

Adalah – The Legal Center for Arab Minority Rights in Israel  
Physicians for Human Rights – Israel  
Al Mezan Center for Human Rights

# On Torture

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Physicians For Human Rights - Israel



مركز الميزان لحقوق الإنسان  
AL MEZAN CENTER FOR HUMAN RIGHTS

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## Introduction

Drafters of the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* (CAT) expressed in the preamble the desire "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." Building on Article 5 of the *Universal Declaration of Human Rights* (UDHR) and Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (CIDT), CAT purposefully heightened the responsibility of State Parties to prevent such acts as well as to create and support mechanisms to punish the perpetrators. Israel ratified CAT in 1991, and eight years later, in 1999, the Israeli Supreme Court delivered its landmark judgment in *HCJ 5100/94, The Public Committee Against Torture in Israel (PCATI) vs. the Government of Israel*. This ruling both revealed and outlawed various methods of torture systematically employed by the General Security Service (GSS or Shabak) and other Israeli security forces, overwhelmingly against Palestinian detainees and prisoners. The welcome judgment nonetheless left grave loopholes such as the "necessity defense" exception in cases of "ticking bombs" (i.e., the interrogation of suspects said to be holding information against potential armed attacks), which continue to threaten the most fundamental human rights of prisoners and detainees.

This volume is a product of a joint initiative by Adalah – The Legal Center for Arab Minority Rights in Israel, Physicians for Human Rights – Israel (PHR-Israel) and Al Mezan Center for Human Rights in Gaza to further prevent and fight against torture and ill-treatment in Israel. Towards that aim, in April 2011, the three partner organizations convened a two-day international expert workshop in Jerusalem for local and international practitioners on the subject of "Securing Accountability for

Torture and CIDT in Israel: New Trends and Comparative Lessons". The participants, who included around forty Palestinian, Israeli and international lawyers, legal experts, medical practitioners and human rights professionals, explored the history of torture in Israel, the daily challenges for local practitioners seeking accountability for torture and CIDT, and the changing face of torture in Israel.

Of primary concern was whether we, as organizations and professionals, were consistently recognizing the full range of means and methods of torture and CIDT, whether the existing domestic mechanisms of preventing torture and ill-treatment and of holding perpetrators accountable were sufficient, and whether and how we could incorporate successful strategies employed in various national, regional and international jurisdictions before Israeli courts. As such, the discussion was enriched by the comparative perspectives of international legal and medical experts, who included Professor Manfred Nowak, a former UN Special Rapporteur on Torture, Dr. Stephen Xenakis, a psychiatrist and retired Brigadier General in the Medical Corps of US Army, and Attorney Jamil Dakwar, Director of the American Civil Liberties Union's Human Rights Program. The last session of the workshop provided a unique opportunity for practitioners to discuss and analyze the lessons learned, and think creatively about ways forward in preventing torture and CIDT and seeking accountability.

This volume brings together several presentations that were delivered during the workshop, as well as work conducted by each of the partners during the project. Adalah, PHR-Israel and Al Mezan have compiled and published this material with the aim of contributing to the debate of how best to confront the manifestations of torture and CIDT in the context of Israel and the Occupied Palestinian Territory (OPT). It is the partners' hope that the documentation of the persistent and pervasive use of torture and ill-treatment against Palestinian prisoners in Israel, presented alongside international comparative lessons and strategies, will heighten the sense of urgency among legal and medical professionals as well as the general public to demand the end of torture in Israeli prisons and accountability for victims.

This volume does not discuss torture or ill-treatment carried out against Palestinians by the Palestinian Authority's two governments (the Fatah-led government in Ramallah and the Hamas-led government in Gaza). This is due to the fact that such a debate is outside the scope of our joint work, and is in no way intended to undermine the gravity of such acts or the suffering of the victims. Palestinian human rights organizations based in the OPT are actively engaged in fighting torture by Palestinian actors in the OPT.

Part I consists of a collection of essays based on the expert presentations at the workshop. Attorney Lea Tsemel, a leading lawyer in the fight against torture in Israel and a founder of PCATI, provides a brief history of the legal struggle against torture and ill-treatment in Israeli prisons. This history, in many ways, traces the trajectory of Attorney Tsemel's career as a human rights lawyer over the last decades. Dr.

Rouchama Marton, the founder of PHR-I, contributes an important piece revealing the involvement of Israeli physicians in the torture and ill-treatment of Palestinian detainees, as well as the individual, social and political mechanisms that make this sort of conduct by physicians possible. In his keynote address, former UN Special Rapporteur on Torture Professor Manfred Nowak acknowledged the universal nature of torture and CIDT. Having spent six years documenting the torture and ill-treatment of prisoners worldwide, Professor Nowak draws comparisons and conclusions from his work globally and offers next steps in the struggle against torture. Attorney Jamil Dakwar extends the comparative legal conversation and focuses on the paradigm shift of 9/11 and the response of human rights lawyers and other professionals to hold the United States accountable for the torture and abuse of non-US citizens at Guantanamo Bay, Abu Ghraib, and other horrific sites around the world.

The volume then returns to domestic concerns with Attorney Irit Ballas investigating regimes of impunity in Israel that effectively prevent the defense of victims of torture. Attorney Bana Shoughry-Badarne broaches critical concerns of Israeli legal practitioners in addressing the seemingly insurmountable challenges left by the loopholes of the 1999 Supreme Court decision. The partners are particularly concerned with the torture and ill-treatment of Palestinian minors, and Attorney Gerard Horton offers sobering reflections on this trend. Part One closes with the keynote address of Dr. Stephen Xenakis, who reminds us of the responsibility of the individual to speak out against torture despite the consequences.

Part Two brings together a series of documents based on work conducted over the course of the three-year joint project of Adalah, PHR-Israel and Al Mezan. This section first presents excerpts from a Supreme Court petition that was submitted by Adalah in December 2010 on behalf of the partners and PCATI challenging a new law that exempts the GSS/Shabak from the duty to make audio or video recordings of detainees suspected of committing security offenses (HCJ 9416/10, *Adalah v. The Ministry of Public Security*). The petition argues that audio and video recordings of these investigations act as a crucial safeguard against torture and CIDT and as a means of uncovering the truth. As of this writing, the petition remains pending before the court.

The next text is a psychiatric expert opinion on the subject of coerced false confessions of Palestinian children written by Graciela Carmon, M.D., a child and adolescent psychiatrist and member of PHR-Israel's Board of Directors. Dr. Carmon analyzes the effects of Israeli Shabak and police interrogations on the behavior and mental state of Palestinian children and adolescents, and investigates the psychological, developmental and social factors that may lead them to make false confessions. The expert opinion was submitted to an Israeli Military Court in the case of A.A., a 14-year-old Palestinian boy who was detained, interrogated and indicted for throwing stones.

The following piece provides extensive new data gathered by Al Mezan's field workers on human rights violations perpetrated by Israel in the Gaza Strip between May 2009 and April 2011. The field review demonstrates how the Israeli-imposed blockade of Gaza is being enforced through policies and practices that violate the absolute prohibition of torture and CIDT enshrined in international law. It argues that the use of such practices and policies is particularly prevalent against Palestinians from the Gaza Strip, where Israel continues to exercise a very high level of effective control and to implement a blockade.

The volume concludes with a review by Professor Lisa Hajjar of the University of California – Santa Barbara of a new book on Palestinian political prisoners, entitled, *Threat: Palestinian Political Prisoners in Israel*, edited by Attorney Abeer Baker and Dr. Anat Matar of Tel Aviv University.

The partners wish to thank all of our colleagues who contributed their expertise both during the workshop as well as to this volume, including the Public Committee Against Torture in Israel (PCATI) and Defence for Children International – Palestine. We are also grateful for and acknowledge the valuable contributions of the following organizations to the lively discussions during the workshop: The Association for Civil Rights in Israel (ACRI), Addameer, Al Haq, B'Tselem, HaMoked, Treatment and Rehabilitation Center for Victims of Torture (TRC), the International Committee of the Red Cross (ICRC), Avocats Sans Frontieres (ASF), UNICEF, and the United Nations Office of the High Commissioner on Human Rights (UNOHCHR). Finally, we wish to thank the European Union for its generous support of this project, which has strengthened our collective efforts to combat the torture and ill-treatment of Palestinians.

# PART ONE



## Notes on the History of Torture in Israel

### Attorney Lea Tsemel

*Israeli lawyer and human rights activist and a founding member and member of the Board of Directors of the Public Committee Against Torture in Israel*

I was first exposed to cases of torture during what were known as the "Haifa Trials". In 1972, many people – a few Jews and many Palestinians – were tried in Haifa for espionage or for having contacts with illegal organizations. Many Palestinians who were interrogated during this time told their own stories of interrogation, though I was not very impressed. I believed them and I knew that their accounts were true, but it didn't shake me as much as the story of Rami Livne, an Israeli man from Tel Aviv, who claimed that he had made a confession under pressure and without free will, although no one had touched him physically. During the interrogation, which took place in Jalameh (Kishon) prison, near Haifa his interrogators told him, "You are Jewish, the son of a Parliament member for the Communist party. We will not touch you, but you will speak; you will confess." To fulfill their promise and make sure that he confessed, they brought his best friend, Shawki Khatib, into the interrogation room, poured water on him, and used a car battery to electrocute him repeatedly. Shawki pleaded, "Don't confess, don't break!" But of course, by playing on his conscience, the interrogators were able to break Rami very easily, and he confessed.

The Haifa Trials were only the beginning of my exposure to torture cases, because subsequently all manner of very cruel tortures – indeed those classic tortures that you read about in books and hear of in Guantanamo and Iraq – were used here very often. There were so many detainees to interrogate using these methods that they had to shorten the interrogations in order to process more people. Two main bodies carried out the torture: the General Security Services (GSS or Shabak), which

continues to do so today, and the Military Intelligence. The Military Intelligence was involved in the interrogation of detainees who had been kidnapped from abroad or had infiltrated the country. The interrogations by the GSS took place in detention centers all over the country, in almost every jail, and by the Military Intelligence first in the infamous Sarafend military base, and later at the old British police station of Gadera. At times, cell after cell in this old encampment, which was entirely surrounded by attack dogs, held people who had been brought in from outside the country, interrogated, hanged, attacked by the dogs, and subjected to all kinds of

extravagant tortures. The Gadera facility is no longer active, and to my knowledge it has been replaced by the "1391" secret facility, the use of which was challenged by HaMoked in a petition to the Supreme Court.<sup>1</sup> As far as we know, Sheikhs Dirani and Obeid were tortured there. The facility was exposed only when Palestinians from the West Bank were brought there.

Of course, the vast majority of the interrogations of thousands of Palestinians took place in the GSS centers. Today, the fact that most of the interrogations of political detainees involved torture or ill-treatment during the first 32 years of the Occupation is no secret. Almost every Palestinian who was interrogated can tell you about the sleep deprivation, the denial of access to a toilet or shower, the hunger, the physical pressures, including being made to sit tied to a small stool for days, the beatings and the

kicks, the threats, the hanging, the bending, the shaking (sometimes to death), etc.

Most defendants would try to challenge their confession during their trials through a special procedure designed especially for such claims. However, it was, of course, almost impossible to retract a confession or obtain a favorable ruling from the courts in such cases. There was certainly no chance of obtaining a decision that criticized the GSS or the Military Intelligence. But these countless special procedure trials, most of which took place in a military court (and it is worth mentioning that up to fifteen years ago there was also a military court in Israel, which ruled in security cases involving Arab citizens), made it very clear – and this is the important point – that each and every person in this industry, policeman and guard, doctor and nurse, and every judge, prosecutor, and soldier involved, knew about the torture and ill-treatment of detainees. Detainees used to be dragged into courtrooms stinking, shivering and crying. It was common knowledge.

The Israeli general public was first exposed to these practices in 1977, after the New York Times published an article containing testimonies given by people from all over the country, young and older Palestinians, who had been tortured. And the reaction of

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<sup>1</sup> HCJ 9733/03, *HaMoked v. The State of Israel* (decision delivered on 20 January 2011).

Almost every Palestinian who was interrogated can tell you about the sleep deprivation, the denial of access to a toilet or shower, the hunger, the physical pressures, including being made to sit tied to a small stool for days, the beatings and the kicks, the threats, the hanging, the bending, the shaking (sometimes to death), etc.

then-Prime Minister Menachem Begin was, "I didn't know it existed! A Jew would not torture." And indeed they then stopped using electrocution and, in part, the hanging. Later on, there were, of course, new and more subtle variations, but the exposure by the media was effective in some way. As a result, the more brutal methods of torture were replaced by other, equally effective, methods.

A landmark was the Nafso case from 1980, in which a Circassian Israeli army officer who worked with collaborators in South Lebanon was interrogated and tortured by the security services. He later happened to see his main torturer from the security services on the news, and exposed the fact that the officer had tortured him. In 1984, there was the Bus 300 incident, in which four Palestinians hijacked an Israeli bus. Two were killed during the takeover operation by the security forces, and the other two were killed after being taken into custody by the GSS, which blamed the army for their deaths.

In the wake of these incidents, in 1987 the Israeli government established the Landau Commission, which looked into the practice of torture and came to a very clear conclusion: torture is sometimes permissible, but lying to the courts is intolerable. You cannot lie to the courts. If you have to torture someone, you must refer to a secret list of permitted and non-permitted methods, and if you use any of these permitted methods you must disclose it. The Commission's recommendations did lead to a reduction in the use of the more horrific methods of torturing, in that you could no longer be "original" in your torture. There were rules and the interrogator had to go according to the book. I am sure that there were experts who made the calculations of how many hours a person could go without sleep, how far you could stretch his arms before the damage became irreversible, etc. They had an actual booklet. It became practical and scientific. The security service interrogators even had to fill out forms. Can you imagine? I have some of those forms. They would take a person, write down his or her name, and fill out special forms for each of the various methods of torture. So, for example, for "hanging," the interrogator would record from which time to which time someone was hanged, where he was hanged, and when he was "brought down." There were similar forms for "bending" and "sleep deprivation." It was all written down. Everyone in the GSS wanted to be able to claim, one day in the future, that they had simply carried out orders and were not personally responsible. So not only did they merely carry out orders, but they also had it in writing.

Following the new procedures initiated by the Landau Commission, there was a long period in which we brought many cases of detainees who had been tortured during interrogation to the Supreme Court. By we, I mean all the human rights organizations and human rights lawyers. Together we found that appealing to the Supreme Court was an efficient means not only because the court stood at the top of the hierarchy, but also because it attracted the most attention. And I do believe that the accumulation of the cases in the Supreme Court had some impact on the justices, and on one judge in particular, Dalia Dorner, a former military court judge in the Lod

Military Court. She became a Supreme Court justice when she left the army, and I think that she was particularly overwhelmed by both the number of cases and by the evidence that we brought before the court.

This build-up of cases came to a head in 1999, when the Supreme Court issued its ruling that torture was practiced, and was illegal. In parentheses it also stated that torture could be permitted in situations of "necessity". So the question is, "What has happened since the revolutionary decision of 1999?"

Torture in Israel has changed in the wake of the 1999 Supreme Court decision. We no longer see the more brutal methods of torture being employed as general practice. What we do see is something far shrewder, though it has not lost any of its efficacy. Of the three new mechanisms that I will describe this morning, the first and most elaborate is what I call "the Palestinian theater." Well-organized Palestinian theaters in prison, involving the use of collaborators, provide the framework for the interrogation and are effective in the extreme. In this show, a collaborating Palestinian prisoner will pose as a head of a secret prisoners' cell in prison and demand information from the detainee using threats and persuasion. I cannot say that the theater is free of torture, because the cast also use brutality. Sometimes the actors, the collaborators, use torture, though their main technique is to create false situations in order to gain the detainee's trust and confession.

Why, then, is this theater so effective? It seems that the detainee, upon meeting the collaborating prisoners, feels a sense of relief and comfort after the harsh interrogation. After the threats and humiliation of the interrogation, the detainee is brought to his cell, where he is greeted by "friends" who often claim to belong to whatever organization the interrogators believe the detainee belongs to, and who trick the detainee into confessing whatever it is they want to know. These friends, or "*Asafeer*" (birds), are kind and, after the harsh and threatening interrogation, having the detainees come into a warm, friendly room is a very effective tactic. If the detainee has nothing to say, then the *Asafeer* try to convince him that confessing is in his own best interests. Those who do not confess in this welcoming environment are threatened to ensure that they confess. The threats vary, but the most popular one involves accusing the detainee of collaborating with Israel or even of being a GSS agent. Of course, all these conversations are recorded by the *Asafeer*, and these "friends" bring the material back to the security service interrogators. When the detainee is brought back to the interrogation room, he finds all this "evidence" laid out before him. In the end, this theater works.

The use of collaborators is also effective for purposes of anonymity. If an interrogator wants to torture, he needs a written permission for each form of brutality he employs, whereas the identity of the *Asafeer* remains secret. We see permission requested in cases that meet the conditions of the "ticking bomb" doctrine of "necessity", as envisioned by the Supreme Court. However, in the so-called "military investigations"

the definition has been broadened to justify the torture of a person who merely "knows someone who may know something that may help prevent an upcoming, though not necessarily immediate, danger."

Other methods used during the interrogation are not referred to as "direct" torture and therefore do not require permission. These include shouting, threats against the detainee and his or her family, and, above all, spitting. All the interrogators have developed their own saliva factories, and so whenever they speak to the detainees they spit on them. It works fantastically and we hear about it often. The interrogators spit and the person under interrogation cannot even wipe the saliva off his face because his arms are tied to the chair. The humiliation is incredibly profound and grows deeper the longer they are left sitting there with saliva dripping down their faces.

The second most common mechanism is the lie detector machine. Whether it's an actual, functioning machine or not is unclear, but either way it is extremely helpful to the interrogators. They tell the detainee, "The machine doesn't believe you. You are lying. You have to satisfy the machine. Say something else." While the results of the machine cannot be used as evidence in court, it is frequently used by the security services to justify to the court the need for additional days of interrogation with a particular detainee.

The third mechanism underlines the first two. It helps to create the imaginary world of the theater, and makes the use of unauthorized methods of interrogation possible: isolation. Every security suspect under interrogation is automatically and immediately denied access to a lawyer. It is so simple, so easy. It is part of the complete isolation of the detainee and it is very effective. People are totally lost. They do not know what to do. They do not have access to a lawyer or to anyone else besides their interrogators. They are not even allowed a visit from the Red Cross until a late stage. The isolation, which is grounded in draconian legislation, is, of course, what makes torture in Israel possible, both torture of the body and of the mind. It continues and we cannot become complacent.



## **From the Personal to the Political: The involvement of Israeli physicians in the torture and ill-treatment of detainees**

**Ruchama Marton. M.D**

*A psychiatrist and the founder and President of Physicians for Human Rights-Israel*

Today, I want to speak about the involvement of physicians in Israel in the torture and ill-treatment of Palestinians incarcerated in detention facilities. I would like to focus on the individual, social and political mechanisms that make this sort of conduct by physicians possible.

The issue of medical personnel being involved in torture is not exclusive to the Israeli-Palestinian conflict, but is a worldwide phenomenon. Many physicians working under various oppressive regimes, in different times and countries, have collaborated with the regime in various ways, instead of siding with its critics. Treaties and declarations against torture that aim to protect human rights are extremely valuable and necessary, but they are insufficient. Too many national medical associations are satisfied with signing the relevant treaties and declarations, without actually implementing them.

The involvement of both individual medical professionals and the medical system in the torture and ill-treatment of detainees has a long history. Medical professionals hold in their hands the power-knowledge of healing and curing body and soul, but that same power-knowledge can also be used to cause harm. The medical system functions as an agent of social oversight, regulation and control. It also determines social norms as society gives health professionals the power to judge and punish. Hence, for example, physicians determine a person's fitness to work, fitness to stand

trial, and the fitness of a patient to decide on the medical treatment that will or will not be administered to him or her. Physicians possess the power to determine how we enter this world and how we depart it.

Israel Prison Service physicians provide medical authorization for the solitary confinement and isolation of prisoners. Psychiatrists, who until recently gave their medical opinions to the courts via "isolation committees," have brought about the continued incarceration of detainees in solitary confinement, causing unequivocal, and sometimes irreversible, harm to their health.

The medical caregiver, in a blindness that serves parts of his subjectivity, perceives only a part of the object (the patient), yet considers it to be the whole. The object is thus seen as nothing more than a "criminal," an "Arab," a "terrorist," a "woman."

The decisions of these physicians are often influenced by extraneous considerations that undermine their commitment to act, first and foremost, for the benefit of the patient, as required by the rules of medical ethics.

Physicians for Human Rights – Israel (PHR-I) view human rights and their protection as an inseparable, fundamental and distinct part of the medical profession. The question of where the medical profession positions itself between the state and the individual is a social-political question that is contingent both on the self-awareness of those who work in the medical field, and on their understanding of the role of healthcare

professionals as protectors of human rights. I will discuss how medical professionals in Israel abuse the vast powers they wield.

### **Torturers, physicians, and the tortured**

Physicians in Israel are involved in the torture and ill-treatment of detainees and prisoners, and particularly of incarcerated Palestinians, in the following ways:

- By disregarding complaints of torture or ill-treatment.
- By failing to prevent the return of detainees/patients to the location where torture or ill-treatment took place.
- By failing to document past or current complaints of torture or ill-treatment made by detainees/patients.
- By failing to report suspicions that torture or ill-treatment is taking place or has taken place.
- By passing confidential medical information about patients to interrogators suspected of employing methods that are regarded as torture or ill-treatment.
- By providing medical authorization, directly or indirectly, for practices that are harmful to a person's health.

The critical question is what causes someone who studied the profession of healing,

the very foundation of which is to benefit mankind, to ignore and not protest against harm caused to a patient under his or her care, or – even worse – to be a complicit partner in inflicting this harm on behalf of an organization or a state?

Detainees and prisoners comprise a vulnerable population. Their rights are violated in many respects, including with regard to the medical care and treatment that is provided to them by physicians. Furthermore, when detainees are members of a cultural and national group that is different from that of the medical caregivers, this difference may significantly affect the quality of the diagnosis and care they receive. The reason is that, whether consciously or unconsciously, the medical professional brings into the interaction of diagnosis or treatment his or her own view of social-political reality, which contributes significantly to the way in which he or she understands the patient and interprets his or her complaints. In too many cases, this interaction entails the diminution of the humanity of the patient – the detainee/prisoner – in accordance with the subjective psychological needs of the physician. One can argue that the doctor reduces the patient to a single aspect of the qualities attributed to him or her.

The medical caregiver, in a blindness that serves parts of his subjectivity, perceives only a part of the object (the patient), yet considers it to be the whole. The object is thus seen as nothing more than a “criminal,” an “Arab,” a “terrorist,” a “woman.” This view eliminates the object’s individuality and transforms him into nothing more than the representative of a group with stereotypical characteristics, which stem from the physician’s prejudices. It happens both inside and outside the prison.

### **The loss of the social and political dimension**

Psychiatry has classically positioned itself in the intra-personal dimension. During the latter decades of the twentieth century, the inter-personal dimension was added to the field. From the perspective of classical psychiatry – according to which everything occurs in the intrapersonal dimension – the social-political dimension has been rejected from the confines of its discourse, disregarding the fact that the exclusion of this dimension is, in and of itself, a political stance. However, there is indeed legitimate scope within psychiatry for this social-political dimension in addition to the interpersonal and intrapersonal dimensions, as a supra-personal dimension, one that goes beyond the personal. The inclusion of the social-political dimension in the discourse of psychiatry serves to introduce what has been missing from psychiatry for such a long period of time: the awareness and theoretical tools needed to both conceptualize a person as a social-political being and recognize human rights as a vital part of it.

These elements – human rights and an inclusive concept of the person – should be integral components of all branches of medicine if we are to implement the rules of medical ethics.

The therapist-physician must be aware of his or her own subjectivity, recognize that it is always present, and not fall back on the classic theory, which supposedly equips him or her with objectivity and neutrality. This will give the patient a chance to stand alongside the caregiver, not automatically opposite him. The patient will then cease to be an "object", which implies "standing opposite", and which in turn carries connotations of enmity and a state of war. Thus, the time-honored concept of the therapist as an objective and neutral person who stands opposite the patient is undermined.

However, this advice cannot apply when the therapist is in no way interested in looking inwards at his or her personal-social-cultural-political perspective, or at his or her own concerns. In this case the therapist may prefer "*outsight*" to insight. Within the political power game that the state plays in order to silence and repress the Other, physicians can have a blind spot when it comes to recognizing the extent of their own cooperation with it. This blind spot allows physicians to disregard their professional-ethical role to protect the rights of the patient, the detainee, the Other, defined as anyone whom the social order consciously silences. "*Outsight*" is a system of ideas and viewpoints that come from the outside – in this case from the social systems of the ruling power. This specific blindness allows physicians to regard themselves as "apolitical" and to view anyone who opposes or does not identify with the regime's point of view as acting out of "political motives", which stand in opposition to the purity of the medical profession. This form of identification by the psychiatrist with the ruling power has been repeated many times in history. We are familiar with cases from the twentieth century, when the medical world served as an instrument of oppressive, despotic regimes, such as those in Germany, the Soviet Union, Argentina, Chile, the USA and others.

It is fundamentally important, both in theory and in practice, that physicians recognize that they are on the side of the forces that are in power in the given political-social-cultural reality: the healthy versus the ill, Israeli versus Palestinian, the free versus the imprisoned, the white collar person versus the convicted criminal, at times the educated person with means versus the uneducated person without, and often, despite the many recent advances, man versus woman.

### **From theory to practice: What happens when a Jewish-Israeli physician examines a Palestinian prisoner?**

What is the physician's personal stance when the person he or she examines is not from his or her own culture or national group? And, in the context of Israel, what is the personal stance of the physician when he or she examines a Palestinian, who is not only a stranger but also perceived as an enemy? Is the medical system aware of its subjective biases, whereby it views the person under examination as a "terrorist" who poses a real security threat to the society? This perspective may be so all-encompassing that it obscures any other element of the patient's humanity.



The health system's role in protecting "public security" in certain circumstances (for example, in cases of danger to the public to incarcerate the patient, contagious illnesses that necessitate reporting, compulsory hospitalization, etc.) and the real power that comes with this may blur the boundaries between the system's political and professional stance. In the Israeli context the absence of sufficient awareness of the physician's personal stance means the Palestinian patient, in too many cases, is perceived as a terrorist and indeed as a threat to the public security rather than as a patient in need of medical care. This increases the likelihood that Palestinian detainees who complain of torture, ill-treatment or harmful detention conditions will not receive the appropriate treatment and protection from their doctor.

### **The case of J.M.**

To underline what I just said, I would like to discuss a specific case. J.M. was arrested in 2008. After three months in detention and interrogation by the GSS (the Israeli General Security Services, Shin Bet, or Shabak), he was taken to a housing unit where he was brutally beaten until his head and face were bleeding and he felt that he was losing consciousness. A doctor examined him and told the interrogators that J.M.

should be taken to a hospital. The interrogator in charge told everyone present (the two men who had beaten J.M., the doctor and the ambulance crew) not to talk about what had happened. If asked, they were to say that J.M. had fallen down some stairs. All present agreed to adhere to this version of events. In the public hospital to which J.M. was later taken, he was examined by three different doctors, each of whom refused to listen to his claims of being beaten. They all appeared to accept the story that he had fallen down stairs. One of them told J.M. that what happened to him was not her concern, that her role was merely to treat him, and that the cause of his injury was of no interest to her. After some three hours, stitches to the head and an X-ray, J.M. was released from hospital and returned to the interrogation center. There he met a doctor employed by the

Israeli Prison Service, who again ignored his attempts to report the abuse, gave him pain killers, and allowed the security guards to escort him to a solitary confinement cell.

On the basis of J.M.'s affidavit and the hospital's medical documentation, it is clear that all the doctors who examined him after the beating ignored his complaints and did not properly document them. They did not report the injuries and allowed J.M. to be returned to a setting where he may be tortured again.

Following the case of J.M., PHR-I contacted the hospital at which he was treated, the Ministry of Health, and the Israel Medical Association to request an investigation

The recognition that we are all "tainted" by a political viewpoint makes it possible to open up a discourse within the medical profession that can develop insight among its members. Progressing in this direction will make it possible for the medical profession to protect human rights

into the involvement of various physicians in this case. PHR-I further requested that copies of the rules of medical ethics and obligations regarding the treatment and protection of imprisoned persons who are subjected to torture or ill-treatment be distributed to medical professionals, and that the Ministry of Health announce legal and financial support for medical professionals who report and bring an end to incidents of torture and ill-treatment in case they encounter mistreatment by their employers.

Furthermore, it is the position of PHR-I that doctors should not be employed by the IPS or the GSS, and that they should not work in GSS interrogation facilities.

In July 2011, following additional complaints by PHR-I against the involvement of medical teams in the torture and ill-treatment of imprisoned persons, and the publication of a report by the Public Committee against Torture in Israel (PCATI) and PHR-I<sup>1</sup>, the Ministry of Health announced that it had appointed a "Committee for Medical Staff Reporting Harm to Interrogatees' Medical Condition." Unfortunately, questions addressed to the Ministry of Health regarding the staffing and function of the committee and how one should approach it have gone unanswered, giving us reason to fear it is not actually operating.

## **Conclusion: From the Personal to the Political**

The fact that the medical establishment in Israel refrains from discussing the involvement of physicians and other medical personnel in the torture and ill-treatment of imprisoned persons testifies to a common political-social need of both many individual physicians and of the organization that binds them. This need is that of the Israeli-Zionist to view the Palestinian as an enemy, a terrorist, an agent of danger. It is so frequently expressed that it can be viewed as a coherent system; one that does not allow a Palestinian who is being tortured or ill-treated to transcend the sole role that has been assigned to him: a terrorist. This attitude has been adopted by junior as well as senior physicians, department heads and district physicians, new immigrants and people born in Israel, and inhabitants of the north, center and south of the country. They all live among their people. One should not assume, however, that physicians act out of malice for malice's sake or out of professional ignorance. The violation of human rights and the rights of the patient is not the goal; rather, the goal is to sustain a single, uniform image for all Palestinians – that of the enemy – which helps to preserve the social fiber of the Israeli Zionists as a coherent group with a common ideology and purpose. The presence of an enemy is vital to maintain both the affinity and the reciprocal relations between the patriotic-Zionist discourse

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<sup>1</sup>The Public Committee Against Torture in Israel and Physicians for Human Rights – Israel, *Doctoring the Evidence, Abandoning the Victim*, October 2011: [http://www.phr.org.il/uploaded/Doctoring%20the%20Evidence%20Abandoning%20the%20Victim\\_November2011.pdf](http://www.phr.org.il/uploaded/Doctoring%20the%20Evidence%20Abandoning%20the%20Victim_November2011.pdf)

and actions that derive from this discourse, which include the Occupation and the repression, arrest and torture of Palestinians.

Therefore, it is what the security forces portray as the political “crimes” of the patient – the Palestinian detainee – and not his or her medical condition, that too often determine the medical diagnosis and treatment that he or she receives. The detainee is seen as a terrorist, an enemy, a person who endangers the State of Israel, and threatens its citizens and soldiers; not as someone who has been hurt and needs a physician’s help and protection.

We at PHR-I are often accused by physicians and the medical establishment at large of taking a political stance, of being “too political.” We answer these claims with the words of Stephen Mitchell: “Is not the posture of not taking sides itself a partisan position, a side one is taking?”<sup>2</sup>

The problem is not one of “taking sides”. The problem is when we do not see that we are taking a side, because all of us take a side. The question is how aware we are, as physicians, that we, like anyone else, are subjective and political. When we take the side of the establishment, there is a tendency to blindness that fosters the comfortable thought that we are not political. Concurrence with the establishment, and avoiding casting doubts on its deeds, is perceived as an objective, not a political, attitude. And yet protesting these deeds is considered a political stance. Elucidating the blind spot is considered a one-sided, extreme act that vilifies one’s colleagues.

The recognition that we are all “tainted” by a political viewpoint makes it possible to open up a discourse within the medical profession that can develop insight among its members. Progressing in this direction will make it possible for the medical profession to protect human rights. By contrast, a lack of openness will result in a perversion of the power of medical professionals, and will necessarily lead to ongoing human rights violations.

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<sup>2</sup> Stephen Mitchell, *Influence and Autonomy in Psychoanalysis*, 1997, London: Hillsdale, pp. 183.

## Keynote Speech

### Torture in the 21st Century Conclusions - Six Years as UN Special Rapporteur on Torture

#### Manfred Nowak

*Professor of International Law and Human Rights, University of Vienna; Director, Ludwig Boltzmann Institute of Human Rights, Vienna; and a former UN Special Rapporteur on Torture.*

This evening, I have been asked to share my general conclusions of my six years as UN Special Rapporteur on Torture [2004-2010]. With a view towards the development and purpose of the international law against torture, I will trace the progress and the setbacks in this development, interspersed with the lessons I have learned. I am convinced now more than ever of the urgent need for hard international law to protect and promote the rights of detainees.

To begin with, I find it instructive to return to the difficulties of defining and proving torture. Doing so requires a look at the Convention Against Torture (CAT), and a brief review of the four major criteria needed to define torture and distinguish it from cruel, inhuman or degrading treatment or punishment (CIDT).

- First, torture requires the "causing of severe physical and/or mental pain or suffering." The word "severe" is critical and means that there is a certain threshold. We should not use the term "torture" in an inflationary manner for other forms of ill-treatment, but it also does not mean "extremely severe" or "excruciating pain", as the Bush administration wanted us to believe.

■ Second, torture requires the attribution of the conduct to the state, whether the act was committed by a law enforcement official or with his or her acquiescence. In many of my reports I have made clear, for instance, that specific practices committed against women or children, including **female genital mutilation** and other traditional practices, do fall within this definition if the state is not taking proper action against them under the principle of due diligence.

■ Third is intention and purpose. You cannot torture negligently. Torture must consist of the intentional, deliberate infliction of severe pain or suffering, and be committed for a particular purpose. More than 90 percent of all cases of torture that I found in all regions of the world were for the classic purpose of extracting a confession, which is later used before criminal courts; however, the purpose might also be intimidation, discrimination, or punishment.

Many have asked why, if even the United States of America, the home of democracy and human rights, is officially torturing, shouldn't they as well?

While it is not present in the CAT, there is a fourth criterion that I regard as extremely important: the powerlessness and defenselessness of the victim. If you look at the definition of torture in the Rome Statute of the International Criminal Court, you will find the element of detention. I agree that it is the powerlessness of the victim that makes torture such an evil, the fact that one person has absolute power

over another. This distinguishes torture from other forms of CIDT, **the excessive use of force on the street to disperse a demonstration or a riot, for example. And this is why, like slavery, torture is the most direct attack on the core of human dignity, a special form of violence whose prohibition** is the highest norm of international law, *jus cogens*.

The prohibition of torture has an interesting history, especially since we have enjoyed saying, in Europe in particular, that torture was eradicated at the end of the Middle Ages with the advent of the Enlightenment. But what we really mean by that hopeful statement was that it was gradually eliminated from criminal law because, until that time, the majority of criminal procedure acts pertained to torture. For instance, in the *Constitutio Criminalis Carolina*, the famous body of German criminal law by Charles V in 1532, two-thirds of the laws were actually about what type of torture could be applied for what types of crime, against which person, for how long, etc. Thus, criminal procedure was very much about regulating torture; and yes, that was eliminated. However, torture itself, despite what the books say, has never been eliminated.

There was a certain renaissance of the use of torture in the twentieth century, in particular by totalitarian regimes, which then led to the absolute prohibition of the practice of torture after 1945. But it continued even after that. I am thinking in particular about the French in Algeria, the Greek military dictatorship in the late 1960s, and, of course, torture in Latin America. In fact, Chile became a kind of a symbolic case,

which inspired Amnesty International's fight against torture and the United Nations' adoption of a declaration on torture in 1975, which was followed by the Convention Against Torture (CAT) in 1984. Finally, in the 1990s, again due to systematic torture in Bosnia-Herzegovina, Rwanda and other countries, the systematic practice of torture was defined in international criminal law as a crime against humanity, which is codified in the Rome Statute of the International Criminal Court. However, with 147 signatories, the CAT remains the most important piece of international legislation with regard to general applicability.

CAT has four main aims and objectives, namely to combat impunity, to prevent torture, to provide reparations to the victims, and to strengthen international monitoring. The first and most important of these objectives is combating impunity. The manner in which the CAT demands that a state does this is a *novum*, something really new. Not only must the systematic practice of torture be made a domestic crime, but states also have an explicit obligation to stipulate the offence of torture in their national criminal codes, together with appropriate penalties.

I would often ask police officers, interior ministers, or prison directors what they would do if someone was found to be practicing torture. Usually the answer is, "No, there is no torture." Were I to stop there, I would have to conclude that there is no torture in any country. So instead my next question is necessarily, "OK, but let us assume the hypothetical case that you find a person torturing who is actually under your command?" To this question they reply, "Yes, of course, we would take very serious measures against this person." And then I am told about measures such as a freeze on promotion for half a year, or a slight reduction in salary; even suspending someone from office is almost unthinkable. To be clear, the CAT does not discuss disciplinary or administrative measures, but criminal sanctions. Further, the Committee Against Torture has stated that if you can actually prove torture, the sanction should be, on average, a very lengthy prison sentence. Torture is one of the most serious crimes, alongside other violent crimes such as homicide and armed robbery, and the punishment for the crime should fall within that category.

Further, the obligation to combat impunity extends beyond territorial jurisdiction. When one of its citizens tortures, every State Party to the CAT has an obligation to bring that person to justice, wherever they are in the world. In addition, Article 5(2) of the CAT obliges states to apply the principle of universal jurisdiction against perpetrators of torture. If a suspected torturer happens, for whatever reason, to be present in the territory of a State Party, its authorities must arrest the person, carry out a preliminary investigation, and then, under the principle of *aut dedere aut judicare*, either extradite the person to another country that might have a better jurisdiction, or, if they cannot extradite, bring the person before their own criminal courts. This scenario has almost never happened in reality. I think that we can count the number of cases in which people have actually been sentenced for torture on the basis of universal jurisdiction on one hand, but it remains an obligation nonetheless.

The second main aim of the CAT is to prevent torture, and here there are a number of specific articles to consider: the principle of *non-refoulement* [Art. 3]; the obligation to train the police [Art. 10]; the obligation to modernize interrogation techniques [Art. 11]; and, very significantly, the non-applicability of information extracted by torture, particularly in criminal trials [Art. 15]. If these principals were applied, they would have a powerful preventive effect, because, after all, the police are torturing in order to extract a confession, and it only makes sense if you can use this confession afterwards. If they and other preventative methods (such as a very short period of police detention, immediate access to a doctor, and the video and audio recording of interrogations) were taken seriously, torture could easily be eradicated in all countries in the world.

In my opinion, the most important preventive means are visits to places of detention. As my pre-predecessor [to the position of UN Special Rapporteur on Torture] Sir Nigel Rodley once said, we have to change the paradigm of opacity to the paradigm of transparency. Opening up prisons and other detention facilities operated by the military intelligence or police would be the most powerful way of preventing torture. Now, with the Optional Protocol to the Convention Against Torture (OPCAT), we have a potential system at the global level that obliges all States Parties to establish a national preventive mechanism, a national commission with the authority to visit all places of detention. I spent much of the time during my tenure [as a former UN Special Rapporteur on Torture], but also afterwards, convincing governments not only to ratify the OPCAT, but also to take it seriously, to establish an effective national preventive mechanism.

The third main objective of the CAT is the obligation to provide victims with an effective remedy and adequate reparation for the harm incurred. I am speaking, of course, of Articles 13 and 14 of the CAT, which, again, are violated in most countries. Victims almost never win a case by obtaining compensation, for example. But what they mainly need is rehabilitation. Victims of torture are often traumatized for the rest of their lives. They need long-term medical, psychiatric, psychological, social and other forms of rehabilitation. But in order to get it they must first win the case before a civil court, which is very difficult because such cases are never independently investigated and proven.

One of my main recommendations for better implementation of the CAT with regard to this third aim is to establish a "police-police", and by that I mean a body with full police investigative powers, that is at the same time completely independent from the police. The same situation exists in Israel, where there have been 600 complaints [against the Israeli Security Agency] and not a single conviction. Why? Because if the same body that is accused of torturing is investigating its own colleagues, then, of course, the esprit de corps comes into play and the investigation just does not work. It does not work in my own country, and it does not work in almost any other country in the world. So, if we are to take the total prohibition of torture seriously, then it is

only reasonable that allegations of torture are impartially examined by independent authorities. It is only if we can prove torture that we can take further measures against the perpetrators and for the benefit of the victims.

The fourth objective is to strengthen international monitoring. The UN has its own Committee Against Torture, which examines individual complaints. In addition there is also the inquiry procedure, i.e. ex officio investigations where there are reasonable grounds to believe that torture is being practiced systematically. The Committee Against Torture has visited quite a number of states at its own initiative, although it needs the agreement of the government concerned to do so. Egypt is the only country in the world that has not allowed the Committee into its territory to investigate. Others, like Peru, Turkey, Serbia and Montenegro, Brazil, Mexico and Sri Lanka, have allowed it to enter their territory, and the Committee found widespread or systematic practice of torture in each of these countries, which should be reason enough not to elect them to the UN Human Rights Council. However, Egypt, for example, is a very powerful member of the Human Rights Council, and we all know about the systematic practice of torture in that country.

The mechanisms that have been developed since the 1970s, including the CAT, have had a certain impact in terms of independent fact-finding, reporting, and "naming and shaming". There has been a certain decline in torture, whether in Latin America, the former communist states, or several African states. However, we must, of course, consider to what extent 9/11 marked a paradigm shift. And by 9/11 I do not mean only the terrorist attacks, but also the counter-terrorism strategy adopted by the Bush administration, which had an extremely negative influence on many other countries. Many have asked why, if even the United States of America, the home of democracy and human rights, is officially torturing, shouldn't they as well? The Speaker of the Jordanian parliament was the first to ask: Why are you coming to us? Why are you criticizing us?

Unfortunately, the US strategy was not without precedent. The British were the first to state officially that certain "combined deep" interrogation methods were permitted against IRA suspects in the late 1960s and early 1970s, including forced standing against a wall for up to 48 hours without being allowed to move, hooding, exposure to loud noise, and sleep and food deprivation. At the time the European Commission of Human Rights considered these acts to be torture. A British judge was persuasive enough to convince his colleagues that they only amounted to inhuman treatment or degrading treatment, but in any case it was a violation of Article 3 of the European Convention of Human Rights. And the British reacted positively; the use of these types of interrogation methods by the British security services was banned. The second attempt to justify certain "enhanced" interrogation methods was made by Israel. The Landau Commission claimed that these methods were not torture and were therefore allowed, before the Israeli Supreme Court decided differently in 1999.

When in 2002 Donald Rumsfeld described, for the first time, the kinds of interrogation methods that he was authorizing against suspected terrorists held at Guantanamo Bay, Alberto Mora, the legal counsel to the US Navy, said that the US Secretary of Defense was authorizing exactly those methods that the British had authorized and that the European Commission had found to constitute torture and inhuman treatment, which are absolutely prohibited. The confrontation led to a slight change in the methods used, although, as we know, torture and ill-treatment persisted as an official policy of the Bush administration, even though it attempted to convince us that these interrogation methods should not be regarded as torture.

The so-called "War on Terror" has really been the first attempt since the Second World War to question the absolute nature of the prohibition of torture, and to make torture socially acceptable in the "ticking-bomb" scenario, as Alan Dershowitz and others wished us to believe. We have also seen the complete dehumanization of the alleged terrorists, who have been deprived of more or less all their rights in the legal no man's land of Guantanamo Bay and other (often secret) places of detention on the ground that they are "outside the rule of law."

Of the three main torture memos that surfaced in the early 2000s, the Bybee Memo of 2002 was particularly influential, as it raised the level of pain that was prohibited from "severe" to "extremely severe". Here the severe pain threshold denoted such pain that accompanies serious physical injury, organ failure, the impairment of bodily function, or even death. That was the official definition that was sent to Alberto Gonzales and used by Rumsfeld, Bush, Cheney and others when they developed enhanced methods of interrogation. The same memo made clear that the purpose of establishing the Guantanamo detention center was to exclude the application of the US Constitution and international law. *Rasul v. Bush* was the first related judgment of the US Supreme Court, issued in 2004, and stated that this first assumption was wrong: according to the Supreme Court, Guantanamo Bay is within US jurisdiction because it is under the effective control of the US, and therefore the US Constitution applied. This was also the beginning of habeas corpus for prisoners at Guantanamo i.e. of lawyers being allowed to represent their clients in Guantanamo Bay.

In 2006, with the joint UN Report on Guantanamo Bay, initiated by my office and joined by several other UN Special Procedures, we made clear that the second assumption was also wrong. International law, of course, fully applies to the Guantanamo detention facility and other secret or non-secret detention facilities abroad. The Bush administration did cooperate to some extent by giving us information which was said to be classified, and even invited us to Guantanamo Bay. However, in the end, when it became clear that we would not be allowed to hold private interviews with Guantanamo detainees, we cancelled our visit. The legal report was thus based on interviews with former detainees and legal documents. In our legal assessment of the situation we came to the clear conclusion that the entire detention facility violated the right to personal liberty because people were held there in unlimited

detention. Not knowing how long they would have to stay in Guantanamo was, in fact, the most difficult experience for most detainees. If they asked, the routine answer they received was, "Until the War on Terror is over." And of course, certain interrogation techniques used there clearly constituted torture, including the use of extreme temperatures and forced feeding. We called for the immediate closure of Guantanamo Bay. We were the first UN body to do so.

Our other joint UN report was released in 2010 and focused on secret detention in the context of counter-terrorism, not only in the US or with regard to CIA-related activities, although, of course, the report makes extensive reference to them. We investigated 64 countries and clearly established that every form of secret detention/enforced disappearance is a crime under international law and always leads to torture, and that the very fact of being "disappeared" for a prolonged period of time amounts to torture. We also looked into the rendition flights, which themselves violated many rules of international law.

The two reports were an opportunity for a group of UN Special Procedures to address a matter of international concern from a variety of angles and areas of expertise. Special Procedures are independent experts, originally established by the UN Commission on Human Rights, which was succeeded by the Human Rights Council in 2006. They were initially country-specific; one of the first was, in fact, established in 1967 on the Occupied Territories. Country-specific working groups and Special Rapporteurs investigated the overall human rights situation in one country. With the establishment of the UN Working Group on Enforced Disappearances in 1980, the first thematic mechanism was created to investigate a specific human rights problem in all countries of the world. Others followed soon, including the Special Rapporteur on Summary Executions, in 1982, and the Special Rapporteur on Torture, in 1985.

in many countries the judicial system is among the most corrupt institutions of the state. This means that if you have money, you pay the police, you pay the judges, or you pay the prosecutors to secure your release. Some call it "bail," but it is more accurate to call it a "bribe." Very often, it is actual bribery. And if you do not have the money, you might spend a lot of time in detention without a trial.

During my tenure as Special Rapporteur on Torture, I received complaints on a daily basis, primarily from family members, telling me, "My husband/wife/daughter has just been abducted or arrested and is now in a place where he or she is at serious risk of being tortured." The complaint might reach the Office of the High Commissioner on the same day, where they would do a preliminary check to determine if the source was reliable and the allegation consistent. When it was submitted to me, I had to decide very quickly whether we needed more information or whether we should immediately send an urgent appeal to the country concerned.

I would send the urgent appeal directly to the minister of foreign affairs, either on the same day or the following day, with a request to investigate, just so that the Minister knew that the UN was aware that the person in question had been detained. We do not really know how successful it was, as very often we would hear nothing back. On fact-finding missions I often met former or even current detainees who told me that the urgent appeal had actually had an impact, and that they had not been tortured subsequently. However, I do not want to exaggerate; in many countries they did not care and then there was nothing to be done.

With regard to fact-finding missions, Special Procedures are different from, say, the European Committee for the Prevention of Torture, or the UN's Subcommittee on Prevention of Torture, which have the right to go to visit a country. I had to ask because Special Procedures are a charter-based rather than treaty-based. In the entire Middle East region, for example, I asked more or less every government, from Morocco, Algeria, and Egypt to Israel for permission to visit. The only government that responded positively was Jordan; the others did not feel the need to respond or did not respond positively. Certain states have a standing invitation, including most European states, for example Denmark. In this case I could call to say, "I accept your standing invitation. Can I come next month?", and they would answer, "No problem." Thus there are major differences. However, as I explained to all countries, they were not obliged to invite me, but if they did, I had certain preconditions. I would require authorization for full access to places of detention, I would be accompanied by a forensic expert for purposes of documentation, and I would speak to detainees in private. Once there, I never announced where I planned to go and, in principle, had authorization to visit places of detention 24 hours a day. I made many night visits and held confidential interviews with detainees. The most difficult assurance to get from governments was that they would refrain from committing acts of reprisal, although, of course, you never knew whether they would indeed comply with that assurance once we had left. And, of course, the participation of detainees was always voluntary.

In China, for instance, it was almost impossible to interview detainees. Nobody wanted to talk to us. Conversely, I was impressed by the courage of detainees in Equatorial Guinea, for example, where torture is practiced systematically. People were extremely frank in speaking to me, but there was no way to follow-up: the ICRC has left the country, and there are no NGOs and no civil society. We knew that they would be beaten up afterwards, but they told us, "We have nothing left to lose. And you can report everything to the public. Use our names, because we want the outside world to know. That is the only way that pressure can be brought to bear." Where the ICRC did operate, for instance in Jordan, I gave the organization a whole list of prisons and names of individuals whom I thought might be subject to reprisals, and asked them to visit them again as quickly as possible, in order to see whether or not there had been reprisals against them. That gives a certain amount of protection. In Equatorial Guinea, however, there was nothing I could do. It was extremely difficult from an ethical point of view.

I surveyed 18 countries in all the regions of the world, and I told the governments in question that my visit did not mean that I expected to find extensive torture. In fact, however, of all the countries that I visited there was only one, Denmark (including Greenland), where I did not find a single case of torture, but on the contrary excellent prison conditions. I found torture in all the other countries; in some there were isolated cases, but in most countries the practice of torture was widespread, routine or even systematic.

And from my visits, my meetings with detainees, and the many years that I have spent thinking, researching and writing about torture, ill-treatment and conditions of detention, I can easily though unfortunately conclude that we are suffering from a global prison crisis, and that generally our criminal justice system is broken. This conclusion is based primarily on four factors. The first is prison populations. The US has been in first place for many years, with an incarceration rate of 743 out of every 100,000 people. The EU average is about 100, and the global average is lower. Israel's, at 325, is fairly high. The second indicator is the prison occupancy rate. In most countries we see tremendous overcrowding of more than 300 percent. Israel currently has an occupancy rate of 92.2 percent, which means that over the entire country its prisons have not reached their capacity. This, however, does not exclude the fact that certain prisons may be overcrowded.

The third factor, which in my view is the most important indicator of whether or not the administration of criminal justice is functioning properly, is the percentage of pre-trial detainees within the overall prison population. Israel's score of 36.5 percent is rather high. A rate above 30 percent is usually an indicator that there is something wrong, meaning that the judiciary is not working or is very slow. Unfortunately, in many countries the judicial system is among the most corrupt institutions of the state. This means that if you have money, you pay the police, you pay the judges, or you pay the prosecutors to secure your release. Some call it "bail," but it is more accurate to call it a "bribe." Very often, it is actual bribery. And if you do not have the money, you might spend a lot of time in detention without a trial.

I have alluded to the fourth factor – impunity for the crime of torture – already. Torture is practiced in the great majority of the world's countries. Most of the States Parties to the CAT are not properly fulfilling their obligations under the Convention. Most countries do not even have a crime of torture. Israel is a good example. There is no crime of torture in Israel that is in accordance with the definition in the Convention Against Torture and that carries appropriate penalties.

The main reasons for the widespread practice of torture are the non-functioning of the administration of justice, corruption, and the demand to be "tough on crime." There is a lot of pressure on the police to solve crimes. Often they simply arrest someone and beat him until he confesses. Having found both that the practice of

torture around the world is widespread and that there is a global prison crisis, I am now calling for a UN Convention on the Rights of Detainees.

Last year, I was in Bahia, Brazil to attend a UN Crime Congress, and the governments of Brazil, Argentina and other countries in Latin America supported such a convention. The whole group of 77 states, including China, agreed to it in principle, but our initiative was ultimately killed by the US and certain European states, including Germany. This was unfortunate but, of course, agreement needs to be achieved. Therefore the convention was not part of the Bahia Declaration. Nevertheless, we still are working on the UN Crime Commission in Vienna.

In principle, while you are deprived of your right to personal liberty, you nonetheless retain all other human rights as far as possible. In reality, however, when you are deprived of your liberty you are often no longer seen as an individual who deserves to enjoy any of your human rights. This is a dangerous attitude that desperately needs to be changed. As a lawyer, I am convinced that a binding treaty might help in this regard, and that when we are made aware of the injustices and ill-treatment to which detainees are subjected, we have a responsibility, not only as lawyers, but also as human beings, to actively seek measures to protect them.

## Looking Back to Move Forward: Holding the United States Accountable for Torture and Abuse in the Name of Counterterrorism

**Jamil Dakwar**

*Director of the American Civil Liberties Union Human Rights Program*

I was asked to talk about the American Civil Liberties Union's experience in combating torture and ill-treatment, or as we know it in the legal framework, CIDT: cruel, inhuman or degrading treatment. Today, I will talk about accountability and the ways in which we see accountability following 9/11 and the wars in Iraq and Afghanistan.

Definitive evidence has come to light that Bush administration officials committed serious crimes under the U.S. Constitution and international law by authorizing the torture and CIDT of detainees in U.S. custody. Although the Obama administration has rightly disavowed torture, it has shielded former senior government officials who authorized torture and abuse from accountability, civil liability and public scrutiny.

To date, no senior government official responsible for the creation and implementation of the Bush administration's torture program has been charged with a crime. At the same time, the U.S. government has sought to end civil lawsuits brought by torture victims seeking redress under the U.S. Constitution and international law. It has done so both by invoking immunity doctrines and by employing an over-expansive interpretation of the "state secrets" privilege to shield Bush administration officials from civil liability. As a result, torture survivors have been denied recognition as victims of illegal U.S. government policies and practices, compensation for their injuries, and even the opportunity to present their cases. Finally, the U.S. government continues

to withhold from the public key documents relating to the CIA's rendition, detention, and interrogation program.

My presentation will address the U.S. government's efforts to stymie meaningful accountability for torture, including its failure to comprehensively investigate and criminally prosecute officials responsible for the creation and implementation of the Bush-era torture program, the practice of securing the dismissal of civil suits brought by torture victims by asserting the state secrets privilege and claiming effective immunity from suit, and opposition to full transparency regarding the use of torture during the Bush administration.

The U.S. government has failed to comprehensively investigate and criminally prosecute Bush administration officials who planned, authorized, and committed torture, despite clear documentation of these serious crimes. In April 2009, the Obama administration released Justice Department memos that exposed a torture program that was conceived and developed at the highest levels of the Bush administration. Justice Department lawyers wrote legal opinions meant to justify torture, senior civilian and military officials authorized torture, and CIA and military interrogators used torture at Guantánamo, in the CIA's black sites, and elsewhere. In fact, President Bush recently admitted in a memoir published in November 2010 that he had personally ordered the waterboarding of Khalid Sheikh Mohammed. Waterboarding constitutes an act of torture and is prohibited under U.S. and international law. Bush said that he had been told that it was a legal act and that he accepted the advice and approved the torture of Khalid Sheikh Mohammed, who was waterboarded 183 times while held in CIA secret detention, including at a CIA-run secret facility in Poland.

Government documents show that hundreds of prisoners were tortured in U.S.-run detention facilities, and that more than one hundred were killed, many in the course of interrogations. Through Freedom of Information Act (FOIA) lawsuits, the ACLU uncovered approximately 150,000 pages of formerly-secret government documents related to the abuse and torture of prisoners in U.S. custody overseas. Leaked confidential reports by the International Committee of the Red Cross of its interviews with detainees transferred to Guantánamo and other U.S.-held detainees provided incontrovertible documentation of the use of torture and abuse by the United States.

Despite this well-documented and credible evidence of the deliberate and widespread use of torture and other illegal abuse during the Bush administration, the U.S. government has not prosecuted the high-level officials who authorized violations of federal criminal statutes and international law. Indeed, President Obama himself has publicly opposed criminal investigations of the architects of the torture regime.

Following the ACLU's repeated requests to Attorney General Eric Holder and his two predecessors to appoint an independent prosecutor with a full mandate to investigate



and prosecute credible allegations of torture, Holder announced in August 2009 that he had ordered an investigation into incidents involving CIA interrogations. The Attorney General characterized Assistant U.S. Attorney John Durham's investigation, however, as a "preliminary review," meant to gather information to determine whether there were sufficient grounds for a full investigation. While the current scope of the sealed Durham investigation is unclear, thus far none of the architects of the torture program has been charged with any crime. In addition, with respect to the criminal investigation, the administration has offered a type of immunity to interrogators who relied on the torture memos while also declining, at least so far, to investigate those who wrote the memos or authorized torture.

The ACLU has advocated that the prosecutor's mandate in the ongoing criminal investigation include the conduct and decisions of senior government officials. Although interrogators who violated the law should be held accountable, the criminal investigation must reach not only the interrogators, but also the senior officials who authorized torture. On June 30, Attorney General Eric Holder announced that the Justice Department was launching a "full criminal investigation" into the deaths of only two detainees in U.S. custody, while closing inquiries into the treatment of nearly a hundred other detainees.

The Department of Justice has made clear that waterboarding is torture and, as such, a crime under the federal anti-torture statute. It is difficult to understand the prosecutor's conclusion that only two deaths warranted further investigation. The narrow investigation that Attorney General Holder announced was not proportionate to the scale and scope of the wrongdoing. The ACLU continues to believe that the scope of Mr. Durham's mandate was far too narrow. The central problem was not with interrogators who disobeyed orders, but with senior officials who authorized a program of torture. We believe that the Justice Department must conduct a broader investigation if it is to reach the senior officials who were most responsible for developing the torture program, including former President Bush and Vice President Cheney.

Moreover, despite the voluminous evidence that senior Bush administration officials authorized torture, the only people who have been held accountable for this maltreatment of prisoners are low-ranking soldiers. To date, over 600 individuals have been accused of having abused prisoners, yet only about ten of them have received prison terms of more than one year. Even more troubling, the highest-ranking officer prosecuted for the abuse of prisoners was a Lieutenant Colonel, Steven Jordan, who was court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007. Only one government contractor has been charged for any crime related to interrogation, and that indictment was in June 2004.

No government official has been charged in relation to the CIA's torture program, which was plainly authorized by the Bush administration's most senior officials.

Numerous prisoners were transferred to torture at secret CIA prisons overseas. At least five individuals are alleged to have died in CIA custody. No one has been held to account.

In May 2009, the Justice Department's Office of Professional Responsibility issued a report on the role of three Office of Legal Counsel lawyers who wrote the "torture memos" legally sanctioning illegal interrogation methods. The report concluded that the lawyers had suffered serious lapses of judgment but should not be disciplined for breach of their ethical responsibility as lawyers. To date, no charges have been brought against these lawyers.

Regarding civil suits seeking justice and remedies for survivors of torture, to date not a single victim of the Bush administration's torture program has had his day in a U.S. court. The U.S. government has sought to extinguish lawsuits brought by torture survivors at their initial stages, thereby protecting senior officials and corporations from civil liability. As a result, victims of torture and secret detention have been denied any form of justice or remedy.

The federal government has invoked the judicially-created doctrine of qualified immunity to successfully secure the dismissal of civil suits – alleging torture, CIDT, forced disappearance, and arbitrary detention – without consideration of the merits. In addition, civil cases alleging torture, CIDT, and extra-judicial killings by private military contractors face procedural hurdles and defenses, resulting in dismissal.

Most problematically, the U.S. government has intervened in cases that allege forced disappearance and torture by U.S. officials and U.S.-based corporations to assert the "state secrets" privilege and to have these cases dismissed without any consideration of unclassified, publicly available information substantiating victims' allegations. Courts by and large have accepted the government's assertions. The U.S. government's "state secrets" tactic to dispose of lawsuits, claiming that any discussion of a lawsuit's accusations would endanger national security, has allowed the government not only to restrict discovery, but also to quash entire lawsuits.

For example, the U.S. government invoked the common-law "state secrets" privilege to squelch a lawsuit brought by the ACLU in April 2006. The lawsuit concerned the

The "extraordinary rendition" program was developed under the Bush Administration to facilitate forced disappearances and torture by the CIA, often with involvement of foreign secret services, and to evade accountability for these egregious human rights abuses. Working in complete secrecy, CIA operatives would take the individual in question and transport him to a third country where he would be subjected to torture and abuse, forced disappearance, and other forms of ill-treatment.

secret detention of German citizen Khaled El-Masri, and it sought compensation for his unlawful detention and torture by U.S. agents in Afghanistan. Khaled El-Masri was kidnapped while visiting Macedonia at the end of 2003. He was then handed over by the Macedonian authorities to the CIA operatives. They drugged, hooded, sodomized and strip-searched him, then put him on a secret flight to Afghanistan, where he was held for about four months in a secret facility called the Salt Pit, a small detention facility run by the CIA with help from Afghan authorities. He was abused and tortured, only for the U.S. government to realize that they had the wrong person. It was a case of mistaken identity. His name, Khaled El-Masri, apparently matched the name of a terrorist suspect. Instead of acknowledging the fact and sending him back to Germany with an apology, he was put on another secret flight and dumped on a hill in Albania, from where he had to make his way back to Germany. Mr. El-Masri's rendition to illegal detention and torture represents the most widely known example of a publicly acknowledged program.

For those of you who don't know, the "extraordinary rendition" program was developed under the Bush Administration to facilitate forced disappearances and torture by the CIA, often with involvement of foreign secret services, and to evade accountability for these egregious human rights abuses. Working in complete secrecy, CIA operatives would take the individual in question and transport him to a third country where he would be subjected to torture and abuse, forced disappearance, and other forms of ill-treatment. This program has been well documented by human rights organizations, investigative journalists, United Nations human rights experts, and public inquiries in Canada and Europe.

High-level government officials have publicly discussed the rendition program, and Mr. El-Masri's allegations have been the subject of widespread media reports in the world's leading newspapers and news programs, many of which are based on the accounts of government officials. The CIA's Office of Inspector General determined there had been no legal justification for Mr. El-Masri's rendition and essentially concluded that the agency had acted illegally.

When a German reporter asked Secretary of State Condoleezza Rice in 2005 whether the United States would provide redress for its horrific abuse of El-Masri, she responded, "When mistakes are made, we work very hard to rectify them. I believe that this will be handled in the proper courts, here in Germany and if necessary in American courts as well." El-Masri sought to bring his claims to those "proper courts," both in the United States and in Germany. But the ACLU lawsuit that was brought on behalf of El-Masri against the CIA was dismissed by American courts, which essentially accepted the government-invoked defense of the "state secrets" privilege. In October 2007, the U.S. Supreme Court refused to review Mr. El-Masri's case, denying Mr. El-Masri's only real chance for justice before domestic courts. We now know – through documents released by Wikileaks – that Secretary Rice's State

Department expended considerable diplomatic resources in seeking to terminate El-Masri's judicial proceedings in Germany as well.

Having exhausted domestic remedies, in April 2008, the ACLU filed a petition to the Inter-American Commission on Human Rights (IACHR) on behalf of Mr. El-Masri, arguing, *inter alia*, that due to the application of the state secrets doctrine, Mr. El-Masri had been deprived of the right of effective access to a court and that his right to a remedy for the human rights violations he suffered had been violated. Despite repeated requests from the Commission, the U.S. government has not responded to the petition to date.

While Mr. El-Masri has received no remedy, the CIA officers determined by the Office of Inspector General to be responsible for his mistaken detention and torture have been promoted. The CIA analyst who pushed for Mr. El-Masri's rendition now has one of the premier jobs in the CIA's Counterterrorism Center, running the CIA's Global Jihad unit dedicated to disrupting al-Qaida. The lawyer who signed off on Mr. El-Masri's rendition is now legal advisor to the CIA's Near East division.

The U.S. government invoked the "state secrets" privilege in another lawsuit brought by the ACLU in 2007 against Jeppesen DataPlan, Inc., a subsidiary of Boeing Company. Since we were not able to seek any kind of accountability against official government personnel, we pursued corporations that had knowingly profited from arranging rendition torture flights. The ACLU filed a federal lawsuit against Jeppesen on behalf of five victims of the CIA's extraordinary rendition program. The suit charges that Jeppesen knowingly participated in these renditions by providing critical flight planning and logistical support services to aircraft and crews used by the CIA to forcibly "disappear" these five men to torture and illegal detention. According to published reports, Jeppesen had actual knowledge of the consequences of its activities.

Shortly after the suit was filed, the government intervened and asserted the "state secrets" privilege, claiming further litigation would undermine national security interests, even though much of the evidence needed to try the case was already public. The trial court accepted claims by the Bush administration that the "state secrets" privilege allowed them to put an end to the entire proceedings. After three judges from the federal appeals court reversed that ruling, the Obama administration asked for a hearing before the full appeals court, asserting again the right to quash a lawsuit against a company that was a knowing accomplice to torture. Interestingly, the Obama administration adopted almost the same position as the Bush Administration, that these kinds of civil cases should not proceed and that judges should have nothing to do with them as they raise issues of national security. In September 2010, an 11-judge *en banc* panel of the Ninth Circuit federal appeals court dismissed the lawsuit, accepting the Obama administration's argument that the case could not be litigated without disclosing state secrets. In May 2011, the Supreme Court refused to review the case, again denying justice to victims of torture.

The state secrets doctrine is not the only mechanism the Obama administration has invoked to extinguish civil suits by torture survivors. In *Rasul v. Rumsfeld*, a suit brought by former Guantánamo detainees seeking redress for torture, abuse, and religious discrimination, the Obama administration argued, remarkably, that the government defendants were immune from suit because, at the time that the abuse occurred, established law did not clearly prohibit torture or religious discrimination at Guantánamo. In *Arar v. Ashcroft*, the administration argued that the Constitution provided no cause of action to an innocent man who had been identified by the U.S. as a terrorist, rendered to Syria for torture, and not released until ten months later when it was determined that he was not a terrorist after all. In that case, the administration also argued to the courts that affording Mr. Arar a judicial remedy would breach the

The U.S. has a choice between silence, inaction and allowing the culture of impunity to take root as foreign courts attempt to clean up a mess of America's making, or firmly turning away from the dark side of torture and fully embracing justice and accountability.

separation of powers and harm U.S. foreign policy, and impermissibly involve the courts in assessing the motives and sincerity of the officials who authorized Mr. Arar's rendition.

Most recently, in *Padilla v. Rumsfeld*, a federal court dismissed a lawsuit filed against former Defense Secretary Donald Rumsfeld and other current and former government officials for their roles in the unlawful detention and torture of U.S. citizen Jose Padilla. South Carolina federal judge Richard Mark Gergel held that Mr. Padilla had no

right to sue for constitutional violations during his nearly four-year imprisonment, and that Rumsfeld and the other defendants were entitled to qualified immunity against all claims of alleged constitutional violations concerning his detention as an enemy combatant.

The Obama administration has sometimes suggested that civil suits are unnecessary because the Justice Department has the authority to investigate allegations that government agents violated the law. But civil suits, of course, serve purposes that criminal investigations do not: they allow victims their day in court, and they provide an avenue through which victims can seek compensation from perpetrators.

Moving on to the issue of the lack of transparency, the U.S. government has fought to keep secret hundreds of records relating to the Bush administration's rendition, detention, and interrogation policies. This secrecy has shielded government officials from accountability for developing and implementing national security policies that violate international law. The U.S.'s lack of transparency not only precludes accountability for U.S. officials, but it also makes it more difficult for citizens of other countries – including Egypt, Tunisia, and Libya – to hold officials or former officials of their own countries accountable for harm that those governments caused to their own citizens while cooperating with the U.S. Moreover, this secrecy has kept secret

some of the documents that would allow the public to better understand how the torture program was conceived, developed and implemented.

To take just a few of many possible examples, the U.S. government has fought to keep secret: a directive in which President Bush authorized the CIA to establish secret prisons overseas; the Combatant Status Review Transcripts in which former CIA prisoners describe the abuse they suffered in the CIA's secret prisons; records relating to the CIA's destruction of videotapes that depicted some prisoners being waterboarded; and cables containing communications between the CIA's secret prisons and officials at CIA headquarters. The current administration also reversed its decision to comply with a court decision ordering the release of photographs depicting the abuse of prisoners in Iraq and Afghanistan. The current administration has also supported legislation granting the Secretary of Defense unprecedented authority to conceal evidence of misconduct, including photographs depicting the abuse of prisoners in Defense Department custody, and it has argued that the CIA's authority to withhold information concerning intelligence sources and methods extends even to methods that are illegal.

The ACLU continues to advocate for the creation of a public record of the Bush administration's policies and their consequences, to obtain recognition and compensation for torture victims, to ensure that government officials who violated the law are held to account, and to reduce the likelihood that the abuses of the last administration are repeated by the current administration, or by a future one.

But the story is far from over. Foreign prosecutors and magistrates are already undertaking the investigations that U.S. legal institutions have refused to conduct, and they are shrinking the world for America's torturers. The U.S. has a choice between silence, inaction and allowing the culture of impunity to take root as foreign courts attempt to clean up a mess of America's making, or firmly turning away from the dark side of torture and fully embracing justice and accountability.



## Regimes of Impunity

### Irit Ballas

*Attorney with the Public Committee Against Torture in Israel*

In the past decade, 600 complaints to the Israeli Attorney General (AG) concerning the use of torture and ill-treatment by Israel's General Security Services (GSS, also known as the Shin Bet or Israel Security Agency – ISA) have been submitted. Regrettably, none of these complaints has led to a criminal investigation.

In my talk, I will explore the concept of impunity within this context. I will start with a description of the existing legal framework that allows for the systematic dismissal of complaints. Then I will outline some of PCATI's efforts in this respect. Finally, I will present some of our – I must admit – limited accomplishments and future prospects.

In an attempt to challenge the law enforcement system, human rights organizations have filed complaints on behalf of victims of torture and ill-treatment to the AG. Following the Israeli High Court of Justice's famous ruling of 1999,<sup>1</sup> which banned most of the then-commonplace methods of interrogation, this course of action has gathered force. Today, it is the main avenue for challenging the use of torture and ill-treatment during interrogations. It is interesting to note here that this course of action has two important strategic objectives. The first objective is to obtain a remedy for a specific victim, and the second is to expose major structural flaws by showing a systematic modus operandi.

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<sup>1</sup> HCJ 5100/94, *The Public Committee Against Torture in Israel, et al. v. The State of Israel, et al.*

As a rule, victims wishing to complain about a crime committed against them lodge a complaint to the police. When the alleged crime is committed by a police officer, Israeli law stipulates that the complaint be handled by a special department within the Ministry of Justice, the Police Investigations Department (PID) [according to Article 59 of the Criminal Procedure Law (Combined Version) 5742-1982, and Article 49 I of the Police Ordinance, 5731-1971]. However, when the alleged offence is committed by a GSS agent, the law contains a special provision: the complaint is first to be submitted to the AG, who has the authority to decide whether or not to forward it to the PID for criminal investigation [according to Article 49 I 1(a) of the Police Ordinance].

One might expect the AG to treat all complaints of torture or ill-treatment by the GSS according to their gravity and thus forward them to the PID. However, what happens in reality is quite different: complaints are forwarded to none other than a GSS agent, who conducts "a preliminary inquiry". Predictably, of the hundreds of complaints that have been lodged in the past decade, not even one has been found worthy of a criminal investigation.

Despite banning the vast majority of the methods of torture and ill-treatment that were brought before it, the court left a number of loopholes that effectively permit the use of torture, primarily through the use of the necessity defense.

Complaints of torture and ill-treatment are dismissed using two types of answers. The first and most common response claims that the complaint has no basis in reality, i.e. the conduct alleged in the complaint never happened: "There is no basis for your complaint," or "The investigation was conducted according to the relevant procedures".

In approximately 20% of cases, we receive the second type of answer, which we call the "necessity defense" type. This answer acknowledges the facts but claims that the methods used were justified. Such answers read more or less as follows, "An examination of the matter found that the complainant was detained for interrogation because of grave suspicions against him [...] suggesting that he was involved in serious terror activities which could harm or endanger human life."

Occasionally, such answers are followed by a short explanation. One complaint, for instance, stated that during the interrogation the complainant had been held for hours in a painful stress position. His investigators had cursed him, spat at him, threatened to rape him and deprived him of sleep. The reply we received to our letter was that sleep deprivation never occurred and that there was no basis for the complaint. However, the answer also contained an additional reference to the spitting, stating that, "During the investigation, a drop of spit from one of the investigators accidentally fell on the complainant's cheek. The investigator wiped the spit off and apologized. Apart from this incident, no one spat at the complainant."

This “necessity defense” model was established by the High Court of Justice in the famous 1999 PCATI ruling. The ruling represents several achievements and has various flaws, but what is relevant here is that despite banning the vast majority of the methods of torture and ill-treatment that were brought before it, the court left a number of loopholes that effectively permit the use of torture, primarily through the use of the necessity defense. The court’s interpretation of necessity is very broad, a fact that has permitted the Attorney General to write guidelines in which he determines in advance which cases will fall under the defense. In these cases, the GSS agent will not be indicted. The necessity defense type of answer is based on this doctrine.

The two types of answers presented above demonstrate the distinction between two regimes of impunity, as I call them, i.e. **the two ways in which impunity is granted to GSS agents**. Under the first regime, torture is not investigated because it has been denied; under the second, torture is not investigated because it was **permitted**.

Trying to challenge the regime under which the AG closes complaints because they “have no basis”, Attorney Samah Elkhatib Ayoub from PCATI and I prepared a major petition that was submitted to the High Court of Justice on behalf of PCATI and five other Israeli human rights organizations in February 2011.

The petition rests on two main arguments. First of all, in complaints of torture and ill-treatment the law does not give the AG the authority to dismiss a complaint or to create a mechanism whereby a preliminary inquiry is an automatic stage of the procedure. Any other interpretation of the law would make GSS agents less accountable for an alleged crime than anyone else, rather than the other way round, as was the intention of the legislature.

Second, we try to show the absurdity of the AG’s conduct, which creates an implicit requirement for additional evidence. Where there is no such additional evidence to support a complaint, the decision will be that there is no basis for investigating it. Naturally, torture is by its very nature an evidence-free crime, which creates a situation in which a complaint of torture can almost never be the subject of a criminal investigation.

Finally, the petition rests on international law, showing how the AG’s conduct violates the obligation to investigate all complaints of torture, an obligation clearly established in various conventions to which the State of Israel is a signatory. This petition is now pending and a hearing has been scheduled for January 2012.

Another course of action in fighting the rejection of our complaints via the first regime is exhausting every individual case we handle, starting with a request for further information: What is the procedure for appeal? Can we see the file pertaining to the investigation? Several petitions concerning individual cases appealing this type

of answer have already been filed. Exhausting a mass of individual cases is based on the same strategy mentioned above, one that achieves the dual purpose of obtaining remedies for individual victims while at the same time revealing the structural flaws in the system.

As for the second regime, the “necessity defense” regime, we are currently working on an additional petition. As I mentioned earlier, in the 1999 “torture ruling”, the High Court of Justice permitted the AG to write guidelines to govern when an indictment should be filed. The AG immediately did so. These guidelines further elaborate the broad interpretation of the necessity defense given by the court. However, the guidelines specifically exclude torture; that is, they will only apply to means of investigation that, though otherwise illegal, do not constitute torture. This gives us a small opening for action. We plan to go to court with cases in which the methods used are undoubtedly torture, as defined under international law. In such cases, we will claim, the guidelines do not apply and a criminal investigation must be launched. It is this argument that forms the basis of the petition.

We may ask: Did these efforts bring about any change? And what are the prospects for further change?

Though we have never received any substantive response by the state, there are indications that certain changes in the mechanism of investigation are, in fact, on their way. The first change, the significance of which is debatable, is the state’s announcement in November 2010 that the GSS agent charged with inquiring into complaints of torture and ill-treatment would, from then on, be an employee of the Ministry of Justice. This announcement, however, leaves open a number of questions: Is the agent the same person, having merely changed his employer? Is he a former GSS agent? Will procedures no longer be secret? Was there a public tender for the position? PCATI submitted a request for answers to these questions to the Ministry of Justice under the Freedom of Information Act.

These requests have been met with unjustified delays and bureaucratic stonewalling, as a result of which PCATI filed a petition demanding that the Court order the release of the requested information.<sup>2</sup>

We have also seen a series of changes in the terminology used in the answers we receive, indicating that someone in the Ministry of Justice is putting some thought into

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<sup>2</sup> AP 9289-09-11, *The Public Committee Against Torture in Israel v. The Supervisor of Freedom of Information Law, Ministry of Justice*. On 25 October 2011, PCATI finally received formal notification from the Ministry of Justice confirming that the announced plans had not been implemented and stating that, “A principled decision was taken regarding the transfer of the IIC [Inspector of Interrogate Complaints] from the ISA to the Ministry of Justice. Subsequently, several discussions have taken place between the [relevant] authorities relating to budgetary and procedural matters. This issue has been prolonged due to our demand that, once transferred, the IIC be in a better position to meet obligations optimally. Additional steps are currently being taken towards formulating decisions, as a result of which we will have answers to all your questions, such as the selection process to fill the position, working procedures and methods of referral to the IIC. Once decisions are made on this issue, we will share this information with you.”

the matter. As far as we can tell, these changes are all cosmetic and do not indicate a real shift in the lack of will to press charges against any GSS agent responsible for torture or ill-treatment. Still, it seems that someone inside the system understands that the current situation is deeply flawed.

Finally, two points should be borne in mind. The first is that of the two regimes of impunity, the first – the one that denies that torture and ill-treatment took place – can possibly be combated. That is, because the conduct of the AG is illegal in these cases even under Israeli law, it can be challenged in court. However, the second regime – the one justifying torture – is much trickier. Even though we are currently writing a petition to challenge the necessity defense guidelines, we do not have the legal tools with which to challenge it under Israeli law. Instead, we are using the state's own legal doctrines to find cracks in the system of impunity. Our petition, however, cannot challenge the legality of the necessity defense. That is not a feasible endeavor in an Israeli court, which is a classic demonstration of the limits of a struggle for human rights using legal means.

The second point is a more general one, and has to do with the "ongoingness" of the struggle against torture: We see that every achievement brings about a refinement of the system and brings with it new struggles. The 1999 torture ruling was a major achievement, but torture did not end because of it. Its perpetrators are merely being protected in a more sophisticated way.

I would like to end on an optimistic note and express hope for success in ending impunity. However, one must take into account the fact that new obstacles inevitably await us down the line. What will these obstacles be? Can we prevent them? Is this an inherent trait of any struggle? These questions remain, as yet, unanswered.



## Torture in Israel – A Question of Getting Away With It

**Bana Shoughry-Badarne**

*Attorney and the Legal Director of the Public Committee Against Torture in Israel*

The question always arises of whether we should simply restate what is happening, how detainees are treated, telling everyone what they already know, or whether we should try to think ahead. I say this because I agree that what has actually changed since the 1999 Supreme Court judgment is not only the methods of torture themselves – the General Security Services or GSS continues to use those methods that were banned by the Court, as well as some others – but also the number or percentage of interrogees who are exposed to a particular method. Before continuing, it is very important to recall that the Israeli Supreme Court declared that there was an absolute prohibition on the use of torture or any brutal or inhuman means. However, when the court examined actual methods and passed its judgment, it never stated that the interrogation methods which were used by Israeli security forces and subsequently prohibited constituted torture. What it said was that, as a general rule, it was illegal to use shaking, "shabeh" stress positions, the "frog crouch," and sleep deprivation as methods of interrogation. More importantly, the court also stated that in cases of necessity, application of these methods in interrogation may not give rise to criminal liability.

Let me be more concrete: The court ruled that the "necessity defense" did not constitute a source of *a priori* authority for GSS interrogators to use physical means during an interrogation. However, physical pressure in extreme circumstances, in the "ticking bomb" scenario, may not result in criminal prosecution of interrogators, since they may rely on the necessity defense against any criminal charges. Furthermore, there is a myth that the use of physical torture is now limited only to those detainees

considered to fit the “ticking bomb” criteria, while the vast majority of detainees are subjected only to psychological pressure, psychological torture, degradation or ill-treatment.

While it is extremely difficult to obtain reliable statistical data, because it is all classified, we do try to verify our information. Last year, PCATI obtained information about the use of torture and/or ill-treatment in up to 240 interrogations. It is important to recall that, like many NGOs, our capacity is limited and therefore PCATI’s lawyers cannot visit every person who is detained and interrogated by the GSS in order to verify whether or not he or she was tortured. Rather, we rely on information that we receive from attorneys in the field, from family members, and from the various Palestinian organizations. Therefore, several months may pass from the time a person is detained until we receive the information, and from then until a lawyer from PCATI gains access to the victim to conform the information in a signed affidavit.

They are exhausted and then either taken straight to interrogation or to the detention cells, which detainees describe as dirty and very small, with rough, darkly-painted walls, a very thin and foul smelling mattress, and a hole in the floor to use as a toilet.

Far more important is the fact that many victims choose not to submit a complaint, for many reasons. First, when we meet detainees and ask them about the way in which they were treated during the interrogation, they often reply *‘ādi* (عادي). *‘ādi* means “as usual”, or “normal”. When you ask them for details you hear the whole scenario, starting from the brutal treatment they received, including women and children, when they were arrested at their homes by Israeli soldiers, usually after midnight. And then there is the humiliation, the threats, the painful

shackling, being spat on while blindfolded, the kicking and beatings all the way to the army detention center. This treatment usually lasts between eight hours and three days, until they are delivered to one of the main interrogation centers. They are exhausted and then either taken straight to interrogation or to the detention cells, which detainees describe as dirty and very small, with rough, darkly-painted walls, a very thin and foul smelling mattress, and a hole in the floor to use as a toilet. The authorities refuse to allow independent monitors access to these areas, even the International Committee of the Red Cross or representatives of the Public Defender’s Office.

Therefore, if they are not severely beaten, but were “just” slapped in their face, it is unlikely that they will report it to their attorney. I will give you an example. One of the victims, a Palestinian with Israeli citizenship who lives in Jerusalem, was detained last December [2010], arrested and taken from his home after midnight. The authorities have now leaked allegations to the press that he is a member of Hamas and that he may have connections to three detainees suspected of preparing a missile attack against a sports complex in Jerusalem. For the first five days following his arrest and

during the last week of his 33-day incommunicado detention he was interrogated by four to five GSS interrogators for up to 22 hours daily, while being humiliated and handcuffed painfully. He was held in putrid cells for the duration of his detention. The interrogators threatened to arrest members of his family and told him that his twin babies would grow up without him. During the thirtieth day of his detention they told him that his father had been arrested and tried to convince the two to meet. In actual fact the detainee's father was being interrogated but had not been arrested and the two refused any offers to meet each other. A case like his is considered *'ādi*. If PCATI's lawyers were to submit a complaint in every case of this kind we would need a much larger legal staff to deal with all the detainees.

In the more severe cases, as in the case of one of the three East Jerusalem residents suspected of planning to fire a missile at a sports complex in the city, the victim was interrogated intensively for 40 days, during which he was allowed to sleep for only two hours every three days. He was painfully shackled while in the interrogation room, and his interrogators regularly shouted directly into his ears. He was beaten and received threats to his life, as well as threats that his sick father would be detained, along with his brothers and wife, whom they threatened to deport from Jerusalem. In the end he confessed to everything they demanded. When he met an attorney, which was 21 days after his arrest, he stated that all the confessions he made had been false. His attorney is a colleague and a very good lawyer. She said that in such cases, there is no way that we can even consider challenging his confession in an evidentiary hearing. In such cases attorneys, including good, experienced attorneys, do not even contemplate challenging the evidence, because both the military and civil courts tend not to dismiss confessions given by Palestinians or evidence obtained in such circumstances.

It is not merely the lack of monitoring that allows all this to happen, but also the fact that detainees are held incommunicado until the end of the interrogation. PCATI recently published a report on the use of incommunicado detention, "When the Exception Becomes the Rule," together with Nadi al-Aseer [the Palestinian Prisoners' Club]. We found that in 70% to 90% of cases a person will not be released from incommunicado detention or permitted to meet an attorney until he or she confesses. There are other "light" cases in which the detainee is not prevented from meeting a lawyer, some of which involve children, who tend to confess at the first interrogation session, and some cases involving participation in protests and throwing stones.

Although we make more than 250 visits every year, in 2010 we submitted only 50 complaints against soldiers, the GSS or the police, on behalf of 33 victims who agreed to file a complaint, and a joint group complaint submitted on behalf of 40 victims. Many victims refuse to file a complaint. Obtaining permission to submit a complaint is almost always complicated by victims' lack of trust in the system. When we tell them, "We are from PCATI and we want to document what happened to you", their first response is, "Okay, so how will that help me or my fellow prisoners?"

Will I ever get justice? Will I be given compensation? Will I get released earlier? Will it help anyone else?" Unfortunately, we cannot answer with a definite "yes" to any of these questions simply because the GSS's impunity is absolute. That is, while more than 700 complaints of torture have been submitted over the past decade, there has not been a single instance in which a GSS interrogator has been criminally charged, prosecuted or convicted.

So how do we choose when to file complaints to the Israeli authorities? Usually it is in very harsh cases, or when the complaint is made on behalf of women or minors, but only in cases where the victim wants and asks us to represent him or her. When we find that a specific method of ill-treatment or torture is being used against several victims, we tend to submit a group complaint, especially if the victims refuse to have their names disclosed because the fear, for example, that the minute they or any

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of their family members file a complaint they will be denied a permit to receive medical treatment or to work in Israel. This fear stems from the fact that many aspects of their lives and their family members' lives are controlled by the Israeli army and they are still living under Occupation. One example involves a child who was raped. When we asked his father if he would consider filing a complaint he replied, "No way. I'm the only person who works and I have to feed three families. I'm not going to challenge what happened to my son. He's home now and that's the main thing."

As I said earlier, 100% of the 700 complaints of torture made against GSS interrogators over the past decade were closed without a criminal investigation. Analysis of PCATI's cases shows that complaints are met with two types of answers: either those that deny all or some of the facts, or – as was the case in 25 complaints that constitute around 15% of the cases submitted by PCATI between 2003 and 2009 – those in which the authorities do not deny the facts of the case, but decide that there is no legal basis to take any legal action, typically because of the "necessity defense". These complaints, in which the facts are not denied by the Israeli authorities, elucidate the meaning of being brutally tortured in Israel. The undisputed facts show that detainees were interrogated intensively by several interrogators for three to seven days, while being totally deprived of sleep. In a recent case we were very fortunate that the victim had the wherewithal to tell the military judge – when his lawyer was not in the courtroom, in accordance with his being held incommunicado – that he had been tortured. He said that he had been kept awake for more than 80 hours and brutally beaten. He said that the soldiers had broken his mother's arm when they arrested him, and that the interrogators had led him to believe that she was dying. All of this was recorded in the court's protocol. When his lawyer read the protocol he contacted us and we submitted a petition to the High Court of Justice to demand the GSS to stop the torture and allow him to meet an attorney, as he had already been



held incommunicado for twelve days. At the hearing the justices spoke to him on his own, in the absence of PCATI's lawyers and his criminal attorney, but also, and for the first time in such a case, in the absence of the GSS interrogators.

We were happy with this case, even though the court decided not to lift the incommunicado detention order, because Chief Justice Beinisch led us to believe that the victim had been heard and that the interrogation methods against which we complained would not be used in his interrogation. However, forty days after his arrest, when even the military court had decided to lift the incommunicado detention order, the state's attorney submitted a petition to the High Court of Justice to request that the incommunicado detention remain in force! Justice Levy eventually gave the GSS all the time it needed by deciding to hold the hearing on the day after the new incommunicado detention order, rejected by military court, was due to expire. Furthermore, he also decided during the hearing to grant the GSS an extra four days of incommunicado detention. (This is the same judge who decided last year that nine days of incommunicado for a Jewish security detainee accused of planning a terror attack against a Palestinian girls' school in East Jerusalem was excessive.)

We finally managed to meet the detainee only ten days after the incommunicado detention order had been lifted. The delay is a result of the many bureaucratic obstacles that are placed before actual meetings between attorneys and clients by the authorities. PCATI's attorney finally met him 50 days after his arrest. He told us that the GSS had interrogated him using all of the usual very painful stress positions, such as the "banana" and the "half-banana", and the various forced standing positions, which include being forced to stand on your toes, straight as an arrow, and being beaten if unable to maintain any of these positions (I would fall down after two seconds). All of these methods are considered torture, especially when combined with severe sleep deprivation and degrading conditions of detention. In addition, he was very painfully shackled in a manner that we refer to as "high shackling", where the detainee is not only shackled at the wrists, but the shackles are also pulled upwards, causing them to dig painfully into the flesh. More seriously, he indicated that his interrogators had tried to rape him, but did not want to go into the details in the presence of a female attorney. When asked about the High Court hearing, he said that it had been used by the interrogators to convince him that they had unlimited power over him, and that even Justice Beinisch, the head of the Israeli justice system, had approved the torture. A month has passed since that meeting, during which we have been trying to meet him in order to get a full affidavit, via a male attorney, and submit a complaint. And one should remember that he will remain in prison until the end of the trial, which could take years.

The "Sweti" case is the last issue that I am going to raise today. Sweti was arrested at the end of 2006 and was subjected to physical and psychological torture that we refer to as "family matters". His wife and father were brought to the same detention center, and the victim's father was shown to him dressed in a prison uniform as a

way of manipulating him. He was threatened that they would be harmed if he didn't talk. The aim was to make him believe that his father and wife had not only been detained but were also being tortured. As a result, he attempted to commit suicide on two occasions by smashing his head against a wall. In April 2007, we submitted a complaint on his behalf following two petitions to the High Court. When we presented his case to a Knesset committee in April 2008, we managed to get a rare admission from the GSS that his interrogation had not been conducted in accordance with the rules. We then went to court with his case, plus an additional four cases, to demand that family members should never be used as a method of interrogation.

The petition was submitted in 2008, and was dismissed in September 2010 for being overly general. The court noted the Attorney General's assertion that, following the Supreme Court's torture ruling of 1999, it was clear that the GSS could not use such interrogation methods, and that, as a rule, if a family member is not directly involved in the case itself, he or she should not be arrested or exploited. At the same hearing the court asked the State Attorney's representative what steps were being taken against the interrogators who had not followed the rules during his investigation, and we learned that nothing had been done. No one had been held accountable for his torture. We therefore submitted another petition, on 15 February 2010, this time specifically demanding the criminal investigation and indictment of specific interrogators who had broken the rules in his case. The response we received from the state was, however, that they would not be indicted because too much time had passed since the interrogation took place. They said, "Well, it is four years later now and they [the interrogators] have moved on with their lives." The case is still pending.

So what can be done? And what will happen? What will the court decide? Just as in all other cases of torture that have ended with no investigation or indictment, we do not know if justice will ever be done. For now we are waiting for a hearing, and you will probably hear about it in three or four years from now, when the court issues its decision.



## Reflections on the Ill-Treatment of Juveniles

### Gerard Horton

*International Advocacy Officer – Lawyer with Defence for Children International – Palestine Section*

I would like to take this opportunity to share some of my reflections on children in the Israeli military court system. Some of what I would like to share is based on over 300 affidavits collected by Defence for Children International – Palestine Section's (DCI) lawyers and fieldworkers in the last few years, and numerous interviews with children.

I would like to address the following three issues:

- First, I will give a very brief overview of the Israeli military court system and its application to children;
- Secondly, I would like to consider what may be the purpose behind this system;
- Finally, I will look at just some of the options available to those trying to provide a defense to children within the system.

As many of you will know, each year, approximately 700 Palestinian children as young as 12 years of age are arrested, interrogated and prosecuted in the Israeli military court system. This averages out at nearly two children each and every day.

Many of you will also be familiar with the scenario. Heavily armed soldiers arrive in the dead of night with a list of children they want to take away. Families are abruptly woken up and often forced outside in their nightclothes at gunpoint. ID's are checked, and once a listed child is identified, his hands will be tied behind his back with plastic ties and he will be blindfolded. In spite of the excellent work by PCATI to challenge the practice of using single plastic ties that cause injury to the hands, the practice continues to this day.

I think it is profoundly disturbing that the parents of these children are almost never told why their children are being arrested, or where they are being taken to in the middle of the night.

Once bound and blindfolded, the child is placed in the back of a military vehicle for transfer to an interrogation center. In many of the cases the children are placed on the floor of the vehicle, and are subjected to both physical and verbal abuse by the soldiers sitting alongside them, which typically consists of kicking and slapping the bound and blindfolded child.

Most of the children are currently being interrogated by Israeli policemen in the settlement blocks of Gush Etzion and Ariel. The policemen don't generally work in the middle of the night, and so the arresting soldiers will take the child to one of the smaller settlements in the West Bank, and wait there until the interrogation centers are open for business.

There is enough evidence to support the perhaps unsurprising conclusion that the purpose of the system is not to impartially determine whether an offence was committed or not, but to intimidate, deter, suppress and instill fear.

In a report submitted by DCI to a number of UN special rapporteurs in January of this year, 47% of the children reported suffering some form of abuse at the hands of soldiers and police inside a settlement – illustrating perhaps the central role the settlements play within this abusive system.

On arrival at Gush Etzion or Ariel settlements, the child is typically taken straight in for interrogation, having now remained painfully tied and blindfolded for many hours. The child enters the interrogation room alone and, not surprisingly, scared – he will not be accompanied by a parent, a right most Israeli children are entitled to – indeed, in all likelihood his parents won't even know where he is.

The ensuing interrogation will almost certainly be abusive, both physically and verbally. There will be no lawyer present or any independent oversight of what takes place inside the interrogation room. After removing the child's blindfold, but leaving him tied by the hands, the interrogator will typically shout and threaten the child with violence or prolonged detention if he does not confess, and will frequently push, slap, punch or kick the child, and sometimes worse. In some of the cases documented by DCI, the treatment clearly amounts to torture, such as reports that hand held electric shock devices were used on three boys during interrogation by a policeman in Ariel settlement late last year. The accusation against these boys was that they threw stones at a road used by settlers. In other cases, there is a strong argument to be made that the cumulative effect of the treatment of these children, over many hours and sometimes days, also amounts to torture, although ill-treatment falling short of torture is still expressly prohibited by law.

According to the findings of a report submitted by DCI to the UN in January of this year:

- 70% of the children reported being beaten or kicked;
- 60% of the children reported some form of position abuse, including being painfully tied to a chair during interrogation;
- 55% of the children reported being threatened or offered inducements, such as a shorter sentence if they confess.

In an analysis of 100 affidavits collected by DCI in 2009, 81% of the children provided a confession following a coercive interrogation.

Within eight days of their arrest, the children are brought before one of two Israeli military courts that have now been operating in the West Bank since June 1967, and which, according to the UN, have now prosecuted well over 700,000 Palestinian men, women and children. It is inside these prefabricated and crowded courtrooms that the child will usually meet with his lawyer for the first time, who will, in all probability, advise the child to plead guilty, as this is the quickest way out of a system that denies bail to Palestinian children in 87% of cases.

Currently, around 62% of the cases handled by DCI in the military court system involve charges of stone throwing. The range of sentences for stone throwing for children at the moment is in the order of two weeks to ten months, although Military Order 1651 – Section 212 does make provision for a maximum penalty of 20 years. Once the child pleads guilty, which the overwhelming majority do, the sentence will, in over half of the cases, be served in a prison located inside Israel, in violation of Article 76 of the Fourth Geneva Convention. In practical terms, this means family visits are difficult, and in some cases, impossible.

I would now like to briefly reflect on what I think is the purpose behind this system. I think a good place to start is to mention that in the last six months of 2010, Palestinian children signed confessions written in Hebrew in 27% of the cases documented by DCI. It is also relevant to note that this extraordinary state of affairs goes unquestioned by the juvenile military court judges who preside over this institution.

In my view, there is enough evidence to support the perhaps unsurprising conclusion that the purpose of the system is not to impartially determine whether an offence was committed or not, but to intimidate, deter, suppress and instill fear, as part of a system which has now maintained control over 2.5 million people for over 43 years. Based on hundreds of testimonies and numerous interviews with children who have been detained, it seems to me that the system is a critical and effective element in this matrix of control.

This point now leads me onto the final part of what I wanted to say today. Faced with a system such as this, what role can a lawyer play, and what defenses, if any, are available to these children?

*First, in theory, proceedings in the military courts can be defended.* However, challenging this system is risky. As mentioned above, few children are released on bail, and if the case is defended, the Israeli military judge, some of who live in the settlements, will ultimately need to answer a very simple question: 'Do I believe the interrogator – an Israeli – or do I believe the child – a Palestinian?' You can probably guess who usually comes second in that contest, and the result will be a far harsher sentence than if the child had pleaded guilty in the first place. This is the simple reason why almost all of the children eventually plead guilty, even if they insist that they did not do that for which they stand accused before a foreign military court.

*Secondly, there is also a complaints procedure.* The system does allow for complaints to be filed against the army and police in the case of any wrongdoing. But according to one recent report produced by B'Tselem and Hamoked, between 2001 and 2010, out of 645 complaints filed on behalf of Palestinians against Israeli security interrogators alleging mistreatment, there was not a single criminal investigation. Cases are typically closed, and I quote, 'for a lack of evidence.'

*Thirdly, you can think about petitioning the High Court.* Occasionally, petitioning the High Court produces a favorable result, but there is frequently little or no follow up enforcement action. Take, for example, PCATI's petition to the High Court in early 2010, regarding the use of painful hand ties. Before judgment was delivered, the state indicated that new procedures had been implemented involving the use of three hand ties instead of one, and yet the painful practice of using one hand tie continues to this day.

*Fourthly, there is the UN.* The UN has two procedures that DCI uses for limited and specific purposes. We took the view back in 2008, that we will never be able to eliminate the abuse of children within the system whilst there remains a military occupation. However, there are two practical steps, which, if implemented, we believe could make a difference: First, no child should be interrogated in the absence of a parent; and second, all interrogations of children must be audio-visually recorded.

Accordingly, we made these two recommendations the cornerstone of our submissions to the UN Committee Against Torture in 2009, and the UN Human Rights Committee in 2010, both of which were adopted by the Committees in their Concluding Observations. Additionally, every six months we now submit a report to a number of relevant UN Special Rapporteurs in which we review the 50 or so cases we have documented in the past six months. I think these are useful procedures, but remember there are no enforcement powers, and they can provide no immediate protection.



And so now I come to the final option that I want to mention, which I will call 'mobilising for equality'. As a lawyer, I have come to the conclusion that the most effective defense for these children probably does not rest in a court room. I believe that the story of these children is a compelling one and the call for justice and equality must be heard, but for it to be heard we need loud voices. That is why we are now focusing much of our attention on mobilising people to start asking a few simple questions, such as:

- Why is the age of majority for an Israeli child 18, whereas it is 16 for a Palestinian child? <sup>1</sup>
- Why can't a Palestinian child have his mother or father present during questioning, just like an Israeli child?
- Why are only 12% of Palestinian children released on bail, whereas 80% of Israeli children are released pending their trial?
- Why do 83% of Palestinian children convicted of an offence go to prison, whereas only 6% of Israeli children receive custodial sentences?
- Why have so many credible reports of ill-treatment and torture been coming out of this system for so long, and yet nobody is ever held accountable and the abuse continues?

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<sup>1</sup> On 27 September 2011, Military Order 1676 was issued raising the age of majority in the military courts from 16 to 18 years. The new military order also makes provision for the notification of a child's parents that the child has been arrested and for informing the child that he/she has the right to consult with a lawyer, but without stating precisely when this consultation should occur.

## Keynote Speech

### Speaking out on Torture: Misgivings and Challenges of a Military Doctor

**Stephen N. Xenakis, M.D.**

*Psychiatrist, Retired Brigadier General and Army Medical Corps Officer  
with 28 years of active service in the US military*

Today I hope to share with you how “the day-to-day trenches of adult existence, banal platitudes (that) can have a life-or-death importance”<sup>1</sup> have affected my work as a military physician and human rights advocate. What the men and women in uniform, and you here in Israel – many of you who have also served in the military – confront on an almost daily basis are not situations that are so remote from all of our lives. In fact, they involve questions that go to the heart of the universals that we must all face at some point or another, universals about beliefs, convictions, and emotions that construct meaning from experience and inform our choices in life. We are all clearly committed to rational thought; indeed the very nature of a decision becomes legitimized if it is the product of rational thought. However, those convictions and emotions that fill our souls and psyche often carry far greater weight than mere rational thought in determining what we do and why and how we do it.

As an American citizen and a soldier, I have been concerned about the conduct of my nation and its complicity with torture, which have stained its reputation and stature. I have spent the equivalent of a few months at Guantánamo, assisted in the defense

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<sup>1</sup> Wallace, David Foster, *This is Water (Some Thoughts Delivered on Significance)*, Commencement Address at Kenyon University (2005), 2008.

of several detainees, and have interviewed a number of alleged terrorists who had been tortured by military personnel, men who were wearing the same uniform that I did for over 28 years.

My friends ask 'how did you get involved in human rights as a former military physician?' I tell them that I was "kidnapped" six years ago and have been held hostage by my conscience ever since. I also remind them that my introduction and growing involvement with the human rights community – with you and your colleagues – has been the most rewarding experience of my professional life. Like all things that are rewarding and gratifying, the experience has also been distressing and disturbing. I am a reluctant participant, but cannot escape now, and cannot back away from the personal and professional duty that has fallen in my lap, defined some professional commitments, and troubled my conscience.

How can our societies progress, or even see daylight, unless we truly confront the realities of the torture and the cruel treatment of others we happen to label as enemies, detainees, or threats to national security? And, on another plane, how can we reconcile our actions without having a deeper understanding and appreciation for how our minds work, or how our souls are inspired?

The boundaries between objective analysis and personal experience are permeable. While I was an undergraduate studying the philosophy of science, the imprint of Descartes appeared in almost all the courses that I encountered. A sharp line of demarcation separated the objective and subjective worlds, the mind and the brain. It seemed paradoxical considering that the Cartesian universe was being promulgated in the midst of the chaotic and unpredictable climate of the sixties. Almost all that we heard as young undergraduates had some personal point of reference in those heated times – the relevance of the tragic American history of slavery and segregation that had direct relevance to the civil rights struggle, for example, or the record of literature and art that demeaned women.

As I studied to become a physician and psychiatrist, the distinction between those Cartesian worlds blurred even more. And the highly disciplined military world in which I came of age, and in which I spent nearly three decades, offered many more shades of gray than black and white distinctions.

I am encouraged today that the developments in neurosciences, particularly in imaging of the brain, have confirmed my biases and are demonstrating that the domains of the mind and the brain are not mutually exclusive but intricately interwoven. Our feelings and sentiments are expressed in thinking, as our thinking is projected in our feelings, and all of these emotions are enabled by neurons.

So, what relevance do all of these philosophical, psychological, and neuroscientific meanderings have to the vexing issue of torture and the treatment of detainees

and potential enemies? Put simply, I believe that my factual observations, objective analysis, and personal experience coalesce and inform, coherently and reciprocally, all my actions and opinions, especially those that are the most personally challenging. It is not that torture and inhumane treatment of detainees and potential enemies was ever an appealing option. Rather, the process of truly comprehending the complexities involved in not choosing torture and inhumane treatment as options lead us all to the most perilous realm of the "day to day trenches of human experience" and cannot help but call upon the full range of our consciousness.

I believe that as much as the tragedies of torture and cruel, inhuman, and degrading treatments are a sad commentary on the human condition – they also are symbolic and symptomatic of social and political forces that may have unimaginable impact in the 21st century and to each of our lives, our children's lives, and, yes, even their children's lives. Witness the latest revolutions in your neighborhood of nations.

But let me return to my own education as a human rights advocate.

The turning point for me occurred when the photographs of the treatment of detainees at Abu Ghraib were first circulated. The photographs were scandalous and tragic. They reminded me of the famous quotation attributed to General George C. Marshall, Jr:

Once an army is involved in war, there is a beast in every fighting man, which begins tugging at its chains, and a good officer must learn early on how to keep the beast under control, both in his men and himself.

Leaders – officers and non-commissioned officers (sergeants) – are responsible to contain "the beast," as it will inevitably raise its ugly head and overwhelm any of us at any time. The harshest and most brutal instincts can erupt in all of us, if the timing and setting permit. Sadly, we have seen still more evidence of "the beast" in a recent issue of Rolling Stone, where a latter day My Lai appears in photographs of triumphant soldiers involved in brutal killings of civilians in Afghanistan, now publicized in connection with the trial of Specialist Morlock (a defendant who has pleaded guilty and been sentenced to 24 years in prison).

Such is the nature of war, and the dilemma that our nations face – to establish and sustain strong military forces, to protect us against enemies, foreign and domestic, and to acknowledge that employing those armies comes with a cost, one that may threaten our core democratic principles. There are no simple or easy choices, either individually or nationally.

So when the pictures from Abu Ghraib first appeared in May of 2004, I was being interviewed for a senior position at the Department of Defense. One conversation

with the leadership pointedly focused on the policies and procedures governing medical personnel treating detainees.

The medics at Abu Ghraib were responsible to report evidence of abuse and take action to protect the detainees from future harm, which I emphasized in my interviews at the White House Personnel Office. Moreover, I suspected that the Reserves and National Guard that had been called up for the war had not been adequately prepared or trained to be an occupation force – that their leadership had not provided the discipline that was needed to restrain them from acting out when feeling personally threatened in face-to-face encounters.

Needless to say, raising such concerns during a job interview with the Bush White House was not exactly going to guarantee a plum job in the administration, and I did not get hired. So, I proceeded to find clinical work and go about building my new life. My wife – a journalist – encouraged me to write a long op-ed that appeared in the *Washington Post* with the headline, “Unhealthy Silence from the Medics”. I contended that the ethos of the medics – “first, do no harm” – serves, or at least *should* serve, to moderate and balance the impulses of the combat arms. I wondered what had happened in Abu Ghraib with the medics. Clearly they must have witnessed some of the atrocities and if they did, what did that imply about their sense of responsibility? Was there some kind of complicated division, or even conflict, between the loyalty they pledged as soldiers and their loyalties as medical professionals?

No doubt, medical leaders frequently confront opposition and must reconcile competing loyalties in being clinicians and soldiers. But the principles of “just war” and the Geneva Conventions anchor their professional conduct. Those of us who had served during the Vietnam War had those lessons drilled into us, especially after our Army had lapsed when it committed the My Lai massacres. Many of us vowed that those mistakes would never be repeated again.

Shortly after the publication of the op-ed, Leonard Rubenstein (former Executive Director of Physicians for Human Rights USA), whom I have grown to respect deeply, called and invited me to a meeting. My last encounters with human rights groups had been 40 years before when I was in ROTC, and I think we were probably throwing rocks at each other. With some reservation, I agreed to meet and learn more about Physicians for Human Rights USA (PHR).

We discussed with great concern the role of clinicians in interrogations, specifically their assignment to Behavioral Science Consultation Teams, known as BSCTs. The participation of doctors directly in interrogations violated the principles of the Geneva Conventions. To its credit, PHR asked to learn more about military medicine and the responsibilities and roles of military physicians. I had never encountered personal duty with interrogators during my years of active duty and regarded a direct involvement in interrogations as inconsistent with the traditions of military medicine.

As I looked deeper into the issue, what surprised me more was how little staffing and deliberation had gone into this major policy directive. Placing physicians and other healthcare providers in unrelated combat support roles constituted a significant departure from established policies and procedures. In most other circumstances, such changes in policy would have followed a protracted analysis by staff and careful consideration by senior leadership. I could not find any evidence of either analysis or thoughtful review with this decision. In fact, policies that eventually became known as "enhanced interrogations" grew out of an uncontested sentiment at the top levels of government that we needed "to take the gloves off" in handling captives and detainees. The policies and procedures that followed, and the attitudes that generated them, lacked review and analysis, were dehumanizing, and reflected ethnic and cultural bias. In short, the thinking was sloppy and had no factual basis. That's no way to run an army, and as a retired general I exercised my prerogative to say so.

I look back with some embarrassment that at one point I actually thought that physicians could work in highly circumscribed roles and advise interrogators. Fortunately, a colleague, and the only other retired Medical Corps General Officer who had been involved, advised that the temptation to cross over the line in such intense conditions was too great to protect either the detainee or the consulting physician.

Further study confirmed that opinion. PHR advocated that the professional medical associations publish official positions opposing doctors' direct involvement in interrogations. Over the years, my review of medical policies in support of CIA practices and numerous logs and medical records of detainees has confirmed my opinion: clinicians should never participate in interrogations under any circumstances. Moreover, they must have the authority and status to act on and report abuse and cruel treatment when it becomes evident.

Most retired Medical Corps General Officers who I approached to join in opposition to torture and related practices demurred. They felt that their positions and responsibilities as physicians did not give them the authority to disagree with combat commanders and senior political leaders. I adamantly disagree. Speaking up about the ethical and proper treatment of soldiers, whether those soldiers are American or those of the enemy is exactly what is expected of military medical leaders.

As my activities became more public, I was invited to participate with other retired generals and admirals (none of them in the medical field) who had been convened by Human Rights First (HRF) to oppose torture. In 2008, HRF set up private sessions with as many Presidential candidates as they could schedule to discuss

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torture, interrogation practices, Guantánamo, and the trials of the detainees in the Military Commissions. More than once, the “ticking bomb” scenario dominated the conversation. Almost all the candidates pointed out deep-seated worries expressed by their constituents that held them responsible to take all and any actions needed to keep the country safe – including torturing a suspect who may know the location of a “bomb” that was about to go off and kill thousands of Americans, including their constituents.

Leaving aside the fact that the “ticking bomb” is largely fictitious, the Presidential campaign of 2008 highlighted the overwhelming power of fear as a proxy for terrorism. To the voters, the fear associated with the “ticking bomb” symbolized the threat of terrorism and justification for war and “an anything goes” mentality to “hunt those guys down.” The sense of fear hijacked any rational conversation. As the “fear factor” was heightened, reasoned debate and deliberation withered.

When I became more involved in terrorism cases and noticed a remarkable absence of deliberate analysis of the terrorist threat, I lost even more confidence in the justification for the course of action we had been following. I came to feel that our political leadership had exploited the “fear factor” to forge a political agenda and not because the detainees realistically endangered our country. Accordingly, I felt it was even more important to oppose torture and cruel, inhuman, and degrading treatments. Torture is counterproductive, and, in fact, it does not enhance, but diminishes, our national defense.

Nonetheless, I have to acknowledge how the enormous political and military realities burdening your nation evoke much greater fear and more immediate threats to your security. I would be presumptuous to ignore the direct impact on your lives, individually and collectively. On the other hand, I have been sensitized to the state of mind that persistent pain, stress, and worry create, and have experienced the insidious and destabilizing effects of pressures and conditions that seem to never go away. Another reason that I oppose torture and cruel, inhuman, and degrading treatment, comes from my conviction that to engage in such heinous acts is to surrender to fear. And leaders – in a family, military unit or community – have the responsibility to assuage and calm, and inspire action that is healing, constructive, and productive rather than replicate the very behavior that we condemn.

My journeys into the realm of torture moved from the theoretical and philosophical to the actual and concrete when I became involved in the defense of Omar Khadr. Khadr is a Canadian citizen, who was captured as a 15-year-old after a firefight in Khost, Afghanistan. When first asked to assist with the case in 2006, I had no idea about his life story or the details of the charges. The defense attorneys did inform me that he was a very young adolescent when captured, appeared troubled and symptomatic, and had been held in Guantánamo without the benefit of treatment or schooling.

That did not seem right to me.

Furthermore, the defense attorneys could not secure the approval of the Convening Authority (the judicial arm of the Department of Defense) to conduct a medical and psychiatric evaluation of him. I agreed to assist at the same time that my misgivings about our policies and procedures had been growing. After a detailed review of the case and hundreds of hours of meetings with Omar, I feel unequivocally that he is not an enemy of the West and deserves help for how he has suffered. Sadly, I have reviewed dozens of other cases and discovered other shameful records of torture and cruel treatment of other detainees. What we have done is wrong for many reasons, morally and strategically. The detention facility at Guantánamo and our actions have compromised our international stature and our ability to defend our country against terrorist threats.

The Khadr case illustrates another insidious theme that degrades our national defense – a racist campaign directed at “radical Jihadism.” This political ideology has been distorted and amplified by government prosecutors to justify harsh and inflexible treatment of men and women simply based on their religious beliefs. Such prejudice clashes with the American heritage of being a “nation of immigrants” and thriving on the diversity and energy that many different people have brought to our shores throughout our history.

This conference has been organized to pursue accountability for torture and cruel, inhuman, and degrading treatment. That is the domain of political activism, of which I know little despite my committed engagement in the democratic processes. I do feel strongly about one possibility for securing greater accountability.

To have accountability there must be transparency and publicity. As the old saying goes, “Sunshine is the best disinfectant.” I feel strongly that the community of healers – physicians, particularly, and other clinicians – must become actively engaged and speak out against violations of human rights. Like other professional groups, physicians and clinicians are subject to political pressure and economic realities. But having taken the oath to “first do no harm” – they cannot back away from the responsibility to act when they see harm being done. I have not heard of a compelling argument – put forth by any political or military expert – that convinces me that any action done with the express intent of harming another individual does any good for the defense of a community or national security. In fact, the lessons of warfare in the 21st century instruct us quite differently – that insurgencies and counter-insurgencies revolve around individual interests, feelings of safety, and personal well-being. To think that violating personal dignity and welfare strengthens national defense defies all reasonable logic. Not today, and probably not ever in our history.

Clinicians and healers, in or out of uniform, can advance on another front: helping the citizens, individually and collectively, to protect themselves from the insidious and

degrading "fear factor." Living under conditions of persistent threat diminishes our capacity to think and act rationally. We live in a time in which developments in the neurosciences and genetics, the epigenetic phenomena, help us 'see' the effects. Fear and threats to security do not promote a healthy state of mind. In fact, they weaken us, individually and collectively, over time. We must take corrective action – to counter the lingering effects of fear and the exploitation of the 'fear factor' by political agencies. Fear is neither a political nor a military strategy. It is also antithetical to basic morality.

I would like to close by sharing with you a few principles that have anchored my professional convictions and actions, even under conditions of extreme stress, when feeling threatened or afraid, and when struggling with the inevitable competing loyalties with which I have served: soldier and physician, citizen and human rights activist, general and defender of detainees. There have been times when I have not always lived up to my standards, even as those standards have become clearer to me over time.

I have learned that:

- Societies endow doctors – healers – with special authority and respect. They cannot abuse that privilege, ever.
- American officers take an oath to the Constitution of the United States to uphold the laws and defend the country against all enemies, foreign and domestic. But the emphasis is that this is an oath to the laws that govern the nation, and not to any individual or political agency. Our laws constitute the cornerstone of our democracies and the hope that they will continue to thrive.
- American soldiers are human rights advocates. We defend the laws of our nation and uphold our Constitution that is grounded in the dictum that "all men are created equal, that they are endowed by their Creator with certain inalienable rights, and that among these are life, liberty and the pursuit of happiness."
- America traditionally has sustained a strong military to preserve the peace, and that going to war is a last resort. Soldiers who have 'seen' war know it is ugly and most are unwilling to go again.
- The Abrahamic religions share a belief in the sanctity of man, and that defiling any one individual defiles us all. When we torture or act in cruel and inhuman ways, we injure one another and sin against God and Man.
- As a physician and senior leader, I do not have the option to back away from difficult, and potentially hurtful, troubling, or troublesome problems. Because society has bestowed special trust and authority in me – as a physician and senior leader – I

owe my fellow citizens and community the responsibility to take on the challenges that come my way. I am obligated to speak truth to power.

- And finally, perhaps most importantly – each of us makes a difference.

More than ever, I believe you are the leaders of the future. You have come together, from diverse backgrounds and beliefs and religions, have committed yourselves to a vision of peace and greater prosperity, not simply economic but in terms of moral and ethical stature. You cannot let the tyrants, despots, and demagogues who only seek power and personal gain snatch a better life away from you. Too often, they incarnate the instincts of greed, hatred, fear, and anger that have impoverished and enslaved too many people. By holding to your values and a sense of higher purpose, you can make a difference. Your campaign – your journey – takes you down a path one step at a time, a path often neither recognized nor acclaimed, and certainly not easy.

And perhaps, you will have moments like I have had – doubting yourself, lacking confidence, and confounded as you try to discern your next steps. I encourage you to seek strength from each other and have faith and confidence that what you are doing is right. Being right is more than feeling self-righteous – it involves feeling humble in the great expanse of mankind, seeking wisdom, and having the deepest compassion for your fellow man and woman. The whole world is looking at you and prays for your success. Because in the end, we who are gathered here this evening, know where these individual templates and beliefs come from. We know they come from inside each one of us in the mysterious alchemy of our beliefs, convictions, and emotions that construct meaning from experience and inform our choices in life. And then we look at the person to our right, and the person to our left, and try to apprehend the enormity of that universe of beliefs, convictions, emotions and meaning within them.

The ultimate challenge and the ultimate goal is to try to reach that level of empathy and understanding, not just with our friends, but also with those who inspire fear in us.

Because the ultimate challenge and the ultimate goal is to try to reach that level of empathy and understanding, not just with our friends, but also with those who inspire fear in us. That is not to preach the gospel of some sentimental version of love thy enemy, but instead to challenge each of us, with toughness and rigor, to recognize that as long as we have the capacity to depersonalize others, we have the capacity to diminish the importance of the day to day trenches that determine life or death experience. And our job as physicians, as leaders and as human beings, is to never diminish that importance.

The hopes and anxieties of the world are telescoped into your backyards. Every word, every action, in this complicated country ripples across the globe, and touches people

unimaginably in this highly interconnected network we call the 21st century. The landscape has changed, and so must the political and military strategies that govern them. The past few months have reawakened us to the power of the individual; human rights that are bestowed on us all can turn around governments and old orders. Empowering individual citizens comes with releasing them from the fears, hatred, greed, and ambition that disrupt their lives. Our challenge is to act individually and collectively to free ourselves from tyranny – from cruel, inhuman, and degrading acts that are committed against all of us – to see things differently and to eschew our old beliefs. In the midst of intense stress and threats to our lives and livelihoods, that is not an easy thing to do. But, if we can, when we can, we will embody principles and guides that affirm our common humanity and love for all – especially as physicians, especially as soldiers, whether military or not, who defend freedom and democracy.

# PART TWO



**The Supreme Court of Israel**  
**HCJ 9416/10**  
**Sitting as the High Court of Justice**

1. Adalah – The Legal Center for Arab Minority Rights in Israel
2. The Public Committee against Torture in Israel
3. Physicians for Human Rights – Israel
4. Al Mezan Center for Human Rights

**Represented by Adv. Abeer Baker and/or Hassan Jabareen and/or Orna Kohn and/or Suhad Bishara and/or Sawsan Zaher and/or Fatmeh El-'Ajou and/or Haneen Naamnih of Adalah – The Legal Center for Arab Minority Rights in Israel.**

Petitioners  
-v.-

1. The Ministry of Public Security
2. The General Security Service

**Represented by the State Attorney's Office, 27 Salah-a-Din St., Jerusalem**

Respondents

Petition for *Order Nisi*

**This is a petition for an order nisi, whereby the Honorable Court is requested to order the Respondents to show cause:**

a) Why Article 17 of the Criminal Procedure Law (Interrogation of Suspects) – 2002, which exempts the police from conducting audio and video recording of the interrogation of persons suspected of security offenses, should not be repealed on the grounds that it is discriminatory and unconstitutional;

b) Why Respondent 2 should not be obliged to conduct video recording of interrogations of persons suspected of security offenses and suspects regarding whom video recording is required in accordance with the Criminal Procedures Law (Interrogation of Suspects) – 2002.

The following are the grounds for this petition:

#### Introduction and summary of petition

1. This petition concerns the Petitioners' demand to revoke the sweeping exemption granted to the state's interrogating authorities, the police and the General Security Service (hereinafter – GSS) from the requirement to make audio and video recordings of interrogation of persons suspected of security offenses. The police are exempted from the audio and video recording requirement stipulated in Article 17 of the Criminal Procedures Law (Interrogation of Suspects) – 2002, which the Court is requested to declare void. According to the policy that it has set for itself, the GSS, which operates de facto as an interrogating authority, considers itself absolutely exempt from the audio and video recording requirement.

2. Under the Criminal Procedures Law (Interrogation of Suspects) 2002 (hereinafter: the Interrogation of Suspects Law), audio and video recording is obligatory in certain cases, where faithful documentation of the interrogation process has special importance in preventing violations of the law and miscarriages of justice. Examples of such cases include interrogations recorded in writing in a language other than that in which they were conducted; interrogations of suspects with disabilities; interrogations conducted in sign language; and interrogations of persons suspected of serious offenses carrying a sentence of over ten years' imprisonment. While the law attaches importance to recording interrogations of individuals suspected of serious offenses, this approach does not apply to interrogations of security suspects, although security offenses are typically considered particularly serious. [...]

3. In May 2009, the UN Committee Against Torture sharply criticized Israel for the sweeping exemption granted by the Interrogation of Suspects Law regarding the audio or video recording of interrogations of security suspects. The Committee recommended that the State give priority to expanding the requirement for video recording, due to its importance in preventing torture and enforcing the law vis-à-vis the various interrogation officials:



Video recording of interrogations is an important advance in protection of both the detainee and, for that matter, law enforcement personnel. Therefore, the State party should, as a matter of priority, extend the legal requirement of video recording of interviews of detainees accused of security offenses as a further means to prevent torture and ill-treatment.

4. [...] [As the legislative history of the Interrogation of Suspects Law shows], the legislature emphasized that audio and video recording was intended not only to protect suspects' rights, but also to help uncover the truth. Recording also serves as an effective mechanism against attempts by interrogators to exceed the powers granted to them by law, particularly the exercise of illegitimate methods of interrogation. [...]

5. In the legal section of the petition, the Petitioners will argue that granting the police and the GSS a sweeping exemption from recording the interrogations of security suspects compromises suspects' constitutional rights to personal liberty, due process, equality and dignity, contrary to the provisions of the limitation clause.

6. Exemption from recording suspects' interrogations does not comply with the legality requirement in the limitation clause ("in accordance with the law"). Article 17 of the Interrogation of Suspects Law provides that interrogations of persons suspected of committing security offenses are not to be recorded, but does not make clear precisely which offenses are to be considered security offenses and which are not. This fundamental regulation is detrimental as it was formulated in an ambiguous manner, lacking details concerning its substance and also clear guidelines, standards or clear criteria regarding the implementation of the regulation it is meant to anchor. This form of legislation is not constitutional and does not meet the demands of the limitation clause, which mandates that the harm to a constitutional right be "in accordance with the law". As a result of this ambiguity, the respondents acquire powers that were not given to them and, in practice, they dictate to the court the bounds of the tools it can employ in carrying out its work.

7. The Petitioners will also argue that suspects' constitutional rights are being compromised for an inappropriate purpose, according to both subjective and objective criteria. The Respondents claim that when conducting interrogations of security suspects, they employ special interrogation methods that cannot be revealed for the sake of the detainee's wellbeing and in the interests of the interrogation. Even assuming that, objectively speaking, the purpose of the exemption is to prevent exposure of interrogation methods, the Petitioners argue that compromising suspects' constitutional rights in order to conceal methods of interrogation methods is inappropriate. Interrogation methods are subject to the principles of transparency and monitoring and must also be legally accountable. Whoever employs them must be prepared to reveal them to the degree necessary when it is so demanded,

rather than conceal them in a sweeping manner that precludes the possibility of determining their legality.

8. The Petitioners further argue in this petition that even if the purpose of granting an exemption from recording interrogations of suspects is considered justifiable, it should be annulled because it violates suspects' constitutional rights beyond what is necessary. The Petitioners will emphasize that the exemption from recording the interrogation of persons suspected of committing security offenses does not meet the requirements of any of the subtests of proportionality, as they have been handed down in the rulings of this Honorable Court.

9. As for the first subtest, the suitability test, the Petitioners will argue that exemption from recording interrogations lacks any logical connection to the Respondents' purported aim. Firstly, the measure chosen to achieve the aim is arbitrary and unfair, which alone suffices to negate its logical connection to the objective [...]. Secondly, an exemption from recording interrogations may increase the likelihood of suspects' welfare being compromised, and does not serve the interest of the interrogation, as it is also in the interest of the interrogation that it should be fair and subject to oversight.

10. Similarly as regards the second subtest, the extensiveness test, the Petitioners will argue that the exemption from recording interrogations of suspects is sweeping: it applies to both minors and adults, and to any suspicion defined as security-related, without enumeration of the relevant suspicions and offenses. [...]

11. Moreover, the arbitrariness of the exemption from recording suspects' interrogations is also manifested in its implications for security suspects, who are subject to other severe restrictions during interrogation. Interrogations of security suspects are characteristically harsh, with minimal possibility of timely, full and transparent judicial review. The suspect is usually prevented from meeting an attorney for protracted periods of time; the interrogations are by nature long, arduous and exhausting; the hearing on extension of detention is done in camera, behind closed doors; gag orders are routinely issued for almost every interrogation; and detention is extended while suspects are also prevented from receiving visits, wholly isolated from human contact apart from with their interrogators. Suspects are held in very harsh physical interrogation conditions [...] and video recordings of interrogation proceedings are the only mechanism to prove claims of illegitimate methods of interrogation used against them.

12. The Petitioners will argue that the third subtest, that of narrow proportionality, is not met in this case either. The exemption from recording interrogations fails to strike an appropriate balance between the benefit it may produce and the damage caused as a result of violating the right. Violating constitutional rights harms not only the

suspect but also basic democratic values [...], such as the principle of the separation of powers, the rule of law, fairness of criminal proceedings, and the public's trust in the judicial process. Exemption from recording interrogations undermines a priori the possibility of judicial review and oversight of the interrogation process, as well as the validity of the evidence brought before the Court during the criminal trial. In fact, a sweeping exemption from recording interrogations of suspects casts a priori doubts on any result reached by the judicial system.

13. Even countries notorious for abusing suspects' rights in the name of the War on Terror record interrogations of security suspects. Despite the reprehensible detention and imprisonment conditions at Guantanamo Bay, for example, numerous guidelines have been issued governing the recording of interrogations carried out there; evidence indicates that interrogations of security suspects are videotaped. The latest development in this regard are guidelines issued by the US Department of Defense in May of 2010 that explicitly require audio-video recording of all interrogations of suspects held by the Department of Defense (DoD) or the military. [...] The objective of the guidelines is to provide conclusive evidence for trial in cases where there exist inconsistencies in testimony or claims of false confessions. The policy is as follows:

It is a Department of Defense (DoD) policy that [...] an audio-video recording shall be made of each strategic intelligence interrogation of any person who is in the custody or under the effective control of the DoD or under detention in a DoD facility, conducted at a theater-level detention facility. [...]

14. Australia has similarly set a requirement to record interrogations of security suspects. This requirement is anchored in the need to balance between human rights and the needs of national security.<sup>1</sup>

15. The Petitioners will argue that the sweeping exemption from recording interrogation proceedings in security cases irrevocably violates the rights and the very humanity of detainees. It damages the judicial process and the semblance of justice, and immeasurably damages the public's trust in the authorities and the judicial system. Even if violation of the detainee's dignity during interrogation cannot be remedied, tools should at least be provided that expose the manner in which his or her rights were violated during interrogation. [...]

[...]

The Special Importance of Making Audio and/or Video Recordings, Particularly of the Interrogations of Security Suspects

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<sup>1</sup> Wayne T. Westling, Vicki Waye, "Videotaping Police Interrogations: Lessons from Australia," *American Journal of Criminal Law*, Summer 1998, vol. 25:493.

a. Security offenses are defined as serious offenses

**35. [...] Granting exemption from recording interrogations in serious offenses misses the purpose of the Interrogation of Suspects Law, which is, as stated by the legislature, to require videotaping interrogations precisely when the alleged offense is serious. This law's attitude toward security offenses is particularly severe. Thus it is not clear why the criterion of the gravity of the offense and the concern for miscarriage of justice precisely as regards serious offenses excludes what are considered to be security offenses.**

b. The identity of the population of suspects in security offenses increases concerns over violations of their rights

**36. Virtually all security suspects are Palestinians, and most of them are residents of the West Bank or Gaza Strip. Most are not fluent Hebrew speakers. Their national difference and non-fluency in Hebrew, in addition to the nature of the alleged offenses, lower their status as suspects and increase concerns that their rights may be violated. Therefore, the degree of protection required for this group of suspects should be increased.**

c. There is increased likelihood that torture and other unacceptable methods of interrogation may be used against security suspects

**37. Persons suspected of security offenses are more vulnerable to violation of their rights and to illegal methods of interrogation being used against them. Most complaints of the use of torture and unlawful methods of interrogation come from security suspects, virtually all of whom are Palestinian. Complaints of the use of illegal interrogation methods continually arrive at the offices of Petitioner 2, which is primarily involved in this matter and in monitoring what occurs in interrogation cells. In the past year alone, Petitioner 2 has received over 150 complaints raising serious allegations of the use of unlawful methods of interrogation against suspects [...].**

**38. Investigations into suspects' complaints regarding use of unlawful interrogation methods are at times closed due merely to the inability to prove the suspect's claims. Israel has argued before the UN Committee Against Torture that one reason that suspects' claims of illegal methods of interrogation are not fully investigated is the difficulty in providing evidence to substantiate them. [...]**

#### The Legal Argument

**44. The Petitioners will argue that granting the police and GSS a sweeping exemption from recording interrogations of security suspects violates their constitutional rights to personal liberty, due process, equality and dignity, contrary to the provisions of the limitation clause. Such an exemption a priori undermines any possibility of**

judicial review or supervision of the interrogation process, as well as the validity of evidence brought before the Court during the criminal trial. Absence of monitoring of interrogating authorities is a certain recipe for false confessions extracted from suspects and the use of illegal methods of interrogation, since the Court lacks the ability to control the interrogation process either while it is in progress or retroactively.

Violation of suspects' constitutional rights to personal liberty, due process and dignity

**45. Depriving the suspect of personal liberty means that he or she is no longer free but under the control of the interrogating authorities. This denial of liberty constitutes a violation of the right to personal liberty grounded in Article 5 of Basic Law: Human Dignity and Liberty. [...]**

**46. Due process during interrogation, detention and trial is one guarantee that denial of liberty is proportionate. Due process guarantees that the factual and legal truth is revealed and ascertained in criminal and administrative proceedings. Ascertaining the truth is a prerequisite of upholding substantive law and enforcing its norms. [...]**

Violation of the suspect's constitutional right to equality

**49. A security suspect is entitled to all the constitutional protections that apply to suspects as such. As far as his or her rights as concerned, what is relevant is his or her status as a suspect, not the nature of the alleged offenses. Sweeping differentiation between suspects on the basis of the alleged offenses is by all accounts a violation of the principle of equality before the law that lies at the heart of the criminal process.<sup>2</sup> [...]**

**51. Israel is party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965. According to Article 5 of ICERD, State Parties undertake to prevent and eliminate racial discrimination and to guarantee the right of everyone to equality before the law, without distinction as to race, national or ethnic origin. As a result, State Parties are obliged to eliminate all forms of legislation that allow discrimination under law, including security legislation, and to ensure equal protection by domestic laws. The UN Committee on the Elimination of Racial Discrimination interpreted this article such that all forms of indirect discrimination against a group of persons suspected of terrorist offenses are prohibited. [...]**

**On the obligation to act equally and without discrimination towards all suspects in criminal proceedings, see Articles 2 (1), 14 (3) and 2 of the International Covenant on Civil and Political Rights (ICCPR).**

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<sup>2</sup> HCJ 11163/03, *The High Follow-Up Committee v. The State of Israel* (Nevo, 27 February 2006), Article 18 of Justice Barak's judgment; HCJ 332/87, *Ben Shlomo v. Minister of the Interior*, PD 43(3) 353, 356 (1989).

Violation of constitutional rights is contrary to the terms of the limitation clause

1. Violation not in accordance with the law

**52. The Petitioners will argue that the violation of suspects' rights is not in accordance with the law, and is null and void. The exemption from recording interrogations is grounded in the law in an ambiguous manner, and does not meet legal requirements. The GSS, acting as an interrogating authority, has exempted itself from the obligation to record interrogations, in the absence of authorizing legislation. [...]**

2. The purpose of the exemption is inappropriate

**58. The Petitioners will argue that both the subjective and objective purposes behind the exemption from documenting interrogations of security suspects are inappropriate. Consequently, the exemption must be annulled for this reason alone. [...]**

**64. The Petitioners will argue that in view of the magnitude of the violation of suspects' constitutional rights, the violating rule must fulfill a substantial social objective in order for it to be considered valid. The Respondents have not indicated any substantive interest or urgent need to justify the purpose of the exemption. [...] The interests which the Respondents aim to protect are meant to fulfill a single objective: to remove interrogation facilities from the eyes of the judges and from any other essential control mechanism. Methods of interrogation are subject to accountability, and whoever employs them must be prepared to reveal them when so demanded. [...]**

3. The violation of constitutional rights is disproportionate

**66. The Petitioners will argue that the Respondents' failure to record interrogations of security suspects violates suspects' constitutional rights to liberty, due process, dignity and equality to an excessive degree. [...]**

**70. [...] Legislative measures that violate a constitutional right will be determined to be appropriate only if the objective of the law cannot be achieved by other means that involve a lesser violation of rights. The Petitioners emphasize that the Respondents chose an arbitrary measure that indiscriminately negates a priori any possibility of recording suspects' interrogations. Fulfilling the aims to which the Respondents aspire may be done in other, less harmful ways.<sup>3</sup> [...]**

**75. In the Anonymous case, in which this honorable Court unanimously invalidated a law that allowed security suspect detention hearings to take place in the absence**

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<sup>3</sup> See HCJ 3969/06, *Head of Dir Samet Council v. IDF Commander (Nevo)*, 22 October 2009; HCJ 2056/04, *Beit Suriq Village Council v. The Government of Israel*, PD 58(5), 807; HCJ 8276/05, *Adalah v. The Minister of Defense (Nevo)*, 12 December 2006.

of the suspect or his or her representative, Justice Rivlin asserted that the concern for the integrity of suspects' rights and for the Court's ability to administer justice is greatly increased in the case of security suspects, whose ability to defend themselves in detention proceedings is limited in view of the various measures that may be employed against them. [...]

Violation of the principle of separation of powers and the Court's ability to conduct judicial review

**79.** Conducting judicial review of interrogation and detention proceedings is a supreme principle and cornerstone of detention law, prompted by the Basic Law: Human Dignity and Liberty. The Court's most important mission is to ascertain the truth. However, the Court's function is not only to ascertain the truth but also to monitor the investigating authority and its conduct in interrogations, which are also intended to uncover the truth. Judicial review is a necessary measure to protect persons from arbitrary detention, and an essential condition for defending the right to liberty against unwarranted violation by continued imprisonment based on false confessions and invalid evidence. [...]

Violation of the requirements of transparency and oversight that are imposed on the state in general, and the interrogating authorities in particular:

**84.** The interrogating authorities, like any other authority and perhaps even more so, are obliged to operate in a transparent manner, allowing their actions to be subject to public scrutiny and monitoring. The possibility of exposing the conduct of the interrogating authorities may strengthen the public's belief that the authority is doing the duty in which it was entrusted without discrimination or bias [...]. The interrogators' knowledge that his words and actions are being recorded and may be subject to judicial review will doubtlessly bring about calculated restraint in his behavior and cause him to adhere to the limits of what is allowed and prohibited during interrogation. [...]

**87.** The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires states to use effective judicial measures to prevent torture (Article 2(a)). The state's obligation to prohibit torture or cruel treatment against detainees and to take action to prevent these acts includes the obligation to maintain effective and appropriate monitoring mechanisms. Exemption from making recordings of suspects' interrogations specifically as pertains to serious offenses constitutes a grave violation of Israel's obligations under Article 11 of the Convention Against Torture. Article 11 requires that each state party keep under systematic review of detention and interrogation practices, with the objective of preventing any form of torture and degradation.

See also: Article 15 of the Convention Against Torture and Articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR).

88. Thus, exemption from making audio and video recordings of security suspects' interrogations violates suspects' constitutional rights, as well as other democratic principles, beyond that which is necessary. The value of due process and a fair criminal trial without discrimination between suspects is of great magnitude, outweighing any other interest that is involved in the interrogation.

Based on these arguments, the Honorable Court is requested to grant an order nisi, as requested at the outset of this petition and, following receipt of the Respondents' response, to make it absolute.

Abeer Baker, Advocate  
Representing the Petitioners  
20 December 2010



## Coerced False Confessions: The Case of Palestinian Children Psychiatric Expert Opinion

**Graciela Carmon, M.D.**

*Child and Adolescent Psychiatrist and a Member of the Board of Directors of Physicians for Human Rights-Israel*

### Introduction by Physicians for Human Rights-Israel

Israel's policy of detaining Palestinians in the West Bank and East Jerusalem, particularly children and youth, is part and parcel of its policy of Occupation. It is a primary means of oppression and crushing Palestinian resistance, while spreading terror and fear throughout the entire population via the systematic, calculated abuse and breaking of individuals. Arbitrary arrests, torture, and cruel, inhuman or degrading treatment (CIDT), particularly of children, are fundamental expressions of the essence of the Israeli Occupation.

Dr. Graciela Carmon, M.D., a member of Physicians for Human Rights-Israel's (PHR-Israel) Board of Directors, specializes in child and youth psychiatry, and has gained extensive experience and expertise in this area. At the request of PHR-Israel, Dr. Carmon wrote an expert psychiatric opinion on the emotional and developmental factors that lead children to make false confessions during interrogations, and the implications of these confessions for the lives of these children and those around them.

Dr. Carmon's medical opinion was submitted to the Judea Military Court by Attorney Gabi Lasky in the case of A.A., a 14-year-old Palestinian boy who was detained,

interrogated and indicted for stone-throwing. In addition to providing her written opinion, Dr. Carmon also testified before the Military Court on 4 July 2011. The Court determined that Dr. Carmon's opinion was acceptable and that the weight ascribed to its conclusions would be determined at a later date.

Every year, lawyers representing Palestinian children and adolescents and Israeli and Palestinian human rights organizations gather testimonies that reveal the systematic use of verbal and physical abuse and threats by the Israeli security forces against Palestinian children and/or members of their families during detention. The detention and interrogation of Palestinian children and adolescents are typically carried out in blatant violation of their rights.

The aforementioned methods of detention and interrogation damage the child or adolescent's emotional and physical wellbeing, and usually break his or her willpower to endure the interrogation process. While many of these methods can be considered CIDT, some of them meet the criteria of torture.

According to DCI-Palestine's analysis of data collected on the basis of 100 affidavits given by children who were detained in 2009, 81% of the children provided confessions following detention and interrogation which were conducted under the conditions described above.<sup>1</sup> 55% of the children represented by the organization in 2010 stated that they had been threatened during interrogation or were offered rewards, such as a lesser sentence, if they confessed.<sup>2</sup>

Israeli law has prescribed special procedures to regulate the detention and interrogation of children and adolescents, providing special safeguards for children due to their young age, in recognition of their unique needs, their particular developmental and emotional makeup, and the anticipated harm to their normal development and future in the absence of such safeguards. One of the considerations that was taken into consideration in determining the current safeguards adopted in Israeli law is the concern that minors may be coerced or encouraged to incriminate themselves or others.

The reliance of the Israeli military and civil legal systems solely on a minor's (or adult's) confession – the harsh and harmful methods of detention and interrogation to which they are subjected – bears witness to a politically-driven and systemic pattern of oppression of the whole Palestinian population by causing harm to individuals.

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<sup>1</sup> DCI-Palestine, *Annual Report 2009*: <http://www.dci-pal.org/english/publ/annual/report2009.pdf>

<sup>2</sup> DCI-Palestine, *In Their Own Words*, January 2011: <http://www.dci-pal.org/English/Doc/Press/JANUARY2011.pdf>

## The Expert Opinion by Graciela Carmon

May 2011

The purpose of this expert opinion is to address psychological and social factors that affect children and adolescents who are in custody and undergoing police interrogation. Three main questions are raised: **What is the effect of the interrogation methods that are employed by the Israeli police, Israel Security Agency (ISA) agents, or the Israeli army on the behavior and mental state of the child or adolescent who is detained and under interrogation? What are the mental and social consequences for the child or adolescent, and his or her family, following a traumatic interrogation experience? What are the psychological, developmental and social factors that increase the vulnerability of children and adolescents and may lead to coerced false confessions?**

Interrogations in general are stressful situations for every person who undergoes them, but certain interrogation conditions and methods may lead to violation of the suspect's free will, disruption of his or her mental balance, and therefore to coerced confessions.

Any person in detention and under interrogation, but especially a child or adolescent, is liable to give a false confession, despite his or her innocence, in order to escape from the situation. This is true particularly in the following circumstances: mental and/or physical stress, threats, mental and/or physical torture, cruel treatment, humiliation, physical and/or mental exhaustion, sleep deprivation, prolonged questioning for many hours, leading questioning, and the use of deceptive and manipulative techniques (e.g. polygraph tests, providing false investigation results, fingerprints, blood, and presenting false witnesses). I would like to note in particular that severe interrogation methods, such as isolation, may lead to irreversible mental damage, ranging from behavioral changes to a loss of touch with reality (a psychotic state).

Following the application of such methods, the detainee feels helpless and out of control of the situation. This state of mind may lead the detainee to surrender totally to the will of the interrogators, yield to their requests and provide a confession according to their demands, a confession that will free the detainee from the interrogation.

Although some detainees understand that providing a confession, despite their innocence, will have negative repercussions in the future, they nevertheless confess, as the immediate mental and/or physical anguish they feel overrides the future implications, whatever they may be.

The groups most vulnerable to these methods of interrogation, and who have a high likelihood of providing a false confession under coercion, are children and adolescents, drug addicts and/or alcoholics, and people with mental illness or mental retardation.

## **The psychological, developmental and social factors that increase the vulnerability of children and adolescents and that may lead to false confessions under coercion**

- Children and adolescents have a lesser ability to endure pain and mental and/or physical stress than adults.
- In terms of psycho-biological development, the younger a child or adolescent is, the less he or she is capable of taking responsibility for his or her actions, and of analyzing complex and shifting situations. In addition, the younger the child, the more dependent he or she is. Children are incapable of objectively analyzing their actions and cannot distinguish between what they did and what they say they did.
- Neuropsychological research indicates that there are differences in maturity between a child or adolescent and an adult. Among other things, the disparity in maturity levels is apparent in the decision-making process, which is influenced by cognitive and psychological factors, together with the ability to analyze and comprehend different situations. These factors affect the ability of the child or adolescent to understand his or her legal rights and comprehend the legal process that he or she is undergoing. Many studies have shown that even in cases where children and adolescents were read their rights, they did not fully understand them or their implications. The cognitive processes of adolescents are more mature and advanced than those of children, but still do not reach maturity level of adults; therefore, adolescents also have difficulty in understanding their legal rights and the legal procedure.
- Children and adolescents are more vulnerable than adults to psychological methods of interrogation. They may confess to crimes or offenses that they did not commit out of impulsiveness, fear or resignation, rather than out of a free and rational choice.
- Children and adolescents are more vulnerable to methods of leading questions in an interrogation. They are more vulnerable to deception and manipulation than adults, due to their relatively short life experience, and because of their tendency to believe in the absolute power of authority figures, such as teachers, religious leaders, parents, doctors, and police officers. Statements such as, "I thought, because they promised me, that if I tell them things they would send me home,"<sup>3</sup> or, "No one told me that policemen are allowed to lie,"<sup>4</sup> illustrate the extent of the vulnerability of children to these methods. Since in their normative lives, children and adolescents attend establishments that are managed by mature authority figures, their natural tendency is to respond to the wishes and authority of adults. Under stress, for example during an interrogation, they lack the ability, and even the option, to object to requests or coercion by adults.
- Children and adolescents are less future-oriented than adults. They take greater account of short-term than long-term consequences.

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<sup>3</sup> Christine S. Scott-Hayward, "Explaining juvenile false confessions: Adolescent development and police interrogations," *Law and Psychology Review*, vol. 31, Spring 2007, p. 68.

<sup>4</sup> *Ibid.*

## **Conditions of detention and interrogation for Palestinian children and adolescents**

- Detention without warning and/or a previous summons.
- Forceful entry into the child or adolescent's house in the middle of the night. This is often done without a warrant, by a large number of soldiers with drawn weapons who threaten the child or adolescent and his or her family. Sometimes the soldiers wear black uniforms and their faces are covered with masks or camouflaged with makeup. The soldiers search the house, awaken its occupants, and drag the child or adolescent out of bed.
- During the arrest, the soldiers employ violence against the children or adolescents who are being detained, and/or their families. Many children and adolescents complain about the use of violence during the jeep ride to the interrogation facility or the wait at the military base.
- The child or adolescent is placed in a jeep waiting outside, and from there is driven to a military base. There he or she is forced to wait for hours, handcuffed and often blindfolded, without food or water, and deprived of access to the toilet or a place to sleep.
- Parents are not informed of where the child or adolescent has been taken.
- The detention and interrogation are undertaken in the absence of the parents.
- The interrogation of the child or adolescent is performed by a number of regular police investigators, and not by certified youth investigators.
- The child or adolescent is sometimes prevented from seeing an attorney during the first few days of the interrogation.
- The child or adolescent is held in isolation and deprived of sleep for many hours.

## **The consequences of the aforementioned interrogation and detention conditions for the mental well-being of Palestinian children and adolescents**

In traumatic conditions of interrogation and detention, like those described above, children and adolescents lose control of the situation and become particularly vulnerable, lacking internal mental resources and external ones drawn from adult figures. Without these resources, they feel helpless and unprotected. Their vulnerability prevents children and adolescents from acting in crisis situations. They thus become apathetic and indifferent, lose their trust in adults, suffer from episodes of extreme anxiety, experience learning difficulties, and suffer from sleeping problems and nightmares. In addition, they may display severe behavioral disorders, such as aggression, over-dependence, avoidance, difficulty in returning to a routine, isolationist tendencies, and weeping. This is in addition to physical disorders, including eating disorders and bedwetting.

Moreover, following the extreme humiliation and the physical and mental stress the children and adolescents endure throughout the interrogation, they experience a profound loss of self-esteem, leading to harm to their sense of dignity and identity.

I also want to emphasize the negative effects of the interrogation of children and adolescents on the family structure, since the family is left in a state of disintegration and helplessness. The adults in the family do not feel that they can provide adequate support to the children and adolescents, as they were unable to prevent their arrest and the hardships of their interrogation. The entire family structure is disrupted as a result of the undermining of the adults as a source of support and authority.

## Summary

The violent arrest process and psychological interrogation methods mentioned above lead to the breaking of the ability of the child or adolescent to withstand the interrogation and flagrantly violate his or her rights. These interrogation methods, when applied to children and adolescents, are equivalent to torture. These methods deeply undermine the dignity and personality of the child or adolescent, and inflict pain and severe mental suffering. Uncertainty and helplessness are situations that can too easily lead a child or adolescent to provide the requested confession out of impulsiveness, fear or submission. It is a decision that is far from free and rational choice.

P. 2763/09<sup>5</sup>: The fact that the investigation of the appellant was conducted at 4:00 a.m., immediately following his arrest, raises some difficult questions. Indeed, the law does not prohibit such an action. Previous rulings have already acknowledged the possibility that a late-night interrogation may impair the discretion of the interrogated individual... There is no doubt that these concerns grow stronger when the suspect is only a 15-year-old minor, who was only dubiously aware of his rights. It is simple to imagine what the state of mind of a child arrested by soldiers in the middle of the night, and immediately brought to a police interrogation may be... In light of the importance of these issues, and their strong influence on the protection of the rights of the detainee, which are basic, fundamental rights... it is appropriate, in my opinion, that the need to provide operative directives to the Israeli Police should be examined, if such directives do not already exist.

The social and mental consequences of the use of the aforementioned methods of detention and interrogation by the investigating and/or detaining authority for the life of the child or adolescent are difficult to remedy and damaging . They can cause serious mental suffering to a child or adolescent and cause psychological and psychiatric problem, as well as post-traumatic stress disorder (PTSD), psychosomatic diseases, fits of anger, difficulties in learning and concentration, memory problems, fears and anxieties, sleep disorders, eating disorders, regressive symptoms, and bedwetting. Such outcomes are devastating to the normative development of the child or adolescent, especially when he or she is innocent.

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<sup>5</sup> Military Court Appeal (West Bank) 2763/09, *A.A. v. The Military Prosecutor*, 16 August 2009.

These detention and interrogation methods ultimately create a system that breaks down, exhausts and permeates the personality of the child or adolescent and robs him or her of hope. These methods are particularly harmful to children and adolescents who live in poor, isolated populations, in a state of conflict, political tension, and/or severe social stress, such as the occupied Palestinian population. The harmful effects on children can also harm the society to which they belong.

Every child has the right to be a child, to his or her dignity, and to protection from all forms of violence.

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# Israel's Use of Torture and CIDT against Palestinians in the Gaza Strip<sup>1</sup>

Al Mezan Center for Human Rights

## Introduction

Between May 2009 and April 2011, Al Mezan Center for Human Rights conducted research on human rights violations in the Gaza Strip. This data collected indicates that the Israeli Occupation Forces (IOF), including the Israeli military and the Israel Security Agency (ISA or Shabak), continue to use torture and cruel, inhuman or degrading treatment or punishment (CIDT) against the Palestinians of Gaza. Moreover, the perpetrators of these acts are not held accountable, but are protected by a culture of impunity that has developed in Israel towards those who commit torture against Palestinians.

Numerous Israeli practices and policies violate the absolute prohibition of torture and CIDT enshrined in international law. Such practices and policies are particularly prevalent against Palestinians from the Gaza Strip, where Israel continues to exercise a very high level of effective control and to implement a blockade of the territory. To enforce this closure, Israel pursues practices that allow for the arrest and detention of Palestinians, including medical patients and fishermen, and permits the use of torture and CIDT against them.

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<sup>1</sup> The data for this report comes from Al Mezan, *Torture and other Forms of Cruel, Inhumane and Degrading Treatment against the Palestinian Population in Gaza Strip by the IOF*, July 2011, available at: [http://www.mezan.org/en/details.php?id=12381&ddname=Torture&id2=7&id\\_dept=22&p=center\\_more](http://www.mezan.org/en/details.php?id=12381&ddname=Torture&id2=7&id_dept=22&p=center_more)

This paper presents the latest data on these acts, gathered by Al Mezan. It demonstrates and explains how the Israeli-imposed blockade of Gaza is being enforced through policies and practices that violate the absolute prohibition of torture and CIDT. In identifying incidents and/or practices that fall within the definitions of torture and CIDT, Al Mezan has been guided by the jurisprudence of the UN Committee Against Torture (CAT) and the UN Human Rights Committee (HRC).

This chapter first describes the current situation in the Gaza Strip, particularly the effects of the policy of blockade on the population and how this makes Palestinians vulnerable to torture and CIDT. The next sections present the data collected by Al Mezan's field monitors between May 2009 and April 2011, and explain how Israel uses torture and CIDT against certain groups as a means of exerting its control over the Gaza Strip. The chapter then concludes with a brief analysis of how the continued use and threat of torture and CIDT has had an impact on the entire population of the Gaza Strip.

### **The blockade and other measures used by Israel to maintain control**

Over the last decade, the Israeli government has implemented a series of measures that constitute collective punishment against the population of Gaza. By controlling the land crossing points between Gaza and Israel, it has imposed severe restrictions on the movement of people and goods. Israel has significantly reduced the quantities of consumer goods, basic commodities, fuel, and medical supplies and equipment allowed to enter the Gaza Strip. Construction materials have been completely banned, leaving the housing sector in crisis and many families homeless, including large numbers who lost their homes during Operation Cast Lead (December 2008-January 2009) and as a result of Israel's continuing policy of house demolitions. Another outcome of the ban on building materials has been the rise in the numbers of scrap and rubble collectors, especially in areas close to the border fence, where many home demolitions have taken place.

Israel has also prevented the movement of Palestinians within the Gaza Strip's land and sea territory. Since February 2009, Palestinian fishermen have only been permitted to fish within a zone of three nautical miles, despite a previous agreement over a 20-nautical mile limit under the Oslo Accords. The Oslo Accords also stipulated a buffer zone of 50 meters from the border fence and into the territory of the Gaza Strip. However, in January 2009, the IOF dropped leaflets on various areas of the Strip declaring that it would fire at Palestinians who came within 300 meters of the border fence between Gaza and Israel. In practice, Palestinians have been shot at up to two kilometers from the border as part of the enforcement of the buffer zone.<sup>2</sup>

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<sup>2</sup> Save the Children UK, *Research Report: Life on the Edge: The struggle to survive and the impact of forced displacement in high risk areas of the occupied Palestinian territory*, October 2009, p. 47, available at: [http://www.savethechildren.org.uk/sites/default/files/docs/English\\_Research\\_Report\\_with\\_Cover\\_low\\_res\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/English_Research_Report_with_Cover_low_res_1.pdf)

The combination of the blockade and other policies to restrict movement allow the IOF to arrest and employ torture and CIDT against Palestinians with whom it comes into contact. The following sections will identify those groups who are most at risk of torture and CIDT and present the latest figures on the use of torture and CIDT collected by AI Mezan's field and data management staff from 1 May 2009 to 30 April 2011.

## Who is Israel arresting?

From May 2009 to April 2011, AI Mezan documented the following cases of arrests and detentions:

- 140 Palestinians from the Gaza Strip arrested by the IOF;
- At least 15 Palestinians from Gaza detained by Israel as 'unlawful combatants,' 6 of whom remain in detention;<sup>3</sup>
- 85 Palestinian detainees subjected to torture in Israeli prisons;
- At least 65 fishermen arrested by the IOF, including 4 minors, most of whom were subjected to torture and/or CIDT;
- 12 medical patients or their escorting relatives arrested by the IOF at Erez crossing;
- 38 rubble and scrap collectors, including 4 minors, arrested during limited incursions by Israel into the Gaza Strip; most of those arrested were subjected to torture and/or CIDT;
- No detainee from the Gaza Strip was permitted a visit from a family member from the Gaza Strip.

Those persons most vulnerable to arrest and therefore torture and/or CIDT are medical patients and their escorting relatives trying to leave Gaza through the Erez crossing, fishermen, and rubble and scrap-collectors. Israel arrests and detains members of these groups in order to maintain its blockade of Gaza and its effective control of the area, and the land and sea borders in particular.

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<sup>3</sup>Information obtained by AI Mezan's lawyers, who have represented several alleged "unlawful combatants," and from the Palestinian Ministry of Prisoners Affairs in May 2011. For more information see, AI Mezan *Unlawful Combatants: The Violation of Gazan Detainees' Rights in Israeli Prisons*, April 2009, available at: [http://www.mezan.org/en/details.php?id=8619&ddname=detention&id\\_dept=22&id2=9&p=center](http://www.mezan.org/en/details.php?id=8619&ddname=detention&id_dept=22&id2=9&p=center); and AI Mezan, "AI Mezan Calls for Release of All Detainees Held by Israel and Especially those Categorized as 'Unlawful Combatants' in Contravention of International Law and Human Rights Principles," 26 March 2009, available at: [http://www.mezan.org/en/details.php?id=8596&ddname=detention&id\\_dept=9&id2=9&p=center](http://www.mezan.org/en/details.php?id=8596&ddname=detention&id_dept=9&id2=9&p=center)

## Patients' access to medical care outside Gaza

In 2009 and 2010, the Palestinian Ministry of Health (MoH) referred a total of 30,127 patients for treatment outside the Gaza Strip.<sup>4</sup> Of these, 6,538 patients in 2009 and 9,585 in 2010 went to receive treatment in the West Bank (including East Jerusalem), Israel, and Jordan, for which they required Israeli permits to exit Gaza through the Erez crossing.<sup>5</sup>

From May 2009 to April 2011, Al Mezan documented the following cases of the denial of access of patients to medical care outside Gaza:

- 856 cases of patients whose applications for permits to cross Erez were delayed;
- 242 cases of patients whose applications for permits to cross Erez were delayed;
- 553 cases of patients who were asked to appear at Erez for an interview and interrogation by ISA;<sup>6</sup>
- 6 cases of patients who died while waiting for their permits to be issued, including 3 children and 1 woman;
- 12 cases of patients or their escorting relatives who were arrested at the Erez crossing;<sup>7</sup>
- 7 reports from patients who were coerced into giving information about relatives and/or friends in exchange for a permit.<sup>8</sup>

Due in large part to the closure and blockade of Gaza, there is a lack of trained staff and advanced, specialized medical equipment that is needed for certain complex conditions, including heart, nerve and eye-related conditions. Medical professionals face severe restrictions on their movement and, in most cases, cannot leave Gaza to receive training, including to other parts of the occupied Palestinian territory (oPt). Israel does not allow essential medical equipment, including X-ray machines, for example, to enter Gaza as a matter of policy.<sup>9</sup> As a result, the Palestinian health authorities have had to refer more than a thousand patients to hospitals outside the Gaza Strip every month to receive treatment.

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<sup>4</sup> See World Health Organization, *Referral of Patients from Gaza, Data and Commentary for 2010*, July 2011, available at: [http://issuu.com/who-opt/docs/who\\_referral\\_abroad\\_report\\_gaza](http://issuu.com/who-opt/docs/who_referral_abroad_report_gaza); and Palestinian Ministry of Health, *Health Annual Report, Palestine 2009*, April 2010, p. 134, available at: <http://www.moh.ps/attach/19.pdf>

<sup>5</sup> See also, Palestinian Ministry of Health, *Health Annual Report, Palestine 2009*, April 2010, p. 134. A monthly breakdown of permit requests is not available from the Palestinian Ministry of Health.

<sup>6</sup> According to information obtained by the Coordination Office at the Ministry of Health, which is responsible for coordinating with the Israelis to facilitate the access of medical patients to hospitals outside the Gaza Strip.

<sup>7</sup> See Joint Press Release, "Human rights organizations: The ISA (Shabak) summons sick patients to the Erez Crossing and detains them, preventing them from receiving medical treatment," 1 March 2010, available at: [http://www.mezan.org/en/details.php?id=9776&ddname=torture&id\\_dept=31&id2=9&p=center](http://www.mezan.org/en/details.php?id=9776&ddname=torture&id_dept=31&id2=9&p=center). See also, Al Mezan, "Al Mezan Condemns Israeli Court Sentencing Palestinian Patient to 30 Months Imprisonment," 21 September 2010, available at: [http://www.mezan.org/en/details.php?id=10768&ddname=detention%20treatment%20abroad&id\\_dept=9&p=center](http://www.mezan.org/en/details.php?id=10768&ddname=detention%20treatment%20abroad&id_dept=9&p=center)

<sup>8</sup> Cases of coercion may go unreported because Palestinians are often afraid to talk about their experiences, since their lives may be put in danger if others find out that they have spoken to Israelis and been asked to collaborate with Israel.

<sup>9</sup> Physicians for Human Rights-Israel *Israel has Pledged to Ease the Closure, What Now? A Situation Report on Obstacles Facing Gaza Residents in Need of Medical Treatment*, July 2010, available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/EC30718EA3DA7CE8C1257758004C4163-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/EC30718EA3DA7CE8C1257758004C4163-Full_Report.pdf)

Patients are mainly referred to hospitals in the West Bank (including East Jerusalem) and Israel. Others are referred to Egypt and Jordan. Patients who are referred to hospitals in the West Bank, Israel or Jordan have to pass through the Erez crossing to reach these hospitals. To do so, they require permission from the ISA, which has the authority and discretion to grant or refuse to issue the permits.

The ISA's processing of patients' requests for permits is lengthy and often causes patients to miss their hospital appointments, which in turn forces them to go through the referral mechanism again, sometimes repeatedly. The Israeli authorities do not provide any detailed reasons for the long delays other than vague 'security' concerns. As most of the referred patients require life-saving medical treatment, patients have died while waiting for a response to their requests for permits (six died between May 2009 and April 2011). In addition to the long delays in the permit procedure, Israel has created a distinction between life-threatening and non-life-threatening, or 'quality of life', medical treatment. This distinction between a life-threatening medical state and one that merely hinders quality of life is arbitrary, but is the main criterion for determining whether a patient is granted a travel permit to cross Erez or not.<sup>10</sup>

The data gathered by Al Mezan also indicates that the IOF exploits Gaza patients' need to access medical treatment outside the Gaza Strip to obtain intelligence information. In some cases, patients applying for permission to exit Gaza through Erez are summoned for an interview/interrogation by the ISA at Erez. During these interviews, patients are usually interrogated and coerced into giving information about people in their acquaintance. Even patients who have not been called for an interview may be arrested and interrogated by the ISA once they reach Erez.<sup>11</sup>

According to Al Mezan's documentation, medical patients who are interviewed at Erez by the ISA are subjected to CIDT. Firstly, they are forced to walk approximately one kilometer to reach the main gate at the crossing. They are then subjected to complicated search procedures that many find exhausting and difficult, particularly the disabled. All patients are strip searched. They are then kept waiting for hours at a time in a hall inside the crossing before being interviewed/interrogated. During this period they are denied access to food and water.<sup>12</sup>

Patients who refuse to provide information run the risk of being denied a permit to cross Erez and therefore of accessing vital, usually life-saving, medical treatment. Al Mezan's research also shows that many patients and/or their escorting relatives have been arrested and taken to prison, where they are interrogated and frequently exposed to torture and/or CIDT.<sup>13</sup>

<sup>10</sup> See Adalah, Physicians for Human Right-Israel and Al Mezan, *Who Gets to Go?*, June 2010, available at: <http://www.mezan.org/upload/10401.pdf>

<sup>11</sup> Information from affidavits taken by Al Mezan's lawyers and field workers.

<sup>12</sup> Information from affidavits taken by Al Mezan's lawyers and field workers.

<sup>13</sup> See Al Mezan, *Fact Sheet: Gaza Patients Access to Medical Treatment Abroad*, 27 December 2010, available at: <http://www.mezan.org/upload/11211.pdf>. For more information about the conditions under which Gaza patients apply for permits to cross Erez, see Adalah, Physicians for Human Right-Israel and Al Mezan, *Who Gets to Go?*, June 2010.

Affidavits collected by Al Mezan show that patients who are arrested and detained have been subjected to torture without consideration for their health during detention. They are treated no differently from other detainees. They are also victims of medical negligence resulting from the poor medical services in prison, and the fact that they are rarely referred to hospitals that have specialized medical equipment or services.

## **CIDT of Palestinian fishermen**

From May 2009 to April 2011, Al Mezan documented the following incidents involving Palestinian fishermen:

- 92 incidents involving attacks, including shootings and arrests, on fishermen off the coast of the Gaza Strip, both within the three-nautical mile zone and outside it;<sup>14</sup>
- 75 cases of attacks committed against fishermen by Israel, resulting in 2 killings and 8 injuries;
- 59 fishermen were arrested, including three minors. All reported being subjected to CIDT during their arrest.

As a result of the Israeli-imposed fishing limit of three nautical miles, fishermen are now among the most vulnerable and poor population groups in the Gaza Strip. There are about 4,400 fishermen in Gaza, of whom 3,700 are registered with the Palestinian Fishermen's Syndicate. Approximately 65,000 people rely on fishing for their living.<sup>15</sup>

The Israeli navy chases and opens fire on fishermen on an almost daily basis, forcing them to leave the sea. On many occasions, the Israeli navy also arrests fishermen, subjects them to CIDT, and/or confiscates their fishing equipment and boats. Al Mezan's documentation indicates that the Israeli navy followed a repeated pattern of procedures that suggests that specific security protocols are in place for the arrest of fishermen from Gaza. In all the documented cases, Israeli naval soldiers ordered the fishermen to stop fishing and to turn off the engines of their boats. They then ordered the fishermen to remove their clothes and swim towards the Israeli naval boats, even in winter, where they were handcuffed, arrested and taken to Israel. In their affidavits to Al Mezan, fishermen stated that Israeli naval officers left them without clothing for several hours, even during the winter. During their detention, usually at the Israeli port of Ashdod, Palestinian fishermen also stated that they were forced to wait handcuffed with plastic ties, blindfolded for many hours and left without food. In all cases the IOF interrogated the detained fishermen and applied pressure on them, through harsh interrogation techniques including shouting,

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<sup>14</sup> Al Mezan does not distinguish between incidents that take place within the permitted zone and those that take place outside it. The three-nautical mile limit was unilaterally imposed by Israel and fishermen's lives are at risk anywhere in the sea because the limit is not respected by the Israeli navy.

<sup>15</sup> See the Office for the Coordination of Humanitarian Affairs (OCHA) and the World Food Programme (WFP), *Between the Fence and a Hard Place: The Humanitarian Impact of Israeli-imposed restrictions on Access to Land and Sea in the Gaza Strip*, August 2010, pp. 10, 11, available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_special\\_focus\\_2010\\_08\\_19\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_special_focus_2010_08_19_english.pdf)



offering monetary payment for information, or threatening further detention, in order to extract information.<sup>16</sup>

Despite having radios onboard their boats, the fishermen reported never having received warning from the Israeli navy before being attacked. This is despite the fact that the Israeli navy possesses advanced communications technology that enables it to warn Palestinian fishermen if they have strayed out of the permitted area. Instead, however, the navy uses violent and degrading methods to enforce the restrictions and prevent fishermen from earning their livelihood.

### **CIDT of civilians in the buffer zone**

From May 2009 to April 2011, Al Mezan documented the following cases of CIDT of civilians in the buffer zone by Israel:

- 252 cases of shooting in the buffer zone, involving rubble and scrap collectors, farmers, peaceful protestors, residents of the buffer zone and other civilians present close to the border;
- 26 cases of people, including 6 children and 2 women, who were killed;
- 142 cases of people who sustained injuries, including 39 children and 2 women;
- 38 cases of arrests of rubble and scrap collectors during limited Israeli incursions into Gaza, including 4 children;
- 22 out of the 38 arrested were subjected to CIDT.

The IOF has carried out continuous attacks on farmers, students, schools, and other civilians who undertake economic activities or have property in the buffer zone. The imposition of the buffer zone has deprived hundreds of Palestinian families of their source of living as the land, which accounts for approximately 17 percent of Gaza's total area and 35 percent of the Strip's cultivated land, is too dangerous to farm.<sup>17</sup>

With the continuation of the blockade of Gaza continues, the need for construction materials to rebuild destroyed houses has increased, particularly in the aftermath of Operation Cast Lead, and to meet the demands of natural population growth. Rubble and scrap collecting in order to extract gravel and iron from destroyed structures near the northern and eastern border fence between Gaza and Israel has flourished, providing a significant source of income for many families.<sup>18</sup> Many of these workers come close to, and sometimes even enter, the IOF-imposed security buffer zone. The IOF routinely opens direct fire at these collectors in order to intimidate them and deter them from approaching the buffer zone.<sup>19</sup>

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<sup>16</sup> Information from affidavits taken by Al Mezan's lawyers and field workers.

<sup>17</sup> OCHA and WFP, *Between the Fence and a Hard Place*, August 2010, p. 5.

<sup>18</sup> Al Haq, *Shifting Paradigms: Israel's Enforcement of the Buffer Zone in the Gaza Strip*, 2011, p. 7, available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_special\\_focus\\_2010\\_08\\_19\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_special_focus_2010_08_19_english.pdf)

<sup>19</sup> OCHA, *Easing the Blockade: Assessing the Humanitarian Impact on the Population of the Gaza Strip*, March 2011, p. 2, available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_special\\_easing\\_the\\_blockade\\_2011\\_03\\_english.pdf](http://www.ochaopt.org/documents/ocha_opt_special_easing_the_blockade_2011_03_english.pdf)

## Demolition of homes and displacement

From September 2000 to the present, Al Mezan's data shows destruction by the IOF to 19,027 homes in Gaza, 5,694 of which were completely destroyed. 183,509 residents, including 91,007 children, have been directly affected. During Operation Cast Lead alone, Al Mezan documented destruction or damage to 11,149 homes as a result of attacks by the IOF, of which 2,652 homes were destroyed completely. These houses accommodated 108,748 people, including 53,217 children.<sup>20</sup>

From May 2009 to April 2011, Al Mezan documented the following cases of home demolitions and displacement:

- 162 cases of houses that sustained damage, including 13 that were demolished entirely;
- 1,790 people who were displaced, including 846 children.

Many homes in Gaza are demolished, some by aerial bombardment, in a policy aimed at punishing members of Palestinian resistance groups and their families, and residents of areas from where rockets have been launched into Israel. The IOF has frequently demolished homes near the border fence between the Gaza Strip and Israel, especially following Palestinian attacks from the border area. Others homes have been demolished on the vague pretext of 'strategic' military reasons. Yet other home demolitions have followed the pattern of pre-emptive attacks, as part of a strategy to evacuate the border areas of all persons.<sup>21</sup>

Whatever the reasons given for these home demolitions, they are illegal under international law in the absence of absolute military necessity and proper consideration to the principles of distinction and proportionality. The UN Committee Against Torture has indicated that such home demolitions may constitute CIDT.<sup>22</sup> They further constitute collective punishment.

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<sup>20</sup> For more details, see Al Mezan, *Cast Lead Offensive in Numbers*, 2 August 2009, available at: [http://www.mezan.org/en/details.php?id=8944&ddname=Gaza%20destruction&id\\_dept=14&p=center](http://www.mezan.org/en/details.php?id=8944&ddname=Gaza%20destruction&id_dept=14&p=center)

<sup>21</sup> Home demolitions in the buffer zone have been ongoing since 2000. OCHA states that most land up to 300 meters has been leveled and most structures within this area (including houses) demolished. Land-leveling and demolitions are now concentrated within the areas from 300 meters to 1.5 kilometers from the border fence. See OCHA and WFP, *Between the Fence and a Hard Place*, August 2010, p. 16.

<sup>22</sup> Conclusions and Recommendations of the Committee against Torture: Israel, CAT/C/XVII/Concl.5, 23 November 2001, paras. 6(j) and 7(g), available at: <http://www.unhchr.ch/tbs/doc.nsf/0/60df85db0169438ac1256b110052aac5?Opendocument>; and Concluding observations of the Committee against Torture: Israel, CAT/C/SR/CO/4, 23 June 2009, para. 33, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/431/65/PDF/G0943165.pdf?OpenElement>

## Conclusion

The data in this paper reveals that Israel continues to use various forms of torture and CIDT against Palestinians from the Gaza Strip. Israel not only uses methods of physical and psychological abuse against Palestinians in their detention, but also employs such practices in maintaining the blockade of Gaza, and in restricting movement and access to resources within the Strip. Palestinian fishermen, people who live or work in the buffer zone, and patients crossing through Erez risk being arrested and subjected to torture and CIDT by the Israeli military and security services. Palestinians present in the sea off Gaza's coast and in the up to two kilometer buffer zone along the border with Israel also risk coming under fire and/or having their houses demolished or damaged.

Israel continues to pursue policies that lead to violations of the absolute prohibition of torture and CIDT in international law with impunity, and carries out acts that constitute torture and CIDT in order to maintain its effective control over the population of the Gaza Strip as a whole. The continued threat of torture and CIDT that faces large parts of Gaza's population, the blockade, and other policies that have increased food insecurity, poverty, unemployment and inadequate health care, are pushing Gazans further into a state of vulnerability and submission and hindering their economic and social development. By bringing an end to its use of torture and CIDT against the population of Gaza, and guaranteeing accountability for the victims, Israel will begin to provide the proper protection and redress that the people of Gaza are entitled to under international law.

## **Book review of *Threat: Palestinian Political Prisoners in Israel*, Edited by Abeer Baker and Anat Matar**

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Imprisonment of Palestinians is one of the key mechanisms of Israeli control over the occupied West Bank and Gaza. *Threat: Palestinian Political Prisoners in Israel*, edited by Abeer Baker and Anat Matar, is an excellent, sweeping survey of the rationales and effects of this carceral order, and it illuminates the various ways mass imprisonment has shaped Palestinian political culture and social relations as well as the lives of individuals and families. Unlike many edited collections, every chapter in this volume makes a strong and original contribution. I do have a quibble with the title, however, because it elides the geopolitical fact that the territories are not “Israel”; my preference would be “Israel/Palestine.”

Since 1967, more than half a million Palestinians have been imprisoned, whether as a result of conviction in the Israeli military court system or administrative detention without trial. For the first two decades, as Alina Korn documents, between 45 and 60 percent of the overall prison population in Israel was Palestinian, between 75 and 82 percent of them serving relatively long sentences. During the period of first intifada (1987-93), Israel had the highest per capita prison population in the world. These numbers decreased after the signing of the Oslo Accords in 1993, a trend that was reversed after the outbreak of the second intifada in 2000. In 2006, it reached its highest record of 9,516 (about 46 percent of the overall prison population in Israel). As of 2010, there were 6,620 incarcerated Palestinians.

In the preface, Baker and Matar critically analyze the concept of “security threat” as operationalized by the Israeli state. Palestinians, regardless of the crime for which they are convicted or detained, are classified as security prisoners. In contrast to criminal prisoners for whom there is no official definition because it comports with the “normal” meaning of criminality (i.e., an individualized accusation of a past prohibited act), a security prisoner is someone who committed a crime or is suspected of committing a crime, “which due to its nature or circumstances was defined as a security offense or whose motive was nationalistic” (p. vii). Security offenses encompass acts (actual, intended or suspected) that harm Israelis or menace the state (including the apparatus of occupation) and are motivated by Palestinian nationalistic purposes. Even civil disobedience and non-violent protests are treated as punishable security offenses. All Palestinians are, therefore, potential security prisoners, vulnerable to being seized, interrogated, prosecuted or administratively detained, and treated in a manner categorically unlike the treatment and rights available to criminal prisoners.

*Threat is the finest and most up-to-date collection on the topic of the imprisonment of Palestinians. It should be essential reading for anyone interested in understanding the Israeli occupation and the ongoing conflict.*

The chapters by Alon Harel and Yael Berda further elaborate on the security prisoner concept through which Palestinians are defined as inherently threatening to Israeli security, and to which incarceration is portrayed as a legitimate response to the requirements of national defense. Harel expounds on the sticky grip of the label to criticize the fact that in this system there is no entitlement to individualized, periodic assessment in terms of dangerousness or “transformations of individuals’ character, lifestyle, convictions and identities” (p. 41). This systemic rigidity, he argues, defies the legal

requirements for human dignity because it deprives people of the right to hope. Berda strikes a tone that blends objective analysis (“I wish to describe the classification of the GSS [General Security Services] that has become known to me through my work as a human rights lawyer in Jerusalem”) with biting yet understated analysis of this system: “The category of the security threat is a master category...a tool for classifying people; it becomes a paradigm of thinking, a binary schema for seeing the Palestinian population” (p. 45). Israeli carceralism is a racialized bureaucracy based on the model of colonial administration, and envelops not only Palestinians from the occupied territories, but those who are Israeli citizens as well. Drawing on Hannah Arendt’s *The Origins of Totalitarianism*, Berda describes and analyzes the role of the security services in transforming Palestinians from “suspect populations” into “objective enemies” of the state, the latter deemed “carriers of tendencies.”

Chapters by Sharon Weill, Smadar Ben-Natan, and Michael Sfard address the requirements of international humanitarian law (IHL), which should govern Israel’s belligerent occupation over foreign civilians in territories seized in war, and the manifold ways in which Israel violates the legal limits and duties of an occupying

state. Weill notes that the “preliminary question of the legality of the Occupation itself was left to the political front” – meaning that the politics of IHL interpretation and enforcement has failed to address major legal questions such as the right to self-determination and the prohibition against permanently seizing foreign land as a result of war. She uses the different laws and sentencing policies in Israel’s multiple court systems to illustrate how the occupation has become a form of apartheid. Paradoxically, she notes, “the exclusive reference to IHL [by international lawyers, academics and practitioners] left the Palestinian land and people to become existentially occupied” (pp. 137-38). Why Palestinian militants were never given prisoner-of-war (POW) status is the focus of Ben-Natan’s chapter. During the period of fedayeen armed struggle (1968-71), Israel rejected prisoners’ claims that they were POWs based on the fact that they were not members of the armed forces of a state. The 1977 Additional Protocol I (API) to the Geneva Conventions was devised to bring the Palestinian struggle for self-determination (as well as the anti-apartheid struggle in South Africa and the remaining anti-colonial wars in Africa) within the ambit of IHL by providing a right to fight for freedom for non-state groups that abide by the laws of war. Israel is not a signatory to API, and has consistently refused to accord POW status even to Palestinians who carry arms openly, wear visible insignia and operate under a chain of command on the grounds that these are terrorist organizations whose targets have included civilians. Sfar focuses on the IHL prohibition to transport people from an occupied population to prisons in the territory of the occupying state—which Israel does by the tens of thousands. He examines the derivative rights violations and personal hardships that result for prisoners and their families (e.g., denial of travel permits to visit) and the collective significance of this flagrant violation on Palestinian society writ large. In March 2009, 7,119 Palestinians were imprisoned within the territory of the State of Israel (p. 190). As the crow flies, those prisons are not very far away from the occupied territories, but for all intents and purposes prisoners have been dispatched to a “devil’s island.”

Many chapters offer profound and insightful analyses and first-person accounts of the experience of imprisonment from Palestinians’ perspectives. Maya Rosenfeld’s contribution focuses on the centrality of the prisoners’ movement to Palestinian national politics. The organizing and activism that emerged inside prisons and, to some extent, the cross-factional alliances among prisoners have been a major influence beyond the walls. Also, she notes: “mass imprisonment is most directly discernible in the biographies of entire strata of political officials, public figures and community leaders in the West Bank and Gaza” (p. 6). Walid Daka, a Palestinian citizen of Israel who is serving a life sentence, writes about the current state of affairs inside prisons and the effects of torture and other aspects of imprisonment on the consciousness of prisoners.

Although the vast majority of prisoners have been men, women have been imprisoned as well, and female family members have been detained and abused instrumentally in the interrogation of males. Nahla Abdo’s and Ittaf Alian (Hodaly)’s chapters combine

analysis of women's imprisonment and nationalist activism (including armed struggle and acts of violence) with a critique of the kinds of orientalist feminism that would portray them as mere dupes and victims of Palestinian patriarchalism.

No book about Israeli imprisonment of Palestinians would be complete without coverage of the pervasive use of torture and cruel, inhumane and degrading treatment. *Threat* contains many chapters that address this issue. In 1987, Israel had the ignominious distinction of being the first state in the world to officially and publicly "legalize" torture by endorsing the use of "moderate physical pressure" in the interrogation of Palestinians as a "necessary" and thus legitimate means of combating "hostile terrorist activity," the latter being the GSS's description of all activities that challenged the occupation and/or were motivated by the goal of national self-determination. As contrasted to official assertions that such "pressure" tactics (including but not limited to protracted stress positions and isolation, exposure to extremes in temperature and noise, beatings and shakings, and sensory deprivation through hooding) were limited to ticking bomb situations, they were in fact used on the vast majority of Palestinians who passed through Israeli interrogation centers. In 1999, the Israeli High Court of Justice (HCJ) rendered a decision that the "routine" use of such tactics was henceforth forbidden, but the option would remain available in cases of real emergency. Bana Shoughry-Badarne addresses the question of what has changed since that ruling. Although the GSS operates behind a thick veil of secrecy (and unaccountability), testimonies from people arrested since 1999, and especially during the peak waves of the second intifada, suggest that "torture is still carried out with authorized permission" (p. 120). In 2008, the Public Committee against Torture in Israel filed a contempt of court motion against the GSS, but the HCJ decreed in 2009 that the 1999 decision is declaratory and therefore not enforceable by this means.

Avigdor Feldman contributes two chapters, "Colonel and Major" which is a poem about the old masters of torture, and "Welcome to Shin Bet Country" written in the form of a travel brochure for a "visitor" to the land of prisons. For example: "In Shin Bet country, your diet will consist mainly of the fruits of the imagination...How so? The black bag, while tangible, foul-smelling and revolting, is not believed to exist by the court, which considers it a fruit of the imagination. You, who have partaken of this fruit of the imagination, will never forget its taste" (p. 110). The first-person accounts of Sheikh Muhammad Abu Tir, Osama Barham, Alina and Daka render that "you" into "me."

The limits of space prevent me from mentioning every chapter. In sum, *Threat* is the finest and most up-to-date collection on the topic of the imprisonment of Palestinians. It should be essential reading for anyone interested in understanding the Israeli occupation and the ongoing conflict.



This edited volume is part of a joint initiative by **Adalah – The Legal Center for Arab Minority Rights in Israel**, **Physicians for Human Rights – Israel (PHR-Israel)** and **Al Mezan Center for Human Rights in Gaza** to prevent and fight against torture and ill-treatment in Israel. It is the product of a two-day international expert workshop held in Jerusalem in April 2011 on the subject of “Securing Accountability for Torture and Cruel, Inhuman and Degrading Treatment in Israel: New Trends and Comparative Lessons”.

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