.coe.int/en/. The Convention has been ratified by 47 Council of Europe States.

[9] See the first annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 14 May 2008, Available at: http://www.apt.ch/region/unlegal/SPTAR1_en.pdf

[10] Inter-American Institute of Human Rights, Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: A Manual for Prevention, 2005, pp. 27-28. Available at, http://www.apt.ch/component/option,com_docman/task,doc_view/gid,42/Itemid,59/lang,en/

[11] See, e.g., The Public Committee Against Torture in Israel, *10 Years, Hundreds of Complaints, No Investigations*, December 2009. Available at: http://www.stoptorture.org.il/en/node/1520. In June 2009, the Committee against Torture concluded its fourth periodic review of Israel and reiterated a number of concerns about torture in places of detention. See the Committee Against Torture, Concluding Observations on Israel, CAT/C/ISR/CO/4, 23 June 2009. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/431/65/PDF/G0943165.pdf?OpenElement

[12] The legal discourse on torture in Israel has been influenced by two major landmarks, the Landau Commission Report (1987) and the Supreme Court's 1999 ruling. According to the report by the Landau Commission, which examined methods of torture employed by the ISA, "moderate physical pressure" was permissible in the interrogation of persons suspected of security offences. In 1999, the Supreme Court overturned this directive and ruled against the use of certain kinds of torture practices, holding that the ISA did not have the legal authority to use physical means of interrogation that cause suffering and are not "reasonable and fair".

[13] The Committee Against Torture, Concluding Observations on Israel, CAT/C/ISR/CO/4, 23 June 2009, para. 13.

[14] Ibid., para. 14.

[15] Israel's Third Periodic Report to the UN Human Rights Committee, CCPR/C/ISR/3, 21 November 2008, para. 206. Available at:

http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/455/90/PDF/G0845590.pdf?OpenElement

[16] See, The Public Committee Against Torture in Israel, "*Accountability Denied - The Absence of Investigation and Punishment of Torture in Israel*", December 2009. Available at: http://www.stoptorture.org.il/files/Accountability_Denied_Eng.pdf. See also a letter sent by PCATI on 9 March 2010 to the Attorney General, on behalf of six Israeli human rights organizations, attacking the policy of impunity and demanding the opening of a criminal investigation following every complaint of torture (Hebrew). Available at: http://www.stoptorture.org.il/files/mv1_0.pdf.

[17] Pursuant to Section 3 of the *Criminal Procedure (Detainee Suspected of Security Offence) (Temporary Order) Law – 2006*.

[18] According to Section 30 of the *Criminal Procedure (Powers of Enforcement - Arrests) Law – 1996.*

[19] Under Section 35 of the *Criminal Procedure (Powers of Enforcement - Arrests) Law – 1996.*

[20] According to Section 34 of the *Criminal Procedure (Powers of Enforcement – Arrests) Law – 1996.*

[21] According to Section 17 of the *Criminal Procedure (Interrogating Suspects) Law (Amendment No. 4) – 2008*. Following its enactment in 2002, it was extended for an additional four years on 16 June 2008, in effect turning it into a permanent law.

[22] The Committee Against Torture, Concluding Observations on Israel, CAT/C/ISR/CO/4, 23 June 2009, paras. 15 and 16.

[23] See the United Against Torture (UAT) Coalition, Alternative Report for Consideration Regarding Israel's Fourth Periodic Report to the UN Committee Against Torture (CAT), September 2008 and Supplementary Reports for Consideration Regarding Israel's Fourth Periodic Report to the UN Committee Against Torture (CAT), April 2009, available at: http://www2.ohchr.org/english/bodies/cat/cats42.htm

[24] For more information, see HaMoked and B'Tselem, "The ISA Interrogation Regime: Routine Ill-treatment," in *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees,* May 2007. Available at: http://www.hamoked.org.il/items/13100_eng.pdf

[25] Official visitors are allowed to enter prisons at any given time (unless special temporary circumstances apply), inspect the state of affairs, prisoners' care, management, etc. During these visits, the prisoners may present their complaints to the visitors, including grievances pertaining to the use of force. AG's Guideline (No. 4.1201 of 1 May 1975, updated 1 September 2002) broadened the scope of the above to also include detention facilities and detention cells in police stations. Available at, http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.ISR.4_en.pdf

[26] Guidelines no. 3.04.00, available in Hebrew at: http://www.ips.gov.il/NR/rdonlyres/0DBB15A5-53C4-444D-9C51-148A8069D581/0/0

[27] On 28 October 2009 PHR-IL, the Association for Civil Rights in Israel (ACRI) and the Public Committee Against Torture in Israel (PCATI) sent a letter to the AG requesting that representatives from the Public Defender's Office be permitted to visit the ISA's detention facilities. On 21 January 2010 the AG representative responded that the policy currently in place is legitimate and that visits to these cells will be conducted only by attorneys from the Ministry of Justice's Supreme Court department.

[28] See http://www2.ohchr.org/english/issues/torture/rapporteur/visits.htm