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**The Role of Jurists in Legalizing Torture:  
An Assessment of the Israeli System under  
International Criminal Law**

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## **Introduction: The Sails and the Boat**

The concept of law is deeply soaked in violence. A possible understanding of the term “law” refers to the set of rules that organize the acts and interactions of members of a community, in their relations with the institutions and within themselves. Regarding this last aspect, the moment of institutionalization of the law and regulation of individual relations can be identified as a fundamental step, where violence was deducted from society and placed under the monopoly of the institutions trusted by the population. Abuse of powers from the governors, on the other hand, is supposedly avoided by means of the same law, as law defines the functions and limits of each authority and strikes the fair balance between different societal needs. In this view, the more a system is regulated through a pervasive and detailed array of laws, and provided with instruments which supervise and ensure adherence to the rules, the more individuals will be protected from risks of misuse and injustice.

However, it would be very naïf to believe that more laws equal better law, as it would be superficial to find the flaw of an abusive system exclusively in its inconsistency with posited law. We can not expect law to be intrinsically just, as it is but the result of an agreement between different political tensions. Adopting an evocative metaphor, we should “think of the law as the sail of a boat”,<sup>1</sup> meaning an instrument which merely serves to move in the direction suggested by the wind – or, out of metaphor, by the political will. A better sail will not ensure that the boat will be directed towards the “right” direction, but it will only grant an earlier arrival to destination or a steadier cruise.

This instrumental role of the law is vividly casted in the concept of “lawfare”. The concept came under the lights in late 2001, after former deputy judge advocate of the US Air Force, Charles Dunlap, defined it as “a method of warfare where law is used as means of realizing a military objective”<sup>2</sup> and used it to delegitimize the legal work of those NGOs and international bodies advocating for human rights, challenging some of the US policies emerging from the “war on terror”. The same meaning was adopted by Avichai Mendelbit – at the time Head of the Chief Military Defense and today Attorney General of Israel – to condemn the “increasing attempts to fundamentally change the law of war while manipulatively accusing the IDF of not following this law”, by threatening to import

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<sup>1</sup> I borrow this allegory from Noura Erakat, *Justice for Some* (Stanford: Stanford University Press, 2019), 11.

<sup>2</sup> Charles Dunlap, “Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts”, presented at *Humanitarian Challenges in Military Intervention Conference*, (29 November 2001): 4.

human rights law norms into warfare.<sup>3</sup> The ever-growing menace that this activity represented, in their view, was then seen as to include the work of the UN Human Rights Council, the UN Security Council, NGOs and international courts, as part of some kind of “legal terrorism”.<sup>4</sup>

The term “lawfare”, however, has been employed also in previous moments and different contexts,<sup>5</sup> and evokes an opposite meaning too, that can be summarized in the words of the anthropologist John Comaroff, who defined it as “the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion”, to “launder brute power in a wash of legitimacy, ethics, propriety”.<sup>6</sup> In this second assumption, the *lanfare* is thus performed by the State, not by its critics, in an abusive exercise of the monopoly of violence and, at the same time, as a tool to mask the abuse by conveying a perception of legitimacy based on flaunted legality.

This way, law becomes not only a structure regulating the monopoly of violence, but can be categorized as a form of violence itself, capable of reaching the extreme point where it enables governments to perpetrate mass atrocities as part of a perfectly formalized and functioning legal system. The most extreme and most notorious form of this phenomenon has been experienced in the Nazi complex structure, but similarly infamous examples can be seen also in more recent years, as in the apartheid system in South Africa.<sup>7</sup>

In these cases, law shows itself as the bare instrument it is, characterized by an intrinsic ductility that makes it powerless in itself, as much as powerful when meticulously directed. Looking at the policies enacting war crimes and crimes against humanity easily takes us to consider the responsibility of political actors, who conceived and pushed the criminal objective: heads of States, chief generals, ministers of chief departments are almost

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<sup>3</sup> Avihai Mandelblit, “Lawfare: The Legal Front of the IDF”, *Military and Strategic Affairs* 4, no. 1 (2012): 52.

<sup>4</sup> This is the understanding of the term shared, amongst others, by the directors of *The Lawfare Project*, who coined the even more specific term “legal jihad”.

<sup>5</sup> See Leila Nadya Sadat & Jing Geng, “On Legal Subterfuge and the So-Called Lawfare Debate”, *Case Western Reserve Journal of International Law* 43, no. 1 (2010).

<sup>6</sup> Jean Comaroff and John Comaroff, *Law and Disorder in the Postcolony* (Chicago: The University of Chicago Press, 2006), 31.

<sup>7</sup> In the words of Justice DP Mahomed, then Chief of the South African Constitutional Court: “For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. (...) The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.”. CCT 17/96, *The Azanian Peoples Organisation v. the President of the Republic of South Africa* (25 July 1996).

unanimously identified as the subjects to be held liable. However, the Nuremberg trials that followed WWII taught us to give attention also to those occupying less scenic positions, whose very diverse nature can be summoned under the term “desk-perpetrators”.<sup>8</sup> Amongst these, jurists undertake peculiar functions, that articulate and reinforce one another: legal advisers designate policies, building their arguments on theories developed in the academia, while judges implement those mechanisms by the way they apply the law.

If, in the case of genocidal dictatorships, judges, attorney generals and government advisers have already been blamed for actively manipulating and distorting justice,<sup>9</sup> whether as scrupulous serves or vigorous executioners, the verdict is less obvious when the setting is more *nuancé* and perhaps the form of government successfully depicted itself as a democracy. Paradoxically, in the latter type of systems, jurists can be seen as taking an even more relevant role in criminal terms, since not only they act as functionaries lending their technical capacities for the machine to work, but they also engage in the proactive and creative task of mystifying facts and creating an appearance of legality and democracy, which represents for them a product to be sold domestically and internationally to dismiss any criticism or concern. At the same time, in these circumstances, it is harder to strike a line between opposed but genuine juridical arguments, on the one hand, and tendentious legal works that blindly serve an illegitimate policy, on the other.

Israel is a very peculiar context to challenge this reasoning. In fact, more than in any other society, the two narratives are simultaneously and vigorously upheld, in a ceaseless theoretical confrontation between the Israeli government and its international allies on one side – predominantly, but not exclusively, the US –, and Palestinian nationals, international human rights bodies and preeminent NGOs on the other. Furthermore, the decades long occupation in play stands out for its hyper-legalized nature: every and each step of it has been carried out through legal work – being it the UN Resolutions defining the borders of the new-established State, the Israeli military orders ruling on the Occupied Territories, or the laws enacted by the Knesset to annex the Eastern side of Jerusalem; correspondingly, legal means have always been a primary tool used by Palestinians to challenge and oppose

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<sup>8</sup> The term was first coined by Hannah Arendt, *Auschwitz on Trial*, originally the introduction to: *Auschwitz: a Report on the Proceedings against Robert Karl Ludwig Mulka and Others before the Court at Frankfurt*, Bernd Naumann's, 1966.

<sup>9</sup> The most explicit condemnation can be found in the words of the US Prosecutor in the *Justice Case*, who referred to the activity of the Nazi judges as to “converting [the judicial system] to an engine of despotism, conquest, pillage, and slaughter”. Original video can be played at: <https://encyclopedia.ushmm.org/content/en/film/telford-taylor-describes-justice-case-defendants> (last accessed: 16 November 2020).

the occupation in general, and its violent emanations in particular, whether through Israeli, foreign or international avenues.

Amongst the different disputed policies performed by Israel, this study will focus on the use of torture during the interrogation of Palestinians detained as suspects of terrorism.

While there are other issues that certainly have more general and far-reaching effects,<sup>10</sup> disentangling them would require not only a broader analysis of the context but, most crucially, a thorough argumentation of the perspective chosen, in order to state the legitimacy or illegitimacy of the acts discussed. On the contrary, torture is a practice universally deprecated and it unequivocally entails a core international crime, regardless whatsoever circumstances and the weight attributed to them.

Thus, the choice of this specific subject allows us to deepen the further step that represents the real object of the research: given that the act of torture performed is certainly illegitimate and unlawful, what are the legal tools and mechanisms that dress it as legal? And, more cardinally, what is the role of those who design these mechanisms and handle these tools, in a way that concedes torture to happen in impunity?

Coming back to our initial metaphor, if we agree that laws aren't but neutral and inanimate sails that can be used to serve any political current, is this enough to relieve those forging and maneuvering them from any responsibility, or do these actions implicate a nodal involvement in the way they strategically embrace the wind?

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<sup>10</sup> It suffices to think of the consequences of house demolition and expulsion targeting Arab communities (especially but not exclusively in Jerusalem), the establishment of settlements into the Occupied Territories, the blockade on the Gaza Strip or the construction of the wall and its associated regime in the West Bank.

## **Chapter I - The Torture Legal Framework within Israeli Laws and Institutions**

In her book *Justice For Some*, Noura Erakat identifies five decisive “junctures” in the history of Israel and Palestine. According to her theory, these moments can be seen as *legal opportunities*, i.e. “key moments of ‘principled opportunism’, or instances where actors were able to use international law as a tool”: “each juncture demonstrates how legal work shaped the meaning of law as a site of resistance or oppression”.<sup>1</sup> This way, the author shows how institutional and non-governmental actors managed to use international law to shape a legal system serving their political purposes.

The instrument of international law has been used in a stunningly more successful way by the Israeli side, and it is actually possible to appreciate this mastery when looking at the use of domestic laws by the Israeli authorities. In fact, focusing on the topic of interrogations, it is all the more clear that the development of norms defining allowed means, justifications and the hierarchy and powers of those involved, happened through an array of seized legal opportunities.

In particular, the executive branch and the High Court of Justice designed a system that is rich in derogations to the Penal Code, based on the main justification that violent means of interrogation constitute a necessary lesser evil to fight terrorism. However, none of the past or present laws dedicated to counter-terrorism mentions the interrogation phase, nor the possible derogations from the general criminal law provisions.

More specifically, the first law on the subject was the Prevention of Terrorism Ordinance (1948)<sup>2</sup>. This law gave a first definition of “terrorist organization” and of the ways one could be considered as participating in it, under different roles and by committing different actions. While it implied far-reaching peculiarities, such as the transfer of jurisdiction on this crime to the military courts<sup>3</sup> and the criminalization of a wide range of behaviors (i.e.: activity in a terrorist organization, membership in a terrorist organization, supporting a terrorist organization through publishing or orally expressing words of sympathy,

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<sup>1</sup> Erakat, *Justice for Some*, 4.

<sup>2</sup> Prevention of Terrorism Ordinance No. 33 of 5708-1948.

<sup>3</sup> In 1980, the Ordinance was amended to reintroduce the crime of terrorism into the general court system. However, this applies only to Israeli citizens: Palestinians from the Occupied Territories are still tried by military courts.

possession of propaganda material...), interrogation is not mentioned in it, and the norm on arrest refers to the general Criminal Procedure Law.<sup>4</sup>

Similarly, the exceptional regime designed for interrogations does not find its basis in the Counter-Terrorism Law (2016)<sup>5</sup>, which repeals the Prevention of Terrorism Ordinance and provides a comprehensive framework for substantial and procedural criminal provisions related to terrorism. The law itself declares in its opening that “The object of this Law is to establish criminal and administrative legal provisions, including special enforcement powers, for the purpose of combatting terrorism”.<sup>6</sup> The same article then specifies two sub-objectives, both focusing on the *prevention* of the establishment and activity of terrorist organizations and individuals. Therefore, it would be reasonable to find in the same law any derogation from the criminal code that is deemed necessary for the purpose of an effective interrogation. Yet, the only pertaining provisions are those delaying the first appearance before a judge of the detainee suspected of terrorism,<sup>7</sup> upon request of a police, military, or security officer, and no mention appears as to exemptions from criminal liability for violence used during interrogations.

In fact, the issue of means of interrogations, its limits and justifiability emerged several times in the history of Israel and was constantly brought before courts. As the next paragraphs will detail further,<sup>8</sup> these occasions have been the “legal opportunities” throughout which the subject was regulated, resorting to internal acts of the security agency, guidelines from the Attorney General and judgments from the High Court of Justice. In this case, it is all the more appropriate to talk about “legal opportunities”, since the whole legal infrastructure has been progressively shaped by these actors in moments where a rare conjunction presented, allowing the powers to make law through *ad hoc* procedures and avoiding the regular parliamentary path. Wherefore, the main actor of this play is not the Knesset, but rather the High Court of Justice, the Attorney General, the Commissions of Inquiry, the State Comptroller and the Israeli Security Agency.

In order to provide the reader with a complete understanding of the mechanisms that this thesis wishes to highlight, and to understand the subtle peculiarities of the Israeli system, these institutions will now be briefly described. Nonetheless, the analysis of the Security

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<sup>4</sup> Prevention of Terrorism Ordinance, art. 13.

<sup>5</sup> The Counter-Terrorism Law, 5776-2016.

<sup>6</sup> The Counter-Terrorism Law, art. 1.

<sup>7</sup> The Counter-Terrorism Law, art. 46.

<sup>8</sup> See *infra* II: *Systematic Torture in Israel as a Progressive Seizure of Legal Opportunities*.

Agency will be disclosed more deeply in a separate section, due to its eccentric features and, most of all, to the convoluted entanglement of its history and the “security offenses” framework.

## 1. Key Institutional Actors

### a. The High Court of Justice

The High Court of Justice is the highest judicial instance in Israel. In fact, it is more precise to refer to it as to the Supreme Court sitting in its capacity as a High Court of Justice (a function referred to as *Bagatz*). It is composed by the same 15 justices and headed by the President of the Supreme Court. However, while the Supreme Court generally sits in panels of three or even in monocratic composition, when sitting as the High Court and dealing with constitutional cases the panel is often of 9 or 11 justices.<sup>9</sup>

The High Court of Justice is the recipient for individuals' challenges of constitutionality against public bodies and governmental authorities, for which it represents the first, last and sole judicial instance with jurisdiction, a unique case in the world.<sup>10</sup>

Its judges are elected by the Judges' Selection Committee, composed of the Minister of Justice and another Minister appointed by the Cabinet, two Knesset members elected by the Knesset, two members of the Israel Bar, the President of the Supreme Court and two other judges of the Court elected by their peers. All judges serve until they reach the age of 70 and can not be removed unless convicted for a disciplinary offense.<sup>11</sup>

The establishment of the Supreme Court in Israel dates back to the British Mandate period:<sup>12</sup> while lower courts would be run by local judges and take care of ordinary disputes, the Supreme Court would be served exclusively by British justices and treat all the cases where the Mandate authorities were involved. With the establishment of the new State, it was decided that the existing legal and administrative structures of the Mandate would remain intact,<sup>13</sup> and so did the Supreme Court, which only substituted its justices with Jewish ones.

However, almost immediately after the establishment of the State, the Court assumed an unprecedented prominence in the development of the law. In the absence of a Constitution, in fact, it led the process to establish the constitutive principles and, through judicial interpretation and a comparative study of democratic countries' and

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<sup>9</sup> Suzie Navot, *The Constitutional Law of Israel* (Alphen aan den Rijn: Kluwer Law International, 2007), 139.

<sup>10</sup> Navot, *The Constitutional Law of Israel*, 137.

<sup>11</sup> David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, (New York: State University of New York Press, 2002), 11.

<sup>12</sup> Navot, *The Constitutional Law of Israel*, 140.

<sup>13</sup> Navot, *The Constitutional Law of Israel*, 140.

international standards, created the so called “Judicial Bill of Rights”,<sup>14</sup> a central element of Israel’s constitutional system. It wasn’t until the 1990s that the Knesset emanated two Basic Laws, providing legal protection to human rights: they were the Basic Law: Human Dignity and Liberty (1992)<sup>15</sup> and the Basic Law: Freedom of Occupation (1994)<sup>16</sup>.

Amongst the fundamental precepts laid out through this dynamic, the High Court established that “the sovereign authorities are subject to the law like all other citizens of the State, and the rule of law is one of the sturdy foundations of the State.”<sup>17</sup> However, a quantitative study on the intervention of the High Court in governmental decisions found that, out of 2,869 petitions filed in 6 years, only in 18% of cases the Court intervened, while about 50% of claims were rejected, 21% postponed and 11% retracted.<sup>18</sup>

Notwithstanding this reluctance to challenge governmental actions, the Court has been addressed by a growing number of individuals and still represents the main body aimed to ask for protection of human rights in Israel. Admittedly, the Court enjoys a strikingly high degree of legitimacy shown by the widest public support amongst all State institutions, “its prestige is almost equal to that of the IDF”<sup>19</sup>

However, things are different when the issue at stake is framed as a “security matter”: in these cases, a study showed, the support for the Court diminishes and reservation increases.<sup>20</sup> On the same line, the Court seems to have taken an increasingly active role in defending human rights from executive interferences, if pertaining to the civil sphere, while its positions have been “decidedly ‘executive-minded’”<sup>21</sup> when called to limit security powers.

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<sup>14</sup> Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 13.

<sup>15</sup> Available in English at: [https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm#:~:text=The%20purpose%20of%20this%20Basic,a%20Jewish%20and%20democratic%20state.&text=2,of%20any%20person%20as%20such.&text=There%20shall%20be%20no%20violation%20of%20the%20property%20of%20a%20person](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm#:~:text=The%20purpose%20of%20this%20Basic,a%20Jewish%20and%20democratic%20state.&text=2,of%20any%20person%20as%20such.&text=There%20shall%20be%20no%20violation%20of%20the%20property%20of%20a%20person). (last accessed: 16 November 2020).

<sup>16</sup> Available in English at: [https://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm#:~:text=The%20purpose%20of%20this%20Basic,Freedom%20of%20occupation.&text=Every%20Israel%20national%20or%20resident,any%20occupation%2C%20profession%20or%20trade](https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm#:~:text=The%20purpose%20of%20this%20Basic,Freedom%20of%20occupation.&text=Every%20Israel%20national%20or%20resident,any%20occupation%2C%20profession%20or%20trade). (last accessed: 16 November 2020).

<sup>17</sup> HCJ 7/48, *Al Carbouti v. Minister of Defense*, 2 PD 5.

<sup>18</sup> Assaf Meydani, “The Intervention of the Israeli High Court of Justice in Government Decisions: An Empirical, Quantitative Perspective”, *Israel Studies* 16, no. 3 (2011): 174.

<sup>19</sup> Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 12.

<sup>20</sup> Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 12.

<sup>21</sup> Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 14.

It should be noticed that the Court has exposed itself more and more over the years, declaring its will to apply judicial review in security matters not differently than on any other subject; in the words of Justice Barak: “Considerations of security have deterred judicial review of administrative discretion in the past. It was thought that judges should not interfere since they are not experts in security matters. But in course of time it has become clear that there is nothing unique about security considerations, in so far as judicial review is concerned. [...] In this connection, security considerations have no special status.”<sup>22</sup> However, these sort of statements seem to be mostly rhetoric when compared with the substance of the decisions, as the aforementioned study reported.

## **b. The Attorney General**

### **i. Functions and Conflicts of Interest**

The Attorney General takes a central role in the Israeli institutions system, at the crossroad between the judiciary and the executive branch. It retains four main functions: heading the general prosecution, representing governmental authorities in judicial fora, providing legal consultancy to the Government and other sovereign authorities, and protecting the public interest and the rule of law.

This accumulation of roles has led to frequent critiques,<sup>23</sup> concerning possible conflicts of interests, and to several proposals to distribute the functions amongst different personalities, and in particular to divide the consultancy function on one hand and the prosecuting and lawyering ones on the other.

In fact, in the current state of things, the Attorney General is required to provide legal advice and interpretation to governmental bodies and, at the same time, to lead the prosecution against the members of the same bodies when their conduct should entail criminal offenses.

The same concern was expressed multiple times about the Military Attorney General (MAG), an institution that exercises the same functions of the Attorney General, but limitedly to the military domain. In particular, the Goldstone Report - the result of the UN Fact Finding Mission on Operation Cast Lead, later endorsed by the UN General Assembly

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<sup>22</sup> HCJ 680/88, *Schnitzer v. The Chief Military Censor*, para. 26.

<sup>23</sup> See, amongst others: Valentina Azarov & Sharon Weill, “Israel’s Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice”, *International Criminal Law Review* 12, no. 5 (2012): 905-935; Yedidia Z. Stern, “Adviser or Prosecutor? Israel’s Attorney General Can’t Be Both”, *The Israel Democracy Institute*, 31 October 2014; FIDH, *Shielded from Accountability: Israel’s Unwillingness to Investigate and Prosecute International Crimes*, September 2011.

-<sup>24</sup> identified this conflict of interest as one of the “major structural flaws”<sup>25</sup> of the military investigation system.

The Turkel Commission, then, dedicated a detailed section of its analysis to the issue of the MAG’s “dual hat”.<sup>26</sup> The Commission presents this characteristic as the origin of a potential conflict of interest, and therefore a threat to the justice system’s impartiality.<sup>27</sup> In their submission, some scholars stressed that “[t]he conflict of interest between the consultancy role and the prosecution role is therefore clearly expressed”,<sup>28</sup> while others went further and referred to the MAG as a centralized authority exercising all three powers: the legislative in defining the army’s rule of conduct, the executive in providing legal counseling during military operations and a judicial power in deciding on investigations and prosecutions.<sup>29</sup>

Even though the MAG is a different institution from the (civil) Attorney General, their position in this sense is equivalent, since they share the same functions, one limitedly to military operations, the other embracing the civilian sphere. To confirm this, the MAG himself pointed out that his “dual-hat” reflected the one of the Attorney General.<sup>30</sup>

Moreover, some scholars highlighted the similarity of the two in their relationship with the HCJ: while the Court is supposed to act as a last judge through judicial review, its scope of revision is extremely limited both in the decisions of the MAG and of the Attorney General,<sup>31</sup> and, as previously mentioned, the Court has shown a constant practice of deference to the executive. Significantly, Deputy Chief Justice Rivlin wrote in a decision: “I was unable to find even one case in which this court intervened in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient

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<sup>24</sup> UN Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC/12/48 [hereinafter: *Fact Finding Mission on Operation Cast Lead*].

<sup>25</sup> UN Human Rights Council, *Fact Finding Mission on Operation Cast Lead*, para. 1959.

<sup>26</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, February 2013, 392 [hereinafter: *Turkel Second Report*].

<sup>27</sup> *Turkel Second Report*, 392.

<sup>28</sup> Shany, Cohen & Rosenzweig, Response Paper to the MAG Position Paper, submitted to the Turkel Commission.

<sup>29</sup> Eyal Benvenisti, ‘The Duty of the State of Israel to Investigate Violations of the Law of Armed Conflict’, Expert Opinion submitted on 13 April 2011 to the Turkel Commission, 24.

<sup>30</sup> MAG Position Paper 2010, 68.

<sup>31</sup> Azarov & Weill, “Israel’s Unwillingness?”: 916.

evidence.”<sup>32</sup> This condescension to the executive is at the origin of a shield of impunity, that covers both military and political officials equally, as demonstrated by the parallelism between lack of accountability for war crimes committed during military operations and torture employed in security interrogations.<sup>33</sup>

To be precise, the MAG and the Attorney General differ substantially under one aspect: while the MAG is subject, at least formally, to the supervision of the Attorney General,<sup>34</sup> who also represents an appeal organ against the MAG’s decisions,<sup>35</sup> the Attorney General is not subject to any other authority: as defined by the guidelines the Attorney General itself issued, it holds “a unique position as head of the Public Prosecution and the legal advice, and as the authoritative interpreter of the law to all arms of the executive branch including the military and security systems.”<sup>36</sup> In light of this, the Attorney General’s conflict of interest and lack of effective judicial review, leave him operating in a “quasi-constitutional vacuum”<sup>37</sup> and raise a higher concern.

To fully understand the entity of the conflict of interests, one should perceive the depth of the involvement of the Attorney General into governmental dynamics. A good indicator is in the Hebrew term indicating this role, which translates literally as “legal adviser”,<sup>38</sup> therefore suggesting its counselor vest takes primary importance. While this task was originally in the hands of the Ministry of Justice - where Ben Gurion proposed it should remain, dividing it from the figure of an attorney general who would only exercise the head of prosecutions - the two functions merged in the latter, subordinated to the Ministry of Justice but responsible in its own capacity for advising the Government.<sup>39</sup> The power resting with this charge has been constantly growing, also thanks to the absence of any

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<sup>32</sup> HCJ 5699/07, *Jane Doe (A) v. The Attorney General* (26 February 2008), para. 10.

<sup>33</sup> Azarov & Weill, “Israel’s Unwillingness?”: 928-929.

<sup>34</sup> Israel AG, “The Military Advocate General”, Directive No. 9.1002.

<sup>35</sup> Israel AG, “The Review of Decisions of the Military Advocate General Regarding Incidents Involving the Death of an Individual in the Course of Israel Defense Forces Operational Activity, When Serious Violations of Customary International Law Are Alleged”, Directive No. 4.5003.

<sup>36</sup> AG Guideline, “Fatal Accidents in the IDF – Appeal to the Attorney-General against a Decision of the Military Advocate-General to Close an Investigation File”, Guideline 4.5000 (2002), 20.

<sup>37</sup> The expression was used referring to the MAG by Eyal Benvenisti, Expert Opinion to the Turkel Commission, p. 25.

<sup>38</sup> Daniel Friedman, *The Purse and the Sword: The Trials of Israel’s Legal Revolution* (Oxford: Oxford University Press, 2016), 238.

<sup>39</sup> Friedman, *The Purse and the Sword: The Trials of Israel’s Legal Revolution*, 29.

legal source to define its boundaries: its powers, appointment procedure, dismissal or organization are not normed in any law or Basic Law.

Given this *vacuum*, a controversy was soon generated around the binding or facultative nature of its legal advice to the executive, and a definitive answer has not been given yet. While some believe in the binding nature of the Attorney General's advice,<sup>40</sup> others uphold its opinion is not binding on the executive, and other argue for an obligatory nature only on the administrative bodies, but not on the Government itself.<sup>41</sup> The High Court has ruled in favor of the first theory, stating that "the Attorney General is empowered to interpret the law and his interpretation binds the authority in all of its internal workings",<sup>42</sup> and progressively confirming obligations on the Government following the issuance of Attorney General's guidelines.<sup>43</sup>

On a different note, a problematic situation emerged more than once when the Attorney General had to represent governmental authorities in court, where they were called to respond for a conduct they held contrarily to the Attorney General's advice. In these cases, can the Government hire a "private" attorney,<sup>44</sup> or should this role be kept by the Attorney General in any case? And in the latter hypothesis, should it uphold its position in name of the public interest of justice, even if not reflecting the one embraced by the executive, or should it defend the Government regardless its belief and interpretation of the law? Also on this point, opposite theories concur.<sup>45</sup>

## ii. Prosecutorial Discretion

Finally, an ever-lasting debate revolves around the discretion of the Attorney General in exerting its power to prosecute. Under one aspect, a prosecutorial discretion free from any governmental interference is crucial to maintain an independent administration of justice; concurrently, a total absence of limits - even in legal terms, such as judicial review from the High Court - makes the prosecution an absolute entity, waived from any external control. In 1962, the Agranat Commission issued a *Report of the Lawyers Commission on the Powers of the Attorney General*, which defined the major boundaries for the powers of the Attorney

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<sup>40</sup> Navot, *The Constitutional Law of Israel*, 168.

<sup>41</sup> Friedman, *The Purse and the Sword: The Trials of Israel's Legal Revolution*, 31.

<sup>42</sup> HCJ 73/85, *Kach Faction v. Knesset Speaker*, 39(3) PD 141.

<sup>43</sup> Navot, *The Constitutional Law of Israel*, 172.

<sup>44</sup> This happened, for example, in HCJ 3094/93, *Movement for the Quality of Government v. Israeli Government*.

<sup>45</sup> The point will be addressed more in detail *infra* at III.1.d: *US Legal Advisers vs. Israeli Jurists*.

General. The Commission clearly expressed itself in favor of a total independence of the Attorney General, especially in deciding whether to file an indictment or not: in taking such a determination, it would be completely independent from the Minister of Justice and the Government, which express their responsibility in appointing a suitable person for the position, but which do not further interfere in the exercise of powers associated to it.<sup>46</sup> Historically, the High Court has been reinforcing an extremely wide interpretation of the prosecutorial discretion,<sup>47</sup> rejecting almost every petition that tried to challenge the manner in which the discretion was applied.<sup>48</sup> As it will be explained, this was also the case in the judgments of *Abu Gosh*<sup>49</sup> and *Tbeish*.<sup>50</sup>

This trend was partially restricted after the *Ganor* case,<sup>51</sup> where the High Court provided an interpretation of the parameters that the Attorney General should consider when deciding whether to submit an indictment. Namely, the Criminal Procedure Law states that:

“If the prosecutor to whom the investigation materials were sent sees that the evidence suffices to indict an individual, the prosecutor will send that person for trial, unless the prosecutor is of the opinion that there is no public interest in holding the trial.”<sup>52</sup>

Therefore, in order to determine whether to charge an individual, the Attorney General is the one entitled to examine and evaluate the evidence available and, at the same time, it has the power to close the case even where the evidence is satisfactory, when it believes the trial would not serve the public interest. The lack of public interest was, indeed, the reason why the Attorney General refused to prosecute the bank heads of the Israeli banking establishment that caused the collapse of the stock market in 1983; such a determination was challenged in front of the High Court, which canceled the Attorney General’s decision, stating that: “the term public interest represents a value judgment as to the benefit gained by society by prosecuting the benefit gained by refraining from doing so. A public interest

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<sup>46</sup> Navot, *The Constitutional Law of Israel*, 169.

<sup>47</sup> Friedman, *The Purse and the Sword: The Trials of Israel’s Legal Revolution*, 249.

<sup>48</sup> Navot, *The Constitutional Law of Israel*, 170.

<sup>49</sup> HCJ 5722/12, *As’ad Abu Gosh et al. v. the Attorney General et. al.* (4 September 2017) [hereinafter: *Abu Gosh*]. See *infra* II: *Systematic Torture in Israel as a Progressive Seizure of Legal Opportunities*.

<sup>50</sup> HCJ 9018/17, *Firas Tbeish v. the Attorney General* (26 November 2018) [hereinafter: *Tbeish*]. See *infra* II: *Systematic Torture in Israel as a Progressive Seizure of Legal Opportunities*.

<sup>51</sup> HCJ 953/89, *Ganor v. Attorney General*, 44(2) PD 485.

<sup>52</sup> Criminal Procedure [Consolidated Version] Law, art. 62.

in avoiding prosecution exists only in cases where the prosecutor deems that the potential damage to the interests and values that the society desires to protect outweigh the interests and values that the criminal code seeks to promote by the prosecution.”<sup>53</sup>

In sum, it appears that the Attorney General should be strictly anchored to the interests and values preferred by the society, but at the same time the Attorney General is censored by the Court as “the authorized interpreter of the law”,<sup>54</sup> even as for the legal meaning of “public interest” itself. In this matter, the Attorney General is recipient of solid trust, “based on the professionalism and experience of the prosecution authorities”.<sup>55</sup> For this reason, the Court has reiterated on different occasions that only an extreme measure of unreasonable discretion can allow intervention in the decisions of prosecuting authorities.<sup>56</sup>

### **c. The Commissions of Inquiry**

Commissions of inquiry are envisaged in Israeli Law in four main forms: Inquiry Committees, Governmental Commissions of Inquiry, State Commission of Inquiry and Parliamentary Commission of Inquiry. The models share the type of activity they pursue, but have different legal basis and powers, and are instituted by different organs, thus resulting in a varying degree of independence and authority.

#### **i. The Inquiry Committees**

The Inquiry Committees are internal to administrative bodies. They represent an auxiliary tool for the authority that establishes them, to gather information through fact finding, investigations and hearings of relevant bodies. These Committees are set up on the basis of the Inquiry Committees Law,<sup>57</sup> which does not define stringent characteristics for them: any Minister is allowed to appoint an inquiry committee for any issue under the jurisdiction of the Ministry, provided that a State Commission has not been instituted on the same

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<sup>53</sup> HCJ 953/89, *Ganor v. Attorney General*.

<sup>54</sup> HCJ 4267/93 *Amitai – Citizens for Judicial Watch v. The Government of Israel* PD 47(5) 441, 475.

<sup>55</sup> HCJ 5722/12, *Abu Gosh*.

<sup>56</sup> HCJ 4372/11; HC 6486/11; HCJ 425/89; HCJ 9018/17.

<sup>57</sup> Inquiry Committees Law, art. 28.

matter.<sup>58</sup> Their power and authority are not defined by law, and the outcome of their work consists in recommendations for the administrative organs.<sup>59</sup>

Examples of these committees include the Tonic-Zamir Committee, set up as a first investigation mechanism into the ISA Affair of 1987;<sup>60</sup> the Rotensteich-Tzur Committee,<sup>61</sup> which investigated the Pollard Affair;<sup>62</sup> and the Chiechanover Committee that investigated on the failed assassination of Hamas leader Khaled Mashaal.<sup>63</sup>

## ii. The Government Commissions of Inquiry

The Government Commissions of Inquiry are based upon the Basic Law: The Government,<sup>64</sup> according to which a Minister may appoint a committee to examine a particular issue within their area of responsibility. The Commission will realize a report and present it to the Government, which however is not bound by the conclusions found.<sup>65</sup> Moreover, their powers are limited to political investigations, cannot call witnesses and compel them to testify and cannot make systemic recommendations, but only personal ones.

However, if the Minister involved requires so, and with the approval of the Government, the Commission can see its powers expanded by the Minister of Justice. This happened, for instance, with the Winograd Commission:<sup>66</sup> the Commission was set in the aftermath of the military campaign in Lebanon, in summer 2006. The conflict, which costed the life

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<sup>58</sup> Dana Blander, “What’s A Commission of Inquiry? Explainer”, *The Israel Democracy Institute*, 22 November 2020.

<sup>59</sup> Navot, *The Constitutional Law of Israel*, 176.

<sup>60</sup> See *infra* I.1.e.ii: *The Nafsu Case and the Bus 300 Affair*.

<sup>61</sup> Thomas L. Friedman, “2 Israeli Inquiries Clear Top Leaders in Pollard Affair”, *The New York Times*, 27 May 1987.

<sup>62</sup> Jonathan Jay Pollard was an American citizen, working as civil intelligence analyst for the US Government. In 1984, he was engaged by Israeli agents to sell them hundreds of top-secret American military documents. He was arrested 18 months later, and sentenced to life in prison. The ministers involved were not charged with any criminal responsibility, and faced minor disciplinary consequences.

<sup>63</sup> Globes, “Cabinet Appoints C’tee to Examine Assassination Failure; Netanyahu: I Am Responsible, Will Not Resign”, 7 October 1997.

<sup>64</sup> Basic Law: The Government, 5761-2001, art. 8A.

<sup>65</sup> Blander, “What’s A Commission of Inquiry? Explainer”.

<sup>66</sup> Israel Ministry of Foreign Affairs, “Winograd Committee Submits Final Report”, 30 January 2008.

of 43 Israeli civilians and between 1,000 and 1,200 Lebanese ones,<sup>67</sup> “evoked a sharp sense of failure among the Israeli public”,<sup>68</sup> who therefore called upon the Government to establish a State Commission to investigate “the failures of the war” and demanded the Prime Minister, the Minister of Defense and the Chief of Staff to resign.<sup>69</sup> The Government eventually refused to establish a State Commission, and set up a Governmental one, yet headed by a retired judge, E. Winograd; this element, not strictly necessary for a Governmental Commission, allowed the Winograd Commission to be vested with additional powers similar to those of a State Commission, such as authorizing to collect material for the inquiry, submitting an interim report and making the report public;<sup>70</sup> it had full discretion in establishing work procedures, deciding for public or in camera hearings, and could compel the interested officials to appear before it and provide any information or document requested.<sup>71</sup>

Yet, a Governmental Commission is originally deeply different from a State Commission: its members are chosen by the competent Minister, and not by the President of the Supreme Court; the law does not prescribe anything regarding its members nor head and its powers are much limited, as mentioned.

### **iii. The State Commissions of Inquiry**

The State Commissions are the type previewed by the Commission of Inquiry Law,<sup>72</sup> for circumstances where “it appears to the Government that a matter exists which is at the time of vital public importance and requires clarification”.<sup>73</sup> They are set up through a governmental decision, that defines the subject of the inquiry and the commission’s power

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<sup>67</sup> The conflict sparked in July 2006 and lasted 34 days, causing 164 Israeli casualties (of which 121 IDF soldiers); in Lebanon between 1,000 and 1,200 civilians died and over 1,000,000 were made refugees; Hezbollah acknowledged 49 combatants killed, but the IDF claimed killing more than 300. For a complete report, see: Human Rights Watch, *Why They Died: Civilian Casualties in Lebanon during the 2006 War*, September 2007.

<sup>68</sup> Suzie Navot, “The Governmental Commission of Inquiry for the Second Lebanon War, 2007”, *European Public Law* 15, no. 1 (2009): 17.

<sup>69</sup> Navot, “The Governmental Commission of Inquiry for the Second Lebanon War, 2007”: 17.

<sup>70</sup> Navot, “The Governmental Commission of Inquiry for the Second Lebanon War, 2007”: 21.

<sup>71</sup> Navot, “The Governmental Commission of Inquiry for the Second Lebanon War, 2007”: 22.

<sup>72</sup> Commission of Inquiry Law, 5729-1968.

<sup>73</sup> Commission of Inquiry Law, art. 1.

too;<sup>74</sup> however, the interpretation of the mandate is provided by the Commission itself, therefore leaving a wide margin of discretion.

These bodies are characterized by a decidedly judicial nature: their composition is determined by the President of the Supreme Court, who also appoints the chairman amongst justices of the Supreme Court and of District Courts, independently from any ministerial influence.<sup>75</sup> Even though they are not bound to the rules of procedure and evidence,<sup>76</sup> the chairman has similar powers to summon a person to testify or produce documents,<sup>77</sup> to order the taking of evidence abroad,<sup>78</sup> to issue a search warrant,<sup>79</sup> to collect material<sup>80</sup> and the commission can request the Attorney General to take part in the enquiry.<sup>81</sup> The outcome of the work consists in a report and, if appropriate, recommendations, which should be made public shortly after the submission to the Government, unless it is deemed dangerous for the security of the State, safeguarding morality or the welfare of a minor.<sup>82</sup>

On the other hand, neither the testimony<sup>83</sup> nor the report<sup>84</sup> constitute evidence in any legal proceeding and, when they raise suspicion on the commission of a criminal offense, the Attorney General may decide not to bring the suspect to trial.<sup>85</sup> In fact, these commissions are normally set in the spirit of establishing a political “public responsibility”, but not a criminal one. This way, the Shamgar Commission examined the circumstances of the assassination of Prime Minister Rabin but did not deliberate on the guilt of the murderer;<sup>86</sup>

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<sup>74</sup> Commission of Inquiry Law, art. 2.

<sup>75</sup> Commission of Inquiry Law, art. 4.

<sup>76</sup> Commission of Inquiry Law, art. 8(a) and (b).

<sup>77</sup> Commission of Inquiry Law, art. 9(a)(1).

<sup>78</sup> Commission of Inquiry Law, art. 9(4).

<sup>79</sup> Commission of Inquiry Law, art. 12.

<sup>80</sup> Commission of Inquiry Law, art. 13(a).

<sup>81</sup> Commission of Inquiry Law, art. 13(b).

<sup>82</sup> Commission of Inquiry Law, art. 20(a).

<sup>83</sup> Commission of Inquiry Law, art. 14.

<sup>84</sup> Commission of Inquiry Law, art. 22.

<sup>85</sup> Commission of Inquiry Law, art. 21.

<sup>86</sup> In the words of the Commission: “The Commission was rightly limited to reviewing the performance of persons and institutional systems that were responsible for the security of the prime minister.”. Commission of Inquiry into the Murder of the Late Prime Minister Yitzhak Rabin, *Report*, 28 March 1996.

the Or Commission avoided deliberating on the guilt of security forces opening fire on demonstrators in October 2000, limiting itself to recommend the initiation of criminal proceedings “against anyone allegedly involved”.<sup>87</sup>

Moreover, the Government is obligated to accept the commission’s factual findings, but not its recommendations. This prerogative allowed for long stagnations even after outrageous events were brought to the light by commissions’ inquiries. For instance, several recommendation of the Turkel Commission Report on Israel’s Mechanisms for Investigating Complaints of Violations of International Humanitarian Law (issued in 2013) have been long ignored,<sup>88</sup> leading to the establishment of a second Commission on “evaluating and implementing” the Turkel Report’s recommendations (the Ciechanover Commission); besides the formal approval of the latter’s recommendations,<sup>89</sup> the Government failed to implement the vast majority of its conclusions too.<sup>90</sup>

Altogether, notwithstanding their highly judicial format, it seems that the State Commissions respond more to a need of public responsibility demanded by the Israeli civil society, rather than an effective fact-finding or judgmental function. A clear example of this dynamic can be seen in the circumstances that led to the appointment of the Landau Commission: as it will be examined in detail in the next chapters,<sup>91</sup> in fact, this Commission was established in the wake of two major scandals involving the secret services of Israel that deeply shocked the public and required some “restoration” of the Security Agency’s image.

#### **iv. The Parliamentary Commissions of Inquiry**

A Commission can be set up by the Knesset, either by empowering one of the permanent committees or by electing a commission for this purpose amongst its members:<sup>92</sup> we refer

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<sup>87</sup> Commission of Inquiry into the Clashes Between Security Forces and Israeli Citizens in October 2000, *Official Summary*, 2 September 2003.

<sup>88</sup> A/HRC/31/40/Add. 1, *Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council resolutions S-9/1 and S-12/1*, para. 37

<sup>89</sup> Prime Minister’s Office, “Security Cabinet Approves Recommendations of the Ciechanover Team on Evaluating and Implementing Part II of the Turkel Commission Report on Israel’s Examination and Investigation Mechanisms”, 3 July 2016.

<sup>90</sup> Adalah: The Legal Center for Arab Minority Rights in Israel, *Challenging the Israeli Attorney General’s Conception of Sovereignty: The Issue of Jurisdiction concerning the “Situation of Palestine” before the International Criminal Court*, June 2020, 37.

<sup>91</sup> See *infra* I.1.e.iii: *The Landau Commission*.

<sup>92</sup> Basic Law: The Knesset, art. 22.

in these cases to a Parliamentary Commission. The Knesset defines the Commission's powers and functions, following a procedure defined in the Knesset Regulations. This instrument is directed mostly towards professional matters, but its use has not been frequent nor gained particular importance or echo in the public audience.<sup>93</sup>

Since 1995, the Knesset Committee for State Audit Affairs is empowered to establish a commission of inquiry, following an input from the State Comptroller.<sup>94</sup> In particular, where an audit revealed elements that the Comptroller deems worthy consideration, it shall submit a separate report to the Committee for State Audit Affairs on the matter. Whether there is a proposal from the Comptroller or not, the Committee is then entitled to establish a Commission of Inquiry, appointed by the President of the Supreme Court and subject to the Commissions of Inquiry Law.

The State Comptroller then assumes the power to summon witnesses to appear before it, give evidence under oath and submit documents.

#### **d. The State Comptroller**

The State Comptroller is a body responsible for overseeing the Government's activities on the Knesset's behalf. It audits "the economy, the property, the finances, the obligations and administration of the State" and "shall inspect the legality, integrity, managerial norms, efficiency and economy of the audited bodies".<sup>95</sup> Fully independent by the executive, the State Comptroller is appointed by the Knesset, which receives its audit reports, and clarifies their content, the High Court thus avoiding to control them by means of judicial review.<sup>96</sup> The scopes of the audits performed by the State Comptroller include compliance with the law, responses to public complaints, working efficiency and learning, internalization and integrity on the ongoing work. Whenever an audit report raises suspicions of criminal offenses being committed, the Comptroller shall bring the matter to the knowledge of the Attorney General who, within six months, shall notify of the manner in which it has dealt with the subject.<sup>97</sup> Since the State Comptroller itself does not have any power to enforce its

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<sup>93</sup> Navot, *The Constitutional Law of Israel*, 178.

<sup>94</sup> State Comptroller Law, 5718-1958, arts. 14(b)(1) and 14 (c).

<sup>95</sup> Basic Law: The State Comptroller, art. 2.

<sup>96</sup> HCJ 4914/94, *Terner v. State Comptroller*, 49(3) PD 771.

<sup>97</sup> State Comptroller Law, art. 14(c).

reports, the Attorney General becomes then the end point of this procedure, and the ultimate judge on the issues arisen.

In any case, even if greater powers were to be attributed to the State Comptroller, it is highly doubtful that this would result in greater accountability. In fact, what emerges from its work is that, even though this body generally points at structural deficiencies in the structure and proceedings of executive organs, it doesn't seem to consider the substantial flaws and contradictions in the system that deeply erode the rule of law.

A recent example can be seen in the aftermath of "Operation Protective Edge". Protective Edge is the name of the military operation launched by Israel in July 2014, comprehensive of airstrikes and ground operations in the Gaza Strip. The Operation lasted for less than two months, in which Gaza faced a devastation scale that the UN Fact Finding Mission defined as "unprecedented":<sup>98</sup> 2,251 Palestinians were killed, of which 1,462 civilians (299 women and 551 children),<sup>99</sup> as well as 6 civilians in Israel and 67 IDF soldiers.<sup>100</sup> Once again, the UN body called for accountability of those responsible for the grave breaches of international law committed,<sup>101</sup> and pointed at the inadequacy of Israel's investigation methods.<sup>102</sup> The Commission was "looking forward to reading the report of the State Comptroller's inquiry into the procedure of decision-making by the military and political echelons",<sup>103</sup> and highlighted the importance of supplementing the inquiry with mechanisms as criminal proceedings and disciplinary measures to ensure accountability.<sup>104</sup> Yet, the long-awaited report presented a drastically different outcome.

Published in 2108, four years after the conflict, the State Comptroller's report concluded, in dramatic contrast with all other findings, that "[t]he State of Israel is a Jewish and democratic state whose army operates in accordance with the principle of the rule of law

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<sup>98</sup> UN Human Rights Council. Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, 24 June 2015, A/HRC/29/52, para. 20 [hereinfter: *Commission of Inquiry on Operation Protective Edge*].

<sup>99</sup> UN Human Rights Council, *Commission of Inquiry on Operation Protective Edge*, para. 20.

<sup>100</sup> UN Human Rights Council, *Commission of Inquiry on Operation Protective Edge*, para. 21.

<sup>101</sup> UN Human Rights Council, *Commission of Inquiry on Operation Protective Edge*, para 74.

<sup>102</sup> UN Human Rights Council, *Commission of Inquiry on Operation Protective Edge*, para. 72.

<sup>103</sup> UN Human Rights Council, *Commission of Inquiry on Operation Protective Edge*, para. 72.

<sup>104</sup> UN Human Rights Council, *Commission of Inquiry on Operation Protective Edge*, para. 72.

and the international obligations of the State”.<sup>105</sup> After praising its ability of coping with enemies through “finding the proper balance between the protection of human rights and defending the State’s security”,<sup>106</sup> and dubbing as “enemies of the State of Israel” those trying to initiate legal proceedings against military officials and politicians accused of perpetrating violations of IHL, the State Comptroller essentially found the Israeli system to be in compliance with international law and cleared all the high-level officials from any responsibility.

The report did identify some flaws in the military operations that caused a humanitarian disaster, but attributed them to a lack of training of the combat staff in international law,<sup>107</sup> to an insufficient consideration of the civilian component in combat exercises,<sup>108</sup> to the absence of Arabic-speaking staff in the Civilian Affairs Officer team,<sup>109</sup> or to low effectiveness of operational legal advice at the combat level.<sup>110</sup> The State Comptroller stated, on the contrary, that the operational legal advisory works properly at the command level,<sup>111</sup> that the political echelon and the senior military echelon “explicitly considered the limitations and rules set forth in international law regarding the conduct of the fighting in Gaza, and even the Prime Minister instructed against harming uninvolved civilians”.<sup>112</sup> The legal advice provided by the Attorney General, the MAG and their teams was found to be always in compliance with international humanitarian law.<sup>113</sup>

The investigation mechanisms were criticized under procedural profiles, as their repeated delay on timetables,<sup>114</sup> lack of formal accuracy,<sup>115</sup> or absence of staff specialized in IHL.<sup>116</sup> However, the report did not address the structural critical issues underneath, and affirmed

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<sup>105</sup> State Comptroller, *Operation “Protective Edge”. IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons - Public Report*, March 2018, 166 [hereinafter: *Report on Operation Protective Edge*].

<sup>106</sup> State Comptroller, *Report on Operation Protective Edge*, 166.

<sup>107</sup> State Comptroller, *Report on Operation Protective Edge*, 35.

<sup>108</sup> State Comptroller, *Report on Operation Protective Edge*, 38.

<sup>109</sup> State Comptroller, *Report on Operation Protective Edge*, 40.

<sup>110</sup> State Comptroller, *Report on Operation Protective Edge*, 50.

<sup>111</sup> State Comptroller, *Report on Operation Protective Edge*, 50.

<sup>112</sup> State Comptroller, *Report on Operation Protective Edge*, 73.

<sup>113</sup> State Comptroller, *Report on Operation Protective Edge*, 73.

<sup>114</sup> State Comptroller, *Report on Operation Protective Edge*, 160.

<sup>115</sup> State Comptroller, *Report on Operation Protective Edge*, 156.

<sup>116</sup> State Comptroller, *Report on Operation Protective Edge*, 142.

that the military investigation mechanisms are consistent with international law.<sup>117</sup> The issue of the independence of the MAG was raised again,<sup>118</sup> but the recommendations on the issue focused on the fact that its appointment, decisions and independence should be anchored to the law or to military orders,<sup>119</sup> while their substance was not contested.

Another telling example of this attitude can be seen in the inquiry realized on interrogation practices, after the scandal on torture invested the Israeli security forces.<sup>120</sup> While the matter will be presented more in detail in the next chapter,<sup>121</sup> it is enough to anticipate that, faced with the evidence of torture as a regular practice on behalf of the Israeli security,<sup>122</sup> the State Comptroller limited its critics to the discrepancy of practice and guidelines on the authorization and record of special interrogations,<sup>123</sup> and to the habit of false reporting on behalf of interrogators and senior officials, identified as “the original sin”.<sup>124</sup>

The State Comptroller has been involved in different stages in the development of the system meant to supervise the interrogation of security suspects, until its functions were absorbed by a Service Comptroller, internal to the Israeli Security Agency.<sup>125</sup> Its supervision, however, remained effective over the Police branch, object of many concerning reports in terms of abuses over detainees and suspects during interrogation.

## **e. The Israeli Security Service (ISA)**

### **i. Origins**

The Israel Security Agency (ISA) is the body demanded to Israel's intelligence service and, together with the AMAN (military intelligence) and the Mossad (foreign intelligence), it's part of the Israeli Intelligence Community. Even though their operations and functioning

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<sup>117</sup> State Comptroller, *Report on Operation Protective Edge*, 127.

<sup>118</sup> State Comptroller, *Report on Operation Protective Edge*, 110.

<sup>119</sup> See, for instance, *Report on Operation Protective Edge*, 105, 107, 109.

<sup>120</sup> State Comptroller, *Summary of the Report of the Review Regarding Interrogations in the Israel Security Agency (ISA) for the years 1988-1992*, 6 February 2000 [hereinafter: *Report on the ISA Interrogations*].

<sup>121</sup> See *infra* I.1.e.iv: *The State Comptroller Report*.

<sup>122</sup> State Comptroller, *Report on the ISA Interrogations*, 4.

<sup>123</sup> State Comptroller, *Report on the ISA Interrogations*, 5.

<sup>124</sup> State Comptroller, *Report on the ISA Interrogations*, 7.

<sup>125</sup> General Security Service Law, 5762-2002 (2002), art. 13.

remained and still remain mostly secret, the existence of this agency became officially known. Formally registered as *Sherut ha-Bitahon haKlali*, meaning “the General Security Service”, in international contexts, it was referred to as the “GSS” until the end of the XXIst century; now, English-speakers refer to it as the “Israeli Security Agency” (“ISA”), as reported by the Israeli institutions themselves.<sup>126</sup> Amongst the local population, however, this organ is better known by the acronym of its Hebrew name (*Shabak*) or simply by the initials of it (*Shin Bet*).

The ISA was formally founded in 1949, but saw the light in even earlier days. In fact, it can be considered a natural descendant of the Haganah. In the words of the *Encyclopaedia Britannica*, the Haganah (“the Defense” in Hebrew) was a “Zionist military organization representing the majority of the Jews in Palestine from 1920 to 1948”, “organized to combat the revolts of Palestinian Arabs against the Jewish settlement of Palestine”. When, after World War II, the British refused to open Palestine to unlimited Jewish immigration, the Haganah turned to terrorist activities, bombing bridges, rail lines, and ships. In 1948, the private organization was dissolved and transformed into the national army of the State, as the name of the armed services testimonies: *Tzva Haganah le-Yisra’el* (Israel Defense Forces).<sup>127</sup>

After the dissolution, however, the intelligence service of the Haganah became the intelligence community including Mahatz, an internal security agency respondent to the Prime Minister and the Defense Minister and led by Isser Halperin-Harel, who was appointed to the command of ISA, as soon as it was officially registered, in March 1949.<sup>128</sup> Together with the general understanding, these common characteristics testify the continuity between the two institutions.

After a first period of focus on internal issues and subversive activity mainly related to violent attacks performed by the extremist fringes of the same Haganah, the Agency took on responsibility about possible threats to the security of Israel and became more involved in transnational operations, such as the one leading to the capture of Adolf Eichmann.<sup>129</sup>

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<sup>126</sup> See, for example, the website of the ISA: <https://www.shabak.gov.il/english/about/Pages/about.aspx>

<sup>127</sup> *Encyclopaedia Britannica* (2016), <https://www.britannica.com/topic/Haganah> (last accessed: 31 January 2021).

<sup>128</sup> Shabak, “The Establishment of the Security Service”, <https://www.shabak.gov.il/english//heritage/Pages/default.aspx#cbpf=.1948-1956#cbp=/SiteCollectionImages/general/4531076-533x800.jpg> (last accessed: 10 February 2021).

<sup>129</sup> ISA/RG 77/G/12968/9; <https://catalog.archives.gov.il/en/chapter/list-documents/> (last accessed: 31 January 2021).

However, a major shift of operational field occurred as a consequence of the Six Day War in 1967. In fact, the ISA was by then assigned responsibility for counter-terrorism and counter-espionage “in the areas of Judea, Samaria [the West Bank] and the Gaza Strip”. In the following decades, the activity expanded progressively, including responsibility for the direction of Israeli airline security abroad (July 1968), supervision of special units in Israeli airports and ports (May 1972), internal security in the Sinai Peninsula (October 1972), direction of security of diplomatic missions abroad (December 1972), responsibility for the security of the immigrants in Austria (September 1973), responsibility for counter-terror in Lebanon (June 1982) and cooperation in military operations, such as Operation Defensive Shield (March 2002), Operation Cast Lead (2008/2009), Operation Pillar of Defense (November, 2012) and Operation Protective Edge (July 2014).

The attraction of these competences was not the result of legal reforms or update in regulations, but rather of punctual reactions to specific accidents, which happened to reveal the exposure of certain State bodies or representatives.<sup>130</sup> Notably, the intelligence service operated at first “without any actual regulation, neither public nor other”,<sup>131</sup> and was often used by political leaders to accomplish controversial operations.

What is more, the operations were carried out for several years under complete secrecy, and even the existence of the services was denied by the government, and its mentioning forbidden by the censorship.<sup>132</sup> Only in June 1957, during a speech to the Knesset, the Prime Minister Ben-Gurion mentioned the ISA publicly, as “one of our most successful services of which any government, regardless of its political affiliation, would be proud”.<sup>133</sup>

Since then, the ISA has started to come under the lens of the Israeli and international public opinion, and therefore started to appear transversally in laws protecting civil rights, such as the Secret Monitoring Law (1979),<sup>134</sup> the Emergency Powers (Detention) Law

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<sup>130</sup> Shlomo Shapiro, “No Place to Hide: Intelligence and Civil Liberties in Israel”, *Cambridge Review of International Affairs* 19, no. 4 (2006): 630.

<sup>131</sup> Eyal Pascovich, “Not Above the Law: Shin Bet’s (Israel Security Agency) Democratization and Legalization Process”, *Journal of Intelligence History* 14, no. 1 (2014): 56.

<sup>132</sup> Pascovich, “Not Above the Law”: 56.

<sup>133</sup> Quoted by *Haaretz*, 20th June 1957.

<sup>134</sup> Available in English at: [https://knesset.gov.il/review/data/eng/law/kns9\\_monitoring\\_eng.pdf](https://knesset.gov.il/review/data/eng/law/kns9_monitoring_eng.pdf)

(1979)<sup>135</sup> and the Protection of Privacy Law (1981).<sup>136</sup> These were the first and only areas where the authority of the ISA was outlined by a legal source.

However, the lack of a comprehensive legal framework, defining the ISA boundaries, powers or even their own existence, emerged impetuously under the circumstances of two major scandals that perturbed the image and the functioning of the services: the Nafsu case and the Bus 300 Affair.

## **ii. The Nafsu Case and the Bus 300 Affair**

In the first case, Lieutenant Izat Nafsu, a Circassian Israeli lieutenant in Lebanon, was charged with treason<sup>137</sup> and aggravated espionage,<sup>138</sup> with the accusation of having met with a PLO commander in Lebanon and having received a suitcase with explosives with the intention of bringing it into Israel.

Although in trial Nafsu denied all the accusations, he was convicted based on a written confession that he claimed had been obtained under duress. Arrested in January 1980, the accused was interrogated by the Shin Bet for multiple days in a row. The interrogators, headed by Yossi Ginossar, used violent means including pulling his hair, pushing him around, throwing him to the ground, kicking, scratching and insults, sleep deprivation, forced standing, exposure to extreme cold temperature, forced nudity and threat to family members.<sup>139</sup> After two weeks of torture, Nafsu accepted to sign the confession and was then condemned to serve 18 years in prison.

In trial, the military judges rejected Nafsu's claim that the admission had been extracted through "unacceptable means of pressure", and therefore was not to be considered admissible evidence: the interrogators and their testimonies denied the facts and the Military Appeals Court then refused to reform the decision. By the same token, his appeal to the Supreme Military Court was rejected.

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<sup>135</sup> Available in English at: [https://www.btselem.org/sites/default/files/1979\\_emergency\\_powers\\_law\\_detention.pdf](https://www.btselem.org/sites/default/files/1979_emergency_powers_law_detention.pdf)

<sup>136</sup> Available in English at: <https://www.gov.il/BlobFolder/legalinfo/legislation/en/ProtectionofPrivacyLaw57411981unofficialtranslatio.pdf>

<sup>137</sup> Military Justice Law, 5715-1955, Section 43(7).

<sup>138</sup> Penal Law, 5737-1977, Section 113(b).

<sup>139</sup> CA 124/87, *Izat Nafsu v. Chief Military Prosecutor* (24 May 1987), para. 4.

The case, however, came to light again following the Bus 300 Affair,<sup>140</sup> when four Palestinians hijacked Bus 300, riding from Tel Aviv to Ashkelon, and held the passengers as hostage in an attempt to negotiate the release of 500 Palestinians detained as terrorists in Israel. With the intervention of the Israeli authorities, two of the hijackers were arrested, taken by the GSS to a contiguous field and beaten to death; in the words of Ehud Yatom, former Shin Bet officer and Member of the Knesset from 2003 to 2006: “I smashed their skulls”, “On the way I received an order from Avraham Shalom to kill the men, so I killed them”. Yatom claimed: “I am proud of everything I’ve done”, “Only clean moral hands in Shin Bet can do what is needed in a democratic State”.<sup>141</sup>

Even though the version released to the public in the immediate aftermath of the facts was that the terrorists had died while resisting arrest, pictures showing that the two had been captured alive leaked out, and the information was published by the newspaper *Hadasbot* – which was then ordered to cease its publication for three days, due to “unpatriotic disobedience” of the censorship instructions.<sup>142</sup>

From the newspapers, Nafsu was able to recognize the figure of one of his interrogators and insisted on his claims, obtaining a re-examination by an ISA investigative team, which found that the controversial confession had indeed been extracted from him “under duress”.<sup>143</sup> The decision of the Military Appeals Court was thus reviewed by the Supreme Court, which accepted Nafsu’s claims and reformed the verdict, 7 years after his arrest.<sup>144</sup>

### iii. The Landau Commission

The GSS actions by then progressively gained weight in the public discourse. The gravity and the resonance of the scandals, together with the will of preventing a criminal proceeding,<sup>145</sup> eventually persuaded the Government to set up a Commission to investigate

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<sup>140</sup> David Appel & David Friedman, “Terrorists Hijack Bus: 33 Ashkelon-Bound Passengers Held Hostage Near Rafah”, *The Jerusalem Post*, 13 April 1984.

<sup>141</sup> From an interview with Israeli newspaper *Yediot Ahronot* on 26<sup>th</sup> July 1996, reported by the *LA Times* the following day: <https://www.latimes.com/archives/la-xpm-1996-07-27-mn-28415-story.html> (last accessed: 31 January 2021).

<sup>142</sup> Udi Lebel & Eyal Lewin, *The 1973 Yom Kippur War and the Reshaping of Israeli Civil-Military Relations* (Lanham: Lexington Books: 2015), 92.

<sup>143</sup> Assaf Meydani, “The Role of Bureaucrats in Designing Policy Outcomes: The Case of the 2002 General Security Service (GSS) Law”, *International Journal of Law in Context* 11, no. 1 (2015): 64.

<sup>144</sup> CA 124/87, *Iz'at Nafsu v. Chief Military Prosecutor* (1987).

<sup>145</sup> Mordechai Kremnitzer, “The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the Needs of the Security Service”, *Israel Law Review* 23, no. 2-3 (1989): 220.

on the operational mechanisms of the service, headed by Justice Moshe Landau.<sup>146</sup> In particular, the members were asked to deal with two subjects: the investigation methods and procedures of the GSS on Hostile Terrorist Activity (HTA), and the giving of testimony in Court regarding these investigations,<sup>147</sup> and to determine to what extent the violations, by then patent, were fruit of individual misconducts or rather institutionalized.

The cases of Nafsu and of the hijackers show clearly different features and outcomes: in particular, while the case of the IDF officer raised a wave of concern and sympathy,<sup>148</sup> the same can not be said about the two Palestinian hijackers.

Both episodes contributed in exposing faults in the operations of the GSS, the use of concerning methods in accomplishing their counter-terrorism activities and an articulated and regularized system of perjury in front of the Courts when these practices emerged in trials. However, reading the two episodes of violence in the same frame bears the risk of underestimating the purposeless brutality of the latter and, on the other hand, the systematized character of the former. In fact, the Bus 300 Affair was the occasion for an arbitrary, extra-judicial killing, where violence was not serving any utility, that could yet be pictured as an extraordinary event, even though authorized by the highest ranks of the intelligence service and, most probably, of the political leadership;<sup>149</sup> conversely, the torture used towards Izat Nafsu was a rule-based tool, ordinarily available to interrogators to obtain confessions.

Juxtaposing the two, as it happened in the public opinion at the time, imposes to focus only on their common features, namely: the use of a certain extent of violence when dealing with suspects of terrorism and the system of perjury conceived and laid down by the GSS top-ranks, therefore creating space, respectively, for necessity and superior orders defense. Indeed, these were the conclusions stemming from the Landau Commission, which had been set up precisely with this confused and mystifying frame.

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<sup>146</sup> Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, *Report, Part One* (1987), 1 [hereinafter: The Landau Report].

<sup>147</sup> The Landau Report, para. 1.6.

<sup>148</sup> See for example David Rudge, "Family of Circassian Convicted of Espionage Say He Was Framed", *The Jerusalem Post*, 17 April 1987.

<sup>149</sup> The documentary *The Gatekeepers* (2012), by Dror Moreh, collects interviews to six former heads of the Shin Bet. Amongst them Avraham Shalom, director of the Shin Bet between 1980 and 1986, admitted he ordered to kill the hijackers and reported conversations with the Prime Minister and the Minister of Defense which would show a political will to condone and hide the affair. In particular, see: 19' and 26' of the documentary.

It is worth noting, however, that the Supreme Military Court had already adopted this approach: as a matter of fact, until the object of the claims of Nafsu was the torture used on him, the Court refused to re-examine the case; only when it became evident – and public – that GSS officers were committing perjury, the Supreme Court felt the urge to intervene, and to intervene only on this matter. Conversely, the acts of torture performed were mentioned only as corroboration of the dishonesty of the officers that denied having committed them. The reasoning of the judges is neatly reflected in the ruling, where they candidly state: “We find that the acts revealed in this case have been reprehensible, *in that they led the court into incorrect findings and conclusions*”.<sup>150</sup>

The Landau Report, then, merely spelt out the underlying logic of this approach. As the Report puts forward,<sup>151</sup> the Letter of Appointment did not even require the Commission to deal with the Bus 300 Affair, which was considered closed with the pardon of eleven GSS officers and the resignation of some of them. However, they deemed it necessary to take the episode into consideration, since it “prepared the ground” for the revelations of the Nafsu case, by shaking the trust into the secret service. Unequivocally, the Report states: “In saying this, we are not referring to the methods of interrogation they employed – *which are largely to be defended, both morally and legally*, as will be explained below – but to the method of giving false testimony in court, a method which has now been exposed for all to see and which deserves utter condemnation”.<sup>152</sup>

It was determined that both the employment of physical pressure on HTA suspects and the perjury on it were systematic features. However, the apprehension of the Commission was primarily – if not exclusively – directed towards the latter issue: while the need to testify truthfully was deemed “a basic principle which must not be deviated from under any circumstances”,<sup>153</sup> the Commission stated that “the effective interrogation of terrorist suspects is impossible without the use of means of pressure” and that, even if psychological pressure was to be preferred when possible, when this doesn’t prove effective “the exertion of a moderate measure of physical pressure can not be avoided”.<sup>154</sup>

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<sup>150</sup> CA 124/87, para. 6 (emphasis added).

<sup>151</sup> The Landau Report, para. 1.7.

<sup>152</sup> The Landau Report, para. 1.8 (emphasis added).

<sup>153</sup> The Landau Report, para. 4.15.

<sup>154</sup> The Landau Report, para. 4.7.

More precisely, while the internal circulation of a memo instructing the GSS staff to lie in trial<sup>155</sup> was considered outrageous and compromising the “moral fiber” of the service, the Commission insisted that precise and written guidelines on the methods available were a necessary and sufficient tool to pursue the “lesser evil”, and provided to their outlining themselves in a Second Part of the Landau Report, which remained secret. It was argued that, as far as the interrogators would have followed these directives, they would have acted within the law; moreover, when acting beyond these boundaries, the justifications of order of the superiors<sup>156</sup> and that of necessity<sup>157</sup> would have been available to them. The last one would quickly become the harbinger of a controversial doctrine, exempting interrogators who used violent means of interrogation from criminal liability.

Regardless of its controversial findings on interrogation methods – which will be addressed in greater detail in the following chapters –, the Commission had the merit of bringing the security service under public scrutiny. In the words of Yaacov Perry, former head of the GSS:

“Until the Bus 300 incident, the GSS had been shut up behind the curtains of a friendly environment. Most people never thought about the possibility of pushing those curtains aside, looking outside to examine the political atmosphere as well as the power of the media and public opinion. Everything was hermetically sealed; the work was carried out in secret, away from the spotlight, almost without any concern about any media involvement or criticism.”<sup>158</sup>

#### **iv. The State Comptroller Report**

The consequences of the Landau approach became public only more than a decade after, but were patent to the relevant authorities a few years after the intervention of the Landau Commission. In fact, in 1991, the State Comptroller started a review of the GSS interrogations related to hostile terrorist activities, and their compliance with the guidelines

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<sup>155</sup> The Landau Report, para. 2.31. In particular, the document presented to the Commission was a memorandum of a discussion between the GSS Chief and the Head of the Investigation Unit, where talking about a method of physical pressure used in interrogations, the point was made that: “In trials within a trial... we shall deny carrying out... and shall maintain that... in line with the prison/detention centre procedures.”

<sup>156</sup> Penal Law, art. 24(a)(1).

<sup>157</sup> Penal Law, art. 22.

<sup>158</sup> Yaacov Perry, *He Who Comes To Kill You* (1999), p. 39, reported in English by Assaf Meydani in *The Anatomy of Human Rights in Israel: Constitutional Rhetoric and State Practice* (Cambridge: Cambridge University Press, 2014), 90.

set by the Landau Commission.<sup>159</sup> The study covered the interrogations performed between January 1988 (immediately after the outbreak of the First Intifada) and December 1992, a period where thousands of Palestinians were arrested and interrogated by the security service.<sup>160</sup> Presented to the Intelligence Sub-Committee in 1995, the report was classified and never disclosed, even to the Knesset. However, prompted by a decision of the HCJ of 1999,<sup>161</sup> the Committee reconsidered its decision and allowed the presentation of the executive summary of the report to the Knesset, in February 2000.<sup>162</sup>

According to the report itself, this period analyzed was a peculiar one, where a “significant change in the conditions under which interrogators operate”<sup>163</sup> was experimented; the change highlighted, however, did not concern the techniques of interrogation employed - as one might have hoped following the scandals of the previous years -, but the pressure that the interrogators purportedly suffered.

After praising the “tremendous appreciation for the devotion and achievements” of the GSS staff in general, and of the interrogators in particular,<sup>164</sup> the report, in fact, pivots the analysis on the pressure that interrogators had to face, given the constant increase of Palestinians arrested and their ideologically increasing stubbornness, their familiarity with torture techniques traditionally employed and the scarce time and space they could use to conclude the interrogations.<sup>165</sup> According to the State Comptroller, these circumstances forced the interrogators to depart from the legal standards and the Landau Commission’s recommendations, on the torture methods considered acceptable and on the system of authorizations to use some of them.<sup>166</sup>

Similarly to the Landau Commission first, and the HCJ after, the State Comptroller dismisses quite rapidly the discussion of the methods themselves, since this does not fit its

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<sup>159</sup> State Comptroller, *Report on the ISA Interrogations*, 2.

<sup>160</sup> Statistics show that between 1987 and 1994 about 175,000 Palestinians were arrested and detained, and more than 23,000 were interrogated by the GSS. See: B’TSELEM. 1987-1997. *A Decade of Human Rights Violations*, January 1998.

<sup>161</sup> HCJ 607/98, 11 November 1999.

<sup>162</sup> State Comptroller, *Report on the ISA Interrogations*, 1.

<sup>163</sup> State Comptroller, *Report on the ISA Interrogations*, 4.

<sup>164</sup> State Comptroller, *Report on the ISA Interrogations*, 2.

<sup>165</sup> State Comptroller, *Report on the ISA Interrogations*, 4.

<sup>166</sup> State Comptroller, *Report on the ISA Interrogations*, 4.

“role, nor is it within her power, to determine whether it is desirable or necessary to make changes to the interrogation methods”,<sup>167</sup> and defers the question to the security officials or the legislator. However, what seems to urge and legitimize intervention is the “mixed message in the agency, both with respect to exceeding permission and with respect to non-adherence to honest reporting as an inalienable value”.<sup>168</sup>

Further, even though the State Comptroller acknowledges that the situation after the Landau Commission did not change, both regarding the limitations and procedure established and regarding the false declarations, only the second point seems to be relevant to the authority.

As in the report on Protective Edge,<sup>169</sup> then, the State Comptroller seems to miss completely the real issue - the torture practiced in interrogations - and ends up giving some procedural recommendations<sup>170</sup> to overcome organizational deficiencies and insubordination; similarly, it stresses the need for the procedure to be better detailed and anchored in the law or in internal directives, without imposing any substantial limitation or criticism on the content of these laws and directives.

In evocative terms, often employed in this context, the report concludes that “[t]he special role entrusted with the [GSS], which sometimes compels it to operate in a grey area both in terms of method and content, does not detract from the requirement that its actions be based on a legal foundation, but rather strengthens it.”<sup>171</sup> In other terms, once again called to prohibit torture, the State limited itself to say that abuses shall not be tolerated, because they are not *yet* contemplated by the law; or in other terms, that torture shall not be practiced, *unless* it is done by the book.

## v. The GSS Law

Given the public exposure and under the auspices of the Landau Commission and the State Comptroller, the GSS then undertook an unprecedented path and moved the first steps towards a formalization of its position under the law, which would have given its

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<sup>167</sup> State Comptroller, *Report on the ISA Interrogations*, 5.

<sup>168</sup> State Comptroller, *Report on the ISA Interrogations*, 5.

<sup>169</sup> See *supra*: I.1.d: *The State Comptroller*.

<sup>170</sup> In particular, the State Comptroller recommends an accurate recording of the interrogation methods and the relevant permissions thereof, an increased training and education of the staff.

<sup>171</sup> State Comptroller, *Report on the ISA Interrogations*, 7 (emphasis added).

most tangible result 15 years later, with the General Security Service Law (hereinafter: GSS Law).<sup>172</sup>

In the aftermath of the publication of the Report, Yossef Hermelin, then chief of the GSS, and Yaacov Perry, his deputy, called on the head of the legal advice department, demanding to provide a legal framework for the functions of the GSS. The process continued in the following years under the direction of Yaacov Perry and, later, under Carmi Gilon, who permitted the legal department to send the material necessary to draft the GSS Statute to the Ministry of Justice.<sup>173</sup>

The Minister of Justice appointed a team jointly with members of the GSS, who worked on a Bill submitted in 1998 to the Knesset, which approved it in first reading. It was then transferred to a joint committee (the Constitution, and Security and Foreign Affairs Committee), before the beginning of its discussion in a closed committee where the three members were part of the Likud party, whose government fell, delaying the bill until 2000.<sup>174</sup>

In the same period, the awareness towards human rights issues was rising and led to well-known statements and judicial decisions, such as *PCATI* from the HCJ (1999).<sup>175</sup> This judgement, together with the pressure of public opinion, and the fear of leaving the matter to legal proposals from private subjects or opposite groups,<sup>176</sup> led Prime Minister Barak to appoint an investigating team focusing on interrogations. The team was headed by two senior lawyers from the Legal Department: Rachel Sucar and Menachem “Meni” Mazuz (already head of the joint team established under the Ministry of David Libai, and Judge of the Supreme Court since 2014). The Sucar-Mazuz Committee highlighted that the Basic Laws principles needed to be upheld in the GSS Law and, at the same time, proposed protecting GSS interrogators in advance. The idea was endorsed by Prime Minister Barak and Legal Advisor Rubinstein, but not by the Foreign Affairs and Security Chairman, the Constitutional Committee Chairman and the Ministry of Justice,<sup>177</sup> who claimed that the Knesset could not pass a law that defied internationally prescribed human rights: many

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<sup>172</sup> General Security Service Law.

<sup>173</sup> Meydani, “The Role of Bureaucrats in Designing Policy Outcomes”: 66.

<sup>174</sup> Meydani, “The Role of Bureaucrats in Designing Policy Outcomes”: 66.

<sup>175</sup> HCJ 5100/94, *Public Committee Against Torture in Israel v. the State of Israel* (6 September 1999).

<sup>176</sup> Meydani, “The Role of Bureaucrats in Designing Policy Outcomes”: 66.

<sup>177</sup> Meydani, “The Role of Bureaucrats in Designing Policy Outcomes”: 71.

jurists, in fact, believed that it would have been disgraceful to enshrine in the GSS Statute a provision permitting torture, even if restrictively to exceptional cases.<sup>178</sup>

The discussion of the GSS Law, then, continued between Knesset members and GSS representatives, until it finally passed in 2002: after a number of amendment, elaborated in cooperation with the police and the military too, 47 Parliamentarians supported the law, while 16 opposed it – mostly from the left-wing and the Arab parties.<sup>179</sup> Remarkably, the only article ruled out was Clause 9: suggested by the GSS, this norm aimed at granting the interrogators *ex ante* authority to use force, if the suspect appeared to withhold information that could save human lives; for the same reasons previously upheld, the Knesset refused to censor such a norm, and no legal source was provided to allow nor prohibit physical pressure during interrogation, or on the possible defenses of those exerting it.

However, this is not the only aspect that has been left out from the Statute, since it was decided that the detailed rules, regulations and instructions would be elaborated in the following 18 months.<sup>180</sup> In 2004, specific regulations were set by a committee of six Knesset Members, amongst which figured Ehud Yatom – the same Shin Bet agent that openly admitted his preeminent role in the Bus 300 Affair, and called for an infrangible moral superiority of the secret services. These regulations remain secret and their implementation is supervised solely through the supervision mechanisms there established (oversight from the Prime Minister and the Attorney General, special Knesset committees, the State Comptroller and an internal supervisor).

The GSS Law was the first source dealing directly with national intelligence, that for the first time was officially spelt out as subject to law.<sup>181</sup>

Before this moment, most of the GSS activities were undefined and justified as forms of “residual prerogatives” of the Government, outlined in the Basic Law: the Government, where article 32 states that: “The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority.”

By contrast, art. 8 of the Statute neatly establishes that the service is competent to receive and collect information, to pass on information to other bodies and to investigate suspects

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<sup>178</sup> Pascovich, “Not Above the Law”: 55.

<sup>179</sup> Meydani, “The Role of Bureaucrats in Designing Policy Outcomes”: 72.

<sup>180</sup> GSS Law, art. 25.

<sup>181</sup> Shapiro, “No Place to Hide: Intelligence and Civil Liberties in Israel”: 635.

in connection with activities aimed at harming State security,<sup>182</sup> while art. 7(b) enumerates the functions of the GSS. The Statute also defines the GSS's mission and functions,<sup>183</sup> methods of appointment and duration of the Head of the service;<sup>184</sup> it establishes a Ministerial Committee for General Security Service Affairs<sup>185</sup> and a Parliamentary Sub-Committee<sup>186</sup> and defines their members, to whom reporting on activities is due on periodic basis (no less than every three months).<sup>187</sup> In terms of supervision, the Law subjects the ISA to the Government in the person of the Prime Minister and to questioning from the Service Comptroller, who shall assist the Government and Ministerial Committee in fulfilling their functions, handle complaints on behalf and against Service employees.<sup>188</sup>

The formal shift was thus a major one. Mazuz, Attorney General at the time the law was published, announced that with this act “The period in which the GSS acted according to caprices has come to an end.”<sup>189</sup> However, some of the most controversial issues, including the one that gave the first input to the legislative process, i.e. the use of extraordinary methods of interrogations, were left out. Furthermore, a closer look to the provisions shows that their significance is not as revolutionary as it tends to be professed. In fact, the influence of the Government, particularly in the figure of the Prime Minister, is quite pervasive and it represents almost the only power with some influence on the services: it appoints the Head of the Service,<sup>190</sup> it delineates the operational area,<sup>191</sup> it

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<sup>182</sup> GSS Law, art. 8.

<sup>183</sup> GSS Law, art. 7.

<sup>184</sup> GSS Law, art. 3.

<sup>185</sup> GSS Law, art. 5.

<sup>186</sup> GSS Law, art. 6.

<sup>187</sup> GSS Law, art. 12.

<sup>188</sup> GSS Law, art. 13.

<sup>189</sup> Ilan Marciano, on *Ynet* on 16th November 2004: <https://www.ynet.co.il/articles/0,7340,L-3005226,00.html>

<sup>190</sup> GSS Law, art. 3.

<sup>191</sup> GSS Law, art. 7.

appoints the Service Comptroller,<sup>192</sup> it prescribes regulations on secrecy and restriction of Service employees.<sup>193</sup>

Despite the fact that some provisions envisage the participation of other bodies with the intention to balance the executive's action, they often fall short in providing guarantees to this aim. For example, the list of functions includes a quite broad area of "activities in any other area determined by the Government"; even though the same norm continues requiring the approval of the Knesset Service Affairs Subcommittee approval on these activities, it should be noticed that "the meetings of the Knesset Service Affairs Committee shall be privileged and publication of statements made or presented therein is prohibited", unless the Head of the Service authorizes such a disclosure.<sup>194</sup> Further, the complaints on behalf of and towards the Service's employees are not handled by the State Comptroller, as for all other executive bodies, but by a dedicated Service Comptroller, the only organ to have full access to the documentation necessary to assess responsibilities for misconducts during the operations; the Service Comptroller, as mentioned, is appointed by the executive branch and works in strict cooperation with it, as a bridge-figure between the GSS and the Government.

Other provisions dealing with accountability raised some concern. Namely, art. 17 which, remindful of the Landau Report and its background, forbids the use of internal debriefing as evidence in trial, except for disciplinary trials or criminal ones for false information; art. 18, which defines the terms for exempting employees from criminal liability in a broad understanding; or art. 19(b), stating that any release of information not authorized by the Service or the Prime Minister constitutes a criminal offense, punishable with up to 5 years of imprisonment.

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<sup>192</sup> GSS Law, art. 13.

<sup>193</sup> GSS Law, arts. 20 and 21.

<sup>194</sup> GSS Law, art. 6(b).



## 2. Torture: What, Who and Why

Violations of human rights are admittedly traced in counter-terrorism operations, whereas claims about their frequency, gravity and justification differ. The security-oriented faction reads these violations alternatively as isolated accidents (adopting the “rotten-apples” narrative), or as extraordinary episodes which developed in response to exceptional circumstances; the human-rights oriented side, on the other hand, holds that these facts are much more recurrent and that their systematic features speak for a scheme of institutionalized violence. Rather than an accusation of wide-spread sadism, the argument underlying the latter view is that most of these measures are used as a tool of governance, pacifically embedded in an “administrative structure in which torture is managed”,<sup>195</sup> where “justice becomes the extension of war - by other means”.<sup>196</sup>

Whether one embraces an ideological orientation or the other, it is worth considering the general picture and the figures of violations of human rights occurring during operations targeting Palestinians. Besides the remarkably spread and constant claims by NGOs, which tend to be discredited by the pro-authorities side as mean of lawfare, the Government itself admitted that some of the violent experiences reported by prisoners are part of the interrogation methods – whether referring to physical or psychological pressure; yet, they claim they are not intense enough to be defined as torture,<sup>197</sup> or that their use is justified by the necessity of thwarting new terrorist attacks.<sup>198</sup> In any case, the confirmation that the facts *per se* happened makes their description relevant.

It is all the more important to adopt an empirical approach when treating the State torture phenomenon. On the one hand, the numbers and statistics are a fundamental instrument to understand what is the frequency of the practices at stake and, consequently, whether these can be named as isolated accidents, or rather their denser pattern suggests a standardized phenomenon. On the other hand, a vivid description of each practice is needed to take them away from an abstract discourse and reacquire their substantial weight. A detached assessment, in fact, unavoidably lifts the reasoning to a purely theoretical frame, which is easily victim of idealization and leads to rhetorical evaluations of “the lesser evil” that have no grasps to reality.

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<sup>195</sup> Itamar Mann, Omer Shatz, “The Necessity Procedure. Laws of Torture in Israel and Beyond, 1987-2009”, *Unbound: Harvard Journal of the Legal Left* 6 (2010): 63.

<sup>196</sup> Mann, Shatz, “The Necessity Procedure. Laws of Torture in Israel and Beyond, 1987-2009”: 96.

<sup>197</sup> See *infra* II.1: *The Definition of Torture in the Israeli Framework and in International Law*.

<sup>198</sup> See *infra* II.3: *The Necessity Defense as the Pillar of Un-prosecution*.

### a. What: Torture Techniques and Their Characteristics

The incredibly high number of complaints and testimonies provided by people who underwent interrogation by the ISA have originated countless reports that describe in detail the torture techniques generally used. Amongst them, one that distinguishes for comprehensiveness and analyticity is *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees*,<sup>199</sup> published by B'tselem and HaMoked, the two main Israeli centers for human rights.<sup>200</sup>

According to the data collected, a traditional technique that is routinely used is the *schabach* position.<sup>201</sup> This consists in the prolonged cuffing to a chair with both hands bound behind the back with metal handcuffs: one hand is placed inside the gap between the chair's seat and back support, the second is tied against the back support. The chair is smaller than a regular one and the seat is tilted forward, towards the ground; the suspect's head is covered by an opaque sack, falling down to their shoulders, and powerfully loud music is played in the room. The HCJ judgment *Public Committee Against Torture v. Government of Israel* (hereinafter: *PCATI*) banned this method in 1999, defining it “a distorted and unnatural position” not required for the investigators' safety,<sup>202</sup> but the reports show that it is still used in nearly all interrogations, with some minor adjustments.

Another frequent method used is the one known as “shaking”, consisting in forceful and repeated shaking of the suspect's upper torso, in a manner that causes the neck and head to swing rapidly. This became grievously famous after it caused the death of a suspect, and was generally found as “likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious

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<sup>199</sup> B'TSELEM & HaMoked. *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees*, May 2007 [hereinafter: '*Absolute Prohibition*'].

<sup>200</sup> B'TSELEM - The Israeli Information Center for Human Rights in the Occupied Territories was founded in 1989 by a group of lawyers, authors, academics, journalists and Knesset members. It documents human rights abuses in the Occupied Territories and brings them to the attention of policymakers and the general public. Its data are based on independent fieldwork and research, official sources, the media and information from Palestinian and Israeli human rights organizations. English website: <https://www.btselem.org/> (last accessed: 23 September 2020)

HaMoked - Center for the Defense of the Individual was established in 1988, against the backdrop of the first intifada. Its mandate is to safeguard the rights of Palestinians of the occupied territories whose rights are violated due to Israeli policies. English website: <http://www.hamoked.org/home.aspx> (last accessed: 24 September 2020)

<sup>201</sup> 96% of the detainees that participated in the study reported being subject to it. *Absolute Prohibition*, 63.

<sup>202</sup> HCJ 5100/94, *PCATI*, para. 10.

headaches”.<sup>203</sup> Also this method was banned by the HCJ in 1999, but has been found to be practiced even after this date.<sup>204</sup>

The “frog crouch”, instead, refers to consecutive, periodical crouches on the tips of one’s toes, each lasting for five minute intervals, while the interrogators push or beat them until they loses their balance and fall.<sup>205</sup> This technique was subject to an order *nisi* before the *PCATI* judgment, but is reportedly still used.<sup>206</sup>

The “banana position” requires the suspect to have the backrest of the chair at their side and their hands cuffed in front of them. An interrogator then forcefully pushes the interrogee backwards, in order for their back to reach a forty-five-degree angle. When the interrogee can no longer hold their back at this angle, they fall back, their body forming an arch; their arms and legs being close in this moment, the interrogators handcuff them and leave them in this position for several minutes, before the practice is repeated.<sup>207</sup>

Another commonly used tool to interrogate is sleep deprivation, for up to 84 consecutive hours.<sup>208</sup> The deprivation is normally performed by putting the interrogee in extremely uncomfortable positions, so that pain will prevent them from falling asleep, or by loud shouting from the interrogators. While this technique might not seem as violent as others, it is reportedly one of the most unbearable means of interrogation,<sup>209</sup> possibly leading to permanent brain damage, and was amongst the five techniques condemned as torture by the European Court of Human Rights as early as in 1978.<sup>210</sup>

Notably, the above mentioned practices are just some of the most dramatic and clear examples of torture used to extract information. However, these are normally combined and alternated with other torture and degrading acts, such as threats and intimidations, cursing, verbal humiliation, dry beating and intentionally painful handcuffing.

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<sup>203</sup> HCJ 5100/94, *PCATI*, para. 9.

<sup>204</sup> Public Committee Against Torture in Israel, *Back to a Routine of Torture: Torture and Ill-treatment of Palestinian Detainees during Arrest Detention and Interrogation*, 73.

<sup>205</sup> HCJ 5100/94, *PCATI*, para. 11.

<sup>206</sup> *Absolute Prohibition*, 72.

<sup>207</sup> *Absolute Prohibition*, 72.

<sup>208</sup> *Absolute Prohibition*, 67.

<sup>209</sup> This was reported, amongst others, by the experience of Abu Zubaydah, the first person subject to the torture program employed by the CIA, known as *Enhanced Interrogation Techniques*. The information was shared by the lawyer of Zubaydah, Prof. Joseph Margulies, during the lecture *Fear and Anger in Criminal Law*, as part of the Criminology course at the Università degli Studi di Milano (15th March 2018).

<sup>210</sup> ECtHR 5310/71, *Ireland v. The United Kingdom* (13 December 1977), para. 167.

However, a sound analysis requires to consider not only the violations experienced strictly during the interrogation by the ISA officers, but should also include the cumulative impact of the violence suffered and conditions imposed on a security suspect between the arrest and the interrogation, and between the interrogation and the trial: all of the above influence the perceptions of the interrogee to a point that can reverberate on their free will, a crucial matter in trials where the accused's confession is generally the most relevant evidence, and often the only one.

In this sense, it is important to notice that one of the distinctive elements of torture is the feeling of helplessness experienced by the victim.

In his article *What's Wrong With Torture?*,<sup>211</sup> David Sussman engages in identifying the characterizing features of torture. The author is more precisely asking himself what is *so* wrong with torture, that makes us perceive it as the one of most despicable and heinous offenses of all, even graver than murder, the ultimate damage to life. The same question has been object of countless academic dissertations, and one of the crucial points emerging is that the victim of torture finds themselves defenseless at the mercy of the perpetrator. Already in 1978, Henry Shue was stressing that “[I]t is in this respect of violating the prohibition against assault upon the defenseless, then, that the manner in which torture is conducted is morally more reprehensible than the manner in which killing would occur if the laws of war were honored.”<sup>212</sup>

In the composite scheme traced in Sussman's findings, a major feature is indeed the asymmetry in the relationship between the torturer and the victim. Moreover, for the mechanism of torture to be in place, the victim needs to be aware of the position of dramatic inferiority he/she holds. In the words of the author, “the torture victim *must see herself as* being unable to put up any real moral or legal resistance to her tormentor”.<sup>213</sup>

This perception can be created with a number of means, that are not confined to the interrogation room and during the core activity of questioning, and that expand to experiences suffered before and in alternation with it. The violent behaviors contributing to this result can be both of physical and psychological nature, spanning from beatings and physical constrictions to humiliation and threats, that often overlap and mutually reinforce one another.

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<sup>211</sup> David Sussman, “What's Wrong With Torture?”, *Philosophy & Public Affairs* 33, no. 1 (2005): 1-33.

<sup>212</sup> Henry Shue, “Torture”, *Philosophy & Public Affairs* 7, no. 2 (1978): 130.

<sup>213</sup> Sussman, “What's Wrong With Torture?”: 7 (emphasis added).

On the other hand, the erasure of *legal* resistance that Sussman refers to is equally enacted. As it will be detailed in the next chapter, the legal remedies that the military, the police and the ISA apparatus envision hardly ensure accountability; moreover, for what is here relevant, the detainee's perception of impossibility to reach out and dispose of effective legal means is a key strategic element. Being subject to the application of orders coming from an unnamed high-ranked official, the prevention from meeting with lawyers or, more generally, from having contact with any institution in "the outer world" cumulatively create the sensation that, neither sooner nor later, any legal venue will be available, and therefore build the sense of helplessness and submission of the detainee.

This dynamic is not only condemnable in terms of ethics, but bears crucial practical consequences on the evidence so obtained: left with no alternative, the victim of torture will use the only tool available to them, providing the interrogator with the information is seeking for, and making it up if necessary. As Cesare Beccaria was writing more than two hundred years ago, "the impression made by pain may grow to such an extent that, having filled the whole of the sensory field, it leaves the torture victim no freedom to do anything but choose the quickest route to relieving themselves of the immediate pain. (...) And thus the sensitive but guiltless man will admit guilt if he believes that, in that way, he can make the pain stop. All distinctions between the guilty and the innocent disappear as a consequence of the use of the very means which was meant to discover them."<sup>214</sup>

This contrasts even more with the argument put forward by the Israeli authorities to justify the use of torture, as exemplarily explained by the Landau Commission. Since the interest of the collectivity was deemed undoubtedly as prior, the legitimacy of the ISA conduct was not tested upon the way they extracted information, but on whether the confession obtained was a truthful one or not. Basically, the Commission affirmed that if the confession obtained was true, the means to extract it could be justified in light of the necessity to undermine the terrorist activity; on the other hand, if the confession was eventually proved not adherent to facts, the use of irregular pressure would have been unjustified.<sup>215</sup> But since the torture is used long before the trial is concluded and the truth - supposedly, or at least formally - ascertained, how does an interrogator in the room decide whether they are going to extract a true confession, and therefore that they can use physical methods on the suspect? The Commission satisfied itself with the answer that such an

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<sup>214</sup> Cesare Beccaria, *On Crimes and Punishment and Other Writings* (Cambridge: Cambridge University Press, 1995), 41.

<sup>215</sup> The Landau Report, para. 2.6.

assessment is made on the basis of a comparison “with information in the hands of the GSS from privileged sources, which cannot be revealed to the Court”.<sup>216</sup>

Therefore, these confessions hold at the same time a very low level of reliability and a fundamental weight in the result of the proceedings, since they represent in most cases the only evidence, or at least the only evidence *accessible* to the Court.

### **b. Who: Security Prisoners and Associated Regime**

Remarkably, Israel subjects its security prisoners (juxtaposed to criminal prisoners) to a separated regime. Before the condition of these detainees is described, a clarification on the concept of “security prisoner” shall be provided. The definition of security prisoner is not given by the law, but it has its roots in an internal administrative decision of the Israeli Prison Service,<sup>217</sup> which states that a security prisoner is:

“A prisoner who was convicted and sentenced for committing a crime, or who is imprisoned on suspicion of committing a crime, which due to its nature or circumstances was defined as a security offense or whose motive was nationalistic.”<sup>218</sup>

Whenever a detainee is classified as pertaining to this group, a different regime applies, which includes the determination of the prison or prison-wing where the prisoner will serve their sentence, possible suspensions and reductions on furloughs, phone calls and family visits, and prevention from petitioning for early release from prison.<sup>219</sup> The formulation of stricter rules is justified as a mean to limit the contacts with the world outside the prison, and to contain the “potential for endangering the security of the State, in general, and the order and discipline in the prisons in particular”;<sup>220</sup> however, these rules present several critical features.

A first problematic aspect of this approach pertains the respect of the rule of law: since these restrictions imply clear limitations on fundamental rights, it appears unlawful that the restrictions’ definition and width does not stem from a primary source, but from

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<sup>216</sup> The Landau Report, para. 2.6.

<sup>217</sup> IPS: commonly known by its acronym *Shabas*. It is the State agency responsible for overseeing prisons in Israel. It is under the jurisdiction of the Ministry of Public Security. English website: [https://www.gov.il/en/Departments/prison\\_service](https://www.gov.il/en/Departments/prison_service) (last accessed: 31 January 2021).

<sup>218</sup> IPS Commission Ordinance No. 04.05.00.

<sup>219</sup> IPS Commission directive of 4.05.2000, Paragraph 1(B).

<sup>220</sup> IPS Commission directive of 4.05.2000, Paragraph 1(A).

administrative ordinances and directives, which can be applied with wide discretion by the IPS and often based on secret information.

Moreover, even if the definition was contained in a law issued by the Knesset, its legality could be challenged under the criteria of precision, clarity and certainty characterizing criminal provisions under the rule of law. In fact, the two alternative requirements of the crime committed are that the offense “was defined as a security offense” or that its motive “was nationalistic”.

As far as the first one is concerned, the definition of security offense is not provided in the penal code, nor in other sources applicable in the State of Israel,<sup>221</sup> but some relevant provisions can be found in the Counter Terrorism Law: here, art. 2 states that a “Grave Security Offense” is “a grave terrorist offense, as well as one of the offenses listed below when committed in circumstances seemingly capable of inflicting harm to national security, and which is affiliated with terrorist activity”.<sup>222</sup> However, “security offense” as well as the general concept of “national security” remain undefined.

As for the second, the law seems to require that the reason for the commission of the crime lies in a nationalistic ideology. If this can be accepted as specific intent to characterize certain misconducts, restricting their limit or designating a particular response in terms of penalty, the subjective purpose seems here to be independent and untied from a general conduct to be circumscribed. Quite the opposite, the purposive element appears to open the door to offenses that wouldn't have been otherwise contemplated as security breaches, therefore attracting them under the security domain only in light of an ideological element.<sup>223</sup>

The consequences of this normative vagueness can be ascertained more concretely by looking at the type of actions that fall in the category of security offense: membership of any organization proscribed by the military, unauthorized peaceful political activity such as waving or displaying political flags or symbols, publications containing material of political nature (even in the form of a post on a social media) and gatherings of more than ten

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<sup>221</sup> The legal sources are somehow more explicit when it comes to residents of the West Bank, except Israeli citizens, to whom law is dictated through Military Orders and applied by Military Courts. Military Order Regarding Security Provisions, section 259 defines a security offense as: “Any offense stipulated in security legislation, and any offense in contravention of emergency legislation as defined in the Order regarding Interpretation (Additional Directives) (No. 5) (Judea and Samaria) (No. 224), 5728-1968, punishable by five years or more of imprisonment.”.

<sup>222</sup> The Counter-Terrorism Law, art. 2.

<sup>223</sup> See, amongst others: Abeer Baker, “The Definition of Palestinian Prisoners in Israeli Prisons as “Security Prisoners” – Security Semantics for Camouflaging Political Practice”, *Adalah's Review* 5 (2009): 65-78; Yael Berda, “The Security Risk as a Security Risk: Notes on the Classification Practices of the Israeli Security Services”, in *Threat: The Palestinian Prisoners in Israeli Jails*, Anat Matar & Abeer Baker, eds. (London: Pluto Press, 2011): 44-57.

people can be punished for up to ten years in prison.<sup>224</sup> The far-reaching effects of this formulation can be gathered from the fact that security detainees represent more than a quarter of the total prison population.<sup>225</sup>

From another perspective, the administrative regime in question raises concerns of discrimination. If it is true that the wording of the provisions examined is not specifically referred to any group, a thorough analysis shows a different reality.

As mentioned, security prisoners are excluded from the possibility of petitioning for early release; however, there are two exceptions to this rule, the first being activated where the prisoner has not been a member of a hostile organization and has not assisted such an organization in committing a crime, and where the ISA provides an assessment declaring that this will not harm State security.<sup>226</sup> The provision then enlists a number of “hostile organizations” for the purposes of the paragraph, where only Arab organizations are included and no Jewish terrorist group is mentioned,<sup>227</sup> even though Jewish organizations have historically been involved in dramatically violent and nationalistic-driven terroristic attacks, which continue up to today.<sup>228</sup> The amended version of the norm refers to the organizations included in the Prevention of Terrorism Ordinance – 1948 and to the Defense (Emergency) Regulations – 1945, and the updated and detailed list of these organizations is held by the legal advisor of the IPS and has not been made public; on the other hand, the Ministry of Justice published a “List of Declared Prohibited and Terror Organizations Ensuining to Defense Regulations (Emergency), 1945, and the Anti-Terror Financing Law, 5765-2005.” The discriminatory nature of these lists can easily be evicted by the IPS statistics: in 2013, Palestinians represented 96% of the security prisoners; while Israeli Jews stated at 0.2%, the rest of the prisoners were foreign Arab nationals.<sup>229</sup>

The unequal treatment dictated challenges the idea that the limitations are set in order to protect State security and public safety. In other words, either the security issues are

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<sup>224</sup> See the IDF Order No. 101, *Order Regarding Prohibition of Incitement and Hostile Propaganda Actions*, 1967.

<sup>225</sup> Adalah: The Legal Center for Arab Minority Rights in Israel, *Statistics on Detainees and Prisoners in Israeli Prisons*.

<sup>226</sup> IPS Commission Directive of 3 February 2000, para. 1(C) 1 and 2.

<sup>227</sup> IPS Commission Directive of 3 February 2000, para. 1(C) 3.

<sup>228</sup> Amos Harel, “Israeli Jewish Terror Incidents Targeting Palestinians Tripled in 2018”, *Haaretz*, 6 January 2019.

<sup>229</sup> Adalah, *Statistics on Detainees and Prisoners in Israeli Prisons*.

underestimated when it comes to Jewish organizations, or they are overestimated when it comes to Arab organizations; in either way, they don't seem to be the factor shaping the policy.

Another element pointing in this direction, partly resultant from the provisions mentioned above, is the fact that the risk that security prisoners pose is not assessed on individual basis when it comes to Arab prisoners.<sup>230</sup> Rather, they are treated as an undifferentiated cluster, regardless the age, degree of involvement and influence in organizations considered hostile, possibility of further engagement in future attacks and so on. Such an approach, even when adopted to protect public safety from terrorist acts, would lead to sounder results by an individualized consideration of each case, that could grant the same level of prevention through a less spread repression of fundamental rights.

An analogous conclusion could be suggested by the fact that some of the exceptional measures dictated for security prisoners are not immediately relatable to security threats.

The rights and treatment of detainees are regulated in the Israeli Criminal Procedure Regulations,<sup>231</sup> where Regulation 22 defines the “Restricted application of regulations for a detainee suspected of security offenses”. The last part of the provision excludes detainees suspected of security offenses from enjoying the right to a daily walk, the right to use a telephone and the possibility to work with authorization of the commander of the place of detention;<sup>232</sup> notably, these rights are not simply limited or subject to special procedures, but completely excluded.

More critically, Regulation 22(A) regulates the derogations applied to the detention cells where security detainees are held. In the first place, the provision dictates for minimal equipment in the room, where not even the presence of a bed is granted.<sup>233</sup> Not only this is hardly relatable to the risk of threats to the security of the State, but it also has consequences on the application of further provisions. Namely, the minimum space per detainee granted by the law is of 4.5 square meters, and identically applies to security detainees; however, the space is calculated by dividing by the number of beds in the cell, an equipment not necessarily provided in the cell of a security detainee. Significantly, the

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<sup>230</sup> Baker, “The Definition of Palestinian Prisoners in Israeli Prisons as ‘Security Prisoners’”: 67.

<sup>231</sup> Criminal Procedure Regulations (Powers of Enforcement – Arrests) (Conditions of Detention), 1997.

<sup>232</sup> Criminal Procedure Regulations (Powers of Enforcement – Arrests) (Conditions of Detention), Regulation 22, B(3).

<sup>233</sup> The IPS argued in front of the High Court that beds could be used as “dangerous weapons of destruction” and therefore refused to provide prisoner Muhammad Dahoud Darwish with one. See HCJ 221/80, *Muhammad Dahoud Darwish v. The Israel Prison Service*.

provision applicable to security detainees reformulates the paragraph on maximum capacity of the cell from “no more than four beds for detainees” to “at most four detainees”, therefore falling short from providing a provision of guarantee for a minimum vital space. Moreover, the detention cells of security detainees are granted a less frequent painting of the walls and treatment of disinfection and pest control, compared to regular detainees’ cells,<sup>234</sup> and a differentiated list of allowed objects is provided in the Second Appendix of the Regulations, preventing security detainees from the possession of objects such as books, writing utensils, plastic mirrors, wrist watches, fans or heaters, or even wedding rings. In 2018, the IPS Commissioner and the IPS legal advisor were demanded to supply security prisoners with blankets, winter clothing and heaters: these basic goods were limited by the IPS regulations, which also did not allow prisoners to receive them from families and sold them exclusively at the prison canteen at unaccessible prices.<sup>235</sup>

The latest regulations dictated to face the COVID-19 pandemic were even more concerning: their health protection was utterly disregarded failing to provide social distancing and medical treatment,<sup>236</sup> while the Israeli Public Security Minister issued a directive preventing security prisoners from receiving vaccinations.<sup>237</sup>

The connection between these dispositions and the possibility to harm the security of the State by engaging in further terroristic activities is hard to trace. Conversely, an effect that is certainly descending from these treatment is that of dehumanizing the prisoner, as a consequence of the complete oblivion of their individuality and personal being and of the degrading conditions of life imposed. As anticipated, this perception is widely incremented by the attitude displayed during the entirety of the operations targeting subjects considered to be security threats.

Such a condition of oblivion reaches its peak with regards to the first phases of the detention, where security suspects are often placed in complete isolation, prevented from seeing even their lawyer or ICRC representatives.<sup>238</sup> In the words of the vice-president of

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<sup>234</sup> Regulation 4 states that regular detainees’ cells will be painted at least twice a year and undergo disinfection and pest control at least once a year; on the contrary, security detainees’ cells need to be painted only once a year and the disinfection and pest treatment is not granted.

<sup>235</sup> Adalah, “Palestinian Prisoners Jailed by Israel Suffering from Extreme Cold”, 12 March 2018.

<sup>236</sup> Adalah, “Israeli Supreme Court rules: Palestinian Prisoners Have No Right To Social Distancing Protection against COVID-19”, 8 November 2020.

<sup>237</sup> Adalah, “Israeli Minister Blocks COVID-19 Vaccinations for Palestinian Prisoners; Adalah Demands Decision to Be Overturned”, 28 December 2020.

<sup>238</sup> *Absolute Prohibition*, 43

the Military Appeals Court: “Preventing the meeting is liable to grant the interrogators a substantial advantage over the interrogee, to the point of breaking the latter’s spirit and delivery of a false confession, or one not made of the interrogee’s free will.”<sup>239</sup>

Order Regarding Defense Regulations (No. 378) explicitly states that ISA officers are entitled to forbid meeting with a lawyer for up to 15 days from the date of the arrest, subject to extension of additional 15 days;<sup>240</sup> the Military Court is then authorized to extend the delay for an additional period of 30 days, also subject to extension of more 30 days,<sup>241</sup> bringing the total to 90 days from the arrest. On the other hand, meetings with ICRC representatives are allowed only starting two weeks after the commencement of detention, and can be anyways postponed for security reasons.<sup>242</sup>

A right to receive family visits during interrogation period is not recognized, therefore the ISA doesn’t need a special authority to deny such visits. Further, suspects are often transferred outside the West Bank, where relatives are unable to visit lacking a permit from the Israeli authorities. This practice, in blatant contrast with the 4th Geneva Convention,<sup>243</sup> has nevertheless been confirmed by the Israeli HCJ, which dismissed the petitions received on this point.<sup>244</sup>

### **c. Why: Systematic Torture as a Tool of Governance for the Occupation**

Israeli, Palestinian and international NGOs claim that, given the frequency and recurring similarities of the misconducts attributed to militaries, police and interrogators, they should not be treated as accidents, but rather as a systematic and intentional policy.

A significant and peculiar perspective can perhaps be given by the reality documented by the organization Breaking the Silence, whose position is of particular interest in the present discussion for it can set aside the accusations of partisanism and ideological and nationalistic bias normally censoring Palestinian and international human rights organizations.

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<sup>239</sup> CA 3765/06, *Amani Jaarmeh v. Military Prosecutor*, reported in English by *Absolute Prohibition*, 44.

<sup>240</sup> Order Regarding Defense Regulations (No. 378), section 58.

<sup>241</sup> Order Regarding Defense Regulations (No. 378), section 59.

<sup>242</sup> Prisons Commissioner’s Order No. 03.12.00, section 4(c).

<sup>243</sup> Geneva Convention IV, art. 66.

<sup>244</sup> Orna Ben Naftali, Michael Sfar, Hedi Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control Over the Occupied Palestinian Territory* (Cambridge: Cambridge University Press, 2018), 390.

In the first place, this organization differs from other local NGOs for its composition, as it is an organization of veteran soldiers who have served in the Israeli military service since the beginning of the Second Intifada, in September 2000. Secondly, their main focus is not to denounce human rights violations towards Palestinians, nor a generic critique of the occupation policy. Rather, their aim is giving the Israeli public access to some concrete aspects of the Israeli military operations on the ground, since, according to their view, they are too rarely portrayed in the media.<sup>245</sup> While organizations representing victims are crucial to present the perspective of abused detainees, but can gather information limited to the violent acts in their material aspect, the perspective of former militaries is useful in reconstructing what is the chain of orders and the social and psychological environment that ends up, and partially induces to, this violence. In this sense, what emerges from the testimonies collected is a frequent use of disproportionate and unnecessary means of force and ordinary humiliation, often mandated by superiors and fueled by the distress intentionally put on soldiers.<sup>246</sup>

After describing the beating of a mentally impaired Palestinian child by an Israeli officer, a soldier commented that: “the thing with violence, I think, it wasn’t how harsh it was, it was how common it was. (...) Most of the times it did come in the form of slapping, pushing, all kinds of things like that. Every day.”<sup>247</sup> Other testimonies recall of daily acts of humiliation as peeing on Palestinians passing in a lower street,<sup>248</sup> arbitrary detention at checkpoints,<sup>249</sup> violence from investigators,<sup>250</sup> blowing up of houses,<sup>251</sup> shooting out of boredom,<sup>252</sup> and even killing to get a better evaluation.<sup>253</sup>

Going back to Sussman, the relational scheme that the military staff enacts is one where the position of inferiority and subjection of the detainee is constantly and repeatedly

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<sup>245</sup> <https://www.breakingthesilence.org.il/about/organization>

<sup>246</sup> A soldier recalled, after the arrest of a suspect near Nablus, how the deputy brigade commander “that instead of taking him with assertiveness he would also remind him who the boss is, who the Jew is and who the Arab is, who the prisoner is and he gave him some two, three, four, chops, elbows to the ribs, a kick to the ass, all kind of... It was the deputy brigade commander releasing tension”. Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 44.

<sup>247</sup> Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 83.

<sup>248</sup> Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 87.

<sup>249</sup> Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 298 and 324.

<sup>250</sup> Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 85.

<sup>251</sup> Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 122.

<sup>252</sup> Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 148.

<sup>253</sup> Breaking the Silence, *Occupation of the Territories: Israeli Soldiers’ Testimonies 2000-2010*, 107.

stressed, therefore contributing to the annihilation of moral resistance that is characteristic of torture.

Even though the military branch is often not directly interrogating suspects, their involvement in the phases of arrest, search and custody is significant in the whole process: in the West Bank, where most of the security suspects interrogated by the ISA reside, the military is responsible for arresting Palestinians and detaining them until their transfer to the ISA, and several detention facilities were run of the Military Police<sup>254</sup> - even though, over the years, most of them have been moved under the responsibility of the IPS.<sup>255</sup> Moreover, a large portion of IPS staff operating with Palestinian inmates are soldiers on active duty serving in the IPS: for instance, they represent 51% of the staff in Ofer Prison.<sup>256</sup>

In any case, a broader perspective, mindful of the context, should be adopted to grasp the real meaning of these measures and of the role of the enforcement bodies that do not pertain directly to the security or detention sphere. In this sense, the security paradigm should be understood in its comprehensive nature, as a categorization that reaches far beyond the prisons' walls: the most evident domain where the security paradigm explicates its effects is probably the management of the Palestinian population in the West Bank.

The Israeli lawyer Yael Berda suggested the concept of “security theology”,<sup>257</sup> as the ultimate belief that, when it comes to Palestinians, the security apparatuses have almost unlimited executive discretion in deciding the content of the category of “security threat”, which justifies itself in light of the need to distinguish “between friend and foe, in Israel’s permanent state of emergency.”<sup>258</sup> The security category, then, does not respond to a need pertaining to the criminal sphere, but it becomes a binary paradigm. As Hannah Arendt put it, “the ‘objective enemies’ (...) knew that they were ‘criminals without a crime’”.<sup>259</sup>

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<sup>254</sup> For instance, Etzion (southwest of Bethlehem), Binyamin in the Ofer military base (northwest of Jerusalem), Ephraim, (in the surroundings of Nablus), Shomron (south of Nablus) and Sallem (north of Jenin) have been run for years by the IDF.

<sup>255</sup> See Notes on B'TSELEM *Statistics on Palestinians in the custody of the Israeli security forces*, [https://www.btselem.org/statistics/detainees\\_and\\_prisoners#Notes](https://www.btselem.org/statistics/detainees_and_prisoners#Notes) (last accessed: 24 September 2020). As of today, only Shomron and Etzion are still controlled by the IDF.

<sup>256</sup> Ben Naftali, Sfard, Viterbo, *The ABC of the OPT*, 387.

<sup>257</sup> Berda, “The Security Risk as a Security Risk”: 45.

<sup>258</sup> Berda, “The Security Risk as a Security Risk”: 45.

<sup>259</sup> Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt Brace Jovanovich, 1951), xxxiii.

Arendt explains that, contrarily to the “suspect”, the “objective enemy” is defined as such by “the policy of the government, and not by his own desire to overthrow it.”<sup>260</sup> In particular, Berda argues, the power to define this policy is resting in a selective group of the executive, to be generally identified with the security apparatus, i.e. the ISA.<sup>261</sup> Not only the ISA is the only authorized drafter of the definition of security threat, and of the associated regime, but it is also the only actor authorized to oversee it, and even to see it: after the construction of the category, the ISA is in fact entitled of a monopoly that covers the knowledge of the topic, the decision making and the administration, which create an “*impenetrable wall* of taxonomy and classification”.<sup>262</sup>

On the opposite, the population - whether Palestinian or Israeli - is allowed to see only the physical projections that are emanated therefrom, and supposedly needed to maintain the control over the threat. This leads to the construction of physical *but penetrable* barriers, that takes the form of a wall, a checkpoint, a detention center. What emerges, however, is that these physical elements do serve the security paradigm, but do not grant security to the population: on the contrary, they end up constituting a threat themselves.<sup>263</sup>

Adopting the concept of Michel Foucault, we can think of these elements as *dispositifs de sécurité*,<sup>264</sup> as a device that is not meant to prohibit an offense - like a legal device -, or to surveil the offender - like the disciplinary device -, but to reduce the risk that the offense happens.<sup>265</sup> The objective then shifts from the one of safety (*sûreté*) to the one of security (*sécurité*),<sup>266</sup> and its application moves from the territory to the population: instead of delineating certain and impenetrable borders, the movement is allowed but upon inspection, because only the circulation allows a constant examination of the whole population, to distinguish friend from foe. Concretely, Israel is closed to Palestinians by military checkpoints, but not everyone is checked when they go through them; a wall has been built all along the border with the West Bank, but it can be illegally trespassed in some

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<sup>260</sup> Arendt, *The Origins of Totalitarianism*, 423.

<sup>261</sup> Berda, “The Security Risk as a Security Risk”: 46.

<sup>262</sup> Berda, “The Security Risk as a Security Risk”: 52 (emphasis added).

<sup>263</sup> Berda, “The Security Risk as a Security Risk”: 54.

<sup>264</sup> Michel Foucault, *Sécurité, Territoire, Population: Cours au Collège de France (1977-1978)* (Paris: Gallimard Seuil, 2004), 17.

<sup>265</sup> Foucault, *Sécurité, Territoire, Population: Cours au Collège de France (1977-1978)*, 17.

<sup>266</sup> Foucault, *Sécurité, Territoire, Population: Cours au Collège de France (1977-1978)*, 57.

specific points - with full awareness of the Israeli army -;<sup>267</sup> some forms of political activity are perfectly known but not punished, while others are.

Recalling another concept from Foucault, more than actually checking and arresting, these dispositives seem to bear the function of *showing* that people *can be* checked and arrested, to cause the gaze of surveillance to be interiorized by each individual under its weight, “to the point that he is his own overseer, each individual thus exercising this surveillance over, and against, himself”.<sup>268</sup>

In the same way but at a much graver stage, during torture, the interrogee is not only experiencing a form of self-surveillance, but even a self-condemnation. To say it with Sussman, torture purports “a kind of forced self-betrayal”,<sup>269</sup> that happens through a distortion and alienation from one’s own mind *and* body, for the torture “contains not only the feeling ‘my body hurts’ but the feeling ‘my body hurts me’”.<sup>270</sup>

The ultimate utility found in torture, then, is not gaining a confession - doubtfully true and, normally, scarcely actionable in trial - but rather in its function of expressing control, as the ultimate form to negate Palestinians their free will. Brought a step further, when the application of torture is “limited” to security threats, but at the same time the whole Palestinian population is considered as such, the constant threat acts not only as a tool to control the individual in the room, but as one of the many tools of governance Israel deploys on Palestinians.

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<sup>267</sup> The information was even publicly dispatched by newspapers, which however mainly interpreted it as a humanistic movement or a merciful concession of the army. See for instance: Jack Khoury and Hagar Shezaf, “Israel Turns a Blind Eye, and Palestinians Revel in a Weekend at Jaffa Beach”, *Haaretz*, 10 August 2020.

<sup>268</sup> Michel Foucault, “The Eye of Power: A Conversation with Jean-Pierre Barou and Michelle Perrot”, in *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, Colin Gordon. Trans. Colin Gordon, Leo Marshall, John Mepham, Kate Soper (eds.), (New York: Pantheon Books, 1980).

<sup>269</sup> Sussman, “What’s Wrong With Torture?”: 4.

<sup>270</sup> Elaine Scarry, *The Body in Pain* (New York: Oxford University Press, 1985): 47.

## Chapter II - Systematic Torture in Israel as a Progressive Seizure of Legal Opportunities

As the previous chapter showed, the frequency of occurrence of torture validates the argument that this practice does not represent an exceptional event, but rather a widespread one amongst interrogators and officials in charge of security matters. The articulation of the acts described, involving the police, military and security agency staff, and their recurring features suggest the existence of a systematic and standardized pattern. Besides opening the door for the qualification of the torture acts also as a crime against humanity, which requires the conduct to be committed “as part of a widespread or systematic attack directed against a civilian population”,<sup>1</sup> this finding calls for the question of what elements, and consequently what authors, formulated and enforced the policy of torture. Hence, this chapter will focus on the legal tools and reasoning that pave the path to a legitimization of torture and to its crystallization in legal terms, through normative and judicial elements.

A speculation on the legalization of torture and its elements has been entertained by few Israeli scholars, who have denounced the systemic impunity that the perpetrators of torture enjoy when interrogating Palestinian “security suspects”.

Some authors,<sup>2</sup> for example, have highlighted the continuity between the Landau Report and the *PCATI* judgment, demonstrating substantial closeness of concepts, which made room for torture to happen with impunity. Most interestingly, they argue that the only real difference between the first and the second approach lies in the fact that *PCATI* brought to life an administrative system where torture is not merely overlooked, but meticulously managed. They see in the interpretation of necessity given by the Israeli HCJ the cardinal element granting impunity to the interrogators, in a form of “un-prosecution” - instead of the lawfulness suggested by Landau -, and therefore refer to this strategy as to the “necessity management” of torture. However, the analysis they provide is not limited to the legal theory surrounding necessity, on which the Israeli and international scholarship has elaborated for decades, but rather brings to light the articulated nature of the torture management, its rooting in the production of evidence and its ramifications into the administrative structure.

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<sup>1</sup> ICC, Elements of Crimes, art. 7(1)(f)(4).

<sup>2</sup> Mann, Shatz, “The Necessity Procedure. Laws of Torture in Israel and Beyond, 1987-2009”: 59.

Another Israeli scholar<sup>3</sup> also points at the different paths through which the Landau Report and the *PCATI* judgment generated the same consequence of rationalizing and legitimizing State violence. While the first did so by simply suspending the prohibition of torture in name of the “war against terrorism”,<sup>4</sup> the author argues that the HCJ judgments generated an “ecosystem of designated exceptions”.<sup>5</sup> Each of the single exceptions is markedly narrower than the one proposed by the Landau Commission, and pertains to an isolated element: whether the perpetrator, the victim, the time or the space of the interrogation; this way, each of them is observed by the Court separately, and thus appears proportional and logic. At the same time, their fragmentation is precisely the element that makes them so hard to identify and challenge, while their various aggregation implement a highly flexible and unpredictable system of suspension of the prohibition on torture.

While it is common belief that torture methods were a custom that pertained exclusively to the past decades, very recent judgments have acknowledged to a variable extent the use of torture on behalf of ISA agents. Moreover, they have further developed the legal theorization around this practice and the situation and ways it can be excused and left unpunished in violation of all international and domestic norms.

It is in our view indeed possible to identify a constant, if not common, line between the Landau Report and the *PCATI* ruling, as well as the systematic reading of the exceptions and justification upheld or even suggested by the Court. Taking the Landau Report as a point of reference and origin of the publicly shared theorization over the legitimacy of torture, this chapter is based mainly on three rulings from the HCJ: *Public Committee Against Torture in Israel v. Israel* (1999),<sup>6</sup> *Abu Gosh v. the Attorney General* (2017)<sup>7</sup> and *Tbeish v. the Attorney General* (2018).<sup>8</sup>

These judgments together suggest that the core narrative has not changed during the years, but it’s only becoming increasingly more fragmented and unveiled. In a way, they can be seen as emblematic epiphanies of “legal opportunities” that were seized to make torture legal and unpunished, by strengthening and developing specific narratives and juridical

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<sup>3</sup> Irit Ballas, “Fracturing the ‘Exception’: The Legal Sanctioning of Violent Interrogation Methods in Israel since 1987”, *Law & Social Inquiry* 45, no. 3 (2020): 818-38.

<sup>4</sup> Landau Report, para. 3.17.

<sup>5</sup> Ballas, “Fracturing the ‘Exception’”: 818-38.

<sup>6</sup> HCJ 5100/94, *PCATI*.

<sup>7</sup> HCJ 5722/12, *Abu Gosh*.

<sup>8</sup> HCJ 9018/17, *Tbeish*.

elements. To better analyze each of these elements, each of them will be assessed in a separate section, accompanied by the relevant fragments of reports and judgments, to testify the constant evolution and continuity of each aspect over the decades.

In particular, our analysis will follow the order of arguments elaborated by the HCJ in these rulings, which generally articulates as follows:

1. First, the Court argues that the treatment received by the interrogee does not represent torture, and supports this view by building a definition of torture that excludes the techniques used by the interrogators.
2. Second, in response to the Petitioners' claim that most evidences are not accessible or tainted, due to the partial investigations conducted by special bodies, the Court might engage in a scrutiny of the ISA mechanism of investigation, which is normally endorsed as an equitable one, and thus continues lamenting a lack of evidence from the side of the Petitioners. The few elements available are constantly dismissed or disregarded if brought by the defense, while welcomed if they come from the State side.
3. Third, the Court argues that, even if torture was committed, interrogators enjoy the protection of the necessity defense, in continuity with the Landau Commission.
4. Fourth, the Court joins the Landau Commission and the State Comptroller in asking that the use of torture is regulated by legal sources, instead of condemning it and banning it. However, the old request to the Knesset, of drafting a list of permitted and not permitted physical means of interrogation, has been substituted with a request to the Attorney General to specify the criteria under which the necessity defense shall apply. The AG, then, becomes able to establish and suggest in advance when torture shall and shall not be prosecuted.

## 1. The Definition of Torture in the Israeli Framework and in International Law

The elements presented, collectively, produce a prohibition of torture that is only relative, against all international law understandings.

The prohibition of torture is, in fact, clearly established under international law. It was already included in the first nucleus of human rights identified by the universal declaration of 1948,<sup>9</sup> and it was then reaffirmed in all the most relevant international and regional human rights treaties, such as the International Covenant on Civil and Political Rights of 1966 (art. 7), the European Convention on Human Rights of 1950 (art. 3), the American Convention on Human Rights of 1969 (art. 5), the African Charter on Human and Peoples' Rights of 1981 (art. 5), the Arab Charter on Human Rights of 2004 (art. 8).

Torture is also criminalized by the Rome Statute, both as a crime against humanity (art. 7(1)(f)) and as a war crime (art. 8(2)(a)(ii) and art. 8(2)(c)(i)), reflecting its prohibition even in the course of armed conflicts: international humanitarian law already banned these acts in the 1907 Hague Regulations respecting the Laws and Customs of War on Land (art. 4), again in all the four Geneva Conventions of 1949 and in the Additional Protocols of 1977, eventually codifying this principle in the ICRC Customary Law Rules (Rule 90 and Rule 156).

In 1984, the UN General Assembly (UNGA) adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force three years later and is today participated by 171 Countries,<sup>10</sup> out of 193 UN member States.

Israel signed the Convention Against Torture, in 1987, and ratified it. It has also signed and ratified additional international conventions which include the prohibitions against torture (such as the International Covenant on Civil and Political Rights or the Convention on the Elimination of all Forms of Discrimination Against Women). Moreover, given its universal recognition and prominence, it is widely affirmed and accepted that the prohibition of torture constitutes a rule of *jus cogens*,<sup>11</sup> meaning a rule “accepted and recognized by the international community of States as a whole as a norm from which no derogation is

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<sup>9</sup> Universal Declaration of Human Rights, art. 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”.

<sup>10</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en) (last accessed: 26 October 2020).

<sup>11</sup> UNGA, *Seventieth Anniversary of the Universal Declaration of Human Rights: Reaffirming and Strengthening the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 20 July 2018, A/73/207, para. 5.

permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>12</sup>

## **a. The Definition of Torture in International Law: a Comprehensive *Formula* or a Dangerous *Lacuna*?**

### **i. The Definition and Criminalization of Torture**

Notwithstanding the various international instruments, a definition of torture has not been “codified” universally in precise or univocal terms yet. This reflects the difficulty of elaborating a single, detailed definition which is able to encompass a complex and multifaceted phenomenon, but at the same time it serves the effectiveness of the norm itself, since encoding too many details would have the opposite outcome of restricting the condemned methods of torture. In the word of the ICRC: “However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers”.<sup>13</sup>

On the other hand, the absence of explicit descriptions and naming of torture methods left room for the States to label them with different terms, and in some cases “legitimizing” forms of abuse that would amount to torture as “enhanced interrogation techniques” and similar concepts.<sup>14</sup>

In fact, the lack of a detailed definition of torture was exploited by the HCJ to condone certain “physical methods” as legal, because they were not grave enough to amount to torture, either on the basis of an unclear distinction between authorized and non-authorized techniques, or depending on the severity of the pain inflicted.

Subsequently, several scholars and NGOs have focused on the importance of promulgating a law criminalizing torture,<sup>15</sup> still absent in the Israeli domestic legal framework, and required by art. 4(1) of the UNCAT. This reflects the consolidated position of the Committee against Torture<sup>16</sup> and of the Special Rapporteur,<sup>17</sup> which constantly

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<sup>12</sup> UN Vienna Convention on the Law of the Treaties, art. 53.

<sup>13</sup> ICRC, *Commentary on the Fourth Geneva Convention: Convention* (1958), 39.

<sup>14</sup> See *infra* II.1.a.ii: *Attempts of Reinterpretation: Enhanced Interrogations and the Severity of Pain* and III.1.c: *Lessons from the US Torture Memos*.

<sup>15</sup> Antonio Marchesi, “Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)”, *Journal of International Criminal Justice* 6, no. 2 (2008): 196.

<sup>16</sup> UNCAT, *Concluding Observations on the Fifth Periodic Report of Israel*, 3 June 2016, C/ISR/CO/5, paras. 12-13.

<sup>17</sup> UNGA, A/73/207, para. 23.

recommend that States “expressly criminalize torture and other forms of ill-treatment”.<sup>18</sup> According to this view, the institution of an *ad hoc* crime defining torture as distinct from common assault or other crimes will advance the prevention of torture, guarantee an appropriate punishment and strengthen deterrence.

Israel being part of several treaties against torture, including the UNCAT, the lack of a specific norm in the criminal code was raised several times and, ultimately, also by the Turkel Commission, appointed in June 2010 by the Israeli Government: the first Recommendation of the Second Report issued by this Commission was indeed the incorporation of an offense prohibiting torture into the Israeli *Penal Law*.<sup>19</sup> Consequently, the Attorney General instructed to formulate a draft bill “anchoring the offense of torture in the Israeli Penal Law”.<sup>20</sup> To date, no such a law has been promulgated yet, nor draft laws have been presented to the Knesset.<sup>21</sup>

## **ii. Attempts of Reinterpretation: Enhanced Interrogations and the Severity of Pain**

However, the Israeli case-law, corroborated by the more explicit documents from the US intelligence apparatus, suggests that the codification of the crime of torture might not be the decisive factor in preventing torture.

In fact, the Special Rapporteur on Torture clearly expressed his concern towards the practice of “reinterpretation” and starkly pinpointed the attitude of States reinterpreting “certain coercive interrogation practices as not violating the prohibition of torture and ill-treatment, predominantly in the context of counter-terrorism and counter-insurgency” by the narrowing of definitions, especially by “over-emphasizing the criterion of the “severity” of the pain and suffering”, requiring a long-term harm, and adopting “euphemistic terminology, such as “enhanced interrogation” or “pressure techniques”.<sup>22</sup> In the same paragraph, the Special Rapporteur sheds light on the combination of this orientation with the coherent “increasing use of methods specifically designed to avoid leaving physical traces”, amongst which he included stress positions, sleep deprivation,

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<sup>18</sup> UNGA, A/73/207, para. 77.

<sup>19</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report: *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, p. 365-366.

<sup>20</sup> Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law, *Report*, August 2015, para. 21.

<sup>21</sup> Meeting with Efrat Bergman Sapir (Director of Legal Department at PCATI), 10 November 2020.

<sup>22</sup> UNGA, A/73/207, para. 45.

suffocation, hooding or blind-folding, long-term exposure to physical discomfort, mental pressure and sensory destabilization.

This remark is of primary importance, considered that the decisions of the Israeli HCJ basically entail an effort to shift the emphasis back to the severity of pain, as the element determining the classification of interrogational abuses of this kind.

Notably, the same interpretation was adopted by the US authorities in order to attract the “enhanced interrogation techniques” used by the CIA in the aftermath of 9/11 into a spectrum of legality.<sup>23</sup> In those circumstances, the Assistant Attorney General Jay Bybee interpreted the definition of torture as requiring the pain inflicted to be “extreme”, to the point it would “be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function”.<sup>24</sup> The invention of a threshold based on severity thus permitted the US executive to corroborate as legal some infamous practices like waterboarding, forced grooming and the use of individual phobias to induce stress,<sup>25</sup> but also the use of stress positions, sensory deprivation, hooding and 20-hours long interrogations (resulting in deprivation of sleep). The CIA could then keep using these practices while publicly condemning any form of torture as “abhorrent and universally repudiated” and reaffirming its absolute prohibition.<sup>26</sup>

Understanding the severity of pain as the distinctive element of torture is a phenomenon that has roots in the evolution of the prohibition developed under the intertwinement of treaty law and international case law which traditionally used the distinction to discern torture and ill treatment.

As we have seen, the first instrument to provide a definition of torture was the UN Declaration against Torture, adopted by the General Assembly in 1975:<sup>27</sup> art. 1(2) defines

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<sup>23</sup> Jamal Barnes, “The War on Terror and the Battle for the Definition of Torture”, *International Relations* 30, no. 1 (2016): 109.

<sup>24</sup> US Department of Justice, OLC, Memorandum for Alberto R. Gonzales, *Re: Standards of Conduct for Interrogation under 18 U.S.C. para. 2340-2340A*, 1 August 2002.

<sup>25</sup> The most renowned version of which is probably the use of dogs against Muslim detainees, for whom dogs represent impure animals, that was proven by the pictures leaked from Abu Greib. See, for instance the picture shot at Abu Greib by an unidentified photographer, showing unidentified US soldiers using guard dogs to intimidate an Iraqi detainee, available on the website of the International Center of Photography: <https://www.icp.org/browse/archive/objects/unidentified-us-soldiers-use-guard-dogs-to-intimidate-an-iraqi-detainee> (last accessed: 4 November 2020).

<sup>26</sup> Barnes, “The War on Terror and the Battle for the Definition of Torture”: 112.

<sup>27</sup> UNGA, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452 (XXX).

torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”. On this basis, a line was drawn between a less grave form of mistreatment (alternatively identified as “inhuman or degrading treatment”, “ill treatment” or “cruel or inhuman treatment”) and torture, but it was not explicated what criteria would assess the gravity. Thus, the first interpretation was given by the European Court of Human Rights when, in 1976, it was called to judge upon the five interrogation techniques used on IRA suspects by the UK security forces.<sup>28</sup> In this occasion, the Court ruled that “the distinction derives principally from a difference in the intensity of the suffering inflicted”.<sup>29</sup> The criterion of relative intensity of pain or suffering was then adopted in the international jurisprudence of the European Court of Human Rights and, partially, by the ICTY;<sup>30</sup> yet, it is not supported by uniform practice of the Human Rights Committee<sup>31</sup> nor by the Inter-American Court on Human Rights.<sup>32</sup> Further, both the UNCAT and the Rome Statute, do not refer to “the level of suffering” in the definition of torture, so that the central element of torture should not be identified in the degree of pain inflicted but on the purposive factor, since “in contrast to the disparity of practice and definition in regard to the factor of aggravation, there is virtually uniform treatment of the factor of purpose as a, if not *the*, central component of the concept of torture”.<sup>33</sup>

It is also interesting to look at the latest draft Report from the UN Special Rapporteur on Torture, from March 2020, which focuses on the use of psychological torture and cyber-torture. If severity of pain was to be considered as the determining factor, these methods, together with “no touch” torture,<sup>34</sup> would be left out of the prohibited methods, while “the generic prohibition of torture covers methods not using the conduit or effect of severe physical pain or suffering”.<sup>35</sup> The growing attention towards this typology of coerciveness suggests, on the one hand, the spreading development of methods that can escape the

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<sup>28</sup> ECtHR 5310/71, *Ireland v. The United Kingdom*, para. 96.

<sup>29</sup> ECtHR 5310/71, *Ireland v. The United Kingdom*, para. 167.

<sup>30</sup> Nigel S. Rodley, “The Definition(s) of Torture in International Law”, *Current Legal Problems* 55, no. 1 (2002): 480.

<sup>31</sup> Rodley, “The Definition(s) of Torture in International Law”: 478.

<sup>32</sup> Rodley, “The Definition(s) of Torture in International Law”: 480.

<sup>33</sup> Rodley, “The Definition(s) of Torture in International Law”: 491.

<sup>34</sup> UN Human Rights Council, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Report of the Special Rapporteur, 20 March 2020, A/HRC/43/49, para 26.

<sup>35</sup> UN Human Rights Council, A/HRC/43/49, para 22.

definition of torture, on the other, that this result is achieved especially thanks to the reference to the threshold of pain, mainly intended in severe and physical terms. In the words of the Special Rapporteur, “intentionally inflicting pain or suffering on a powerless person for purposes such as coercion, intimidation, punishment or discrimination always amounts to torture”.<sup>36</sup>

## **b. The Definition of Torture as Shaped by the Israeli Case Law**

### **i. The *PCATI Case*: Introducing Prohibited and Authorized Interrogation Methods**

As far as Israel is concerned, the most relevant classification of interrogation techniques was made in 1999, in occasion of the *PCATI* judgement. The ruling gained unparalleled notoriety in Israel and internationally, since for the first time the Court pronounced itself on the legality of some interrogation methods used by the ISA, and stated the absolute and non-derogable prohibition of torture.<sup>37</sup>

The judgment was issued joining seven different petitions submitted to the High Court of Justice, which all claimed that the techniques used in security-related interrogations were illegal as they amounted to torture. The State, on the contrary, held the methods used did not violate international law, as they cannot be described as “torture”, “cruel and inhuman treatment” or “degrading treatment”, and did not cause pain and suffering.

The judges approached the question by testing the legality of these methods against the “law of interrogation”. In this light, they stated that “a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment and free of any degrading conduct whatsoever”,<sup>38</sup> in accordance with the international treaties prohibiting torture of which Israel is a signatory. What is more, they affirmed that “these prohibitions are ‘absolute’. There are no exceptions to them and there is no room for balancing.”<sup>39</sup> Then, the decision turned from the general to the particular, and questioned the legality of each of the five methods submitted, and found they were all “prohibited investigation methods”. Notably, the Court never affirmed that these methods amounted to torture, nor cruel and inhuman treatment – both of which it banned, coherently with the *jus cogens*

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<sup>36</sup> UNGA, A/73/207, para. 46.

<sup>37</sup> HCJ 5100/94, *PCATI*.

<sup>38</sup> HCJ 5100/94, *PCATI*, para. 23.

<sup>39</sup> HCJ 5100/94, *PCATI*, para. 23.

status of the norm -; distinctively, the Court used the wording “prohibited investigation methods”,<sup>40</sup> methods “not authorized by the general power to investigate”,<sup>41</sup> or “method not authorized by the powers of interrogation”.<sup>42</sup> The terminological difference allowed the judges to suggest that the “physical means” required a statutory provision to be authorized and that they could be justified, in the case of a criminal proceeding, on the basis of the necessity defense,<sup>43</sup> therefore silently holding the view that they were not to be considered as torture. This classification raised concerns, especially in light of the particular practices at stake, namely: shaking, the “*schabach*” position, the “frog crouch”, the use of excessively tight handcuffs and sleep deprivation.

The judgment itself provides a description of the five techniques object of discussion. Since the ISA did not describe the physical means, and the State Attorney’s proposal to present the information only *in camera* was rejected by the petitioners, the information before the judges was provided by the petitioners themselves. However, the State “did not deny the use of these interrogation methods, and even offered justifications for these methods”.<sup>44</sup>

As recalled by the judges themselves, these techniques appear to be similar to the “five techniques” examined by the European Court of Human Rights in *Ireland v. the United Kingdom*,<sup>45</sup> when the judges found they amounted to inhuman and degrading treatment and therefore violated art. 3 of the European Convention of Human Rights.

More directly, in 1998, the UNCAT had already confronted with the use by Israel of the techniques that would have been investigated in *PCATI*; back then, the UN Committee stated that the methods employed constituted a violation of art. 1 of the Convention against Torture.<sup>46</sup> The same position was reiterated by the UNCAT in the following reports

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<sup>40</sup> HCJ 5100/94, *PCATI*, para. 25.

<sup>41</sup> HCJ 5100/94, *PCATI*, para. 27.

<sup>42</sup> HCJ 5100/94, *PCATI*, para. 30.

<sup>43</sup> HCJ 5100/94, *PCATI*, para. 38.

<sup>44</sup> HCJ 5100/94, *PCATI*, para. 8.

<sup>45</sup> ECtHR 5310/71, *Ireland v. The United Kingdom*, para. 96.

<sup>46</sup> UNCAT, Supplement No. 44, *Report of the Committee against Torture*, 16 September 1998, A/53/44, paras. 239-240.

on Israel.<sup>47</sup> On the same line, in 2006, the UN Commission on Human Rights found that the use of stress positions, hooding, extremely lengthy interrogations and sleep deprivation are amongst the techniques that can be said to amount to degrading treatment and that, when causing severe pain or suffering, they constitute torture.<sup>48</sup> The difference between torture and cruel, inhuman and degrading treatment is admittedly blurred;<sup>49</sup> generally, torture is understood as an aggravated form of cruel, inhuman or degrading treatment or punishment, characterized by the elements of intent or specific purpose.<sup>50</sup> the UN Voluntary Fund for Victims of Torture, established by the General Assembly, suggested that various elements can be taken into account to determine the threshold between torture and ill-treatment,<sup>51</sup> namely: the powerlessness of the victim, the severity of the treatment (made in regard of the duration, the physical effects, the mental effects, the sex, age and state of health of the victim) and the purpose of the treatment.

Notwithstanding the clear position of courts and international human rights bodies, the High Court of Justice did not go as far as in defining the five techniques as torture nor degrading human treatment, and defined them as “physical means”, or “non-authorized” and “non-ordinary methods”.

## **ii. The *Abu Gosh* Case and the Severity of Pain Threshold**

It is interesting to analyze the reason that led the judges to consider the means used by the ISA as different from the ones, apparently corresponding, employed by other States in similar circumstances. A partial clarification in this sense can be found in a subsequent judgment from the same Court: *Abu Gosh v. The Attorney General* (2017).<sup>52</sup>

In *Abu Gosh* the petitioners requested a grant of an order to launch an immediate investigation and an indictment against ISA interrogators involved in the interrogation of

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<sup>47</sup> UNCAT, Supplement No. 44, *Report of the UN Committee Against Torture: Twenty-seventh Session (12 to 23 November 2001) and Twenty-eighth Session (29 April to 17 May 2002)*, 1 November 2002, A/57/44, para. 52; UNCAT, C/ISR/CO/5, para. 30; UNCAT, *List of Issues Prior to Submission of the Sixth Periodic Report of Israel*, 7 December 2018, C/ISR/QPR/6, para. 30.

<sup>48</sup> UN Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, 27 February 2006, E/CN.4/2006/120, paras. 51-52.

<sup>49</sup> UN Voluntary Fund for Victims of Torture, *Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies* (2011), 2.

<sup>50</sup> See Manfred Nowak & Elizabeth McArthur, “The Distinction between Torture and Cruel, Inhuman or Degrading Treatment”, *Torture* 16, no. 3 (2006): 148.

<sup>51</sup> UN Voluntary Fund for Victims of Torture, *Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies*, 6.

<sup>52</sup> HCJ 5722/12, *Abu Gosh*.

As'ad Mahmoud Namer Abu Gosh, a Palestinian national from Nablus, on suspicion of using torture and abuse on him. Amongst other, the petitioners claimed that the interrogatee was subject to beating, slamming against the wall, being made to sit on the edges of his toes, being bent in the “banana position”, bending his fingers painfully, sleep deprivation, severe mental pressure, and using threats and false pretense as to blowing up his home and menacing his family, unless he cooperated.<sup>53</sup> The State did not deny the application of these methods and affirmed that “stress methods were applied”,<sup>54</sup> but refused to reveal further details other than *in camera* “for reasons of State security”.<sup>55</sup> The petitioners affirmed that the methods amounted to torture, on the basis of the *PCATI* judgment, but also on the basis of decisions from international tribunals and human rights committees.

The Court rejected the argument that the methods employed amounted to torture and, on the contrary, embraced the State interpretation of the term “torture”, arguing that the classification of interrogative means has to be based on the specific circumstances of the case. Specifically, the judges found that “the definition of specific methods as ‘torture’ depends on concrete circumstances, even when one is discussing interrogative methods explicitly recognized as ‘torture’ by international law”.<sup>56</sup> The conclusion follows a number of paragraphs where the judges refuted the veracity of the factual reconstruction offered by the petitioner and of the forensic experts – two physicians and a clinical psychologist –, who supported the patient’s report. The distinction made by the Court thus seems to lie on the gravity of the circumstances or the intensity of the pain inflicted, and its medical consequences. Indeed, a similar assertion had been expressed already in *PCATI*, where one of the State’s main arguments was that “the practices of the GSS do not cause pain and suffering.”<sup>57</sup>

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<sup>53</sup> HCJ 5722/12, *Abu Gosh*, para. 9.

<sup>54</sup> HCJ 5722/12, *Abu Gosh*, Preliminary Answer on Behalf of the Respondents, para. 10.

<sup>55</sup> HCJ 5722/12, *Abu Gosh*, Preliminary Answer on Behalf of the Respondents, para. 21.

<sup>56</sup> HCJ 5722/12, *Abu Gosh*, para. 35.

<sup>57</sup> HCJ 5100/94, *PCATI*, para. 15.

## 2. Investigation Mechanisms, between Unwillingness and Inability

### a. the ISA Internal Investigator for Complaints (*Mavtan*): Description and Critiques

Another element that seems to be critical in the Israeli system, in denying accountability for cases of torture, is the differentiated investigation path to which ISA interrogators are subject. This procedure has been carefully illustrated in the *Abu Gosh* case and, highlighting the relevant changes, in the case of *Tbeish*.

Based on article 1.i.49(a) of the Police Ordinance, when an ISA employee is suspected of an offense as part, or in relation to, the fulfillment of their duty, the investigation shall be conducted only by the Police Investigations Division at the Justice Department (PID), upon decision of the AG. This already represents a deviation from the regular procedure, where the police is the body required to investigate over any offense it becomes aware of, regardless the filing of a complaint.<sup>58</sup> However, when the ISA employee involved is an interrogator, in order to decide whether to open the PID investigation, a further preliminary inspection is demanded to the ISA Inspector for Interrogatee Complaints (*Mavtan*), whose identity is secret.<sup>59</sup>

When a complaint is presented, all the authorities within the ISA are instructed to forward such report to the *Mavtan*, who carries out an inspection which generally includes a meeting with the complainant, questioning of the relevant ISA officials and a review of the material related to the interrogation available to ISA and medical professionals.<sup>60</sup> The *Mavtan* then forwards to the Supervisor of the *Mavtan* the inspection file, including all the material collected, complemented with a summary of the findings, recommendations and conclusions.<sup>61</sup> The Supervisor of the *Mavtan* at the State Attorney's Office later evaluates the inspection file and decides whether to archive the complaint, complete the inspection, suggest disciplinary treatment or a criminal investigation. The last option, however, is not directly available to him, but can only be object of a recommendation to an official authorized to take such an action (meaning the AG, the State Attorney or their deputy).<sup>62</sup> The *Mavtan*'s decision not to open an investigation can be appealed to the State Attorney

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<sup>58</sup> Criminal Procedure Law 5742-1982, sec. 59: "Should the police become aware of the commission of an offense, whether as a result of a complaint or by any other means, it shall launch an investigation."

<sup>59</sup> Sharon Weill, Irit Ballas, "The Investigation Mechanism of Torture Claims in Israel: An Analysis of the 2012 GSS Investigation Decision and the Türkel Report", *Adalah's Newsletter*, June 2013, Issue 105: 2.

<sup>60</sup> HCJ 5722/12, *Abu Gosh*, Respondents' argument, para. 30.

<sup>61</sup> HCJ 5722/12, *Abu Gosh*, Respondents' argument, para. 31.

<sup>62</sup> HCJ 5722/12, *Abu Gosh*, Respondents' argument, para. 33.

and the decision of the Attorney General can, in turn, be appealed in front of the HCJ – as it happened in *Abu Gosh*, where the AG approved the recommendation not to open a criminal investigation.<sup>63</sup>

The above mentioned procedure raised multiple concerns - including by the Special Rapporteur on Torture, who expressed his “utmost concern at the decision of the Supreme Court not to open a criminal investigation” in the case of Abu Gosh<sup>64</sup> - regarding the impartiality and effectiveness of the investigations, concerns that indeed extend to other investigation and oversight mechanisms. As pointed out by the human-rights lawyer Michael Sfard,<sup>65</sup> these pre-investigation mechanisms are generally characterized by a lack of professionalism and transparency, they mostly rely on few direct testimonies rather than looking at other evidence, keeping most of the material available classified. Moreover, as an internal inquiry, they belong to the investigated body itself and therefore carry on an *operational* inquiry and not a judiciary one; consequently, they aim to improve future performances and avoid operational failures, rather than establishing truth of facts and criminal responsibilities. The pre-investigation being a mandatory preliminary step, the result is often that “the priority given to the operational inquiry undermines the subsequent criminal investigation”.<sup>66</sup>

Notably, the conflict of interests embedded in the nature of the Mavtan led to the most conspicuous critiques, and to some administrative changes. This body was established in 1992 by source of ministerial guidelines,<sup>67</sup> following the recommendations of the Landau Commission, in a format approved by the then-State Attorney Dorit Beinisch and the Director of the ISA at the time. Initially, the Mavtan was an ISA employee subject to the “Supervisor of the Mavtan”, a position held by a high-ranking attorney at the State Attorney’s Office and directly subordinated to the State Attorney and the Attorney General.<sup>68</sup> However, in 2010, it was decided that the Mavtan would no longer be under the

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<sup>63</sup> HCJ 5722/12, *Abu Gosh*, para. 20.

<sup>64</sup> Nils Meltzer, Mandate of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Letter to the Israeli Government, 31 January 2018.

<sup>65</sup> See “Investigations” in Ben Naftali, Sfard, Viterbo, *The ABC of the OPT*.

<sup>66</sup> Ben Naftali, Sfard, Viterbo, *The ABC of the OPT*, 192.

<sup>67</sup> Decision No. IS/16 of the Ministerial Committee for Israel Security Agency Matters, “Procedure for Examining Interrogatees’ Complaints” (20 May, 1992), quoted in Turkel Report, para. 48.

<sup>68</sup> HCJ 5722/12, *Abu Gosh*, Respondents’ argument, para. 28.

authority of the ISA, but rather under that of the Ministry of Justice.<sup>69</sup> This change came three years after an examination of sample cases handled by this organ,<sup>70</sup> which led the Attorney General to the conclusion that the Mavtan “lacks in practice investigative experience which is definitely required for this position” and that there was “inherent difficulty to justify a situation in which an internal employee in the ISA examines complaints – ostensibly criminal – against his co-workers”.<sup>71</sup>

Even though the organizational and administrative transfer under the Ministry of Justice is noteworthy, and was indeed praised by the international institutions,<sup>72</sup> it should be noticed that of the 700 complaints filed between 1992 and 2013 none of them resulted in a criminal investigation.<sup>73</sup> Apparently, the trend did not change after that date: according to the 2019 submission of PCATI to the UNCAT, between 2001 and 2018,<sup>74</sup> over 1,100 complaints have been presented to the Mavtan; one has led to a criminal investigation, but not yet to any indictment, while all the rest have been dismissed.<sup>75</sup>

The only case considered by the Mavtan to warrant an investigation deserves further attention: the petitioner in this case was a woman, who was subjected to vaginal search by soldiers under order of the ISA, at the moment of her arrest;<sup>76</sup> while the case clearly entails a breach of domestic law and international human rights, it doesn't pertain “special interrogation” methods and, most of all, it was performed on the spot, out of the interrogation room and involving many individuals from different organs. The circumstances seem to indicate that the case was subject to exceptional attention because it did not happen in the black-box interrogation facilities; however, there is skepticism that even this case will bring to any criminal or relevant disciplinary consequences.<sup>77</sup>

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<sup>69</sup> Transfer of the Mavtan to the Ministry of Justice (Summary of Discussion of Oct. 4, 2010, Attorney General's office, Nov. 11, 2010), quoted in Turkel Report, para. 50.

<sup>70</sup> Letter from Yehoshua Lemberger, Deputy State Attorney (Criminal Matters), to Eran Shendar, State Attorney, Sample examination of the Mavtan's files (Oct. 9, 2007), quoted in Turkel Report, para.50.

<sup>71</sup> Transfer of the Mavtan to the Ministry of Justice, Turkel Report, para. 50.

<sup>72</sup> UNCAT, C/ISR/CO/5, para. 6.

<sup>73</sup> See: Transcript – Part B, session no. 11 “Testimony of the Israel Security Agency Chief” 15 (Apr. 12, 2011); See also: *Above Criticism: The Lack of Investigations and Sanctions for Torture and Abuse in ISA Interrogations*, The Public Committee against Torture in Israel (Dec. 2009), quoted in Turkel Report, para. 115.

<sup>74</sup> UNCAT, C/ISR/CO/5, para. 30.

<sup>75</sup> The Public Committee Against Torture in Israel, *Submission to the United Nations Committee Against Torture List of Issues Prior to Reporting Concerning the Sixth Periodic Report to Israel*, 25 June 2018, p. 8.

<sup>76</sup> Josh Breiner and Yotam Berger, “Shin Bet Officers Suspected of Ordering Unwarranted Search of Palestinian Woman's Private Parts”, *Haaretz*, 2 November 2018.

<sup>77</sup> Breiner and Berger, *Haaretz*, 18 November 2018.

### **i. The HCJ Evaluation of the *Mavtan*: the ISA Investigations Decision and the Case of Abu Gosh**

The High Court of Justice examined in detail the mechanism of review of complaints in 2012.<sup>78</sup> In the case at hand, the petitioners challenged the legitimacy of the norms transferring the power to close the investigation on a complaint from the Attorney General to the Supervisor of the Mavtan; in particular, they argued that the latter and the AG's acts of instituting a pre-inquire mechanism are not permitted by the law, and therefore *ultra vires*.<sup>79</sup> The AG, acting as the Respondent, replied that these actions are part of the discretionary power of the AG to launch an investigation, and were articulated by means of a special agreement "put in place to balance concerns regarding frivolous complaints".<sup>80</sup> The Court embraced the position of the Respondent, stating that the power to conduct an inquiry to determine whether to order a criminal investigation is part of the options available to the AG, who is the one entitled to determine criteria for the scope, nature and quality of the inquiry. On the other hand, the Court held that only the power to launch an investigation, and not the power of not launching one, is exclusive to the AG or a delegated person, but that it "would be appropriate" that the closing of a case had the approval of the official competent to launch the investigation. Yet, instead of reserving both actions for the AG, Judge Rubinstein suggested that the Supervisor of the Mavtan shall be provided both with the power of closing and launching an investigation, and that this delegation of powers shall be enshrined in the ISA Law.<sup>81</sup> By taking such a stance, the judges seem to believe that the Supervisor should be the center of the decision, establishing where the case should be open or close, without necessary intervention of the AG, whose influence and independency in the process thus acquire a different weight. The Court then expressed its view that moving the post of the Mavtan under Ministry of Justice, but maintaining him a former ISA employee, represented the right balance between protecting the secrecy of the ISA affairs and to make him "aware of his task and of his institutional position" and "for the sake of appearances".<sup>82</sup> It also justified the exception to the general criminal procedure, preventing the police to investigate ISA employees because of the working relationship between the two, which would generate a conflict of interests;

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<sup>78</sup> HCJ 1265/11, *The Public Committee Against Torture in Israel et al. v. The Attorney General*, Petition for an Order Nisi (6 August 2012).

<sup>79</sup> HCJ 1265/11, *PCATI v. The Attorney General*, Petition for an Order Nisi, para. 10.

<sup>80</sup> HCJ 1265/11, *PCATI v. The Attorney General*, Petition for an Order Nisi, para. 13.

<sup>81</sup> HCJ 1265/11, *PCATI v. The Attorney General*, Petition for an Order Nisi, para. 28.

<sup>82</sup> HCJ 1265/11, *PCATI v. The Attorney General*, Petition for an Order Nisi, para. 21.

however, almost ironically, no such concern was expressed neither in the election of a former ISA officer investigating his co-workers, nor in the fact that the presiding judge, Elyakim Rubinstein, was acting as AG in the *PCATI* judgment and is the same who designed the framework for the exercise of discretion on investigations of interrogators.<sup>83</sup> Essentially, the High Court stated that “the mechanism for reviewing complaints filed by ISA interrogees meets legal standards and that it is reasonable on its merits”.<sup>84</sup> On the other hand, the enormous number of unaddressed allegations, too obviously pointing at a systematic feature, was considered merely as a slip into the past “problematic ‘organizational culture’”<sup>85</sup> - a terminology that recalls much of the “strict compartmentalization of directives” and “distorted attitude towards strict discipline” mentioned by the Landau Commission to justify torture by the GSS.<sup>86</sup>

The case of *Abu Gosh* is pivoting precisely on the investigation mechanism following a complaint for torture.

Following his arrest by security forces (3 September 2007), the petitioner was interrogated with the application of “means of pressure” for more days; 15 days later, and shortly before his indictment in front of the Military Court, he was able to meet at the detention centre with a representative of the ICRC, which the following day filed a complaint to the ISA as to the use of violence during the interrogation.<sup>87</sup> Two months later, PCATI filed a complaint to the Attorney General for the same facts, and it was dismissed on the basis of the ISA internal inquiry. A different complaint was filed with the Central District Attorney due to abuse by the soldiers who took part in the arrest, followed by an additional complaint to the IDF Attorney for Operational Matters; these led to a Military Police investigation by the DIP, closed due to a lack of public interest and appealed by the petitioner.<sup>88</sup>

Subsequently, on 25 July 2012, the petitioner submitted a request to the HCJ for an *order nisi* to launch an immediate criminal investigation against the ISA interrogators involved, on suspicion of using torture and abuse during interrogation. In particular, the petitioners

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<sup>83</sup> AG Memorandum, *ISA Interrogations and the Necessity Defense - A Framework for Discretion*, Letter No. 99-04-12582 (18 October 1999) [hereinafter: AG Memorandum on Necessity].

<sup>84</sup> HCJ 1265/11, *PCATI v. The Attorney General*, Petition for an Order Nisi, para. 35.

<sup>85</sup> HCJ 1265/11, *PCATI v. The Attorney General*, Petition for an Order Nisi, para. 35.

<sup>86</sup> Landau Report, para. 4.23.

<sup>87</sup> HCJ 5722/12, *Abu Gosh*, para. 4.

<sup>88</sup> HCJ 5722/12, *Abu Gosh*, para. 8.

questioned why the respondents did not immediately order the Police Investigations Division to open a criminal investigation against the interrogators and why they did not commit them to trial on the basis of the evidence in their possession.<sup>89</sup>

The operational-oriented nature of the inquiry emerged quite neatly in this case. In fact, one of the main points raised by the Petitioner was that, in the letter justifying the decision not to open a criminal investigation against the interrogators, the Supervisor of the Mavtan mentioned that, even though no grounds for legal proceedings were found, “it should be noted that the inspections carried out on the basis of this complaint did, on specific points, lead to lessons being learned for the future”.<sup>90</sup> The assertion suggests that, at minimum, some irregularities occurred during the interrogation of the Petitioner; however, rather than representing a reason to open an investigation on the ISA officers, they primarily and exclusively called for an implementation of the internal system of the security service. After several requests were submitted by the Petitioners to obtain more details on the decision taken, the Supervisor of the Mavtan replied specifying that “the inspection led to lessons learned in the ISA with regard to documentation and reporting, and that in response to the inspection the Director of the ISA Interrogations Division refreshed the directives and clarified various instructions to the relevant authorities in the ISA.”, and explaining that the content of such directives could not be described for State security reasons.<sup>91</sup>

The case of Abu Gosh also seems to show some continuity even after the new policy. In fact, the complaint was filed immediately after the meeting with the ICRC, in 2007, but it took several years before the case reached the HCJ, which in 2014 suggested the “new” Mavtan should effect a review of the petitioner’s case, expecting it “to be independent, thorough and comprehensive, rather than merely seeking to support findings of the previous review”.<sup>92</sup> However, both the Mavtan and the Supervisor suggested once again that there were no grounds for a criminal investigation and the AG decided accordingly.

Albeit both the State and the Court stressed, in different occasions, that the ultimate decision on whether to open the investigation is taken solely by the Attorney General, and that the considerations taken into account in this context are identical to those applied in

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<sup>89</sup> HCJ 5722/12, *Abu Gosh*, para. 1.

<sup>90</sup> HCJ 5722/12, *Abu Gosh*, Petition for Granting of Order Nisi, Addendum A: Correspondence from the Supervisor of the IIC dated 15 September 2011.

<sup>91</sup> HCJ 5722/12, *Abu Gosh*, Petition for Granting of Order Nisi, Addendum A: Correspondence from the Supervisor of the IIC dated 15 September 2011, para. 24.

<sup>92</sup> HCJ 5722/12, *Abu Gosh*, para. 11.

general, it appears that the AG is called to decide solely upon the review and recommendations of the Mavtan and their supervisor. The Court supported the view that this mechanism is a general tool regulated by the Attorney General himself,<sup>93</sup> and that it does not diminish the independency of the decision. However, if we can accept that the independency of the AG is not undermined by the recommendations received by the Mavtan, the impartiality of the decision is worth a more thorough examination.

#### **b. Evidence (Un)Availability: Absent, Altered and Unconsidered Records**

Another central element is that of evidence. In fact, the lack of a real inquiry by an investigative agency makes it difficult to establish a preliminary evaluation of the elements, on the basis of which it is decided to proceed with the charges or discontinue the investigation. Since the AG is presented only with the evidence collected by the Mavtan, the choice of the tools used in the inquiry becomes crucial in determining the outcome of the procedure.

A prior aspect to take into consideration is that the investigators cannot rely on real nor documentary evidence, but only on what is reported by the complainant, on one hand, and by the ISA, on the other.

Nevertheless, the case of Abu Gosh shows that, when confronted with the material from the Mavtan, the Court finds that the investigations were professional, thorough, inclusive and comprehensive,<sup>94</sup> and is satisfied with the reports on the questioning of the ISA personnel. Of the opposite view is the analysis conducted by the Turkel Commission, which referred to the examination of the Mavtan activity performed by the State Attorney's Office in 2007, reporting that "the Mavtan 'is very limited in his skills as an investigator' and his questions are 'laconic'", that "the Mavtan 'does not know how to confront his interrogatees with diverse findings and conflicting testimonies, and he does not always investigate all of the interrogators relevant to the complaint. This problem is exacerbated by the fact that he has to investigate talented and experienced interrogators'".<sup>95</sup>

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<sup>93</sup> HCJ 9018/17, *Tbeish*, para. 35.

<sup>94</sup> HCJ 5722/12, *Abu Gosh*, para. 50; HCJ 9018/17, *Tbeish*, para. 49.

<sup>95</sup> *Turkel Second Report*, p. 414-415.

## **i. The Exception on Audio-Visual Recordings**

### **1. Petitions and Criticisms on behalf of Local and International Entities**

The fact that the investigator has to rely almost exclusively on testimonies is due first of all to a lack of direct recordings of the interrogation. Generally speaking, audio-visual recordings of interrogations are mandatory to the Israeli police,<sup>96</sup> as well as a meticulous written documentation; however, the last article of the relevant law<sup>97</sup> exempts interrogation of a suspect on a security offense both from any kind of recording encompassed by the law (visual or, exceptionally, audio and written documentation) and from the obligation of presentation and approval of documentation for interrogations conducted outside of a police station. As the heading of the article suggests, the exemption was meant to be temporary, but has been subject to continuous extensions, that keep the provision in force as of today, drawing harsh criticisms by local NGOs,<sup>98</sup> scholars<sup>99</sup> and UN committees.<sup>100</sup>

In December 2010, *Adalah* filed a petition to the High Court of Justice, questioning the legality of the exemption from audio and video recording of security suspects.<sup>101</sup> Three years later, the Court rejected the petition, noting that the exception for security interrogations was stemming from a “temporary order”, meant to expire in 2008 but subsequently extended until 2012 and then to 2015, and in light of the commitment expressed by the Ministry of Justice to examine and amend the law within this timeframe.<sup>102</sup> However, the undertaking was disregarded and the exemption further

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<sup>96</sup> Criminal Procedure Law (Interrogation of Suspects) – 2002, Chapter A: General Directives. Section 4(A) reads: “Visual documentation or audio documentation of the interrogation of a suspect will include the entire course of the interrogation, from its beginning to its end, and will include the exchange of words that takes place between an interrogator and the suspect, or in the presence of the suspect; and in visual documentation, this will include reactions or body movements”.

<sup>97</sup> Criminal Procedure Law (Interrogation of Suspects) – 2002, Chapter A: General Directives, section 17.

<sup>98</sup> See, for example, the petition filed by Adalah, ACRI, PCATI, Physicians for Human Rights Israel, Al Mezan Center for Human Rights, HaMoked and Yesh Din: <https://www.adalah.org/en/content/view/8605>

<sup>99</sup> Yuval Shany, Ido Rosenzweig, “The Amendment of the Criminal Procedure Law”, *The Israel Democracy Institute*, 17 July 2012; Yuval Shany, Mordechai Kremnitzer, “Two Small Steps on the Long Road to Suppressing Unlawful Security Interrogations in Israel”, *Lanfare*, 6 March 2018. See also meeting with Yuval Shany, 17 November 2019.

<sup>100</sup> See the latest *Concluding observations* CAT/C/ISR/CO/5, para. 18-19; the 2014 *Concluding observations* from the Human Rights Committee (CCPR/C/ISR/CO/4), para. 14. Notwithstanding the justifications put forward by the State, the Human Rights Committee reiterated its concern in the 2018 *List of issues prior to submission*, para. 14.

<sup>101</sup> HCJ 9416/10 *Adalah v. Ministry of Public Security* (6 February 2013).

<sup>102</sup> HCJ 9416/10, *Adalah v. Ministry of Public Security*.

extended, bringing the major Israeli NGOs to file another petition to the HCJ demanding the cancellation of the provision.<sup>103</sup>

In the meanwhile, the matter was addressed by the Turkel Commission, which in 2011 recommended the adoption of full visual documentation of the interrogations conducted by the ISA, according to rules determined by the Attorney General in coordination with the head of the ISA.<sup>104</sup> Nevertheless, the Ciechanover Commission, appointed in 2014 to review and implement the recommendations of the Turkel Report, rejected this instructions. It suggested, instead, to install cameras broadcasting the interrogation room in real time to a control room, located in one of the ISA facilities and accessible to a supervising entity on behalf of the Ministry of Justice, without prior notice; the supervisor would be allowed to prepare a “concise memorandum”, but no record of the video would be kept.<sup>105</sup> Even though the Ministry of Justice seemed prone to endorse the variation proposed by the Ciechanover Commission, rather than the original,<sup>106</sup> such a supervision method would not increase the ability of the interrogee to corroborate his/her claims against the interrogators. In fact, concerns have been raised that “The solution advocated by the Ciechanover Committee creates a mere semblance of accountability, without taking seriously enough the importance of the right not to be subjected to torture and other cruel inhuman and degrading treatment and the need by the state to take effective measures to prevent and punish violations of this right.”<sup>107</sup>

## **2. The Forced Invisibility of Torture as a Form of Representational Violence**

However, an interesting analysis has been proposed, warning against putting the visual evidence at the center of the debate and legal suggestions to contrast State torture.<sup>108</sup>

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<sup>103</sup> Petition, <https://www.adalah.org/en/content/view/8605>.

<sup>104</sup> *Turkel Second Report*, p. 417.

<sup>105</sup> Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law, *Report*, August 2015, p. 48.

<sup>106</sup> UN Human Rights Council, Israel 29th Session of Universal Periodic Review, 23 January 2018, <http://webtv.un.org/search/israel-29th-session-of-universal-periodic-review/5717085072001/?term=Universal%20periodic%20review&lan=english&sort=date&page=2>.

<sup>107</sup> Shany, Kremnitzer, “Two Small Steps on the Long Road to Suppressing Unlawful Security Interrogations in Israel”.

<sup>108</sup> Hedi Viterbo, "Seeing Torture Anew: A Transnational Reconceptualization of State Torture and Visual Evidence", *Stanford Journal of International Law* 50, no. 2 (2014).

The author suggests that this approach increments the evidentiary privilege enjoyed by visual records, whose persuasiveness is evaluated based strictly on parameters of accuracy and transparency; consequently, all other kind of evidence (primarily testimonies) are disregarded and victims of crimes like State-torture are easily rendered invisible. This is all the more concerning, since the State is the part mostly in control of the decision on which elements to make visible and which ones to hide, and to whom. Further, even when images “accidentally” leak out, as it happened with the pictures from the US-led detention facility of Abu Ghreib, this normally allows to direct the public gaze against the specific episodes portrayed, profiting by the public shock to detach individuals from the social, legal and political context that gives rise to the phenomenon.

The critique is clearly not meant to disregard the witnessing value of photos and videos proving torture, but to extend the evidentiary weight that these enjoy to other attestations of facts that are immensely more accessible to victims, such as testimonies and drawings. Claims of this latter kind should not be considered as a mere lack of evidence; or rather, they should be considered and valued *in light of* the vacuum they point at. This vacuum, in fact, even though representing an absence of evidence of the torturous acts, is evidence itself of another aspect of violence included in interrogational torture: the “representational violence” that the State perpetrates against its victims.

In the author’s view, this kind of violence consists of “the various practices and mechanisms state agents and institutions employ in their attempt to monopolize the representational economy of torture”,<sup>109</sup> involving “state attempts to control the (in)visibility of torture - to determine what can be seen and said, and consequently what can be known in relation to state torture”. Amongst the practices analyzed by the author, we find specifically the prevention of audio-visual recordings, carried out with the complicity of the law, as a form of “distal representational violence”.<sup>110</sup>

Ultimately, the claims for video-recordings, if isolated and inscribed in a prevalent visual-evidentiary paradigm, are highly susceptible of being incorporated into the narrative of denial upheld by the State, and contribute to ignore and even conceal another aspect of violence, different from the physical and psychological ones, which harms the victims of torture in an equal and further manner.

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<sup>109</sup> Viterbo, "Seeing Torture Anew": 290.

<sup>110</sup> Viterbo, "Seeing Torture Anew": 301.

## ii. Medical Records on Victims of Torture

### 1. *Abu Gosh* and *Tbeish* as Examples of Unequal Evaluation of Evidence

From another perspective, both in *Abu Gosh* and in *Tbeish*,<sup>111</sup> the judges gave very limited credit to the position of the petitioners, not only as for their interpretation of domestic and international law, but also regarding the reliability of their declarations. In particular, the medical reports held a crucial weight in evaluating the veracity of the declarations.

The Court considered the forensic opinions submitted by the petitioners and the examinations conducted by the medical staff at the detention facilities. It is interesting to notice that in both cases the reports submitted by the Petitioners were deemed not reliable, on analogous basis: the medical reports were only conducted 5 years after the facts alleged, the results were conflicting with the facts noted in the ISA memoranda, with the first accusations made by the detainees and with the answers given to military judges at the hearing for extension of arrest.<sup>112</sup> By contrast, the prison's medical reports are considered to have a higher credibility and a greater impartiality.

As a matter of method, it can be noticed that, on the contrary of the prison's medical staff, the forensic opinions on behalf of the petitioners were written by specialists who had received special training in documenting and diagnosing the harm inflicted by torture, in accordance with the Istanbul Protocol.<sup>113</sup>

The *Istanbul Protocol : Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is an international guide for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body.<sup>114</sup> The manual was written through the collaboration of forensic scientists, physicians, psychologists, human rights monitors and lawyers from different countries, including Israel. However, as we noted, the official prison's authorities and their medical staff only proceeded with a superficial scrutiny that led them to the conclusion that the conditions of the interrogee were "satisfying"<sup>115</sup> or "reasonable".<sup>116</sup>

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<sup>111</sup> HCJ 9018/17, *Tbeish*, para. 49.

<sup>112</sup> HCJ 5722/12, *Abu Gosh*, para. 26; HCJ 9018/17, *Tbeish*, para. 7.

<sup>113</sup> HCJ 5722/12, *Abu Gosh*, para. 17; HCJ 9018/17, *Tbeish*, para. 29.

<sup>114</sup> UN OHCHR, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev. 1, p. 10.

<sup>115</sup> HCJ 5722/12, *Abu Gosh*.

<sup>116</sup> HCJ 9018/17, *Tbeish*.

Based on the obligation of State authorities to investigate and prosecute acts of torture, and on the national and international deontology associated to the legal and medical professionals, the Protocol provides indications not only to diagnose torture based on physical evidence, but also on the basis of psychological evidence - therefore detecting also “white torture” techniques -, cumulatively with the background of the victim, before and during the arrest. Further, the code takes into consideration the risk of re-traumatization during the interview, which can affect the interview process and the outcome of the investigation, and the intense fear and suspicion, one of the manifestations of Post-Traumatic Stress Disorder, that lead victims to be typically reluctant to tell what they have suffered.<sup>117</sup> Clearly, this reluctance will be even stronger when the interview is conducted by a State official that works for the same authorities that perpetrated the torture and in direct collaboration with them, as it is the case for Mavtan investigators.

## **2. The Case of al A'rbeed and the Complicity of Medical Staff**

Another disturbing claim is that, as a rule, the prison's medical staff is present during the interrogation, and their health assessments are sometimes part of the tools to control and regulate physical methods, that can be thus ratified as balanced and free of consequences on the detainees physical integrity.

This aspect is one of the central issues denounced by Physicians for Human Rights Israel (P4HRI), an Israeli NGO founded in 1988 by a group of Israeli physicians, with the aim of granting the right to health equally to all people under Israel's responsibility. Through P4HRI, medical professionals provide services free of charge, including to Palestinian residents of the West Bank and Gaza, prisoners and detainees.<sup>118</sup>

Recently, the role of institutional physicians has been put under critical public light by the case of Samer al A'rbeed, a Palestinian from Ramallah arrested following investigation of the ISA on suspicion of being involved in the placing of an IED that killed an Israeli civilian in the West Bank. The following day, al A'rbeed had a court session where he reported to the judge that he suffered from severe pain in his chest, continuous vomiting and difficulties in swallowing; however, he was not transferred to the hospital and his interrogation continued and, as the Israeli intelligence confirmed to the press, involved

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<sup>117</sup> UN OHCHR, *Istanbul Protocol*, p. 29-30.

<sup>118</sup> English website: <https://www.phr.org.il/en/about/> (last accessed: 29 September 2020).

exceptional interrogation techniques.<sup>119</sup> Two days after, on 28<sup>th</sup> September 2019, he was transferred to Hadassah Hospital in Jerusalem, where he arrived unconscious and connected to a medical ventilator, suffering from kidney failure and with broken ribs and bruises all over his body. About three days later, the military court noted that, given the gradual improvement seen in the suspect's condition, "it might be possible to resume his interrogation in the next few days", thus allowing the Israeli authorities to proceed with the interrogation in the intensive care unit first, and in the prison clinic after, where he was transferred on 7<sup>th</sup> November 2019. Besides rising serious concerns about the adequacy of the methods of interrogations used,<sup>120</sup> which triggered a public condemnation and solicitation to immediately investigate the allegations from three UN Special Rapporteurs,<sup>121</sup> the episode shows a lack of proper medical care and supervision emerges. The case is all the more critical, since the malpractice seems to be affecting not only the medical staff from detention facilities, but also those working in the external hospital, who claimed to be following IPS and ISA directives.<sup>122</sup> In this context, a group of 20 senior Israeli physicians exceptionally wrote a letter<sup>123</sup> to the management of the Hadassah Hospital, highlighting the most controversial points on medical staff involvement in allegedly torturous methods of interrogation.

Al Arbeed's lawyers demanded to investigate the circumstances of the interrogation that brought the interrogee in those critical conditions, but, at the end of January 2021, the AG communicated he decided to close the investigations against the ISA, because he found "no grounds to prove that the crime of torture has been committed."<sup>124</sup> The decision prompted a condemnation on behalf of the relevant UN Special Rapporteurs, who defined themselves "alarmed at Israel's failure to prosecute, punish and redress the torture and ill-

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<sup>119</sup> Yonah Jeremy Bob, "Authorities Silent on Medical Update of 'Tortured' Palestinian Suspect", *The Jerusalem Post*, 2 October 2019.

<sup>120</sup> See, for example, Yuval Shany, "Special Interrogation Gone Bad: The Samer Al-Arbeed Case", *Lamfare*, 10 October 2019.

<sup>121</sup> UN OHCHR, "Israel Must Uphold Obligation to Prevent Torture and Investigate Claims Over Samer Al-Arbeed, Say UN Rights Experts", 18 October 2019.

<sup>122</sup> PHRI, "Hadassah MS Hospital Refuses to Provide Information to the Relatives of Samer Arbeed", 2 October 2019.

<sup>123</sup> PHRI, Letter to the Management of Hadassah Hospital urging not to release Samer Arbeed: <https://www.phr.org.il/wp-content/uploads/2019/10/samer-arbeed-letter-from-physicians.pdf> (last accessed: 8 November 2020).

<sup>124</sup> Addameer, "Addameer Condemns the Israeli Attorney General's Decision to Close the Investigation against the Shabak for Committing Torture against Samer Arbeed", 24 January 2021.

treatment perpetrated against Mr Al-Arbeed”<sup>125</sup> and adding that “such abuse is not at the discretion of the Government or the judiciary, but constitutes an absolute obligation under international law”.

In light of the above, one could question whether the firm reliance on the institutional medical reports provided by the prisons’ clinic – which are not questioned in their laconism, illegibility,<sup>126</sup> or even absence<sup>127</sup> – is soundly based on technical elements or, rather, on a more generalized propensity towards the credibility of one part over the other.

### **iii. Framing the Witnesses: Palestinian Terrorists vs. ISA Heroes**

This systemic bias in the evaluation of evidence’s reliability, in favor of the interrogators, occurs also in the evaluation of testimonies, and is appalling in the case of extorted confessions. Here, in fact, the confessions are mostly the main or sole evidence to convict the suspect; thus, whenever he contests its truthfulness, a “trial within a trial” is opened, also known as “mini-trial”, where the object is exclusively the genuineness of the confession, which however reflects on the outcome of the whole trial. In this procedure, the lack of other sources of evidence just described, reduces the question to a confrontation of testimonies.

The spontaneous trust given to the security service is then justified upon a rationalized narrative, whereby interrogees always have an interest in lying and claiming they have been tortured, to cancel the major evidence against them and to avoid ostracization from their community for having released information to the Israeli authorities.<sup>128</sup> The authorities do not seriously conceive alternative hypothesis, for example that these people claim interrogators tortured them to extract information they did not have. On the other hand, such an utilitarian understanding of facts is not applied to ISA officers and their acts: it is not considered that extracting information is the ultimate goal of their job, that a confession confirming their inference is the fastest way to close a case,<sup>129</sup> that they engage in a performative job where stress can lead them to push beyond boundaries in order to

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<sup>125</sup> UN OHCHR, “Israel Must End Impunity for Torture and Ill Treatment - UN Experts”, 8 February 2021.

<sup>126</sup> HCJ 5722/12, *Abu Gosh*, para. 26: “The log states, in handwriting that is not completely legible, that...”.

<sup>127</sup> HCJ 9018/17, *Theish*, para. 17, 52.

<sup>128</sup> See for example Landau Report, para. 2.18; Israel Ministry of Foreign Affairs, *Israel’s Interrogation Policies and Practices*, 1 December 1996; *The Law in these Parts*, directed by Raanan Alexandrowicz (2011), at 1:36:54; meeting with Yuval Shany, 17 November 2019.

<sup>129</sup> Ra’anan Alexandrowicz interviewing former judge Ilan Katz, “Confession is ‘the Queen of Evidence’” *The Law in These Parts - Beyond the Film, an Interactive Journey* (2016).

achieve the expected result. By contrast, they are seen as dedicated employees working in the sole interest of the collectivity.

This belief, quite idealistic itself, could have been highly questioned by the Landau Commission after the Nafsu and the Bus 300 Affair,<sup>130</sup> where the focus was put precisely on the perjury of ISA officials in Courts and on their ethically questionable behaviors. However, the occasion apparently didn't represent a chance to increase awareness on the critical dynamics treated, but rather as a moment to increase the idealization of the public officials, by stressing their expected intrinsically higher moral sense. In the Commission's words: "The investigation staff of the GSS is characterized by professionalism, devotion to duty, readiness to undergo exhausting working conditions at all hours of the day and night and to confront physical danger, but above all by high inner motivation to serve the nation and the State".<sup>131</sup> The Commission was therefore convinced that its own principal function "as being to guide the essential process of rehabilitation and healing",<sup>132</sup> and noting with satisfaction that, after its work, the harmful practice of lying in Court "has now been totally abolished".<sup>133</sup> It is a shared thought, not only amongst the State authorities, but also between the public, that the Landau Commission represented a turning point, where the security service went through a catharsis that restored and arose its moral values.

What actually happened, however, is that the use of torture was split into two different circumstances, which brought about two different moral judgments: on one hand, episodes like the Nafsu Case were classified as extraction of confessions, condemned and ostensibly barred; on the other hand, where the same means would be used for purposes of "intelligence gathering", they could be excused as a necessary mean to prevent terroristic activity. In this light, interrogators are not perceived as torturers, but rather as heroic figures, called to face the existential dilemma of applying *some* violence against terrorists or risk the materialization of attacks that would brutally kill hundreds of civilians. The use of torture is for them a necessary burden, that they valiantly carry for the sake of the whole community.<sup>134</sup>

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<sup>130</sup> See *supra* I.1.e.iii: *The Nafsu Case and the Bus 300 Affair*.

<sup>131</sup> Landau Report, para. 1.8.

<sup>132</sup> Landau Report, para. 1.9.

<sup>133</sup> Landau Report, para. 2.53.

<sup>134</sup> Mann, Shatz, "The Necessity Procedure. Laws of Torture in Israel and Beyond, 1987-2009": 70; Mordechai Kremnitzer, Liat Levanon, "Not a Suicide Pact: A Comment on Preventive Means in General and on Torture in Particular", *Israel Law Review* 42, no. 2 (2009): 272.

According to Luban, as a consequence of this liberal understanding of torture, interrogators are thought of as “kindly torturers rather than tyrants”.<sup>135</sup> In an extremely eloquent interview, former judge Oded Pesensson depicted his perception in these terms:

“I come from the free world. A world where, if I want to ask someone a question, I ask. And if he doesn’t want to answer, he doesn’t. I can’t twist his arm and force him. And you arrive in a world whose purpose is to protect you. (...) The grey world, where there are people whose job is to protect you. And you don’t always know what they do and how. And they walk the fine line between legal and illegal. There are people whose job is to protect your life. (...) The question is, how do you conduct yourself? How does this affect your decisions?”<sup>136</sup>

This reasoning clearly rests on the assumption, mostly not based on judicial findings, that all Palestinian suspects in the hands of the ISA actually *are* terrorists, willing to hide information, escape convictions and perpetrate some sort of communal criminal activity that necessarily represents a threat to Israelis’ lives.

As a consequence, the State is more willing to defend its public servants, providing them with a defense in Court, rather than focusing on finding a way to effectively prosecute them for their actions. With this protective purpose in mind, the Landau Commission posed the first stone for what became an articulated and consolidated doctrine of necessity, which exempts interrogators from criminal liability.

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<sup>135</sup> David Luban, “Liberalism, Torture and the Ticking Bomb”, *Virginia Law Review* 91 (2005): 1436.

<sup>136</sup> From *The Law in These Parts*, at 1:35:42.

### 3. The Necessity Defense as the Pillar of Un-Prosecution

The international community has agreed that “no circumstances whatsoever” may be invoked as a justification of torture, including state or threat of war, internal political instability or any other public emergency.<sup>137</sup> Yet, the fact that the UNCAT specifies that the superior order defense cannot be invoked,<sup>138</sup> was exploited by certain States to interpret the exclusion of criminal exemptions as limited to this particular defense. Such a conclusion would be in stark contradiction with the precedent provision of the Convention, and is not conciliable with the status of *jus cogens* that the prohibition of torture enjoys.

Nevertheless, the question of whether States may encompass torture as a mean to interrogate suspects has been object of debate for decades, and it intensified consistently after the attacks of 9/11 and the subsequent leak on the torturous methods employed by the CIA. While the question conceived in broader terms involves a moral and philosophical dilemma rather than a legal one, the juridical question has developed in different technical disputes, some of which have been mentioned in the previous paragraphs.

Even restricting the field of research to the subjective dimension of the interrogators, and their criminal responsibility, different angles have been explored: from arguments of military necessity, to superior orders and self-defense.

In Israel, in particular, the reflection on torture and its legal boundaries and consequences seems to have intensified and taken the lead ensuing the publication of the Landau Report. Significantly, in the months after the Landau Report’s publication, the Israel Law Review dedicated two of its issues to this debate,<sup>139</sup> which has been periodically revived and re-approached until the current days.

The main pillar to avoid the prosecution of torture, constantly exploited from the Landau Commission on, lies in the application of the necessity defense. The theory has been ceaselessly condemned, and the UN experts keep expressing their their concern, since “[a]llowing individual agents the ‘necessity defense’ against criminal prosecution is a grave loophole within the Israeli judicial system which effectively excuses the coercive

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<sup>137</sup> UNCAT, art. 2§2.

<sup>138</sup> UNCAT, art. 2§3.

<sup>139</sup> “Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity”, *Israel Law Review* 23, no. 2-3 (1989).

interrogation of persons”<sup>140</sup> and “[t]his misguided defence provides de facto impunity for investigative measures amounting to torture”.<sup>141</sup>

#### **a. The Landau Commission and the Origins of a Narrative**

The Report aroused such a big wave of comments not only because of the novel “exposure” on the ISA activity and its proposal to legally formalize its powers and activities, even when purported through illegal methods, but also because it suggested that interrogators shall be exempted by criminal responsibility for torture in light of the necessity defense. To maintain a claim of this kind, the Commission developed a doctrine of necessity that brings it well beyond its limits and has far-reaching consequences, and was therefore object of moral as well as technical critiques.

In fact, the necessity doctrine was stretched as to cover all cases where interrogators applied “moderate physical pressure” in order to obtain information from an HTA suspect – the predecessor of the contemporary security suspect – : no difference was found between a so-called “ticking-bomb” scenario, where an interrogator seeks to obtain from the suspect the location of a bomb already set and ready to explode, and the gathering of generic information such as caches of explosive materials, future acts of terrorism, other members or headquarters of his/her organization.<sup>142</sup> In this sense, the Commission argued that, since “any such information can prevent mass killing and individual terrorist acts”,<sup>143</sup> the necessity defense should equally apply and shield interrogators from criminal liability. This way the Commission bluntly rejected the pre-requisite of immediacy<sup>144</sup> and endorsed an all-embracing understanding of threat, in terms of its concreteness and entity.<sup>145</sup>

#### **i. The Rejection of the Immediacy Requirement**

More specifically, the immediacy factor was rejected on the basis that the (then) relevant norm<sup>146</sup> did not expressly require it. As the Israeli jurist Mordechai Kremnitzer pointed out, recalling thinkers as Hobbes, Bacon, Kant, Hegel, Fichte and Feuerbach, however,

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<sup>140</sup> UN OHCHR, “Israel Must End Impunity for Torture and Ill-Treatment - UN Experts”, 8 February 2021.

<sup>141</sup> UN OHCHR, “Israel Must End Impunity for Torture and Ill-Treatment - UN Experts”, 8 February 2021.

<sup>142</sup> Landau Report, para. 3.13.

<sup>143</sup> Landau Report, para. 3.13.

<sup>144</sup> Landau Report, para. 3.12.

<sup>145</sup> Landau Report, para. 3.14.

<sup>146</sup> Penal Law, art. 22.

“that factor, even though not explicitly included in our statutory definition of necessity, is an ancient condition for ‘necessity’ both as philosophical and as a legal term”,<sup>147</sup> for this defense was conceived for those cases where a danger is so imminent that there is no time to refer the matter to the authorities and an instantaneous action is therefore required to avoid the damage. Only in these cases, the actor is excused in breaking the law, for complying with it in that specific moment would mean letting the worse damage happen. Other authors also agreed that “no express mention of the condition [of immediacy] should even be required, since it is *inherent* to the situation of necessity as a sudden emergency situation”.<sup>148</sup>

It has also been pointed out how “imminence is not merely a matter of time but also of the nature of the harm inherent in the possible realization of the danger, in terms of its specific materially and quantitative dimensions”.<sup>149</sup> Crucially, the degree of certainty and proximity of the danger that will cause the harm in case of inaction, are parameters in the balancing process to establish the proportionality between the illegal action and the harm avoided, which needs to be evaluated in concrete terms,<sup>150</sup> since proportionality also constitutes a condition for necessity to apply. For this same reason, “the security of State” was not included amongst the protected elements - limited to life, limb, freedom, honor and property – that justify breaking the law out of necessity, as it does not identify a concrete and specific object.<sup>151</sup>

## ii. The Rhetoric of the Lesser Evil

By manipulating these elements, the Commission reduced the necessity defense to a choice of the lesser evil.<sup>152</sup> If it’s true that this is the crucial moment where the actor takes the path to – or not to – break the law, this isn’t but the third step of the evaluation: first, a situation of danger for a protected good must be occurring and such a danger needs to be actual and imminent; second, the unlawful conduct must represent the only reasonable alternative to avoid the damage; only lastly, the actor should estimate, in the light of the

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<sup>147</sup> Kremnitzer, “The Landau Commission Report”: 244.

<sup>148</sup> Shneur-Zalman Feller, "Not Actual Necessity but Possible Justification; Not Moderate Pressure, But Either Unlimited or None at All", *Israel Law Review* 23, no. 2-3 (1989): 205. In this case, Shneur-Zalman Feller, who intervened in the debate after the Landau Report mentioned his writings expressing the need to react and “to point out those things which we never expressed, but which were, nevertheless, attributed to us”.

<sup>149</sup> Feller, "Not Actual Necessity but Possible Justification": 205.

<sup>150</sup> Kremnitzer, “The Landau Commission Report”: 247.

<sup>151</sup> Kremnitzer, “The Landau Commission Report”: 244.

<sup>152</sup> Landau Report, para. 3.15.

value attributed to each of the goods by the legal framework, which of the alternatives represents the lesser evil. Neglecting the first two steps of the evaluation, on the contrary, makes it impossible to draw a line between the commission of a crime that is *necessary* – and therefore justifiable – and one that is based on personal moral judgment, especially in the frame depicted by the Commission, according to which the applicability of necessity is determined on the basis of “what the doer of the deed reasonably believed, and not what the situation actually was”.<sup>153</sup>

If the damage is considered exclusively in its ultimate outcome of taking civilians lives, regardless its proximity or reality, isn't any other breach of the law less deplorable? Why would we, then, impose limits to interrogation means at all, and why would we supposedly limit it to suspects that are believed to conceal critical information, when each piece of information is itself at least advantageous to avert the potential attack to happen?

The elements of necessity and actuality and proximity of the damage constitute a barrier to this kind of delirious conclusions, and reflect the emergency nature of the situations where an individual is called to overcome the legal system with their moral evaluation, as reaction to the critical choice between saving either one good or another. Out of a situation of immediate danger, it is normally for the legislator to establish what conduct represents the public interest. Not casually, the core suggestion of the Landau Commission, which then guided the subsequent legislative and jurisdictional developments, was that of enshrining in law what interrogation methods would be permitted and under what circumstances.

However, because explicitly legislating how and when torture is permitted is a morally controversial issue, the Report falls into a less noticeable aberration: it states that torture is unlawful, but can be necessary under certain circumstances and therefore justified under the necessity defense; yet, it asks for those circumstances to be pre-defined, pre-assessed and formalized, transforming an exception based on *promptu* reaction in a system based on solid and preemptive codification.

#### **b. The PCATI Judgment and the Architecture of a System**

Twelve years after the Landau Report, the High Court of Justice intervened on the prohibition of torture, with a judgment that was cheered nationally and internationally, for it seemed to establish, for the first time and against the Landau Commission's conclusions, an absolute prohibition over torture, in light of the statement that “a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free

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<sup>153</sup> Landau Report, para. 3.16.

of any degrading conduct whatsoever. (...) These prohibitions are “absolute”. There are no exceptions to them and there is no room for balancing”.<sup>154</sup>

However, the judgment was way less revolutionary than it was claimed. In fact, while the first half of the judgment leads to the conclusion that “[t]his authority [to interrogate] – like that of the police investigator – does not include most of the physical means of interrogation in the petition before us”,<sup>155</sup> immediately after the judges suggest that “[i]f the state wishes to enable GSS investigators to utilize physical means of interrogations, it must enact legislation for this purpose”,<sup>156</sup> basically reiterating the invitation to authorize torture in a legislative act. Yet, probably more aware of the viability of the option, the Court seems to make the suggestion in more rhetorical terms; by contrast, it recalls the shield of necessity proposed by the Landau Commission and makes it fully operative.

### **i. Immediacy, Concreteness and Ex-Post Requirements**

To start, the Court silently rejects the most controversial points of the necessity doctrine constructed by the Commission, by recalling the pre-requisite of immediacy, affirming the *post factum* nature of the necessity defense and consequently refusing that the defense itself could serve as *ex ante* source of authority for the application of torture. Yet, each of these statements contains, almost as an *obiter dictum*, the contradiction of itself.

First, the Court accepts the State’s argument that torture becomes necessary in “ticking bomb” scenarios, by anchoring it to the immediacy requisite – which, unequivocally, came to be part of the new wording of the Penal Law.<sup>157</sup> Yet, it explains that the immediacy does not refer to the harm, the danger or the act generating the danger, but rather to the subjective need to break the law. This way, the imminence criteria is highly diluted and “is satisfied even if the bomb is set to explode in a few days, or even in a few weeks”.<sup>158</sup>

On the other hand, the Court insists here on the other pre-requisites: that the danger is certain to materialize and there is no other mean to avoid it; then, it rephrases this certainty as the existence of “a concrete level of imminent danger of the explosion’s occurrence”, therefore attributing the concreteness to the immediacy (that, as stated, is conceived in

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<sup>154</sup> HCJ 5100/94, *PCATI*, para. 23.

<sup>155</sup> HCJ 5100/94, *PCATI*, para. 33.

<sup>156</sup> HCJ 5100/94, *PCATI*, para. 37.

<sup>157</sup> Penal Law, art. 34(11): “No person shall bear criminal responsibility for an act that was immediately necessary in order to save his own or another person’s life, freedom, bodily welfare or property from a real danger of severe injury, due to the conditions prevalent when the act was committed, there being no alternative but to commit the act.”

<sup>158</sup> HCJ 5100/94, *PCATI*, para. 34.

subjective terms), and leaving the objective certainty of the explosion itself rather disregarded. In other words, the Court seems to suggest that if the interrogator feels the imminent need to use torture, because *he* believes the explosion will occur, he is to be excused.

Secondly, the Court elaborates extensively on the “after-the-fact judgment” nature of the necessity defense, which is “an improvised reaction to an unpredictable event.”<sup>159</sup> The judges refer to the scholar opinion holding that this defense is thought for those emergency situations whose circumstances are varied and unexpected, but also suggest that where the circumstances are known and may repeat themselves, as it is the case in ISA interrogations, there is no reason for not regulating them through law. Thus, they refuse the necessity defense as an *ex ante* source for torture, and suggest such a prevision is made in legislation, and they do so explicitly in more than one point.<sup>160</sup>

Finally, notwithstanding the asserted *post factum* nature of a criminal defense, the judges propose that the Attorney General establishes “guidelines regarding circumstance in which investigators shall not stand trial, if they claim to have acted from ‘necessity’”.<sup>161</sup> Basically, while claiming necessity to be a defense that can be evoked only in the aftermath of an indictment, the Court asks the Attorney General to provide the interrogators with certain criteria on when their criminal action will or will not cause an indictment, i.e. to know *ex ante* when their necessity claim *will* be accepted or not, therefore making the whole *post factum* argument void.

## ii. The Lesser Evil Meets the Warfare Paradigm

The symmetry between the two narratives culminates in the cardinal point found in the “choice of the lesser evil”, guided by the “moral duty to employ the means necessary” to fight terrorism.<sup>162</sup> Significantly, Justice Barak opens the judgment by referring to Israel’s “unceasing struggle for its security – indeed, its very existence”<sup>163</sup> and it concludes it by quoting the Landau Commission, pointing to the “difficult dilemma between the imperative to safeguard the very existence of the State of Israel and the lives of its citizens, and between the need to preserve its character – a country subject to the rule of law and

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<sup>159</sup> HCJ 5100/94, *PCATI*, para. 36.

<sup>160</sup> HCJ 5100/94, *PCATI*, para. 37; para. 39: “Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch(...). The debate must occur there.”.

<sup>161</sup> HCJ 5100/94, *PCATI*, para. 38.

<sup>162</sup> HCJ 5100/94, *PCATI*, para. 33.

<sup>163</sup> HCJ 5100/94, *PCATI*, para. 1.

basic moral values”.<sup>164</sup> This way, the criminal necessity is somehow merged into the military necessity: justified by what is depicted as a war-threat, the admissibility of torture is not limited to a personal criminal defense, but it rather becomes based on a suspension of constitutional obligations for the sake of the State itself.

It should be noticed that, on the basis of this, Israel has proclaimed a state of emergency in 1948 that has been constantly renovated ever since, marking its 72nd year of uninterrupted enactment. The wide emergency powers, that this state provides for, are completed by the Defense (Emergency) Regulations, promulgated by the British authorities in Mandatory Palestine in 1945, and still effective (mostly through their transposition in the Counterterrorism Law of 2016).

This perpetual emergency framework reveals that, besides the naming, the frame is actually rather an un-exceptional one, where torture is not employed as a tool to be used for reason of emergency, but rather on the basis of urgency, two concepts that relate to temporality in slightly different ways. Emergency suspends ordinary law in “exceptional times” for as long as the special danger persists, parting from the creed of the society in order to avoid great harm; on the other hand, urgency refers to the result of gathering information more quickly.<sup>165</sup> This way, the use of torture is not linked to a “special situation”, but to a “special need”, that will reoccur every time there is an urgency, thus making it a tool that can be activated by the authorities *ad libitum*.

Altogether, then, the picture drawn by the HCJ does not differ substantially by the one portrayed by the Landau Commission. Torture keeps being contrary to the law, unless the Knesset provided differently, but a wide interpretation of necessity keeps representing a back-up door for interrogators, which are now entitled of the right to know with precision and in advance if they will enjoy the criminal exemption or not. As just showed, in order to leave this getaway open, the judges engaged in the interpretation and legal construction of another yet distorted version of necessity, capitalizing the door left open in 1987.

### **c. Abu Gosh, Tbeish and the Application of a Policy**

While *PCATI* only put forward a theoretical reasoning, its application was effective in the *Abu Gosh* and *Tbeish* judgments: even though the cases were dismissed on even more radical grounds, in both occasions the HCJ affirmed that the ISA interrogators wouldn't have

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<sup>164</sup> HCJ 5100/94, *PCATI*, para. 40.

<sup>165</sup> Ballas, “Fracturing the “Exception””: 827.

bared criminal responsibility, based on the necessity defense, as reconstructed by the Court in 1999.

### **i. Potentially-Ticking-Bombs**

In the first case, Abu Gosh was arrested by the ISA on suspicion of serving as an explosives expert for a terrorist foundation in Nablus. The security service claims that the violent interrogation he underwent “was based on solid suspicion, which were later found to be justified, as to his possession of information on an imminent terrorist attack and the location of explosive labs.”<sup>166</sup> and was therefore to be justified under necessity defense. However, the only information Abu Gosh withheld were related to the location of a lab with “numerous production means for explosive devices”.<sup>167</sup>

Since these elements were revealed after the application of “means of pressure”, the interrogators believed that the suspect was hiding further information as to another lab and to an imminent attack to happen, and therefore kept on the irregular interrogation the following day. The interrogators affirm that he then revealed the position of another lab, but when brought to the place indicated he could not locate it; he did not provide any information on planned terrorist attacks, but the name of someone, whose interrogation led to someone else’s interrogation, who, 17 days after Abu Gosh’s interrogation, admitted he smuggled an explosive belt out of the West Bank.<sup>168</sup>

It is therefore questionable to what extent the torture on Abu Gosh could be considered directed to thwart an imminent attack, and to what extent he was the only possessor of the crucial information to avoid the bomb to explode.

Nevertheless, the Court concluded that the immediacy criterion was satisfied on the basis of the *PCATI* requirements, since “there was a measure of concrete and imminent risk of explosion”, which stemmed “from the circumstances of the necessity does not have to be immediate, and it is sufficient for the “act” committed to be immediately required in order to prevent the materialization of the risk”.<sup>169</sup> For the judges, it was enough that the interrogee had information about the first lab, since for them “It is clear that the explosives which were found in the various explosive labs would have been intended for the

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<sup>166</sup> HCJ 5722/12, *Abu Gosh*, para 10.

<sup>167</sup> HCJ 5722/12, *Abu Gosh*, para. 2.

<sup>168</sup> HCJ 5722/12, *Abu Gosh*, para. 2.

<sup>169</sup> HCJ 5722/12, *Abu Gosh*, para. 45.

production of additional devices, if they had not been seized”.<sup>170</sup> Besides the fact that the mention of a plurality of “labs” implies that the dangerous materials were not necessarily all present in the only lab Abu Gosh had knowledge of, the judgment here perfectly reflects the Landau Report reasoning, where it stated that the danger that justifies an action under necessity defense can be “the harm to life or person of others which could occur sooner or LATER.” – uppercase in the original.<sup>171</sup> Further, the judges believed that “even if the Petitioner’s interrogators were not convinced at the time that he had information on the specific explosive belt, which had been smuggled into Israel, they were authorized to use the exceptional interrogation means, without violating the immediacy condition”;<sup>172</sup> in sum, in another elegantly self-contradicting statement, they affirmed that the denial of concreteness and immediacy of the danger can very well be, without violating the prerequisites of a necessity defense.

In the second case, Firas Tbeish was first arrested in 2011 for suspicion of membership and activity in the Hamas organization, deemed an unauthorized association, and detained for more than a year in administrative detention.<sup>173</sup> In late 2012, he started being interrogated by the ISA because “up to date intel raised a suspicion of his involvement in Hamas military activity”.<sup>174</sup>

The ISA claimed that the information in their possession suggested Tbeish’s “knowledge of the whereabouts of an arsenal in a warehouse (...) containing a significant amount of over ten weapons, including rifles”.<sup>175</sup> Torture was then applied, based on the suspicion that these weapons would have been used to commit terrorist attacks, and since “the ISA interrogators believed that he was holding information about a plan to harm public safety”.<sup>176</sup>

Following the use of torture, the ISA claimed that Tbeish provided information “which assisted in the exposure of many weapons which were used by an active military infrastructure”, that he admitted receiving weapons in accordance with the instructions of a senior member of Hamas and transferred them in a hiding spot and to Hamas active

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<sup>170</sup> HCJ 5722/12, *Abu Gosh*, para. 46.

<sup>171</sup> Landau Report, para. 3.12

<sup>172</sup> HCJ 5722/12, *Abu Gosh*, para. 45.

<sup>173</sup> HCJ 9018/17, *Tbeish*, para. 1.

<sup>174</sup> HCJ 9018/17, *Tbeish*, para. 3.

<sup>175</sup> HCJ 9018/17, *Tbeish*, para. 3.

<sup>176</sup> HCJ 9018/17, *Tbeish*, para. 4.

members.<sup>177</sup> The suspicion was maintained despite the interrogee's denials and "based, amongst other things, on a polygraph test".<sup>178</sup> The continued use of torture, then, brought Tbeish to provide information concerning additional weapons he received and transferred, and information that "assisted with the advancement of the interrogations of other active members of the terrorist infrastructure".<sup>179</sup>

The Petitioners contested the application of necessity, because the ISA failed to indicate a certain and concrete danger to human life:<sup>180</sup> not only they could not refer to an immediate threat, but not even to a distant future threat. In sum, the threat was neither imminent nor certain. This was further proved, according to the Petitioners' arguments, that the interrogation took place only after 7 days of moving between facilities, and suspended during Jewish holidays.<sup>181</sup>

The Court eventually found that the necessity defense could be applied, because, based on the information provided by the ISA and the Mavtan, the circumstances indicated that "the interrogation was intended to prevent real and concrete danger to human life, at a high level of certainty".<sup>182</sup> The Court drew this conclusion on the belief that Tbeish's complicity "in a plot to collect and hide many dangerous weapons",<sup>183</sup> which might have been used for the commission of an attack that, if committed, might have costed human lives.<sup>184</sup>

This very broad interpretation of immediacy and certainty was accompanied, in the reasoning of the Court, by the assertion that "the key to preventing such a real danger to human life was held within the information kept solely by the Petitioner".<sup>185</sup> However, also this last-resort argument is not very convincing, considered that the authorities themselves stated that the major result after the application of torture on Tbeish was that he led to information useful for the interrogation of Hamas members that were already detained by

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<sup>177</sup> HCJ 9018/17, *Tbeish*, para. 4.

<sup>178</sup> HCJ 9018/17, *Tbeish*, para. 5.

<sup>179</sup> HCJ 9018/17, *Tbeish*, para. 5.

<sup>180</sup> HCJ 9018/17, *Tbeish*, para. 23.

<sup>181</sup> HCJ 9018/17, *Tbeish*, para. 23.

<sup>182</sup> HCJ 9018/17, *Tbeish*, para. 59.

<sup>183</sup> HCJ 9018/17, *Tbeish*, para. 59.

<sup>184</sup> HCJ 9018/17, *Tbeish*, para. 59.

<sup>185</sup> HCJ 9018/17, *Tbeish*, para. 59.

the Israeli authorities.<sup>186</sup> This element proves that there were at least other subjects who had the information, besides the fact that the time to prevent the attack then appears to be long enough to resort to other methods of interrogation and of investigation in general.

## ii. Necessity Defense: Excuse or Justification?

In the case of Tbeish, the Court stretched the necessity defense even further under doctrinal aspects, rejecting the Petitioner's statement underlining that it constitutes a criminal excuse, and not a criminal justification.

Generally speaking, the line has always been blurred between the notion of "excuse" and that of "justification". From a theoretical point of view, excuses manifest the situation where a wrongful action has been committed, but the defendant is not considered blameworthy, meaning there is no culpability;<sup>187</sup> justifications, instead, correspond to situations where the violation of law is not considered as a wrongdoing.<sup>188</sup> In other words, "a justification affirms the rightness of an action; an excuse preserves the wrongfulness of the conduct, but recognizes the injustice of holding the actor criminally liable."<sup>189</sup>

It seems more sound to consider necessity an excuse, as it would reflect the nature of the defense and the suggestion of the HCJ itself, constantly upheld, which highlighted the difference between the (*ex-ante*) authority stemming from law and the (*ex-post*) defense one can enjoy under adequate circumstances.<sup>190</sup>

Even though the debate might seem purely theoretical, its practical consequences are not to be disregarded. The unconditional starting of a prosecution, in fact, seems the only way to ensure that the impunity is not granted to those perpetrating interrogational torture. Moreover, also its meaning as a transposition of what is socially – before than legally – allowed or justifiable should be remarked: transposing the justifying feature from the subjective dynamics to the action *per se* embeds the risk of creating a vicious circle, where an act thought of as necessary fuels social tolerance towards the practice, which is then more frequently and easily condoned at a judicial level first and at a policy level after.

Anyhow, the HCJ took an opposite stand in Tbeish, where it claimed that the necessity defense should be fully considered as a justification, not only relieving the perpetrator of

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<sup>186</sup> HCJ 9018/17, *Tbeish*, para. 59.

<sup>187</sup> I. Haenen, "Justifying a Dichotomy in Defences: The Added Value of a Distinction between Justifications and Excuses in International Criminal Law", *International Criminal Law Review* 16, no. 3 (2016): 549.

<sup>188</sup> Haenen, "Justifying a Dichotomy in Defences", 549.

<sup>189</sup> Haenen, "Justifying a Dichotomy in Defences", 549.

<sup>190</sup> HCJ 5100/94, *PCATI*, para. 38.

torture from criminal responsibility, but also legitimizing the act *per se*, “such as it is not defined as a negative phenomenon which penal law wishes to consider as prohibited”.<sup>191</sup>

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<sup>191</sup> HCJ 9018/17, *Tbeish*, para. 61.

#### **4. Consultations and Guidelines from Legislative, through Judiciary, to Executive and Internal Provisions**

From another point of view, the Petitioners in *Abu Gosh* claimed that the necessity defense can not be invoked preemptively, but for its own nature of criminal defense it has to be invoked after the criminal indictment, based on the *PCATI* judgment. They argued that the necessity exception could not apply to the case, also according to *PCATI*, since the use of violent means “was planned in advance, and carried out in coordination between several interrogators, and after receiving permits from senior ISA officials”.<sup>192</sup> On the contrary, the Respondents held that, since *PCATI* did not rule out the possibility of applying this exception to specific cases, no specific cases should be excluded.<sup>193</sup>

To be clear, *PCATI* did reject the possibility of an *ex-ante* defense of necessity, but at the same time invited the Attorney General to instruct himself on the exemption from criminal indictment based on necessity. And the Attorney General did so, with unprecedented solicitude, publishing the *GSS Interrogations and Necessity Defense* guidelines<sup>194</sup> as soon as the following month. This way, the necessity defense is formally not applied in advance, but the guidelines offer a road-map to regulate ahead the application of it, therefore nullifying the absolute prohibition that should be held against torture.

##### **a. The Attorney General’s Guidelines and the ISA Consultations Procedure**

Moreover, in the *Abu Gosh Case*, the petitioners criticized the fact that, the evaluation on necessity was made by the interrogators after alerting the interrogee that they would have switched to exceptional methods, and after consultations with senior officials,<sup>195</sup> thus showing that torture is not employed in exceptional circumstances led by immediacy, but as a regulated procedure. The Court refused this argument, stating that “even if the interrogators consulted senior officials prior to the use of exceptional interrogation means, this does not detract from the “ad-hoc” nature of the exception”,<sup>196</sup> claiming once again that the immediacy criterion is satisfied by the immediate need to use those means, and that the practice emerged from the Respondents’ statements does not violate the AG instructions.

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<sup>192</sup> HCJ 5722/12, *Abu Gosh*, para. 9.

<sup>193</sup> HCJ 5722/12, *Abu Gosh*, para. 10.

<sup>194</sup> AG Memorandum on Necessity.

<sup>195</sup> HCJ 5722/12, *Abu Gosh*, para. 44.

<sup>196</sup> HCJ 5722/12, *Abu Gosh*, para. 44.

One year later, then, the attorneys of Firas Tbeish questioned the legality of the AG guidelines, on the same ground that using violent means only after consulting a superior would not reflect the necessity situation, where an interrogator is compelled to act out of an ad-hoc decision, as a reaction to an unexpected danger. The Court, however, did not take this occasion to acknowledge the far-reaching consequences of the ambiguity of the *PCATI* and *Abu Gosh* decisions, but rather extended its approval from the AG guidelines to include the ISA system of permissions too, which was for the first time scrutinized, but *ex parte*.

More specifically, the Court disclosed that a special ministerial committee concerning ISA interrogations adopted, based on the recommendations of the Landau Report, a procedure titled “The Permission Procedure”, for the use of “physical interrogation techniques”.<sup>197</sup> However, since *PCATI* ruled that *ex ante* authorization of torture is illegal and therefore null, the “Procedure” was canceled immediately after the issuance of the ruling.<sup>198</sup> Simultaneously, the ISA interrogators were warned that they were not allowed to use physical interrogation techniques anymore, such a behavior being criminally relevant, but that in the case they did they may resort to ‘necessity’ as a defense.<sup>199</sup> To this purpose, the AG guidelines expressly state that: “The ISA should have internal guidelines, *inter alia*, about the system of consultations and confirmations within the organization, which is needed for this matter.”<sup>200</sup> The Respondents then reported that, following the AG guidelines, ISA internal guidelines were established, providing the procedure for consultations with superiors “in real time”, whenever an interrogator felt like the necessity defense could apply, and therefore violent means allowed. Then, the guidelines were presented to the AG to test their compliance with the legal framework and the jurisprudence on the matter.

#### **b. The Problematic Aspects of the Administration of Torture as a Bureaucracy Issue**

When the Petitioners raised the point that the chain of permissions and authorizations “indicates that the Guidelines offer a coherent and foreseeable policy regarding cases in

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<sup>197</sup> HCJ 9018/17, *Tbeish*, para. 40.

<sup>198</sup> HCJ 9018/17, *Tbeish*, para. 41.

<sup>199</sup> HCJ 9018/17, *Tbeish*, para. 41.

<sup>200</sup> AG Memorandum on Necessity, art. G(4).

which the use of enhanced techniques would be approved”,<sup>201</sup> the Court replied once again that the immediacy requirement of necessity refers to the act of the interrogator, and this is satisfied in the circumstances discussed by the fact that the senior officials are consulted in real time.<sup>202</sup>

What is more, the presiding judge, echoed by his colleagues and captured by a mirage of bureaucratic perfection, cherished the establishment of an articulated and detailed procedure for the use of violent methods of interrogations, because the interpretation according to which the interrogator should make the decision solely by himself without referring to his superiors, is “distasteful”.<sup>203</sup>

Another alarming element lies in the statement that the Petitioners’ idea of allowing necessity to be invoked only after the commencement of a criminal procedure “lacks any systemic logic, and is also opposed to the efficient and correct way of managing criminal procedures”.<sup>204</sup> In a way that disturbingly recalls Hannah Arendt’s reflections at Eichmann’s trial, the judges almost seem more concerned about the economy of the proceedings and the coherency of the bureaucratic system, rather than about implementing law in a way that effectively halts the commission of crimes against humanity.

Altogether, this seems to be the direction undertaken: in order to make the interrogators safe rather than sorry, the debate was shifted from necessity defense and the penal code, to consultations and special guidelines. Notably, the same centralized administration was already present under the eyes of the Landau Commission, which endorsed the system itself, limiting its critiques to issues of appearance and honesty between different institutions. Just as the HCJ, the Landau Commission acknowledged the existence of the internal guidelines on physical pressure, as a combination of top-to-bottom administration of torture and ascending mechanism of consultations, with the main function of guiding the interrogators “by setting clear boundaries in this matter”,<sup>205</sup> kept their content secret but assured that the guidelines were laid down according to the law.<sup>206</sup>

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<sup>201</sup> HCJ 9018/17, *Tbeish*, para. 64.

<sup>202</sup> HCJ 9018/17, *Tbeish*, para. 64.

<sup>203</sup> HCJ 9018/17, *Tbeish*, para. 64; Justice Amir concurring opinion, para. 3; Justice Mintz concurring opinion, para. 2.

<sup>204</sup> HCJ 9018/17, *Tbeish*, para. 61.

<sup>205</sup> Landau Report, para. 4.7.

<sup>206</sup> Landau Report, para. 4.19.

The issuance of the administrative guidelines and their validation constitutes the last central component of the system examined, fulfilling the transversal function of modulating and – internally – supervising the use of torture, so to avoid interrogators will use it based on an individual choice, and to make sure they will use it when so instructed, providing them with “a fair measure of judiciary certainty” they are entitled to receive, according to the Attorney General’s view.<sup>207</sup>

All the elements examined – the definition of torture; the cover up through partial investigations, removal or partial evaluation of the evidence; the necessity defense and the administrative protocols – contribute to create a system where the perpetrator is immune and the victim voiceless. It emerges clearly that it’s all the more appropriate to consider it as a system, since none of the elements is used, or can be convincingly used, in an isolate manner, but rather they are always all evoked and entangled in a fashion that allows them at times to substitute, at time to reinforce one another.

The edulcorated image of torture as an ugly-but-necessary, extraordinary-but-controlled tool is thus built and conveyed to the public. While this reasoning is used by the Israeli institutions to justify what otherwise would be a reprehensible conduct, it serves as the clearest manifestation of an even more reprehensible fact: the conscious creation of a system made of rules and exceptions where torture has a room to keep being practiced invisibly, systematically and with State approval. As put by Itamar Mann and Omer Shatz, the position of the State “is not that torture should be stopped, but that it should be applied as little as possible”.<sup>208</sup>

The creation of the system, critically, is an extremely rational process, designed by legal professional out of fine scientific thoughts and techniques, using mainly legal arguments and their theorization. Therefore, the central question of this study: can these legal professionals be deemed complicit in the systematic perpetration of torture?

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<sup>207</sup> AG Memorandum on Necessity, art. D.

<sup>208</sup> Mann, Shatz, “The Necessity Procedure. Laws of Torture in Israel and Beyond, 1987-2009”: 90.

## Chapter III - Complicity of Legal Advisors and Judicial Authorities in Torture

### **1. Responsibility of Legal Professionals?**

The last chapter thoroughly displayed that considering the system of “torture management” in its entirety is of crucial importance to properly understand it and address it. In this sense, it appears more clearly that the impunity for single acts of torture isn’t but the ultimate and tangible phenomenon of a much wider network of thoughts and beliefs, embodied in an articulated juridical system. Consequently, convicting those directly and individually perpetrating torture in the interrogation rooms is needed, but is not sufficient to address the whole picture of responsibilities. As pointed out by Orna Ben-Naftali, “focusing on individual accountability de-contextualizes our understanding of the nature of such crimes, belies deterrence, distorts the very search for truth, and contaminates the judicial process”,<sup>1</sup> forgetting that these cases collocate themselves in a wider culture of impunity, where “crimes do not occur as a result of sporadic or arbitrary individual decisions, but in a sociopolitical, ideologically driven, and institutionally sanctioned context”.<sup>2</sup> On the contrary, assessing the criminal responsibility of those directing the public and legal dimension can be more effective in definitively assessing the public and legal dimension of a culture of impunity.<sup>3</sup>

For this scope, the responsibility of military or political leaders is often easily drawn and connected to the war crimes and crimes against humanity committed. Distinctively, the criminal liability of legal advisors, and jurists in general, might not be of immediate understanding. It is common belief that a lawyer’s job - including Government’s lawyers – consists in upholding the client’s view,<sup>4</sup> regardless of personal ideologies; by the same token, judges and prosecutors are generally understood as public servants who merely apply a given code of laws, and therefore have no say in the content of it.<sup>5</sup> This, however, reflects an extremely simplified analysis of the legal professions: lawyers, in fact, can bear

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<sup>1</sup> Ben-Naftali, Sfard, Viterbo, *The Abc of the OPT*, 450.

<sup>2</sup> Ben-Naftali, Sfard, Viterbo, *The Abc of the OPT*, 450.

<sup>3</sup> Ben-Naftali, Sfard, Viterbo, *The Abc of the OPT*, 453: “A culture of impunity/accountability has a public and legal dimension. The latter is expressed in the quality of the four main components of the criminal process: criminal legislation that defines certain acts as war crimes; investigations geared toward the exposure of the relevant facts; diligent prosecution of suspects; and an independent judicial system that renders a reasoned judgment and determines the appropriate punishment.”

<sup>4</sup> See *infra* III.1.c.ii: *Responsibility of Legal Professionals: the Role of Law and the Role of Ethics*.

<sup>5</sup> Joe W. Pitts, “Judges in an Unjust Society: The Case of South Africa”, *Denver Journal of International Law & Policy* 15 (1986): 85.

criminal liability for committing or facilitating the commission of crimes,<sup>6</sup> as well as judges<sup>7</sup> and attorney generals<sup>8</sup> when they abuse or misuse the law.

In Israel, the latter aspect has been denounced frequently by different organizations and perspectives, which found a comprehensive frame in two works of particular interest for the present thesis.

The first is the documentary *The Law in These Parts*,<sup>9</sup> directed by Ra'anán Alexandrowicz. The film is a collection of interviews, conducted by the director, to nine former military judges and prosecutors operating in the West Bank between 1963 and 2008. The director's intent was, in his own words, "to document a legal system",<sup>10</sup> meaning a system which organizes life in a particular place through a group of "entrusted people" who wrote, developed and implemented the law.<sup>11</sup> The documentary offers a rare insight of the point of view of these legal professionals, the motivations that prompted a decree or another, the thoughts and values guiding their judicial decisions.

The second is the book *The ABC of the OPT: A Lexicon of the Israeli Control Over the Occupied Palestinian Territory*, which contains a detailed and thorough product of the experience of three prominent human rights lawyers. The authors analyze the reality of Israel and the territories it occupies through the legal instruments adopted to administer the convoluted reality that Palestinians and Israelis live in daily, aware of the fact that "[l]aw has played a significant role in the making and maintaining of this reality".<sup>12</sup> In listing the main objective of the book, the writers declare:

"[t]he study seeks to highlight the nexus between the normative legal text and the narrative context within which it is written and that endows it with meaning. While decisions on the legality of a specific measure affecting the occupied population often accept the normative relevance of international law, they are neither made in abstracto nor by abstracted decision makers. The legal text is written in a national

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<sup>6</sup> Joel S. Newman, "Legal Advice Toward Illegal Ends", *University of Richmond Law Review* 28, no. 2 (1994): 314.

<sup>7</sup> Konrad Neugebauer, "Holding Domestic Judges Accountable under International Criminal Law - A Useful Step to Foster the International Rule of Law?", *KFG Working Paper Series*, no. 36 (2019): 6-7.

<sup>8</sup> It's noteworthy that the NMT's *Justice Case* included amongst the accused senior and chief prosecutors from the Nazi regime.

<sup>9</sup> *The Law in These Parts*, directed by Raanan Alexandrowicz (2011).

<sup>10</sup> From *The Law in These Parts*, at 00:01:00.

<sup>11</sup> From *The Law in These Parts*, at 00:03:15.

<sup>12</sup> Ben-Naftali, Sfard, Viterbo, *The Abc of the OPT*, 1.

context by domestic decision makers (judges, legal advisors and legislators) and, in most cases, its argumentation is directed primarily at the national constituency.”<sup>13</sup>

Even though both the mentioned works, as well as most scholars, focus on the situation in the occupied territories of the West Bank and Gaza, the same logic can very well apply to the bigger picture, comprehensive of the “civil” Israeli institutions. In fact, the fragmentation of the juridical system surely creates different clusters of territories and individuals, which are collocated into radically dissimilar sub-systems, however the legal and concrete porosity between the designated areas eventually renders a much blurred picture. For example, while military jurisdiction supposedly applies to the whole occupied territories of the West Bank and Gaza, Israeli settlers elude such jurisdiction and are tried under the civil system;<sup>14</sup> similarly, while the Palestinian Authority has jurisdiction – even though limited and varied depending on the classification in Areas A, B and C – over the West Bank, Israeli settlers cannot be subject to it.<sup>15</sup> On the other hand, Palestinians charged with criminal offenses can be tried before civil Courts if they have an Israeli citizenship (while in any case they are not entitled to enjoy the Israeli nationality, which is exclusive for Jewish Israelis),<sup>16</sup> while they mostly fall under the military authorities if they are residents of the West Bank or Gaza;<sup>17</sup> a completely separated regime applies to Jerusalem and its Palestinian residents, who enjoy better legal conditions than residents of the OPT, but do not hold Israeli citizenship and neither rights and freedoms, such as voting, health and social assistance rights, or even accessing the Israeli national airport.<sup>18</sup>

The result can be evocatively thought of as a knitted fabric, where different threads submerge, interlace and reemerge elsewhere in a mystifying trim; even if the threads will always be traceable and re-conducted to well separated yarns, some Israeli institutions, in name of their asserted democratic nature, will gather and treat all of them. This is the case of the HCJ, which accepts petitions from all realities and works as a supervision organ for

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<sup>13</sup> Ben-Naftali, Sfar, Viterbo, *The Abc of the OPT*, 5.

<sup>14</sup> For a complete overview see: Sharon Weill, “The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories”, *International Review of the Red Cross* 89, n. 866 (2007).

<sup>15</sup> Ben-Naftali, Sfar, Viterbo, *The Abc of the OPT*, 266.

<sup>16</sup> UN ESCWA, *Israeli Practices towards the Palestinian People and the Question of Apartheid*, 2017, E/ESCWA/ECRI/2017/1, p. 4.

<sup>17</sup> Rasha Shammās, “In Practice”: Interview with Attorney Saher Francis on her Experiences in Representing Palestinians before the Israeli Military Courts”, *Adalah Review* 5 (2009): 55.

<sup>18</sup> UN ESCWA, E/ESCWA/ECRI/2017/1, p. 41.

both the civil and military Israeli authorities.<sup>19</sup> Likewise, the Attorney General is also a guide and review organ on the activities of the Military Attorney General and, in its vest of legal advisor, it directs the actions of the Government even in those issues which are militarily connoted.<sup>20</sup> Finally and notably, the legal department of the ISA shares this hybrid competence, operating for a body that deals with the ultimate “grey area” of security that, as detailed in Chapter I, came to be an all-comprehensive term capable of pervading all different sectors.<sup>21</sup> Therefore, the “two worlds” should not be understood as markedly distinct when it comes to these organs.

#### **a. An International Criminal Law Perspective**

In light of the above, the mechanisms to hold the heads of the military activity (seldom including Prime Ministers and Ministers of Defense) accountable through the regular domestic justice system does not fit the situation, due to both the contamination of the military and civil organs and to the almost automatic and undisputed prevalence of the former. In such a context, where domestic authorities appear unwilling or unable to prosecute war crimes and crimes against humanity happening under its jurisdiction, an analysis under the lenses of ICL is particularly sensible.

Many cases worldwide have led to an assessment of criminal liability of legal professionals. The well known scandal that engulfed the US administration for its infamous “Torture Memos”<sup>22</sup> revived a wake of reflections on the responsibility of legal professionals in criminally relevant State policies, and resulted both in domestic proceedings against the lawyers involved and investigations from foreign Courts through the application of universal jurisdiction. For example, the complaint filed on 14 November 2006 by the European Center for Constitutional and Human Rights (ECCHR), the International Federation for Human Rights (FIDH), CCR and more than 40 human rights organizations

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<sup>19</sup> Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 1.

<sup>20</sup> Ben-Naftali, Sfard, Viterbo, *The Abc of the OPT*, 193.

<sup>21</sup> The latest example of this nature was shown during the CoVid-19 crisis: while most Countries resorted to voluntary contact-tracing apps managed by the health authorities, in order to limit the spreading of the virus, the Israeli executive was the only one to give such a power to its secret service agency. All personal devices were automatically traced, the data being collected by the ISA who could store them for up to 6 months, without any limit on the processual use of the material obtained. For more details and the development of this issue, see Adalah’s case at: <https://www.adalah.org/en/content/view/9921> (last accessed: 9 November 2020) and following updates.

<sup>22</sup> See *infra* III.1.c: *Today: Lessons from the US Torture Memos*.

and individuals, including two former Nobel Peace Prize winners and the former Special Rapporteur on Torture included, amongst the defendants, five government attorneys, in light of their role in formulating the detention and interrogation policies that resulted in the torture of the plaintiffs.<sup>23</sup>

By the same token, Argentina convicted also former high-ranking judges for their contribution to the commission of atrocities during the Dirty War;<sup>24</sup> the former Chief of Justice of Iran is under investigations by the German Federal Prosecutor for aiding crimes against humanity,<sup>25</sup> while a former Iranian Prosecutor is under investigation in Sweden for abetting the execution of political prisoners.<sup>26</sup>

In terms of ICL, jurists have not been convicted in contemporary cases neither by domestic tribunals under universal jurisdiction nor by the International Criminal Court. However, in the Nuremberg Trials there were two cases, known as the *Justice Case*<sup>27</sup> and the *Ministries Case*,<sup>28</sup> that dealt with this.

## **b. The Legacy of Nuremberg**

### **i. The *Justice Case***

The *Justice Case* is the leading case about the criminal responsibility of legal professionals, for it unequivocally stated that lawyers can be guilty as accomplices in criminal policies. In this case, the defendants were 16 German jurists, including judges, senior prosecutors, counsellors and legal advisors of the Ministry of Justice, chief of relevant divisions at the Ministry of Justice – for example, the Chief of the Civil Law and Procedure Division, the Chief of the Penal Administration Division and of the Secret Prison Inmate Transfer

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<sup>23</sup> Katherine Gallagher, “Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture”, *Journal of International Criminal Justice* 7 (2009): 1106.

<sup>24</sup> Neugebauer, “Holding Domestic Judges Accountable under International Criminal Law”: 5.

<sup>25</sup> Neugebauer, “Holding Domestic Judges Accountable under International Criminal Law”: 5.

<sup>26</sup> Richard Spencer, “Hamid Nouri: Iranian Accused in Mass Purge of Dissidents is Arrested in Sweden”, *The Times*, 14 November 2019.

<sup>27</sup> NMT, United States of America v. Josef Altstoetter et al. (1947), in *Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Washington: United States Government Printing Office, 1951), vol. III [hereinafter: *Justice Case*].

<sup>28</sup> NMT, United States of America v. Ernst von Weizsäcker et al. (1947), in *Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Washington: United States Government Printing Office, 1951), vol. XIV [hereinafter: *Ministries Case*].

Division and the Director of the Legal Education and Training Division in the Ministry of Justice – and the Acting Minister of Justice.<sup>29</sup> In the words of the Prosecutor: “the root of the accusation here is that those men, loaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage and slaughter”.<sup>30</sup>

Concretely, the deformation of the judicial system happened through very different acts, which besides personal beliefs and orientations, varied depending, on the position held and on the period considered: in the first stage, judges and prosecutors used legal tools argumentation to reach the political goal imposed by the Nazi regime, in a way that maintained the appearance of legality and adherence to the rule of law. However, “eventually even the pretext faded”<sup>31</sup> and the judicial ministries were explicit in subjugating justice to the political aims of the Nazi regime. By the same token, one can only be shocked by the unfairness of judgments given by regular and special courts, but the real focus of the trial pertains to acts such as the Ministry of Justice’s centralization of the judicial powers under Hitler’s direct power, to the judges and prosecutors deciding to turn suspects to the SS and the Gestapo, and to the emanation and enforcement of decrees giving course to atrocious crimes.

All the aforementioned conducts were considered relevant in defining four charges against the defendants: common design and conspiracy, war crimes, crimes against humanity and membership in a criminal organization.

The first charge, contrary to contemporary understanding of ICL, features conspiracy itself as a crime, and not as a mode of liability.<sup>32</sup> This crime included the actions to “enact, issue, enforce, give effect to certain purported statutes, decrees and orders, which were criminal both in inception and execution, and to work with the Gestapo, SS, SD, SIPO, and RSHA for criminal purposes”.<sup>33</sup> The conspiracy explicated also in the preparation of legislation concerning all branches of law, courts and prisons, which for example led to the

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<sup>29</sup> NMT, *Justice Case*, Indictment. Available at: <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1000&context=nmt3> (last accessed: 22 November 2020).

<sup>30</sup> NMT, *Justice Case*, Opening Statement for the United States of America, p. 1.

<sup>31</sup> Jens David Ohlin, “The Torture Lawyers”, *Harvard International Law Journal* 51, no. 1 (2010): 247.

<sup>32</sup> For a more detailed analysis, see: Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Tom Gal, Dillon Roseen, and Thomas Van Poecke. “Conspiracy” in *Modes of Liability in International Criminal Law* (Cambridge: Cambridge University Press, 2019).

<sup>33</sup> NMT, *Justice Case*, Opening Statement for the United States of America, 6.

establishment of the Special Courts to treat “political” cases.<sup>34</sup> Under this system, public prosecutors could arbitrarily refer all cases related to acts considered inimical to the Party or to the government to the Special Courts, which were characterized by their severity of punishment, secrecy of the proceedings and denial of basic guarantees of fair trial.<sup>35</sup>

The charge of war crimes was based on the fact that the defendants had a part in the commission of crimes such as murder, torture, illegal imprisonment and other inhumane acts against civilians of occupied territories and war prisoners.<sup>36</sup> The charge of crimes against humanity was similarly based on the participation in the commission of atrocities as murder, extermination, enslavement, deportation, illegal imprisonment, torture, persecution on political, racial and religious grounds and ill-treatment of German civilians and nationals of occupied territories.<sup>37</sup> While the two charges refer to different crimes, they share many relevant conducts. For example, Jews and “gypsies”<sup>38</sup> were discriminated upon and arbitrarily designated as “asocial” by agreement between the Ministry of Justice and the SS, and were thus turned to the SS;<sup>39</sup> after undergoing a “summary travesty of trial” before the Special Courts, and after serving their sentence, many of the accused were then turned to the Gestapo for periods of “protective custody”.<sup>40</sup> All these apparently neutral judicial acts were culminating in the direct killing or transfer to detention camps, making the obvious and ultimate outcome of the proceedings the murder, torture, ill-treatment and unlawful imprisonment of thousands of persons.

In the same way, the Ministry of Justice was accused of aiding the unlawful annexation and occupation of Czechoslovakia, Poland and France, where Special Courts were established to try Roles, Jews and political opponents, “generally by the employment of summary procedures and the enforcement of draconic penal laws”.<sup>41</sup> From a different perspective, the Ministry was also accused of granting impunity and amnesty to Nazi Party members for major crimes against civilians of the occupied territories.<sup>42</sup>

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<sup>34</sup> NMT, *Justice Case*, Opening Statement for the United States of America, 6.

<sup>35</sup> NMT, *Justice Case*, Opening Statement for the United States of America, 6.

<sup>36</sup> NMT, *Justice Case*, 8.

<sup>37</sup> NMT, *Justice Case*, 11.

<sup>38</sup> This was the category used by the Nazi to gather indiscriminately all nationals of the occupied Eastern territories.

<sup>39</sup> NMT, *Justice Case*, 8.

<sup>40</sup> NMT, *Justice Case*, 8.

<sup>41</sup> NMT, *Justice Case*, 9.

<sup>42</sup> NMT, *Justice Case*, 10.

However, the deepest involvement of jurists in the Nazi policies probably appeared in the execution of Hitler's *Nacht und Nebel* decree, in force of which civilians of the occupied territories accused of "endangering German security"<sup>43</sup> were captured and subjected to trial before Nazi Special Courts, during which the accused whereabouts, trial and subsequent dispositions were kept secret, therefore "serving the dual purpose of terrorizing the victims' relatives and associates and barring recourse to any evidence, witnesses or counsel for defense".<sup>44</sup>

This example is particularly emblematic of the approach of the prosecution in the Justice Case, and is particularly relevant for the present dissertation. In fact, on the one hand, it shows the different roles that the heterogeneous group of jurists took in perpetrating the crime: from discussing the content of and signing the *Nacht und Nebel* decree,<sup>45</sup> assessing its compatibility with international law,<sup>46</sup> and drafting orders for its execution,<sup>47</sup> to enforcing it in ministerial departments<sup>48</sup> and courts as judges and prosecutors.<sup>49</sup> On the other hand, it clearly displays that the criminal conduct of the jurists accused at Nuremberg was not limited to the most radical denial of fair trial to certain groups of individuals, but rather used these cases as evidence of the use of the judicial system to commit *other* crimes. As the NMT prosecutor stated, "the defendants are not now called to account for violating constitutional guarantees or withholding due process of law. On the contrary, the defendants are accused of participation in and being responsible for the killings, tortures, and other atrocities which resulted from, and which the defendants know were an inevitable consequence of, the conduct of their offices as judges, prosecutors, and ministry officials".<sup>50</sup> Therefore, the misuse of law was not automatically considered as a crime *per se*, but only when it constituted a form of primary or secondary commission of international crimes.

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<sup>43</sup> See *Nacht und Nebel Erlass*, secret order issued by Adolf Hitler on 7 December 1941.

<sup>44</sup> NMT, *Justice Case*, 9.

<sup>45</sup> NMT, *Justice Case*, 1038.

<sup>46</sup> NMT, *Justice Case*, 1040.

<sup>47</sup> NMT, *Justice Case*, 1037.

<sup>48</sup> NMT, *Justice Case*, 1046-1053.

<sup>49</sup> NMT, NMT, *Justice Case*, 1038.

<sup>50</sup> NMT, *Justice Case*, 32.

## ii. The *Ministries Case*

Another Nuremberg case that is relevant to the present dissertation is the *Ministries Case*. This trial did not deal with the responsibility of strictly legal professionals, but with that of relevant Nazi ministries and government officials, including officials from the Foreign Office, which the accuse considered “the most important of the several Reich Ministries represented in this proceeding”.<sup>51</sup> However, some argue this case is even more relevant to assess responsibility of legal professionals in State authored crimes.<sup>52</sup>

More specifically, the NMT held that Ernst von Weizsaecker, State Secretary in the Foreign Office, and Ernst Woermann, Undersecretary of State and head of the Political Department in the Foreign Office, were liable for the massive deportation of thousands of Jews and political opponents, in light of their role “to advise the government as to whether or not proposed German action was in accordance with or contrary to principles of international law”.<sup>53</sup> In its closing statement, von Weizsaecker’s defence tried to make the point that a government lawyer is only a diplomat, whose profession “requires him to wrestle every day with the forces of evil for the preservation of the rule of law, but what he ultimately succeeds in wrestling from these evil forces does not necessarily represent the rule of law as such”<sup>54</sup> and that as diplomats they had no ground for objection to the policies decided upon. The judges however rejected this argument as irrelevant: “While admittedly it could not compel the government or Hitler to follow its advice, the defendants von Weizsaecker and Woermann had both the duty and responsibility of advising truthfully and accurately”.<sup>55</sup>

It should be noticed that, even though the charges against Foreign Office officials were mainly related to the fact that they “played dominant roles in the *diplomatic* plans and preparations for invasions and wars of aggression”,<sup>56</sup> their capacity of legal advisers played a decisive role and was in itself considered a criminal conduct:

“If the program was in violation of international law the duty was absolute to so inform the inquiring branch of the government. (...) When Woermann approved

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<sup>51</sup> NMT, *Ministries Case* (vol. XII), 145.

<sup>52</sup> See for example Kevin Jon Heller, “Want to Prosecute the Lawyers? Cite Ministries - Not the Justice Case”, *Opinio Juris*, 23 April 2009; Kevin Jon Heller, “John Yoo and the *Justice Case*”, *Balkanization*, 1 May 2008; Ohlin, “The Torture Lawyers”: 246.

<sup>53</sup> NMT, *Ministries Case* (vol. XIV), 958.

<sup>54</sup> NMT, *Ministries Case* (vol XIV), 96.

<sup>55</sup> NMT, *Ministries Case* (vol XIV), 958.

<sup>56</sup> NMT, *Ministries Case* (vol XII), 24 (emphasis added).

the language “the Foreign Office has no misgivings” and von Weizsaecker changed it to the phrase “has no objections”, which phrases so far as this case is concerned are almost synonymous, they gave the “go ahead” signal to the criminals who desired to commit the crime. (...) There is a vast difference between saying “no” and saying “no objection”. The first would exonerate, the second is criminal.”<sup>57</sup>

Similarly, Joachim von Ribbentrop, Foreign Policy Adviser to Hitler and one of the principal accused in the trials against Nazi figures, was found guilty of crimes against peace, war crimes, and crimes against humanity.<sup>58</sup> One of the relevant conducts to establish his responsibilities was that of preparing the Foreign Office memoranda attempting to justify the aggressions against Norway, Denmark and the Low Countries.<sup>59</sup> Whereas Ribbentrop claimed that a sharp line of demarcation existed between his own diplomacy and military matters relating to the planning and execution of war,<sup>60</sup> it is noteworthy to see that the offense of crimes against peace was not limited to professional military planners, but could embrace all the most senior policy-making levels of the Nazi regime.<sup>61</sup>

Amongst the senior policy-making levels, the fact that heads of the legal field can be held equally responsible was proved by the case against Rudolf Lehmann, Chief of the Legal Department of the High Command of the Armed Forces (“OKW” for *Oberkommando der Wehrmacht*).

Lehmann appeared as a defendant in the High Command Case,<sup>62</sup> where high-ranking officers of the Nazi military forces were tried for crimes against peace (today referred to as aggression), war crimes, crimes against humanity and conspiracy,<sup>63</sup> by making an “unlawful” use of war and rejecting the laws of war which, according to the Nazi German

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<sup>57</sup> NMT, *Ministries Case* (vol XIV), 959.

<sup>58</sup> IMT, USA et al. v. Goring et al. (1946), in *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1947), vol. I, 289.

<sup>59</sup> IMT, USA et al. v. Goring et al., 286.

<sup>60</sup> Michael Salter, Lorie Charlesworth, “Prosecuting and Defending Diplomats as War Criminals: Ribbentrop at the Nuremberg Trials”, *Liverpool Law Review* 27 (2006): 89.

<sup>61</sup> Salter, Charlesworth, “Prosecuting and Defending Diplomats as War Criminals”: 82.

<sup>62</sup> NMT, USA v. Willhelm von Leeb, et al. (1948), in *Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Washington: United States Government Printing Office, 1951), vol. X-XI [hereinafter: *High Command Case*].

<sup>63</sup> NMT, *High Command Case* (vol. X), 10.

Military Manual, “not infrequently degenerated into sentimentally and flabby emotion”.<sup>64</sup> Lehmann, in particular, was accused of contributing to the crimes by being heavily involved in the formulation and distribution of orders which led to the slaughter of thousands of Russian civilians,<sup>65</sup> formulating and approving the Commissar Order<sup>66</sup> and the Barbarossa Order.<sup>67</sup> The first, entitled “Directives for the Treatment of Political Commissars”,<sup>68</sup> provided that the treatment of bolshevik prisoners “will be cruel, inhuman and dictated by hate” and that they won’t be recognized as soldiers, therefore not enjoying the protection granted to prisoners of war.<sup>69</sup> The second, instead, substantially legalized the murder of Russian civilians: it provided that “enemy civilians”<sup>70</sup> committing crimes would not be tried by courts and that their attacks “are to be suppressed at one by the military, using the most extreme methods, until the assailants are destroyed”,<sup>71</sup> and that, when the menace was not quickly identifiable, collective punishment should be taken against the whole localities where the threat originated from;<sup>72</sup> moreover, the order established that, when German soldiers murdered or otherwise offended a civilian, they would have been prosecuted only if required to maintain the discipline or security of the army.<sup>73</sup> The following year, the High Command issued the Commando Order,<sup>74</sup> a secret order directing the summary execution of captured Allies’ troops, even if fully uniformed;<sup>75</sup> Lehmann was

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<sup>64</sup> NMT, *High Command Case* (vol. X), 62. The argument is disturbingly similar to the one made by the White House counsel to authorize torture on terror suspects, when he dismissed the relevant prohibitions of the Geneva Conventions as “obsolete” (see the Draft Memorandum from White House Counsel Alberto R. Gonzales to President George W. Bush, 25 January 2004).

<sup>65</sup> NMT, *High Command Case* (vol. X), 125.

<sup>66</sup> NMT, *High Command Case* (vol. X), 127.

<sup>67</sup> NMT, *High Command Case* (vol. X), 135.

<sup>68</sup> Guidelines for the Treatment of Political Commissars, 6 June 1941.

<sup>69</sup> NMT, *High Command Case* (vol. X), 127.

<sup>70</sup> “Decree on the Jurisdiction of Martial Law and on Special Measures of the Troops”, 13 May 1941, C-50 [hereinafter: Barbarossa order] art. 1.

<sup>71</sup> Barbarossa Order, art. 3.

<sup>72</sup> Barbarossa Order, art. 4.

<sup>73</sup> Barbarossa Order, art. 3.

<sup>74</sup> Commando Order, 18 October 1942.

<sup>75</sup> Commando Order.

responsible for drafting this order and putting forward a “pseudo-legal justification” for it.<sup>76</sup>

Further, the defendant was responsible for preparing and formulating the *Nacht und Nebel* decree and the supplemental “Terror” and “Sabotage” decrees, issued in 1944 to intensify the brutality of treatment of the civilian population, stating that civilians charged with any act of violence were to be either summarily shot or turned over the Security Police, without trial.<sup>77</sup>

In the trial, it was underlined that defendants like Lehmann “were not directly concerned with operations and did not attend the major meetings”, but “each within his own sphere - law, prisoners of war affairs and other important fields - was called upon to plan for coming operations and to issue appropriate directives”,<sup>78</sup> since they were leading staff officers in those key fields. It was also noticed how Lehmann had no strategic or tactical responsibilities, however he was accused of being the equivalent of a field commander in his own sphere – the legal one – and “almost exactly analogous” to Funk, convicted by the ITM of making economic preparations for the aggressive war against the Soviet Union.<sup>79</sup>

All together, it was believed that Lehmann was not a leading figure in the origination of the war plans, but took a substantial part in his own field,<sup>80</sup> and was eventually convicted for his participation in war crimes and crimes against humanity. In particular, Lehmann was responsible for criminal connection with, participation in and formulation of the Barbarossa Order,<sup>81</sup> which the judges defined “an excellent example of the fundamental and essential functions which a staff performs in producing a military order from an original idea”,<sup>82</sup> therefore assessing that “the net result of the entire proceedings as to this order was that Lehmann became the main factor in determining the final form into which the criminal ideas of Hitler were put”.<sup>83</sup> The Commando Order was found to be another example of the part a staff officer plays in the final structure of a military order: even though Lehmann was not responsible for it as a whole, he “made certain suggestions as to

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<sup>76</sup> NMT, *High Command Case* (vol. X), 114.

<sup>77</sup> NMT, *High Command Case* (vol. X), 121.

<sup>78</sup> NMT, *High Command Case* (vol. X), 341-342.

<sup>79</sup> IMT, *USA et al. v. Goring et al.*, 307.

<sup>80</sup> NMT, *High Command Case* (vol. X), 360.

<sup>81</sup> NMT, *High Command Case* (vol. XI), 693.

<sup>82</sup> NMT, *High Command Case* (vol. XI), 691.

<sup>83</sup> NMT, *High Command Case* (vol. XI), 693.

methods which might, by a strained construction, give some appearance of legality” and was therefore criminally responsible for its production.<sup>84</sup> Finally, he was found guilty as a participant of the *Nacht und Nebel* decree and of the connected Terror and Sabotage decrees, by which “he proceeded to make effective the illegal desires of his superiors”.<sup>85</sup>

### c. Today: Lessons from the US *Torture Memos*

After the Nuremberg trials, international criminal tribunals seem to have overlooked the role of legal professionals in the commission of mass atrocities. However, the legacy left by Nuremberg became relevant again,<sup>86</sup> in the post 9/11 American “war on terror”. In 2004, in fact, it became public<sup>87</sup> that President Bush signed memoranda authorizing torture on individual supposedly<sup>88</sup> related to terrorist networks. Strong doubts on the legitimacy of the means used by the CIA emerged in earlier times: in 2002, the Pentagon published pictures of the first Guantanamo prisoners, being transported to the detention facility kneeling in stress position and wearing sensory deprivation gear,<sup>89</sup> and in the same year, it was reported that the US security agency might be using mind-altering drugs and performing extraordinary rendition of detainees to foreign governments, which would use torture on them.<sup>90</sup> Moreover, this suspicion was in line with the agency’s torture tradition,

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<sup>84</sup> NMT, *High Command Case* (vol. XI), 694.

<sup>85</sup> NMT, *High Command Case* (vol. XI), 694.

<sup>86</sup> See Ohlin, “The Torture Lawyers”: 246; Heller, “John Yoo and the *Justice Case*”; Elia Ciammaichella, “A Legal Advisor’s Responsibility to the International Community: When Is Legal Advice a War Crime?”, *Valparaiso University Law Review* 41, no. 3 (2007): 1143-1164; Leila Nadya Sadat, “Extraordinary Rendition, Torture and Other Nightmares from the War on Terror”, *The George Washington Law Review* 75 (2007): 101-149; Orna Ben Naftali, Noam Zamir, “Whose ‘Conduct Unbecoming?’”, *Journal of International Criminal Justice* (2009); Neugebauer, “Holding Domestic Judges Accountable under International Criminal Law”; Jordan J. Paust, “Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees”, *Columbia Journal of Transnational Law* 43 (2005): 811-864.

<sup>87</sup> David Johnston, “C.I.A. Tells of Bush’s Directive on the Handling of Detainees”, *New York Times*, 15 November 2006.

<sup>88</sup> See Sadat, “Extraordinary Rendition, Torture and Other Nightmares from the War on Terror”: 145-146. The author states that “most of the detainees *appear not to be terrorists at all*”. The information is backed up by numerous sources, including a 2004 Red Cross report suggesting that 70% to 90% of the prisoners held by the US in Abu Ghreib were brought there by mistake.

<sup>89</sup> Lisa Hajjar, “Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective”, *Annual Review of Law and Social Science* 5, no. 1 (2009): 313.

<sup>90</sup> Hajjar, “Does Torture Work?”: 313.

which dates decades back.<sup>91</sup> However, the leak of detailed and extremely explicit documents proving the use of torture provoked a big shock in the public and raised the old moral questions that many considered answered long ago: is torture ever admissible?

Answers and reactions were not univocal,<sup>92</sup> but, amongst those who condemned these brutal interrogation methods, some triggered more specific issues in a quest for responsibility: from that of interrogators and soldiers directly perpetrating torture, to that of the psychologists who wrote the manual for “effective” torture,<sup>93</sup> to the liability of the CIA officials and executive members authorizing the program, up to the criminal responsibility of the US President himself.<sup>94</sup>

### **i. Torture Memos: Facts and Premises**

An important stream of academic debate<sup>95</sup> started from the main pieces of evidence that disclosed the facts to the public: the “Torture Memos”.<sup>96</sup>

These memoranda were redacted by an heterogeneous group of senior officials of the Bush Administration, and provided legal arguments for the legality of “enhanced interrogation techniques” and their consistency with international humanitarian law;<sup>97</sup> argued that human rights treaties and conventions signed by the US were not binding extraterritorially – i.e. in the black sites and in Guantanamo –;<sup>98</sup> stated that federal laws and

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<sup>91</sup> Lisa Hajjar, “From *The Manchurian Candidate* to *Zero Dark Thirty*: Reading the CIA’s History of Torture through Hollywood Thrillers”, *Film & History: An Interdisciplinary Journal* 47, no. 2 (2017): 41.

<sup>92</sup> Several studies reported that the US public developed an increasing tolerance for torture against suspects of terrorism. For a comprehensive analysis of this phenomenon, see: Joseph Margulies, *What Changed When Everything Changed: 9/11 and the Making of National Identity* (New Haven: Yale University Press, 2013).

<sup>93</sup> See for example the interactive report on the role of the two contract psychologists who designed the CIA’s “enhanced interrogation techniques” program: Larry Siems, “Inside the CIA’s Black Site Torture Room”, *The Guardian*, 9 October 2017.

<sup>94</sup> ECCHR, “Criminal Complaint Against George W Bush”, <https://www.ecchr.eu/en/case/criminal-complaint-against-bush/> (last accessed: 27 February 2021).

<sup>95</sup> See Ohlin, “The Torture Lawyers”, Averell Schmidt and Kathryn Sikkink, “Partners in Crime: An Empirical Evaluation of the CIA Rendition, Detention, and Interrogation Program”, *Perspectives on Politics* 16, no. 4 (2018): 1014–1033; Heller, “John Yoo and the *Justice Case*”, Karen J. Greenberg, “What the Torture Memos Tell Us”, *Survival* 51, no. 3 (2009): 5-12.

<sup>96</sup> The ACLU implemented a comprehensive database of more than 100,000 pages of documents relating to the treatment, death and rendition of detainees in US custody abroad, obtained under the Freedom of Information Act: [https://www.thetorturedatabase.org/search/apachesolr\\_search](https://www.thetorturedatabase.org/search/apachesolr_search) (last accessed: 30 November 2020).

<sup>97</sup> US Department of Justice, OLC, Memorandum for Alberto R. Gonzales, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §2340-2340A*, 1 August 2002.

<sup>98</sup> US Department of Justice, OLC, Memorandum for William J. Haynes II, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, 14 March 2003.

international treaties, including the Geneva Conventions, did not anyway apply to members of al Qaeda and Talibans.<sup>99</sup> The main actors involved occupied different positions: Alberto Gonzales, for instance, was the White House Counsel,<sup>100</sup> while Douglas Feith was Undersecretary of Defense,<sup>101</sup> David Addington was acting as legal advisor to Vice President Dick Cheney,<sup>102</sup> Steven G. Bradbury was head of the Office of Legal Counsel<sup>103</sup> (hereinafter “OLC”) and William Haynees II was acting as General Counsel of the Department of Defense.<sup>104</sup>

The authors of the most infamous memorandum, though, can be identified in Jay Bybee and John Yoo, which were in fact the two lawyers whose conduct was more deeply scrutinized by the US Department of Justice,<sup>105</sup> even though it did not lead to any relevant consequences.<sup>106</sup> Both Bybee and Yoo were lawyers employed at the OLC: the former, now a federal appellate judge in the Ninth Circuit, was Assistant Attorney General at the OLC; Yoo, today a professor of law at the University of California at Berkeley, was Bybee’s deputy.<sup>107</sup> Since their contribution to the torturous system happened in the form of fallacious interpretation of law, assessing their responsibility in the crimes committed raised multiple technical questions: could they be considered complicit in torture, and therefore internationally prosecuted?<sup>108</sup> When is a legal adviser responsible for the acts of the

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<sup>99</sup> US Department of Justice, OLC, Memorandum for John A. Rizzo, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees*, 20 July 2007.

<sup>100</sup> Scott Horton, “The Bush Six to Be Indicted”, *The Daily Beast*, 13 April 2009.

<sup>101</sup> Horton, “The Bush Six to Be Indicted”.

<sup>102</sup> Ohlin, “The Torture Lawyers”: 194 (fn. 3).

<sup>103</sup> Ohlin, “The Torture Lawyers”: 194 (fn. 3).

<sup>104</sup> Horton, “The Bush Six to Be Indicted”.

<sup>105</sup> US Department of Justice, Office of the Deputy Attorney General, Memorandum for the Attorney General, *Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, 5 January 2010.

<sup>106</sup> Eric Lichtblau and Scott Shane, “Report Faults 2 Authors of Bush Terror Memos”, *New York Times*, 20 February 2010.

<sup>107</sup> Ohlin, “The Torture Lawyers”: 194 (fn. 3).

<sup>108</sup> Kai Ambos, “Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the Torture Memos Be Held Criminally Responsible on the Basis of Universal Jurisdiction”, *Case Western Reserve Journal of International Law* 42, no. 1 (2009): 405-448; Paust, “Executive Plans and Authorizations to Violate International Law”.

government?<sup>109</sup> Can they be excused in light of the nature of their profession?<sup>110</sup> Or in light of necessity?<sup>111</sup>

Jordan J. Paust, in a clear-cut paper,<sup>112</sup> affirms that the Torture Memos essentially represent common plans and authorizations which have criminal implications, since, by openly violating the laws of war, they constitute war crimes.<sup>113</sup> Further, the author upholds that the legal memoranda contain claims evidentiary of an “unprincipled plan to evade the reach of law and to take actions in violations of Geneva law while seeking to avoid criminal sanctions”.<sup>114</sup>

Paust effectively enlightens the relevance of the lawyers’ conduct, in the way it guided the more evident actions of the Government, the CIA staff and the judiciary. In fact, their advice formed the basis for executive orders from the President, whose memorandum “authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions, which are war crimes.”;<sup>115</sup> it became executive policy<sup>116</sup> and, according to the Independent Panel established to assess responsibilities for the crimes committed at Abu Ghraib, it was the basis to determine that certain individuals, classified as unlawful combatants, were not entitled to the Geneva Conventions protection.<sup>117</sup> Moreover, Paust argues that the lawyers from the Department of Justice attempted, and successfully misled, the judiciary in the “continued denial of rights and protections of detainees required under the Geneva Conventions and other customary laws of war”.<sup>118</sup>

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<sup>109</sup> See Matthew A. Smith, “Advice and Complicity”, *Duke Law Journal* 60, no. 2 (2010): 499-535; W. Bradley Wendel, “Legal Ethics and the Separation of Law and Morals”, *Cornell Law Review* 91, no. 1 (2005): 67-128.

<sup>110</sup> See Claire Oakes Finkelstein, Michael Lewis, “Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?”, *Faculty Scholarship at Penn Law*, 994 (2010); Milan Markovic, “Can Lawyers Be War Criminals?”, *Georgetown Journal of Legal Ethics* 20, no. 2 (2007): 347-370.

<sup>111</sup> See Jens Ohlin, “The Torture Lawyers”.

<sup>112</sup> Paust, “Executive Plans and Authorizations to Violate International Law”.

<sup>113</sup> Paust, “Executive Plans and Authorizations to Violate International Law”: 812.

<sup>114</sup> Paust, “Executive Plans and Authorizations to Violate International Law”: 825.

<sup>115</sup> Paust, “Executive Plans and Authorizations to Violate International Law”: 828.

<sup>116</sup> Paust, “Executive Plans and Authorizations to Violate International Law”: 834.

<sup>117</sup> Independent Panel to Review DoD Detention Operations, *Final Report* (August 2004), 83.

<sup>118</sup> Paust, “Executive Plans and Authorizations to Violate International Law”: 855.

Similarly, Claire Oakes Finkelstein, voicing for the prosecution of the authors of the Torture Memos, states that: “The lawyers are accomplices because they aided in the commission of the prohibited act (torture) by encouraging, soliciting, or otherwise contributing to the act by giving it legal validation.”<sup>119</sup>

## **ii. Responsibility of Legal Professionals, between the Role of Law and the Role of Ethics**

The most engaging point of debate was offered by the opposed thesis that the legal counsels couldn't be held responsible because of their profession. To explain this position, two arguments have been upheld that may sound more convincing than the others, and are therefore worth mentioning.

The first rests on the assumption that lawyers are technicians of law, using it merely as a neutral tool. Since, according to this view, law and moral can and *should* be hermetically separated fields, lawyers should not alter their technical interpretation with their personal ethics, following the premise that “[t]he act of being professionalized as a lawyer begins with moral desensitization”.<sup>120</sup> Accordingly, the ‘Torture Memos’ are “standard lawyerly fare, routine stuff”;<sup>121</sup> their authors cannot be blamed, and should, on the contrary, be pleased for their professionalism and unbiased approach.

Wendel effectively counters this purely positivist premise, referring to a concept known as “inclusive” or “incorporationist” positivism:<sup>122</sup> moral values, he argues, can and should be integrated in legal reasoning, as they already play a role in the realm of legal concepts such as good faith, fair dealing or the reasonableness standard in negligence.<sup>123</sup> More suitably, the necessity defense to criminal liability applies on the basis of a choice of the lesser evil: the evaluation grounding this choice entails an understanding of social values, or, in other words, moral reasoning.<sup>124</sup> As briefly discussed in the previous chapter, this is not to suggest that the moral evaluation of the actor or their lawyer should substitute the law, and

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<sup>119</sup> Finkelstein, Lewis, “Should Bush Administration Lawyers Be Prosecuted”: 201.

<sup>120</sup> Michael Hatfield, “Professionalizing Moral Deference”, *Northwestern University Law Review Colloquy* 104, no. 1 (2009): 5. Notably, the author however concludes that moral deference is the “perennial evil” that enabled Nazi atrocities.

<sup>121</sup> Eric Posner and Adrian Vermeuele, “A ‘Torture’ Memo And Its Tortuous Critics”, *The Wall Street Journal*, 6 July 2004.

<sup>122</sup> Wendel, “Legal Ethics and the Separation of Law and Morals”: footnote 116.

<sup>123</sup> Wendel, “Legal Ethics and the Separation of Law and Morals”: 101.

<sup>124</sup> Wendel, “Legal Ethics and the Separation of Law and Morals”: 103.

therefore validate the unlawful behavior, but rather to maintain that the lawyer's interpretation should and does take into account the fact that the client's choice will be judged based on a moral assumption.<sup>125</sup> It is thus more correct to state that effective lawyering work includes moral reasoning.

The second relevant assertion lies in the claim that a lawyer *is* a neutral tool that mechanically serves the client's will. This theory is the root for two different conclusions: first, that the objective is determined solely by the client;<sup>126</sup> second, that a good lawyer is one that finds a way to meet the client's objective, by pushing any legal argument they manage to maintain.<sup>127</sup> In this sense, the US executive was the client of the OLC and, because it needed to use certain interrogation methods, it demanded the lawyers to provide them with a legal justification; it is true that the general interpretation of international customary law would have prohibited those methods, but the ability of the authors lies precisely in the fact that they managed to find an alternative and logically coherent path, which backs up the client's version.

This argument is akin to the first for it suggests the lawyers should not take a moral stand when considering cases; however, while the first theory denies the presence of a moral judgment *tout court*, the second one more moderately shifts the moral burden from the lawyer to their client. In a mechanism that Hatfield refers to as "moral passivity, moral silence, moral deference",<sup>128</sup> "[t]he lawyer defers to the legal system's conclusion that the client, rather than the lawyer, is morally responsible for the objective."<sup>129</sup>

Wendel, for his part, refers to this as "moral imperialism",<sup>130</sup> as the belief that moral advice is inappropriate in the lawyer's profession, as it would interfere in the lawyer-client relationship and could affect the client's autonomy. This premise, he argues though, is to be rejected in light of the fact that the client's right to determine their actions and purposes cannot be mistaken with "a putative 'right' to be insulated from moral criticism",<sup>131</sup> a moral

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<sup>125</sup> Wendel, "Legal Ethics and the Separation of Law and Morals": 109.

<sup>126</sup> Wendel, "Legal Ethics and the Separation of Law and Morals": 110. The author reports the view that "[M]oral counseling might interfere with the client's autonomy, which is protected as both a moral value and as one of the central policies underlying agency law."

<sup>127</sup> Hatfield, "Professionalizing Moral Deference": 6. "From the beginning of law school, a lawyer is idealized as a zealous advocate for her client's objective."

<sup>128</sup> Hatfield, "Professionalizing Moral Deference": 9.

<sup>129</sup> Hatfield, "Professionalizing Moral Deference": 9.

<sup>130</sup> Wendel, "Legal Ethics and the Separation of Law and Morals": 110.

<sup>131</sup> Wendel, "Legal Ethics and the Separation of Law and Morals": 110.

criticism that can be provided by a lawyer as by any other person, as long as the client's authority for their final choice is respected. Further, it could be argued that lawyers *have to* integrate moral considerations, regardless the client's position on the matter.<sup>132</sup> Significantly, Bilder and Vagts argue that: "the prospect that a client may not like the advice should not deter a lawyer from giving an honest assessment" and the American Bar Association itself prescribes that lawyers refer to moral and ethical consideration in giving advice, since moral and ethical beliefs will influence the application of law eventually.<sup>133</sup> In a similar fashion, the first principle of the OLC guidelines affirms that the legal advice provided should be "an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies".<sup>134</sup>

Ultimately, rather than exempting the lawyers from moral considerations, it seems that it's precisely their role and profession to require them to engage in a moral reflection. All the more so, in the case of government lawyers, whose position calls them to serve the public interest: their "client" is not simply the executive, but the government as a whole and, fundamentally, the public and its "collective interests and values".<sup>135</sup> As a Harvard publication put it, "the attorney primarily has a duty to advance the aims of the current President, but in cases of conflict, the duty to serve the public interest predominates".<sup>136</sup> This particular aim makes the position of a legal expert who works for the government even more deeply and necessarily ethically connoted.

An interesting article from Harry Aitken allows us to take the reasoning even further: grounding his thesis in the institutional duties that lawyers have, when arguing in the domestic arena, towards their national institutions, the author infers that lawyers in the international arena are subject to analogous duties to the international institutions.<sup>137</sup> More in detail, Aitken argues that lawyers normally owe duties not only to their clients, but also to domestic courts and to "the interest of justice", and that these institutional duties are "hierarchically superior" and prevail in case of contrast with the client's preference.

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<sup>132</sup> Richard B. Bilder, Detlev F. Vagts, "Speaking Law to Power: Lawyers and Torture", *The American Journal of International Law* 98, no. 4 (2004): 692.

<sup>133</sup> Bilder, Vagts, "Speaking Law to Power: Lawyers and Torture": 692.

<sup>134</sup> Walter E. Dellinger and others, *Principles to Guide the Office of Legal Counsel*, 21 December 2004, 1.

<sup>135</sup> Bilder, Vagts, "Speaking Law to Power: Lawyers and Torture": 693.

<sup>136</sup> "Government Counsel and Their Obligations", *Harvard Law Review* 121, no. 5 (2008): 1411.

<sup>137</sup> Harry Aitken, "The Duties of a Government International Legal Adviser", *EJIL: Talk!*, 2 June 2020.

This dominance appears to be reflected in several national systems: from the New York Lawyer's Code of Professional Responsibility,<sup>138</sup> to the opinion of a senior judge in Australia<sup>139</sup> and, most cardinally, in a notorious judgment from the UK House of Lords, where Lord Reid went as far as in stating that: "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests."<sup>140</sup> As Aitken explains, the duties referred to are not strictly limited to the Court, but include obligations to the public, the administration of justice and the integrity of the rule of law. Correspondingly, international lawyers have obligations towards international courts, when pleading in front of them – which can be identified in the forum's rules and codes of professional conduct –, but also towards international law and the international community itself, when advising national entities. According to Aitken, the latter can be more punctually identified and organized in a duty to present honest and accurate advice, a duty to promote States' compliance with international law and a duty to protect the centrality of international law when forging foreign policies. Even though the author concedes that the boundaries of the proposed model are largely to be defined, he finds a minimum standard that "precludes counseling the State to violate international law".<sup>141</sup> The moral paradigm, hence, appears relevant also outside domestic boundaries and sources.

#### **d. US Legal Advisers vs. Israeli Jurists**

##### **i. US and Israel: Common Aspects and Legal Narratives Surrounding Torture**

The US situation offers a good parallel with Israel for the analysis of the role of lawyers in shaping torture policies. In general terms, the two States share a high degree of consideration for national security, which they feel to be threatened by certain categories of individuals committed to a terrorist ideology, and who therefore are considered to be

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<sup>138</sup> New York State Bar Association, *New York Lawyer's Code of Professional Responsibility (Updated Through December 28, 2007)*.

<sup>139</sup> Hon. Marilyn Warren AC, "The Duty Owed to the Court - Sometimes Forgotten", Speech at the Judicial Conference of Australia Colloquium, Melbourne (9 October 2009).

<sup>140</sup> UK House of Lords, *Rondel v. Worsley* (22 November 1967).

<sup>141</sup> Aitken, "The Duties of a Government International Legal Adviser".

“torturable” for the sake of collective safety. This description may fit other governments, but what makes the two entities analyzed special is the way they have been able to utilize their counter-terrorism narrative in order to justify the multiple and constant violations of IHL, committed in an asymmetrical warfare against quasi-State entities.<sup>142</sup>

In one of her articles, Lisa Hajjar compares the doctrines and policies deployed by Israel, following the second *intifada*, and the US, after 9/11, to justify their violations of IHL. As the author points out, these States are unique because they do not simply ignore the laws of armed conflict, but they seek to reinterpret these codes, significantly departing from the common law developed by the international community over the decades.<sup>143</sup> They equally enthusiastically advertise their law-abiding and democratic institutions, and therefore declare to *generally* respect human rights and the rule of law,<sup>144</sup> but claim they do not apply to certain *sui generis* groups of people (as al-Qaeda or the Palestinians), in certain non-State entities (as the OPT or Afghanistan under the Talibans), or to certain conflicts (as the asymmetrical “war on terror” they both feel engaged in).<sup>145</sup>

According to Hajjar’s analysis, Israel’s “elaborate array of rationales to ‘legalize’ practices that defy the international consensus on IHL”<sup>146</sup> served as a model for the US “new paradigm” to wage the “global war on terror”.<sup>147</sup> The examples span from legal doctrines arguing for a selective application of IHL,<sup>148</sup> to the use of judicial military bodies to try the “enemy” category,<sup>149</sup> the practice of targeted killings<sup>150</sup> and the torturous methods of interrogation, which are mostly identical to the one used by the ISA and for which the

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<sup>142</sup> See generally Lisa Hajjar, “International Humanitarian Law and ‘Wars on Terror’: A Comparative Analysis of Israeli and American Doctrines and Policies”, *Journal of Palestine Studies* 36, no. 1 (2006): 21-42.

<sup>143</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 21.

<sup>144</sup> See generally: Israel Ministry of Foreign Affairs, *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* (2009).

<sup>145</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 21.

<sup>146</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 22.

<sup>147</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 22.

<sup>148</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 26.

<sup>149</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 36.

<sup>150</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 34.

Torture Memos explicitly refer to the Israeli model –<sup>151</sup> even though some argue the US services are less “skillful” and “professional” in their performances.<sup>152</sup>

On the other hand, the US experience has also produced original narratives and legal discourses, which have been adopted by the Israeli authorities to justify their treatment of Palestinian detainees: the designation of Palestinians as “illegal combatants”, as a group that lies outside both the protected categories of civilians and of combatants,<sup>153</sup> and the use of a dedicated secret facility, known as “1391” and characterized as “Israel’s Guantanamo”.<sup>154</sup>

What is relevant, however, is not merely the exchange of policies and unlawful practices, but the effort that both US and Israeli officials make to rationalize their practices as legal.<sup>155</sup> This is somehow required to convincingly claim their democratic form, in a way that still allows them to pursue their military and political objectives.<sup>156</sup> In this sense, Hajjar argues in a later article,<sup>157</sup> there is an “elevation of operational law”, meaning that military and security operations are coupled with and supported by advice and justifications provided by lawyers,<sup>158</sup> basically making of international law just a moldable blanket for the executive. Craig Jones’s writings support this point, where they state that: “The *raison d’être* of operational law is to specify that which cannot be articulated by international law. Operational law transforms international law from the abstract and general to the specifics of what is militarily ‘necessary’. The move from international law to operational law is not a neutral or purely technical exercise of rescaling, but rather is a transformation in the form and content of law itself. Therefore, it is important to note that operational law and international law are not the same thing”.<sup>159</sup> Craig and Hajjar then agree that this

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<sup>151</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 33.

<sup>152</sup> See Robert F. Coulam, “Skill versus Brutality in Interrogation: Lessons from Israel for American Policy”, *Intelligence and National Security* 28, no. 4 (2013).

<sup>153</sup> Jeremiah Lee, “Guantanamo Exported: ‘Illegal Combatants’ and the Israeli Supreme Court”, *JURIST Legal News & Commentary*, 11 May 2006.

<sup>154</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 30.

<sup>155</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 22.

<sup>156</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 22.

<sup>157</sup> Lisa Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US ‘War on Terror’”, *Law & Social Inquiry* 44, no. 4 (2019): 929.

<sup>158</sup> Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law”: 929.

<sup>159</sup> Craig A. Jones, “Frames of Law: Targeting Advice and Operational Law in the Israeli Military”, *Environment and Planning D: Society and Space* 33 (2015): 690.

dominance of operational law characterizes the US and Israel, since “[m]any States violate and deny people’s rights, but few have gone to such lengths to frame their policies and practices as legal, just and necessary.”<sup>160</sup>

In developing her analysis, Hajjar attributes a central role to the intellectual authors of the “War on Terror” paradigm and, in particular, to the lawyers behind it.<sup>161</sup> In fact, she refers to the elaboration of the new paradigm as an “interpretative project”, where narratives are not just occasional justifications for reprehensible actions, but are instead marked by “cohesiveness and mutual reinforcement of [their] underlying rationales”,<sup>162</sup> about the rights of their respective government to “pursue national security through violent means against an evolving cast of enemies”.<sup>163</sup> Therefore, besides the comprehensive political intention, primary attention is given to the “legal entrepreneurs”<sup>164</sup> who forged the paradigm by means of interpretation.

The accent posed on the action of *interpreting* should not be underestimated, since it allows to identify the relevant category of actors in the shaping of criminal policies, which is not always limited to government legal advisers and its lawyers. As it emerges from the theories of Pierre Bourdieu, “to varying degrees *jurists and judges* have at their disposal the power to exploit the polysemy or the ambiguity of legal formulas”.<sup>165</sup> Wendel’s thoughts are worth recalling on this point, where he states that a judge’s interpretation is in some ultimate cases based directly on a moral judgment, and not on a moral belief incorporated in a previous decision, and therefore “a judge is engaged in lawmaking rather than in legal interpretation”.<sup>166</sup> Conclusively, Hajjar states that “[t]he premises of Israel’s legal doctrine have been reinforced over the decades by rulings of Israel’s High Court of Justice, which were crucial to garner domestic (Jewish Israeli) legitimacy for state policies that violate the letter and/or spirit of the Fourth Geneva Convention”.<sup>167</sup> Through different avenues, all

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<sup>160</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 26.

<sup>161</sup> Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law”: 926.

<sup>162</sup> Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law”: 922.

<sup>163</sup> Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law”: 922.

<sup>164</sup> Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law”: 924.

<sup>165</sup> Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field”, *Hastings Law Journal* 38, no. 5 (1987): 827.

<sup>166</sup> Wendel, “Legal Ethics and the Separation of Law and Morals”: 109.

<sup>167</sup> Hajjar, “International Humanitarian Law and ‘Wars on Terror’”: 26.

the authors examined show that, when it comes to the definition of substantial law, the wider group of lawyers, judges and jurists in general should be considered.

## ii. The Case of Israel and Its Peculiarities

Naturally, the case of Israel presents major differences with both the Nazi and the US cases.

It goes without saying that the scale and systematic nature of cruelty that was experienced under the Nazi regime has not been reproduced after it. Per contra, the attacks on civilians, that instantly sparked the US elaboration of the torture and extraordinary rendition program, have been far less recurrent there than in Israel, and involved an almost global-scale population – whether on the side of victims or on that of perpetrators.

On the other side, jurists and judges in the Israeli system can enjoy a degree of freedom in their profession that is remarkably higher, if compared to those working under the Nazis or even in the US system. Some have referred to this concept with the German word *Spielraum* – meaning a room to maneuver and mitigate evil, even by working for an unjust authority – and have argued that the amount of *Spielraum* lawyers enjoy, and how they exploit it, should be the relevant parameter to assess their responsibility under authoritarian regimes.<sup>168</sup>

It is well known that judges and prosecutors under the Nazi regime would pay a high price for any opposition, or even for not providing the necessary enthusiasm and strength to the governmental repression. As the Prosecutor in the Justice Case reminded: “Judges were removed from the bench for political and ‘racial’ reasons. Periodic ‘letters’ were sent by the Ministry of Justice to all Reich judges and public prosecutors, instructing them as to the results they must accomplish. Both the bench and bar were continually spied upon by the Gestapo and SD, and were directed to keep disposition of their cases politically acceptable.”<sup>169</sup>

There is only one case where a judge tried to oppose Hitler’s will: that of Lothar Kreyssig.<sup>170</sup> Kreyssig was a judge at the Court of Guardianship in Brandenburg, and he opposed the “Operation Mercy Killing” policy, by which patients of a local mental hospital

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<sup>168</sup> See Prof. David Luban’s Lecture: ‘Complicity and Lesser Evils’, TAU September 23, 2020 at Tel Aviv University, Minerva Center for Human Rights. An interesting critique to Luban’s position can be found in: Leora Bilsky and Natalie R. Davidson, “Legal Ethics in Authoritarian Legality: A Response to David Luban”, forthcoming in *Georgetown Journal of Legal Ethics* 34 (2021).

<sup>169</sup> NMT, *Justice Case*, 19.

<sup>170</sup> Famous Trials, “Law’s Heroes: Dr. Lothar Kreyssig”: <https://famous-trials.com/nuremberg/1892-lawsheroes> (last accessed: 27 February 2021).

were secretly removed and murdered by the authorities. He objected the legality of this operation to the Minister of Justice Franz Gurtner, without any result, and consequently filed a murder complaint with the State attorney in Potsdam, against the head of Hitler's Chancellery and the Nazi euthanasia program; moreover, he issued injunctions against the hospital ordering not to transfer his wards without his prior approval.<sup>171</sup> Notwithstanding the pressure from the Ministry, Kreyssig refused to withdraw his injunctions and accusation.<sup>172</sup> He was forced to early retirement and a criminal investigation was opened against him – yet eventually closed without prosecution.<sup>173</sup>

Even though this case shows that even the most stubborn opposition to the Nazi plans did not result in serious consequences against the judges, the tools of terror and violence used by the regime were often coming to extreme consequences and undoubtedly hard to predict in their outcome, and predominantly acted as a pressure element on the jurists. In any case, the Justice Case shows that even this degree of pressure was not deemed enough to deprive the judges of their moral choice and relieve them from criminal responsibility.

On a different note, also the authors of the Torture Memos enjoyed a lesser margin of choice than the members of the Israeli judiciary. A particularly useful study on the matter<sup>174</sup> compares the different models applied to government attorneys in the US and in Israel.

In their article, Asimow and Dotan start by describing the US model, labeled as “the hired gun model”, where government attorneys are conceived as the exact equivalent of private attorneys, with the only peculiarity that their client is to be identified in the government.<sup>175</sup> Correspondingly, they are perceived as a zealous advocate of the client's interest, as defined by the client themselves: even though the lawyer is free to discuss the strategy, the ultimate decision is not their own.<sup>176</sup> Even though different views have been presented on whether the client is to be more precisely identified with the specific governmental agency, or with the Government as a whole and hence the public interest, the actual practice shows that the rare objections from lawyers to the governmental policies are fruit of a consultative

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<sup>171</sup> <https://www.un.org/en/holocaustremembrance/docs/pdf/chapter4.pdf>

<sup>172</sup> <https://www.un.org/en/holocaustremembrance/docs/pdf/chapter4.pdf>

<sup>173</sup> Famous Trials, “Law's Heroes: Dr. Lothar Kreyssig”.

<sup>174</sup> Michael Asimow, Yoav Dotan, “Hired Guns and Ministers of Justice: The Role of Government Attorneys in the United States and Israel”, *Israel Law Review* 49, no. 1 (2016): 3-21.

<sup>175</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 3.

<sup>176</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 4.

process within the Department of Justice.<sup>177</sup> Moreover, the US applies a kind of judicial review (“closed record”), which limits considerably the choice of the attorney, who fundamentally needs to “take the case as he or she finds it”.<sup>178</sup>

On the contrary, the Israeli Attorney General is appointed by the government and serves as its legal adviser, and is considered a “minister of justice”, and the unbiased guardian of the rule of law.<sup>179</sup> The governmental lawyers are not members of the Cabinet,<sup>180</sup> they are subject exclusively to the supervision and directives of the AG and to the judicial review of the HCJ.<sup>181</sup> Most notably, the Israeli Government is legally required to follow the advice of the AG and, in turn, the AG can decide whether to represent the Government or not, since “[t]he Attorney General and subordinates are fully authorized to develop their own perception of the ‘public interest’ under the principle of the rule of law.”<sup>182</sup>

The wide latitude of choice is not only theoretical: it must be recalled that, in the *Amitai Case*,<sup>183</sup> the AG opposed the Prime Minister’s position, whom he was representing in front of the HCJ, and was supported by the Court, who stated that: “the Attorney General should represent the Government according to his own legal perception”.<sup>184</sup> As noted by Asimow and Dotan, the power of the AG to contradict the executive’s decisions extends even before the decision is challenged in Court. The authors recall the 2015 episode, where Prime Minister Netanyahu decided to veto the appointment of three judges to the Israel Prize, due to their political beliefs; the AG ran in their defense and announced publicly that, in case it was brought before the HCJ, he wouldn’t have defended the Prime Minister’s choice;<sup>185</sup> as a consequence, Netanyahu, who was running for the next elections a week later, withdrew the decision.<sup>186</sup>

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<sup>177</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 10.

<sup>178</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 18.

<sup>179</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 12.

<sup>180</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 12.

<sup>181</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 13.

<sup>182</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 14.

<sup>183</sup> HCJ 4267/93, *Amitai - Citizens for Judicial Watch v. The Government of Israel* (1993).

<sup>184</sup> HCJ 4267/93, *Amitai - Citizens for Judicial Watch v. The Government of Israel* (1993).

<sup>185</sup> Peter Beaumont, “Israel Prize Judges Resign After Binyamin Netanyahu's ‘Political’ Intervention”, *The Guardian*, 12 February 2015.

<sup>186</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 15.

Lastly, the judicial review in Israel follows rules that leave utmost freedom to the attorneys, since not only they can introduce new evidence, arguments and reasoning during the judicial review, but they are also free from any factual or legal framework the Government previously set, since at the agency level no official record is created.<sup>187</sup>

The Israeli system further presents some peculiarities, which markedly underline the common features shared by legal advisers, attorney generals and judges – and thus for their consideration under the general category of “jurists”. Besides the general arguments presented in the last paragraph, the Israeli judiciary is informed by a special porosity between the prosecutorial and judicial bodies, which emerges clearly and strikingly in Asimow and Dotan’s analysis.

As the authors explain, the representation of governmental entities before the HCJ is performed by a special department in the office of the AG: the HCJ Department.<sup>188</sup> This Department is composed by a small group of elite lawyers, who appear almost daily in front of the HCJ bench, which represents the natural arrival point of their career,<sup>189</sup> and whose judges’ opinions are thus highly regarded by the government attorneys. On the other side, the judges’ view is heavily informed by the attorneys’ findings of facts, since, in order to ease the caseload on the Court, the HCJ informally delegates crucial functions to the HCJ Department: the government attorneys are therefore demanded to collect data and investigate the cases against the government, and coordinate the policy revisions under the direction of HCJ justices.<sup>190</sup> This deep and mutual bias is all the more concerning, considering that the HCJ is the only organ reviewing the AG’s decisions, and it apparently does so based solely on the investigation and view of the same AG office, whose staff is seen more as a colleague than as a party in trial.

From another perspective, the AG and subordinates’ freedom to develop their own understanding of the public interest is backed up by the Court, but at the same time it *has to be derived* from the principles developed by the HCJ itself.<sup>191</sup> That is to say, the two bodies are almost constantly engaged in a joint interpretation of law, which is normally prompted when one of the two is called to defend a certain governmental policy which has been petitioned in front of the other.

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<sup>187</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 17.

<sup>188</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 12.

<sup>189</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 13.

<sup>190</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 13.

<sup>191</sup> Asimow, Dotan, “Hired Guns and Ministers of Justice”: 14.

Altogether, the comparisons show that the Israeli judiciary collectively enjoys an extremely high level of independence, from a technical point of view. The picture that emerges is one where the judiciary is subject exclusively to a sort of internal “peer review”, which is though used more as a distribution of tasks, as it would happen to accomplish a common outcome, and not as a check mechanism that has its autonomous substance and relevance.

As a matter of fact, however, the previous paragraph demonstrates clearly that the AG, its subordinates as State attorneys and legal advisers, and the HCJ are autonomous actors entitled of a wide discretion, which gives them the space to exercise a moral choice, a moral choice that is way less obvious in the cases of the Nazi and the Torture Memos lawyers – who yet were deemed responsible for the final outcome of their work.

Complementary, the Israeli members of the judiciary – and the AG in particular – are highly influential both on the executive, which has to comply with the legal advice received, and on the Israeli Jewish public, which generally finds in judicial bodies the most trusted institutions.<sup>192</sup> This high influence makes their moral choice extremely relevant, and fraught of consequences: veritably, the international tribunals repeatedly identified in the standard of the “moral choice” the diriment element to assess the criminality of a legal advice, which is used for a criminal purpose.<sup>193</sup>

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<sup>192</sup> Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 12.

<sup>193</sup> Ciammaichella, “A Legal Advisor’s Responsibility to the International Community”: 1150.

## 2. Aiding and Abetting in International Criminal Law: Analysis and Application

In terms of international criminal law, the responsibility of judiciary members justifying, overlooking, condoning and regulating torture can be subsumed under the form of aiding and abetting. This form of complicity involves assisting or encouraging the principal perpetrator,<sup>194</sup> by aiding, abetting or otherwise assisting the commission of a crime.<sup>195</sup>

It can be interesting to theoretically frame the case of torture in Israel within the standards exposed, focusing on the hypothetical responsibility of the members of the judiciary involved in the systematic use and justification of torture on Palestinians. While the crime in question is that of torture, considered both as a war crime and as a crime against humanity,<sup>196</sup> the conducts taken into consideration for this analysis will be those of the judges, Attorney General and State attorneys, as possible aiders or abettors.

### a. Historical Development: from Nuremberg to the International Criminal Court

Aiding and abetting holds a crucial role in international criminal law, since its very early days. In fact, after World War II, the international community felt it necessary to hold accountable not only direct perpetrators of mass atrocities, but also those who crucially lended assistance to the material actors.<sup>197</sup> Therefore, in order to find neat requisites and boundaries, not to result in over-criminalizing effects, the ancestors of international criminal tribunals first tried to transplant the definition from domestic definitions of complicity.<sup>198</sup> The provisions faced, however, presented very different standards, and left

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<sup>194</sup> Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 239.

<sup>195</sup> Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", *Journal of International Criminal Justice* 5 (2007): 968.

<sup>196</sup> See as a reference Rome Statute, arts. 7(2)(e) and 8(2)(a)(ii). The analysis of the two different crimes and their elements, as well as the classification of the situation (as an international or non international armed conflict, state of occupation, apartheid, or other formulations) lies beyond the scope of this dissertation. Anyhow, useful sources to outline the context can be read in: UN ESCWA, E/ESCWA/ECRI/2017/1; Valentina Azarova, "Israel's Unlawfully Prolonged Occupation: Consequences Under an Integrated Legal Framework", *European Council on Foreign Relations* 216 (2017); Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*; Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley Journal of International Law* 23, no. 3 (2005): 551-614; Ghislain Poissonnier, Eric David, "Israeli Settlements in the West Bank, a War Crime?", *La Revue des Droits de l'Homme* 17 (2020); Sari Arraf, "In Permanent Limbo: Prolonged Occupation or De Facto Annexation?", Dissertation for the course: Human Rights and Natural Resources by Prof. Marco Pertile, PSIA Sciences Po (Spring 2018).

<sup>197</sup> Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy, Alyssa T. Yamamoto, "Aiding and Abetting in International Criminal Law", *Cornell Law Review* 104, no. 6 (2019): 1601.

<sup>198</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, "Aiding and Abetting": 1601.

most of the work for the interpretation of judges of the IMT,<sup>199</sup> based on the responsibility assigned to “[l]eaders, organisers, instigators *and accomplices* participating in the formulation or execution of a common plan or conspiracy” to commit a crime.<sup>200</sup> While this provision reflected the essential root of aiding and abetting and provided bases for different forms of complicity, its wording does not distinguish aiding and abetting from other modalities of involvement, such as planning, ordering or co-perpetrating.

Similarly, Control Council Law No. 10 stated that who had been “an accessory to the commission of any such crime or ordered *or abetted* the same”<sup>201</sup> or “took a consenting part therein”<sup>202</sup> were included as perpetrators of the crime. Through this provision, the Nuremberg Military Tribunals defined some essential elements that are still at the core of aiding and abetting liability,<sup>203</sup> as the substantial effect threshold<sup>204</sup> and the knowledge standard for the *mens rea*.<sup>205</sup>

The principle was further confirmed by international instruments, in the same period: the 1948 Convention against Genocide criminalized complicity in genocide,<sup>206</sup> the International Law Commission identified complicity as a crime *per se*<sup>207</sup> and included it in the offense of the 1954 Draft Code of Crimes against the Peace and Security of Mankind.<sup>208</sup>

Since the Cold War caused a setback for ICL in general, it wasn’t until the 1980s that the elements of aiding and abetting had a chance to develop more in detail. In 1983 the ILC recalled the general principles of international criminal law, there including complicity;<sup>209</sup> accordingly, the 1991 Draft Code stated that “[a]n individual who aids, abets or provides

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<sup>199</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, “Aiding and Abetting”: 1601.

<sup>200</sup> Nuremberg Charter, art. 6(c), emphasis added.

<sup>201</sup> CCL No. 10, art. 2(b).

<sup>202</sup> CCL No. 10, art. 2(c).

<sup>203</sup> These will be addressed in detail in the next paragraphs. See: Chapter III.2.b: *Constitutive Elements: Uniform and Controversial Features throughout the International Jurisprudence*.

<sup>204</sup> NMT, United States of America v. Otto Olendorf et al. (1947), in *Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (Washington: United States Government Printing Office, 1951), Vol. IV [hereinafter: *Einsatzgruppen Case*], 526.

<sup>205</sup> NMT, *Einsatzgruppen Case*, 572.

<sup>206</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948), art. III(e).

<sup>207</sup> ILC Principles, UN Doc. A/1316 (1950).

<sup>208</sup> ILC Draft Code, A/2693 (1954).

<sup>209</sup> ILC A/38/10 (1983).

the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor”,<sup>210</sup> but still did not define more precise standards.

However, the following years represented a turning point. The ICTY and ICTR Statutes contained a provision that still treated together different kinds of secondary liability, where they stated that: “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime (...) shall be individually responsible for the crime”.<sup>211</sup> What is relevant, though, is that at this point *actus reus* and *mens rea* standards started to be developed “from the bench”.<sup>212</sup>

The 1996 ILC Draft Code that followed inherited these opinions, and affirmed that: “[a]n individual shall be responsible for a crime (...) if that individual: (...) (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such crime, including providing the means for its commission”.<sup>213</sup> As it can be noticed, the wording reflects the substantial contribution and knowledge standard already developed in the Nuremberg era and, according to the Commentary of the Draft Code, its formulation is also consistent with the Convention against Genocide, the ICTY and the ICTR, in the first attempt to harmonize and detail aiding and abetting in ICL.<sup>214</sup>

The next and final step in the definition of aiding and abetting came with the drafting of the Rome Statute. Art. 25(3) of the Statute enlists the different forms under which a person shall be liable in front of the ICC for a crime within the jurisdiction of the Court: these include direct perpetration, co-perpetration and perpetration by means;<sup>215</sup> ordering or instigating;<sup>216</sup> aiding and abetting;<sup>217</sup> otherwise contributing to a group crime.<sup>218</sup>

While the effort in precisely delimiting each variant of complicity is praiseworthy, the formulation of art. 25(3)(c) attributes elements to aiding and abetting that are dissimilar, if

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<sup>210</sup> ILC Draft Code 1991, art. 3(2).

<sup>211</sup> ICTY Statute, art. 7(1); ICTR Statute, art. 6(1).

<sup>212</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, “Aiding and Abetting”: 1604.

<sup>213</sup> ILC Draft Code 1996, art. 2(3)(d).

<sup>214</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, “Aiding and Abetting”: 1605.

<sup>215</sup> Rome Statute, art. 25(3)(a).

<sup>216</sup> Rome Statute, art. 25(3)(b).

<sup>217</sup> Rome Statute, art. 25(3)(c).

<sup>218</sup> Rome Statute, art. 25(3)(d).

not opposite, to the one affirmed over the years by the previous international tribunals,<sup>219</sup> by defining an aider or abettor as anyone who “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”<sup>220</sup> As it stands out, and will be further articulated,<sup>221</sup> the article contrasts with the preceding jurisprudence, for it seems to replace the *mens rea* of knowledge with one of purpose, while no threshold – substantial or otherwise – is explicitly required for the *actus reus*.

## **b. Constitutive Elements: Uniform and Controversial Features throughout the International Jurisprudence**

While the contrast might be surprising, it is true that the statutes of former international tribunals did not go into detail in defining the elements of aiding and abetting; consequently, the related judgments between different tribunals, and even within the same ones, have always been ambiguous and at times contradictory. By studying the case-law of the ICTY, ICTR, ECCC, SCSL and STL<sup>222</sup> certain elements emerge as uniform and relatively settled, while others have been until now more controversial; yet, the ICC position seems to upturn even those aspects that were considered as crystallized.

The analysis of the constitutive elements will be presented starting with those pertaining to the *actus reus*, followed by the causal link between the conduct of the aider or abettor and the crime, and concluding with the *mens rea* standards. Each element will be presented in its various interpretations, and simultaneously applied to the case of the Israeli judiciary’s complicity in torture, based on the elements emerged from the previous chapters.

### **i. Actus Reus**

Most of the characteristics regarding the *actus reus* of aiding and abetting are essentially shared between the *ad hoc* and hybrid tribunals.

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<sup>219</sup> Cassese, *The Oxford Companion to International Criminal Justice*, 239.

<sup>220</sup> Rome Statute, art. 25(3)(c).

<sup>221</sup> See *infra* III.2.b: *Constitutive Elements: Uniform and Controversial Features throughout the International Jurisprudence*.

<sup>222</sup> It should be noticed that the STL has in this matter a limited significance, because its construction of aiding and abetting is primarily based on the Lebanese domestic criminal code.

## 1. Material Elements Constituting the Provision of Assistance

The definition of the relevant conduct, based on the jurisprudence of *ad hoc* and hybrid tribunals, can be framed as acts or omissions that assist, encourage or lend moral support to crimes.<sup>223</sup> In this respect, also the ICC tends to align with the tradition, as the judges considered aiding and abetting “the provision of practical or material”, “moral or psychological assistance (...) to the principal perpetrator”.<sup>224</sup>

Moreover, all the tribunals accept that the acts of the aider or abettor are relevant if performed before, during or after the principal’s crime<sup>225</sup> – even though in different terms, that will be addressed further on –,<sup>226</sup> and even if the aider or abettor is far – in time and or space – from the location and moment of the principal’s commission.<sup>227</sup>

Starting to apply the theory to the case of Israeli jurists, this last specification is much relevant for the hypothesis of their complicity in the commission of torture. For instance,

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<sup>223</sup> ICTY IT-95-14-A, Appeals Chamber, *Prosecutor v. Tibomir Blaškić* (29 July 2004), para. 46; ICTY IT-95-13/1-A, Appeals Chamber, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin* (5 May 2009), para. 81; ECCC 001/18-07-2007/ECCC/TC, Trial Chamber, *The Prosecutor v. Kaing Guek Eav alias Duch* (26 July 2010), para. 533; STL STL-11-01/1, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (16 February 2011), para. 226; SCSL SCSL-03-01-A, Appeals Chamber, *The Prosecutor v. Charles Ghanekay Taylor* (26 September 2013), paras. 362, 369, 401, 447, 475 and 481–482; ICTY IT-05-87-A, Appeals Chamber, *Prosecutor v. Nikola Šainović et al.* (23 January 2014), paras. 1626 and 1649; ICTY IT-05-88-A, Appeals Chamber, *Prosecutor v. Vujadin Popović et al.* (30 January 2015), paras. 1732, 1758, 1783 and 1812; ICTR ICTR-98-42-A, Appeals Chamber, *The Prosecutor v. Pauline Nyiramasuhuko et al.* (14 December 2015), paras. 1955, 3332 and 3343.

<sup>224</sup> ICC ICC-01/05-01/13, Trial Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.* (19 October 2016), para. 89 (citing the case law of the *ad hoc* and hybrid Tribunals).

<sup>225</sup> IT-95-14-A Blaškić Appeal Judgment, para. 48; ICTR ICTR-99-46-A, Appeals Chamber, *The Prosecutor v. Andre Ntagerura et al.* (7 July 2006), para. 372; ICTY IT-95-9-A, Appeals Chamber, *Prosecutor v. Blagoje Simić* (28 November 2006), para. 85; ICTY IT-02-60-A, Appeals Chamber, *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (9 May 2007), para. 127; SCSL SCSL-04-16-T, Trial Chamber, *The Prosecutor v. Alex Tamba Brima et al.* (20 June 2007), para. 775; ICTR ICTR-99-52-A, Appeals Chamber, *Ferdinand Nabimana et al. v. the Prosecutor* (28 November 2007), para. 482; SCSL SCSL-04-14-A, Appeals Chamber, *The Prosecutor v. Moinina Fofana and Allieu Kondewa* (28 May 2008), paras. 71–72; SCSL SCSL-04-15-T, Trial Chamber, *Prosecutor v. Issa Hassan Sesay et al.* (2 March 2009), para. 278; ICTY IT-95-13/1-A Mrkšić and Šljivančanin Appeal Judgment, para. 81; ICTR ICTR-05-88-A, Appeals Chamber, *Callixte Kalimanzira v. the Prosecutor* (20 October 2010), fn. 238; STL, *Interlocutory Decision on the Applicable Law*, para. 226; SCSL-03-01-A Taylor Appeal Judgment, para. 367; ICTR ICTR-98-42-A Nyiramasuhuko et al. Appeal Judgment, paras. 3332 and 3343; ICC ICC-01/05-01/13 Bemba et al. Trial Judgment, para. 96; ICC ICC-01/05-01/13 A, Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.* (8 March 2018), paras. 20, 1399.

<sup>226</sup> See *infra* III.b.iii: Ex Post Facto *Aiding and Abetting*.

<sup>227</sup> ICTY IT-96-21-A, Appeals Chamber, *Prosecutor v. Zejnil Delalić et al.* (20 February 2001), para. 352; ICTY IT-95-14-A Blaškić Appeal Judgment, para. 48; ICTR ICTR-99-46-A Ntagerura et al. Appeal Judgment, para. 372; ICTY IT-95-9-A Simić Appeal Judgment, para. 85; SCSL SCSL-04-14-A Fofana and Kondewa Appeal Judgment, paras. 71–72; ICTY IT-95-13/1-A Mrkšić and Šljivančanin Appeal Judgment, para. 81; ICTR ICTR-05-88-A Kalimanzira Appeal Judgment, fn. 238; SCSL SCSL-03-01-A Taylor Appeal Judgment, para. 370; ICTR ICTR-98-42-A Nyiramasuhuko et al. Appeal Judgment, para. 3332; ICC-01/05-01/13 Bemba et al. Trial Judgment, para. 96.

the judges' claims that: "Judges were never allowed to be present at interrogations",<sup>228</sup> or that they "didn't see the actual interrogation process"<sup>229</sup> would be rather inconsequential.

The *ad hoc* and hybrid tribunals also agreed on the legal differentiation between the meaning of aiding – as "giving somebody assistance"<sup>230</sup>, and helping the principal to commit the crime<sup>231</sup> – and that of abetting – as "facilitating the commission of an act by being sympathetic thereto",<sup>232</sup> therefore involving actions facilitating or instigating the commission of the crime.<sup>233</sup>

The ICC seemed at first to follow this path, when, in the *Bemba et al.* Trial Judgment, it clarified that: "aiding" implies the provision of practical or material assistance",<sup>234</sup> while "the notion of 'abet' describes the moral or psychological assistance of the accessory to the principal perpetrator".<sup>235</sup> The same judgment, however, takes an ambiguous stand by stating that "[w]hile the terms 'aids', 'abets', and 'otherwise assists' bear a separate meaning, they nevertheless belong to the broader category of assisting in the (attempted) commission of an offense."<sup>236</sup> The fact that the same sentence is supported by citations of *ad hoc* and hybrid tribunals' jurisprudence, where aiding and abetting are explicitly differentiated, ultimately seems to suggest that the ICC decided to follow the approach separating the conducts. However, the *Bemba et al.* Appeal Judgment took a resolute stand, stating that the differentiation "adds confusion rather than clarity",<sup>237</sup> and that the terms should be conceptualized together as a *single* mode of liability, therefore existing no reason to distinguish between the acts either.<sup>238</sup>

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<sup>228</sup> From *The Law in These Parts*, at 1:29:08.

<sup>229</sup> From *The Law in These Parts*, at 1:31:06.

<sup>230</sup> ICTY IT-98-30/1-T, Trial Chamber, Prosecutor v. Miroslav Kvočka (2 November 2001), para. 254; ICTR ICTR-96-4-T, Trial Chamber, *The Prosecutor v. Jean-Paul Akayesu* (2 September 1998), para. 484.

<sup>231</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, "Aiding and Abetting": 1610.

<sup>232</sup> ICTY IT-98-30/1-T Kvočka Trial Judgment, para. 254; ICTR ICTR-96-4-T Akayesu Trial Judgment, para. 484.

<sup>233</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, "Aiding and Abetting": 1610.

<sup>234</sup> ICC-01/05-01/13 Bemba et al. Trial Judgment, para. 88.

<sup>235</sup> ICC-01/05-01/13 Bemba et al. Trial Judgment, para. 89.

<sup>236</sup> ICC-01/05-01/13 Bemba et al. Trial Judgment, para. 87.

<sup>237</sup> ICC-01/05-01/13 A Bemba et al. Appeal Judgment, para. 1325.

<sup>238</sup> ICC-01/05-01/13 A Bemba et al. Appeal Judgment, para. 1325.

Admittedly, if the distinction was to be upheld, it would be controversial to classify the assistance given through legal argumentation to the perpetrators of torture: it does not seem to represent a form of material assistance, and it might feel as an exaggeration to frame it as sympathy or moral and psychological assistance.

However, the judgments from the HCJ definitely frame their decision firstly in moral terms,<sup>239</sup> therefrom developing a technical justification of torture; likewise, the application of the necessity defense by the Court is, ultimately, a form of moral approbation – even if in “exceptional” situations –, of the crime committed, especially if considered as a justification and not an excuse.<sup>240</sup> From a different perspective, the publication of the guidelines, detailing what conducts will be later justified in the event of a criminal trial, definitely work as a psychological reassurance for interrogators, as the judges and Attorney General themselves stated multiple times when arguing in favor of their validity.<sup>241</sup> The experienced almost certainty of non-prosecution<sup>242</sup> probably shares this comforting feature, and it could by itself be considered as a form of material aid, since it practically and physically allows the perpetrator to keep practicing torture on the suspect.

In light of the above, if the ICC Appeals Chamber’s opinion was to be embraced, the conducts mentioned would definitely suit the aiding, abetting or otherwise assisting definitions collectively considered. In this sense, considering the guidelines, un-prosecution and justification system as a whole could make more evident the assistance provided to perpetrators of torture.

Another element of contrast between the *ad hoc* and hybrid tribunals on one hand, and the ICC on the other, lies in whether the commission of the principal’s crime should be completed or not, for the aider and abettor to be responsible.

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<sup>239</sup> Israel Ministry of Foreign Affairs, *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*.

<sup>240</sup> See *supra* II.3.b.ii: *Necessity Defense: Excuse or Justification?*

<sup>241</sup> See the AG Memorandum, *ISA Interrogations and the Necessity Defense - a Framework for Discretion*, Letter No. 99-04-12582 (18 October 1999), art. D: “The ISA’s interrogators are the representatives of the State of Israel, and insofar as they act on its behalf in accordance with the Law, they are entitled to receive a fair measure of judiciary certainty.”

<sup>242</sup> See *supra* II: *Systematic Torture in Israel as a Progressive Seizure of Legal Opportunities*.

In fact, while the previous Tribunals require the crime to be fully executed<sup>243</sup> (with the exception of genocide at the ICTY, ICTR and ECCC),<sup>244</sup> the ICC recognizes attempted crimes as giving rise to criminal responsibility, as explicitly stated by art. 25(3)(f) of the Rome Statute.<sup>245</sup> Moreover, by setting a higher standard for the *mens rea* of the aider and abettor,<sup>246</sup> which makes them closer to the principal, the ICC may include a broader extent of responsibility, involving even aiders and abettors of *attempted* crimes. Significantly, the same position of the ICC was then taken up by the East Timor Tribunal, where attempt is capable of generating criminal responsibility.<sup>247</sup>

In the analysis of our case, adopting the previous jurisprudence or the ICC view would make little difference. It does not appear that methods of torture, whenever the ISA wanted to adopt any, were ever halted at the attempt stage: while it might have been the case in some situations, there is no evidence of cases where the interrogators had to stop because of circumstances independent of the person's intentions.

## 2. Aiding and Abetting by Omission and Failure to Punish Grave Crimes

Few words should be said also on the possibility of aiding and abetting a crime not by acting, but by omitting to act.<sup>248</sup> Despite the general agreement on the fact that the failure to act, when the accused has a legal duty to, can satisfy the *actus reus*,<sup>249</sup> there is less common ground on the circumstances where an omission becomes criminally relevant. In particular, the jurisprudence has taken different views along the years in arguing whether

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<sup>243</sup> ICTY IT-95-14/1-A, Appeals Chamber, *Prosecutor v. Aleksovski* (24 March 2000), para. 165; ICTY IT-03-68-T, Trial Chamber, *Prosecutor v. Naser Orić* (30 June 2006), para. 282; SCSL SCSL-04-16-T Brima et al. Trial Judgment, para. 775; ICTY IT-05-87-T, Trial Chamber, *Prosecutor v. Milan Milutinović et al.* (26 February 2009), vol IV, para. 92; ICTY IT-05-88-T, Trial Chamber, *Prosecutor v. Vujadin Popović et al.* (10 June 2010) para. 1015; ECCC 001/18-07-2007/ECCC/TC Kaing Trial Judgment, para. 534.

<sup>244</sup> See ICTY Statute, art. 4(3)(e); ICTR Statute, art. 2(3)(e); ECCC Law, art. 4.

<sup>245</sup> The provision holds responsible anyone who: “[a]ttempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions”.

<sup>246</sup> See *infra* III.2.b.ii: *Mens Rea: Knowledge, Purpose or Both?*

<sup>247</sup> See Regulation on Panels with Exclusive Jurisdiction over Serious Criminal Offences (East Timor Tribunal), Section 14.3(c) (aiding and abetting) and 14.3(f) (attempt).

<sup>248</sup> For a more detailed analysis of the issue, see: Jessie Ingle, “Aiding and Abetting by Omission before the International Criminal Tribunals”, *Journal of International Criminal Justice* 14, no. 4 (2016): 747-770.

<sup>249</sup> ICTY IT-98-29-A, Appeals Chamber, *Prosecutor v. Stanislav Galić* (30 November 2006), para. 175; ICTY IT-94-1-A, Appeals Chamber, *Prosecutor v. Dusko Tadić* (15 July 1999), para. 188; ICTR ICTR-99-46-A Ntagerura Appeals Judgment, paras. 334, 370.

the legal duty had to be grounded in criminal law or could also be grounded in general legal obligations.

The first judgment to intervene on the point, albeit without citing any relevant source nor developing a deep analysis, was the *Tadić* Appeal Judgment, which stated that “the culpable omission of an act that was mandated by a rule of criminal law” was the ground for such liability.<sup>250</sup> The same ruling was then cited by a number of subsequent judgments issued by the ICTR and ICTY.<sup>251</sup>

By contrast, some argued for a broader spectrum of omission, affirming that responsibility could also rise from any violation of a duty under International Humanitarian Law (IHL) whose breach amounts to a war crime<sup>252</sup> or from the accused’s position of authority.<sup>253</sup>

Besides the divergences found amongst judicial decisions, a shared principle can be found by looking at customary international law and general principles of law. More precisely, various cases from the World War II-era case law reflect the broader approach, upholding that the legal source of duty does not need to be criminal. Likewise, domestic legislations of a very large number of States endorse this same view: “one may find a traditional general principle of law providing for criminal responsibility, if a legal duty to act exists and the agent has the material ability to act”.<sup>254</sup>

The conclusion on this point is much relevant in the case at hand. In fact, while providing justifications for torture and acquitting perpetrators in spite of clear evidences can be framed as positive actions, one may argue that the un-prosecution of perpetrators or the same acquittal merely represent omission to punish. One may therefore assess the question of whether the ISA legal advisers, the AG or the judges did not act, where they had a legal duty to do so.

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<sup>250</sup> ICTY IT-94-1-A *Tadić* Appeal Judgment, para. 188.

<sup>251</sup> ICTR-99-46-A *Ntagerura* Appeals Judgment, paras. 334, 335. ICTY IT-96-23-T & IT-96-23/1-T, Trial Chamber, *Prosecutor v. Dragoljub Kumarac et al.* (22 February 2001), para. 390; ICTY, *Kordić and Čerkez*, Trial Chamber Judgment, IT-95-14/2-T, 26 February 2001, para. 376; ICTY IT-98-33-T, Trial Chamber, *Prosecutor v. Radislav Krstić* (2 August 2001), para. 601; ICTY IT-97-25-T, Trial Chamber, *Prosecutor v. Milorad Krnojelac* (15 March 2002), fn. 378; ICTY IT-98-34-T, Trial Chamber, *Prosecutor v. Mladen Naletilić and Vinko Martinović* (31 March 2003), para. 62; ICTY IT-03-66-T, Trial Chamber, *Prosecutor v. Fatmir Limaj et al.* (30 November 2005), para. 509; SCSL SCSL-04-16-T *Brima et al.* Trial Judgment, para. 762; SCSL-04-14-T, Trial Chamber, *The Prosecutor v. Moinina Fofana and Allieu Kondewa* (2 August 2007), para. 205; SCSL SCSL-04-15-T *Sesay et al.* Trial Judgment, para. 249; ECCC 001/18-07-2007/ECCC/TC *Kaing* Trial Judgment, para. 480.

<sup>252</sup> ICTY IT-95-13/1-A *Mrksić and Slijvančanin* Appeal Judgment.

<sup>253</sup> ICTY IT-03-68-T *Orić* Trial Judgment.

<sup>254</sup> Kai Ambos, *Treatise on International Criminal Law* (Oxford: OUP Oxford, 2013), vol. I, 197.

It might be useful, in this perspective, to consider that the ICTY Appeal Chamber specified that communicating a message of impunity, resulting from a failure to punish crimes and covering them up, can become relevant as aiding and abetting.<sup>255</sup> To be precise, the case cited employed this element to state that this inaction is likely to be interpreted “at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed”;<sup>256</sup> therefore framing it as an active aiding in the form of encouragement. Moreover, the judges were then assessing the responsibility of a superior for his subordinates’ acts. However, if failing to punish soldiers can be meaningful enough to be interpreted as an *act* of encouragement, it can definitely be read as a relevant omission on behalf of an internal investigator, a prosecutor or a judge, which by their function are primarily demanded to enforce and apply law. The HCJ and AG failure to make justice, in fact, is even more severe, for they are the ones responsible to ultimately review the decisions taken at lower or field level.

### 3. Specific Direction: Ambiguity and Critiques

The most disputed aspect of the *actus reus*, however, can be seen in the “specific direction” requirement.<sup>257</sup> In trying to make explicit the kind of behaviors that may be deemed relevant, the *Tadić* Appeal Judgment issued a very ambiguous statement, in saying that aiding and abetting would differ from Joint Criminal Enterprise liability because the former’s *actus reus* consists of “acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime”.<sup>258</sup> This was the basis for a conspicuous jurisprudence amongst international Tribunals, which were then arguing that “specific direction” was meant to be a requirement for aiding and abetting responsibility,

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<sup>255</sup> ICTY IT-01-47-A, Appeals Chamber, *Prosecutor v. Enver Hadžibasanović and Amir Kubura* (22 April 2008), para. 30.

<sup>256</sup> ICTY IT-01-42-A, Appeals Chamber, *Prosecutor v. Pavle Strugar* (17 July 2008), para. 301.

<sup>257</sup> Marina Aksenova, “Complicity in International Criminal Law”, PhD Thesis at European University Institute (May 2014): 61.

<sup>258</sup> ICTY IT-94-1-A *Tadić* Appeal Judgment, para. 229(iii).

often by simply referring to the *Tadic* Appeal Judgment.<sup>259</sup> Alongside, a number of other rulings would reject or plainly avoid the definition of this element as essential.<sup>260</sup>

If the element of specific direction was to be adopted, one might be skeptical to affirm that a HCJ judgment, the guidelines provided, or the decision not to prosecute ISA officers, were specifically directed to assist the perpetration of torture. Yet, employing different terms to describe the same situation could bring the reader to a different conclusion: for example, it would probably be shared view to state that the legal system shaped by the AG and the HCJ is meant to *protect* the officers of the security service, so that they can *effectively* interrogate terror suspects, by ensuring they will not incur into criminal responsibility for their actions. The terminology adopted talks for a radically different perception of the phenomenon at hand, but still validates the view that the actions performed by the judiciary are directed to assist the same act, whether one prefers to call it torture or effective interrogation.

Having analyzed the whole debate, however, it can be found that the reasoning underlying the specific direction requirement sprung rather from a blind trust upon previous decisions, that did not always conduct an in-depth analysis of the issue and were sometimes mis-interpreted.<sup>261</sup> Moreover, the application of such a criteria presents some practical and doctrinal difficulties, such as the one related to aiding and abetting by omission: how can *no action* be judged upon as to be controlled and directed specifically? Or how would this requisite relate to remoteness: would it be loosened by physical distance from the crime? If so, how could presence via technological means alter the assessment? And how could an *ex post facto* assistance be specifically directed and controlling a past event?

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<sup>259</sup> ICTY IT-04-81-A, Appeals Chamber, *Prosecutor v. Momčilo Perišić* (28 February 2013), para. 126; ICTY IT-95-16-A, Appeals Chamber, *Prosecutor v. Zoran Kupreskić et al.* (23 October 2001), paras. 254 and 283; ICTY IT-98-32-A, Appeals Chamber, *Prosecutor v. Mitar Vasiljević* (25 February 2004), paras. 102(i) and 134-135; ICTY IT-02-60-A Blagojević and Jokić Appeal Judgment, para. 127; ICTY IT-95-14/1-A Aleksovski Appeal Judgment, para. 163.

<sup>260</sup> ICTY IT-95-13/1-A Mrksić and Slijivancanin Appeal Judgment, para. 159; SCSL SCSL-03-1-T, Trial Chamber, *Prosecutor v. Charles Ghankay Taylor* (26 April 2012), para. 484; SCSL SCSL-03-01-A Taylor Appeal Judgment, paras. 417-476; ICTY IT-05-87-A Sainović et al. Appeal Judgment, paras. 1623-1250; ICTY, IT-95-17/1-T, Trial Chamber, *Prosecutor v. Anto Furundžija* (10 December 1998).

<sup>261</sup> For a punctual analysis, see: Manuel J. Ventura, “Aiding and Abetting”, in de Hemptinne, Roth, Sliedregt, Cupido, Ventura, Yanev, *Modes of Liability in International Criminal Law* (Cambridge: Cambridge University Press, 2019), 191-201.

Thus, it is not at odds that the SCSL<sup>262</sup> and the ICC, aligning with a number of skeptical commentators,<sup>263</sup> did not adopt the specific direction threshold for the *actus reus*.

#### **4. Substantial Contribution/Effect: Unanimous Requirement and Different Interpretations**

On the contrary, an element that was unanimously thought as central by the *ad hoc* and hybrid tribunals,<sup>264</sup> with the exception of the STL,<sup>265</sup> and yet completely excluded by the Rome Statute's definition of aiding and abetting, is the one of substantial contribution, or substantial effect. There is no shared definition to guide the assessment of what contribution or effect might be considered substantial, and the terms have been applied in a broad fashion.<sup>266</sup> In general terms, this element lies at the edge of the *actus reus*, and could more properly be identified as a causal link, since it qualifies the contribution of the aider or abettor as one "which has a substantial effect on the perpetration of the crime".<sup>267</sup> While the presence of a causal link is universally shared by the courts, the correct threshold thereby is highly disputed.

The issue first arose in *Tadić* Trial Judgment that, by studying the World War II-era cases and the 1996 International Law Commission (ILC) Draft Code of Crimes established that: "it calls for a contribution that in fact has an effect on the commission of the crime", since "in virtually every situation, the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused had in fact assumed",<sup>268</sup> therefore building the causal link as almost a *sine qua non* condition.

In these terms, one might contend that the Israeli judiciary's actions represent a *condicio sine qua non* for the performance of torture on behalf of public authorities, because civil society came to a point of awareness and sensitivity to democratic values that could hardly bear the use of these interrogation methods, if they were not supposedly limited and checked upon

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<sup>262</sup> Taylor Appeal judgment (SCSL SCSL-03-01-A) deeply addressed the issue, at 390.

<sup>263</sup> Ventura, "Aiding and Abetting", 199. The author, based on a rich bibliography there referenced, concludes that: "specific direction's legal basis is unsound and its application presents practical and doctrinal difficulties. It should therefore, as the vast majority of commentators suggest, be rejected in so far as customary international law is concerned."

<sup>264</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, "Aiding and Abetting": 1611.

<sup>265</sup> It should be reminded, however, that the STL does not require substantial effect, because it construes aiding and abetting in accordance with Lebanese domestic criminal law.

<sup>266</sup> Werle, "Individual Criminal Responsibility in Article 25 ICC Statute": 968.

<sup>267</sup> ICTY, IT-95-17/1-T Furundzija Trial Judgment, para. 223.

<sup>268</sup> ICTY, IT-94-1-T, Trial Chamber, *Prosecutor v. Dusko Tadić* (7 May 1997), para. 688.

by a trusted institution. However, adopting a stricter and more factual assessment, the history of interrogation from the ISA<sup>269</sup> shows that, even before the active intervention of the judiciary, torture methods were employed against Palestinians, and with little difference: it cannot be staunchly said that, without them, the crime would have not happened in the same way.

Soon after, however, the *Furundžija* Trial judgment clarified that the acts did not need to “bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal.”<sup>270</sup> The term was later shaped in the most diverse ways: from stating that the contribution must be “substantial and efficient enough to make the performance of the crime possible or at least easier”;<sup>271</sup> that it must not be fungible,<sup>272</sup> and “would not be somebody readily replaceable”;<sup>273</sup> that the inferences drawn from the evidence, and deemed substantial, should be the only reasonable ones.<sup>274</sup> It might be interesting to test the case study of this dissertation upon the different definitions there provided.

For example, the *Furundžija* Trial judgment rejects the *conditio sine qua non* threshold and, after a thorough analysis of WWII tribunals and international customs, concludes that the contribution only needs to facilitate the crime<sup>275</sup> in a way that makes a significant difference,<sup>276</sup> which was found in the case of the administrative personnel running facilities where detainees were tortured and ill-treated.<sup>277</sup>

Interestingly, the *Kvočka et al.* Trial Judgment introduced a fungibility criteria (even if in dealing with JCE), when clarifying the meaning of significant participation: “in most situations the aider or abettor or co-perpetrator would not be somebody readily replaceable, such that any ‘body’ could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents.”<sup>278</sup> In other words, the

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<sup>269</sup> See *supra* I.1.e: *The Israeli Security Service (ISA)*.

<sup>270</sup> ICTY, IT-95-17/1-T, *Furundžija* Trial Judgment, para. 233.

<sup>271</sup> ICTY, IT-03-68-T *Oric* Trial Judgment, para. 282.

<sup>272</sup> SCSL, SCSL-03-01-A *Taylor* Appeal Judgment, para. 391.

<sup>273</sup> ICTY, IT-98-30/1-T *Kvočka* Trial Judgment, paras. 309, 312.

<sup>274</sup> ICTR, ICTR-98-42-A *Nyiramasuhuko et al.* Appeal Judgment, paras. 1510-1512.

<sup>275</sup> ICTY, IT-95-17/1-T *Furundžija* Trial Judgment, para. 231.

<sup>276</sup> ICTY, IT-95-17/1-T *Furundžija* Trial Judgment, para. 233.

<sup>277</sup> ICTY, IT-95-17/1-T *Furundžija* Trial Judgment, para. 213.

<sup>278</sup> ICTY, IT-98-30/1-T *Kvočka et al.* Trial Judgment, para. 309.

accused needs to play “a role that allows the system or enterprise to continue its functioning”.<sup>279</sup> This definition easily applies to the judges of the HCJ, as well as to the Attorney General – and perhaps to the “elite” group of State attorneys working at the HCJ Department –<sup>280</sup> who definitely represent highly qualified personnel and hold apical positions, which could be relevant in this perspective. The same judgment, in fact, also stated: “It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence”.<sup>281</sup>

The *Oric* Trial Judgment, on its account, read the meaning of significant contribution in the effect of facilitating the crime, irrespective of whether provided directly or indirectly, remotely or not,<sup>282</sup> and could therefore apply with less interpretative obstacles to the case study.

More hints could be gathered, as suggested by Ventura, by looking at the thresholds of “significant” and “essential” contribution, employed to assess joint criminal enterprises and co-perpetration.<sup>283</sup> However, as the same author concludes, “language eventually reaches a certain vanishing point (...) where it is simply unable to adequately articulate fine distinctions between evidentiary thresholds with a sufficient level of precision”.<sup>284</sup>

However, many judgments, while avoiding any attempt to define the meaning of “substantial contribution”, provided several examples of what is or is not to be considered as such, therefore on one hand providing a useful guide in reasoning, and on the other hand confirming a preference for a fact-based and case by case approach.

For instance, the *Taylor* Appeal judgment found that substantial contribution was given by making civilians more vulnerable and less able to defend themselves, providing a pretext for the commission of crimes, sustaining the functioning of the organized commission of

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<sup>279</sup> ICTY, IT-98-30/1-T Kvočka et al. Trial Judgment, para. 312.

<sup>280</sup> See *supra* III.1.d.ii: *The Case of Israel and Its Peculiarities*.

<sup>281</sup> ICTY, IT-98-30/1-T Kvočka et al. Trial Judgment, para. 309.

<sup>282</sup> ICTY, IT-03-68-T Oric Trial Judgment, para. 284.

<sup>283</sup> Ventura, “Aiding and Abetting”, 207.

<sup>284</sup> M. J. Ventura, “The “Reasonable Basis to Proceed” Threshold in the Kenya and Côte d’Ivoire Proprio Motu Investigations Decisions: The International Criminal Court’s Lowest Evidentiary Standard?”, *The Law and Practice of International Courts and Tribunals* 12, no. 1 (2013): 79.

crimes,<sup>285</sup> supporting and enhancing the capacity of the principals to commit crimes,<sup>286</sup> supporting and sustaining the system of arrests and detention that resulted in atrocities committed against the detainees,<sup>287</sup> contributed to and made possible the victims' deportation<sup>288</sup> and permitted the continued existence and further development of the inhuman situation.<sup>289</sup> Quite strikingly, all of the expressions above could be used to describe the role of the Israeli judiciary in the torture matter.

On the contrary, the same judgment found insufficient the causal link where the accused's position and responsibilities did not render substantial assistance to the crimes,<sup>290</sup> or the acts of the accused were too insignificant or inadequate, or the accused had little to no influence,<sup>291</sup> or the accused's proposal of discriminatory laws and decrees was not sufficiently connected to the crimes.<sup>292</sup>

While the argument of having little influence most probably would not suit the HCJ judges, and even less the AG, it might be invoked by the subordinates to the Attorney General, that still took a part in the cases analyzed. On the opposite, the fact that signing certain decrees and proposing discriminatory laws was mentioned as an example of insufficient contribution might speak in favor of the Israeli judiciary. However, a more careful analysis shows that the decrees object of the case mentioned had the effect of forcing certain groups of Poles to accept German citizenship; for as much as that conduct was abusive and degrading, it is truly hard to say that it substantially contributed to the commission of war crimes on behalf of the Nazis. Arguably, then, the same principle would not immediately apply to the conduct of the Israeli judiciary in the cases of torture. More relevant examples can be drawn from the *Šainović et al.* Appeal Judgment, where the failure to take investigative and punitive measures against the commission of forcible displacement may have had an effect on the ability of the prosecutor to pursue perpetrators of such crimes, it was insufficient to establish aiding and abetting

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<sup>285</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, paras. 373, 374.

<sup>286</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, para. 375.

<sup>287</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, para. 376.

<sup>288</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, fn. 1194.

<sup>289</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, para. 378.

<sup>290</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, fn. 1231.

<sup>291</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, fn. 1231.

<sup>292</sup> SCSL, SCSL-03-01-A Taylor Appeal Judgment, fn. 1231.

responsibility.<sup>293</sup> The argument could favor, perhaps, the superiors of the ISA interrogators or the Mavtan, who hold a key position in reporting to the AG, but not directly the AG itself. On the other side, it should be noticed that the ICTY came to that conclusion because it found that even in the case that investigative and punitive measures were attemptedly undertaken by the military justice system, it would have had little effect because of the heavy interference from the political and military leadership.<sup>294</sup>

Coming to the ICC position, this has been utterly inconsistent over the years. After a first decision where the judges cited the ICTR and ICTY jurisprudence and moderately stated that: “a substantial contribution to the crime may be contemplated”,<sup>295</sup> later confirmed only *arguendo* by another decision,<sup>296</sup> subsequent decisions did not explicitly accept nor reject the substantial contribution threshold. The court held that “the elements of this mode of liability are met in so far as the accessory’s contribution had *an effect* on the commission of the offense”,<sup>297</sup> and that aiding and abetting merely requires “that the person provides assistance to the commission of the crime”.<sup>298</sup>

The Court, however, came to different conclusions and plainly rejected the substantial threshold in two Confirmation of Charges Decisions, firmly holding that “[i]t is nowhere required, contrary to the Defence argument, that the assistance be “substantial” or anyhow qualified other than by the required specific intent to facilitate the commission of the crime”.<sup>299</sup>

The question was then extensively addressed in the *Bemba et al.* Trial judgment, which, after analyzing the precedents and anchoring its view to a comparison with the 1996 ILC Draft Code, clarified: “The Chamber considers that the form of contribution under Article 25(3) (c) of the Statute does not require the meeting of any specific threshold. The plain wording

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<sup>293</sup> ICTY, IT-05-87-A, Šainović et al. Appeal Judgment, para. 1678.

<sup>294</sup> ICTY, IT-05-87-A, Šainović et al. Appeal Judgment, para. 1681.

<sup>295</sup> ICC-01/04-01/10, Pre-Trial Chamber, *The Prosecutor v. Callixte Mbarushimana*, Confirmation of Charges Decision (16 December 2011), para. 279.

<sup>296</sup> ICC-01/09-01/11-373, *The Prosecutor v. William Samoei Ruto et al.*, Confirmation of Charges Decision (4 February 2012), para. 354.

<sup>297</sup> ICC-01/05-01/13-749, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Confirmation of Charges Decision (15 November 2014), para. 35.

<sup>298</sup> ICC-02/11-02/11-186, *The Prosecutor v. Charles Ble Goudé*, Confirmation of Charges Decision (12 December 2014), para. 167.

<sup>299</sup> ICC-02/04-01/15-422, *The Prosecutor v. Dominic Ongwen*, Confirmation of Charges Decision (23 March 2016), para. 43, then quoted in ICC-01/12-01/15-84-Red, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Confirmation of Charges (24 March 2016), para. 26.

of the statutory provision does not suggest the existence of a minimum threshold.”<sup>300</sup> When the point was raised in appeal, the Appeals Chamber acknowledged the substantial effect standard was demanded by the *ad hoc* tribunals, but equally reminded that the ICC is not bound by their jurisprudence,<sup>301</sup> and that the Trial Chamber stated that only a causal link was needed.<sup>302</sup> It then went even further, by stating that the text of art. 25(3)(c) only requires the conduct to be purposeful, “without indicating whether the conduct must have also had *an effect* on the commission of the offence”.<sup>303</sup>

Notwithstanding the endorsement from the Appeals chamber, the total rejection of a substantial or of *any* effect is debatable. A good analysis can be found in the *Mbarushimana* Confirmation of Charges Decision, which interpreted the ICC Statute under the light of its *travaux préparatoires*, coming to the conclusion that a threshold is indeed needed to exclude overextension of responsibility to *any* contributor.<sup>304</sup> Criticisms can be raised towards this argumentation too, since it held that the substantial contribution threshold is needed to ensure that the gravity threshold of article 17(1)(d) is satisfied:<sup>305</sup> arguably, this provision refers to an admissibility criteria, which should operate by itself and at an earlier stage of the proceedings, and thus should not be confused with the *actus reus* threshold of a mode of liability.

## **ii. Mens Rea: Knowledge, Purpose or Both?**

A long and ongoing debate regards the level of *mens rea* required for aiding and abetting liability. In particular, the wording of art. 25(3)(c) seems to suggest a stricter “purposeful”

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<sup>300</sup> ICC-01/05-01/13, Bemba et al. Trial Judgment, para. 93.

<sup>301</sup> ICC-01/05-01/13 A, Bemba et al. Appeal Judgment, para. 1326.

<sup>302</sup> ICC-01/05-01/13 A, Bemba et al. Appeal Judgment, para. 1327.

<sup>303</sup> ICC-01/05-01/13 A, Bemba et al. Appeal Judgment, para. 1327 (emphasis added).

<sup>304</sup> ICC-01/04-01/10, Mbarushimana Confirmation of Charges Decision, para. 279.

<sup>305</sup> ICC-01/04-01/10, Mbarushimana Confirmation of Charges Decision, para. 276.

*mens rea*; by contrast, the *ad hoc* tribunals' jurisprudence<sup>306</sup> and in general art. 30 of the Rome Statute, find in "knowledge" the necessary level of *mens rea*; some commentators even promote the idea of enabling and strengthening different standards, in a perspective of "functional pluralism".<sup>307</sup>

International tribunals seemed to agree, at first, on the fact that the *mens rea* standard for aiding and abetting amounts to the "knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal".<sup>308</sup> This formulation implies that only a threshold of awareness has to be met, while the aider or abettor is not required to act for the scope of committing the crime.

A specific case could be found when the principal's crime is a *dolus specialis* or "specific intent" one, i.e. a crime that, to be committed, requires the perpetrator to act with a certain

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<sup>306</sup> ICTY, IT-94-1-A, Tadić Appeal Judgment, para. 229(iv); ICTY, IT-95-14/1-A, Aleksovski Appeal Judgment, paras. 162–163; ICTY, IT-98-32-A, Vasiljević Appeal Judgment, para. 102(ii); ICTY, IT-95-14-A, Blaškić Appeal Judgment, paras. 46 and 49; ICTR, ICTR-99-46-A, Ntagerura et al. Appeal Judgment, para. 370; ICTY, IT-95-9-A, Simić Appeal Judgment, para. 86; ICTY, IT-02-60-A, Blagojević and Jokić Appeal Judgment, para. 127; ICTR, ICTR-95-1B-A, Appeals Chamber, *Mikaeli Muhimana v. The Prosecutor* (21 May 2007), para. 189; ICTR, ICTR-99-52-A, Appeals Chamber, *Ferdinand Nahimana et al. v. The Prosecutor* (28 November 2007), para. 482; ICTR, ICTR-01-66-A, Appeals Chamber, *The Prosecutor v. Athanase Seromba* (12 March 2008), para. 56; ICTY, IT-03-68-A, *Prosecutor v. Naser Orić* (3 July 2008), para. 43; ICTR, ICTR-00-55-A, Appeals Chamber, *Tharisse Muvunyi v. The Prosecutor* (1 April 2011), para. 79; ICTR, ICTR-01-74-A, Appeals Chamber, *François Karera v. The Prosecutor* (2 February 2009), para. 321; IT-95-13/1-A, Mrkšić and Šljivančanin Appeal Judgment, para. 159; ICTY, IT-04-84-A, Appeals Chamber, *Prosecutor v. Haradinaj et al.* (19 July 2010), para. 58; ICTR, ICTR-05-88-A, Appeals Chamber, *Callixte Kalimanzira v. The Prosecutor* (20 October 2010), para. 86; ICTR, ICTR-2001-70-A, Appeals Chamber, *Emmanuel Rukundo v. The Prosecutor* (20 October 2010), para. 53; ICTR, ICTR-05-82-A, Appeals Chamber, *Dominique Ntawukulihayo v. The Prosecutor* (14 December 2011), para. 222; ICTY, IT-98-32/1-A, Appeals Chamber, *Prosecutor v. Milan Lukić and Sredoje Lukić* (4 December 2012), para. 440; IT-04-81-A, Perišić Appeal Judgment, para. 48; SCSL-03-01-A, Taylor Appeal Judgment, para. 384; ICTR, ICTR-01-68-A, Appeals Chamber, *Grégoire Ndashimana v. The Prosecutor* (16 December 2013), para. 157; IT-05-87-A, Šainović et al. Appeal Judgment, para. 1649; ICTR, ICTR-99-54-A, Appeals Chamber, *Augustin Ndirabatware v. The Prosecutor* (18 December 2014), para. 155; IT-05-88-A, Popović et al. Appeal Judgment, para. 1758; ICTR-98-42-A, Nyiramasuhuko et al. Appeal Judgment, paras. 1955 and 2255.

<sup>307</sup> Hathaway, Francis, Haviland, Kethireddy, Yamamoto, "Aiding and Abetting": 1634.

<sup>308</sup> IT-94-1-A, Tadić Appeal Judgment, para. 229.

purpose. In this case, however, the intention is still required exclusively to the perpetrator, while the aider or abettor only needs to be aware of the principal's intent.<sup>309</sup>

Relatively to the case study here assessed, this specification has to be considered. In fact, under the Rome Statute, torture is framed as a *dolus specialis* crime when considered as a war crime: the Elements of Crimes explain that the perpetrator must have inflicted “the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind”.<sup>310</sup> On the opposite, torture as a crime against humanity does not present this feature.<sup>311</sup> It should be noticed, though, that the wording of domestic and international instruments<sup>312</sup> and the constant jurisprudence of international tribunals<sup>313</sup> clearly asserts that torture “must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person”.<sup>314</sup>

In any case, even considering the stricter requirement of intent, this translates in the fact that the interrogator must be applying torture for one of the purposes listed above, and the lawyers must be aware that the principal is torturing for those purposes. This seems to be the case, when the judiciary accepts that the information are coerced from the prisoners. The interviews realized by Raanan Alexandrowicz are, in this sense, very explicit. The best example is probably the segment of conversation with former Judge Livni, where Alexandrowicz starts reading the statement of a Palestinian detainee interrogated for 30

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<sup>309</sup> ICTY, IT-97-25, Appeals Chamber, *Prosecutor v. Milorad Krnojelac* (17 September 2003), para. 52; IT-98-32-A, Vasiljević Appeal Judgment, para. 142; ICTY, IT-98-33-A, Appeals Chamber, *Prosecutor v. Radislav Krstić* (19 April 2004), paras. 140 and 143; IT-95-9-A, Simić Appeal Judgment, para. 86; IT-02-60-A, Blagojević and Jokić Appeal Judgment, para. 127; SCSL-04-14-A, Fofana and Kondewa Appeal Judgment, para. 367; IT-04-84-A, Haradinaj et al. Appeal Judgment, para. 58; ECCC 001/18-07-2007/ECCC/TC, Kaing Trial Judgment, para. 535; ICTR-05-88-A, Kalimanzira Appeal Judgment, para. 86; ICTR-2001-70-A, Rukundo Appeal Judgment, para. 53; STL, Interlocutory Decision on the Applicable Law, fn. 343; ICTR-05-82-A, Ntawukulilyayo Appeal Judgment, para. 222; ICTR-01-68-A, Ndahimana Appeal Judgment, para. 157; ICTR-99-54-A, Ngirabatware Appeal Judgment, para. 155; ICTR-98-42-A, Nyiramasuhuko et al. Appeal Judgment, para. 1512.

<sup>310</sup> Elements of Crimes, art. 8(2)(a)(ii)(1)

<sup>311</sup> Elements of Crimes, art. 7(1)(f)

<sup>312</sup> See Oona A. Hathaway, Aileen Nowlan, Julia Spiegel, “Tortured Reasoning: The Intent to Torture Under International and Domestic Law”, *Virginia Journal of International Law* 52 (2012): 791-837.

<sup>313</sup> IT-95-17/1-T, Furundzija Trial, para. 162, 208, 252; ICTY, IT-95-17/1-A, Appeals Chamber, *Prosecutor v. Anto Furundzija* (21 July 2000), para. 80-85; ICTR-96-4-T, Akayesu Trial, para. 593; ICTR, ICTR-97-20-A, Appeals Chamber, *Laurent Semanza v. The Prosecutor* (20 May 2005), para. 320.

<sup>314</sup> IT-95-17/1-T, Furundzija Trial Judgment, para. 162.

days and then released without charges. Visibly irritated, the former judge exasperates and stops abruptly the interviewer: “What are you asking me? If I was aware? Of course.”, “Even though the Landau Commission reported that you were not?” asks Alexandrowicz, “I was aware” confirms Livni.<sup>315</sup>

To be sure, it is irrelevant whether the judiciary truly believed that the acts committed amounted to torture or not: what is relevant is that they facilitated those acts, and *knew* they were facilitating them.

On this aspect, the Rome Statute seems to come as a radical shift, where it states that the aider or abettor has to act “*for the purpose* of facilitating the commission of (...) a crime”.<sup>316</sup> When called to interpret the article, the judges recognized that the *ad hoc* tribunals did not require the accused to share the intent of the perpetrator, but nonetheless confirmed that “the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article”.<sup>317</sup>

However, the *Bemba et al.* Confirmation of Charges Decision adopted a milder approach, stating that the contribution has to be made “with the purpose of facilitating such commission”,<sup>318</sup> therefore requiring the intention to be directed towards the facilitation of the principal’s action, and not towards the crime itself. The same stand was taken by the ICC in three further Confirmation of Charges Decisions.<sup>319</sup>

Scholars then alimented the debate trying to reach a conclusion; most of them supported the need of a purposive *mens rea*,<sup>320</sup> but different opinions persist amongst them regarding the interaction between art. 25(3)(c) and art. 30:<sup>321</sup> some argue that art. 25(3)(c) purposive wording impedes, as a *lex specialis*, the application of art. 30, while others hold that art. 25(3)(c) simply adds a *mens rea* element, to the one found in art. 30.<sup>322</sup>

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<sup>315</sup> From *The Law in These Parts*, at 1:31:50.

<sup>316</sup> Rome Statute, art. 25(3)(c)

<sup>317</sup> ICC-01/04-01/10, Mbarushimana Confirmation of Charges Decision, para. 274.

<sup>318</sup> Bemba et al. Confirmation, 35

<sup>319</sup> ICC-02/11-02/11-186, *Blé Goudé* Confirmation of Charges Decision, paras 167; ICC-02/04-01/15-422, *Ongwen* Confirmation of Charges Decision, para 43; ICC-01/12-01/15-84-Red, *Al Mahdi* Confirmation of Charges Decision, para 26.

<sup>320</sup> Ventura, "Aiding and Abetting", 214.

<sup>321</sup> Ventura, "Aiding and Abetting", 214.

<sup>322</sup> Ventura, "Aiding and Abetting", 214.

The ICC eventually extensively addressed the issue in *Bemba et al.* Trial Judgment, which stated that aiding and abetting's *mens rea* should be constructed as a two-folded element: on the one hand there's a *mens rea* related to the crime committed by the principal (which is satisfied by simple knowledge), on the other there's a *mens rea* referring to the accessory's own conduct (where the purposive standard has to be met). Therefore, in order to be found responsible, the aider or abettor should have knowledge of the crime committed by the principal and carry out their own conduct for the purpose of facilitating such criminal activity (even if that is not the sole purpose pursued).<sup>323</sup>

Seemingly, this was already the opinion expressed in the *Bemba et al.* Confirmation of Charges and subsequent decisions, and could be considered consolidated. To support this view, the *Bemba et al.* Appeal Judgment did not intervene again on the *mens rea* standard, and merely recalled that the aider or abettor doesn't need to know all the details of the crime assisted.<sup>324</sup>

Turning again to the case of the Israeli judiciary, adopting the ICC stream that seems more consolidated would require the jurists to be aware of the interrogators' acts and to have the intention to facilitate their conduct. Notably, the arguments made in the context of the specific direction requirement<sup>325</sup> can be used to equally uphold the intention of the judiciary to facilitate the ISA conducts. In fact, the decisions of the HCJ and the AG, are exclusively directed to facilitating the interrogators' position, and collaterally result in blatant violations of the most basic human rights.

Moreover, one should consider that the awareness of the circumstances considered in a comprehensive way can speak for the level of *mens rea* to be attributed to the accused. For example, in *Bemba et al.* Trial Judgment, the fact that the accused made certain payments to the witnesses was not sufficient by itself to deduct that it happened in order to corrupt them; however, his awareness of the circumstances surrounding the crime, and his involvement in the scheme of perpetration, led the judges to conclude that he lent his assistance "with the aim of facilitating the offences", since he "was aware that the payments were illegitimate and aimed at altering and contaminating the witnesses' testimony".<sup>326</sup>

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<sup>323</sup> ICC-01/05-01/13, *Bemba et al.* Trial Judgment, paras. 97-98.

<sup>324</sup> ICC-01/05-01/13 A, *Bemba et al.* Appeal Judgment, para. 21.

<sup>325</sup> See *supra* III.2.b.i.3: *Specific Direction: Ambiguity and Critiques*.

<sup>326</sup> ICC-01/05-01/13, *Bemba et al.* Trial Judgment, para. 893.

By the same token, one could perhaps say that the Israeli jurists were aware that the methods of interrogations were illegitimate, and aimed at coercing the suspects' will and declarations; nonetheless, they provided justifications, refused to prosecute or to condemn the perpetrators of torture.

### **iii. *Ex Post Facto* Aiding and Abetting**

At this point, clarification needs to be provided regarding the mode of assistance known as *ex post facto* aiding and abetting, which refers to those cases where the aider or abettor acts *after* the principal. While the perceptible manifestation of this assistance pertains to the timing of the *actus reus*, its relevance is assessed mainly by looking at the *mens rea* of the accused. In fact, the awareness and will of the aider and abettor become crucial in determining whether their acts were committed in order to lend assistance to a crime that already happened. Also, one may wonder how an assistance provided after the commission of the crime can be directed to or substantially effective on a fact that already happened.

It is rather undisputed, amongst the jurisprudence of the *ad hoc* and hybrid tribunals, that the assistance can be provided also after the commission of the principal's crime.<sup>327</sup> Even the ICC, when called to express on the point, recognized that – notwithstanding the initial hesitations of the Rome Statute drafters and the skepticism of some commentators –<sup>328</sup> concluded for the established recognition of aiding and abetting after the crime.<sup>329</sup> Nonetheless, different opinions have been expressed regarding the characteristics of this assistance, in order to preserve a connection with the principal's crime that is significant enough to commute the causal link normally required.<sup>330</sup> Some judgments argued for the need to show that a “prior agreement” occurred between the principal and the aider or abettor,<sup>331</sup> therefore demanding a sort of anticipation of the accessory's conduct, to ensure a causal link.

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<sup>327</sup> IT-95-14-A, para. 48; IT-95-13/1-A, Mrkšić and Slijvančanin Appeals Judgment, para. 81; IT-02-60-A, Blagojević and Jokić Appeals Judgment, para. 127; SCSL-04-15-T, Sesay et al. Trial Judgment, para. 278; SCSL-03-1-T, Taylor Trial Judgment, para. 484.

<sup>328</sup> ICC-01/04-01/10, Mbarushimana Confirmation of Charges, para. 286.

<sup>329</sup> ICC-01/04-01/10, Mbarushimana Confirmation of Charges, para. 286; ICC-01/05-01/13, Bemba et al. Trial Judgment, para. 96; ICC-01/05-01/13 A, Bemba et al. Appeal Judgment, para. 1399.

<sup>330</sup> See *supra* IV.2.b.i.4: *Substantial Contribution/Effect*.

<sup>331</sup> ICTY, IT-02-60, Trial Chamber, *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* (17 January 2005), para. 731; SCSL-04-15-T, Sesay et al. Trial Judgment, para. 278; SCSL-03-1-T, Taylor Trial Judgment, para. 484.

Already with the *Furundžija* Trial Judgment, however, did not require a prior agreement: curiously, it cited the ILC Commentary on the 1996 Draft Code,<sup>332</sup> which anchors the relevance of *ex post facto* aiding and abetting to a prior agreement,<sup>333</sup> and yet concluded that “willingness to provide assistance, when made known to the perpetrator, would also suffice”.<sup>334</sup> Analogously, other decisions from the ICTY affirmed that it is enough for the perpetrator to know that the aider and abettor “was to supply practical assistance”,<sup>335</sup> or for the aider and abettor to promise to perform certain acts,<sup>336</sup> or generally did not specify a prior agreement was needed.<sup>337</sup> Following, the ICC either did not require a prior agreement to establish responsibility for aiding and abetting.<sup>338</sup>

Furthermore, it would be rather incongruent with the general structure of aiding and abetting to demand an antecedent arrangement between the parties. In fact, no agreement at all is required for all other cases of aiding and abetting,<sup>339</sup> the aider and abettor does not need to know the details of the principal’s acts,<sup>340</sup> and is not demanded to share the

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<sup>332</sup> IT-95-17/1-T, *Furundžija* Trial Judgment, para. 229.

<sup>333</sup> 256 Report of the I.L.C., on the work of its forty-eighth session, G.A. Supp. No. 10 (A/51/10) 1996, p. 18.

<sup>334</sup> IT-95-17/1-T, *Furundžija* Trial Judgment, 230.

<sup>335</sup> ICTY, IT-04-84-T, Trial Chamber, *Prosecutor v. Ramush Haradinaj et al.*, (3 April 2008), para. 145.

<sup>336</sup> ICTY, IT-95-14/1-T, Trial Chamber, *The Prosecutor v. Zlatko Aleksovski* (25 June 1999), para. 62.

<sup>337</sup> ICTY, IT-01-42-T, Trial Chamber, *Prosecutor v. Pavle Strugar* (31 January 2005), para. 355.

<sup>338</sup> ICC-01/05-01/13, *Bemba et al.* Trial Judgment, para. 96.

<sup>339</sup> IT-94-1-A, *Tadić* Appeal Judgment, para. 229(ii); ICTY, IT-95-9-T, Trial Chamber, *Prosecutor v. Blagoje Simić et al.* (17 October 2003), para. 162; ICTY, IT-99-36-A, Appeals Chamber, *Prosecutor v. Radoslav Brđanin* (3 April 2007), para. 263; ECCC 001/18-07-2007/ECCC/TC, *Kaing* Trial Judgment, para. 534; SCSL-03-1-T, *Taylor* Trial Judgment, para. 484.

<sup>340</sup> IT-95-14/1-A, *Aleksovski* Appeal Judgment, paras. 162 and 164; IT-97-25-A, *Krnojelac* Appeal Judgment, paras. 51–52; IT-95-14-A, *Blaškić* Appeal Judgment, para. 50; *Simić* Appeal Judgment, para. 86; IT-99-36-A, *Brđanin* Appeal Judgment, para. 484; IT-02-60-A, *Blagojević and Jokić* Appeal Judgment, para. 221; ICTR-99-52-A, *Nahimana et al.* Appeal Judgment, para. 482; IT-03-68-A, *Orić* Appeal Judgment, para. 43; ICTR-01-74-A, *Karera* Appeal Judgment, para. 321; IT-95-13/1-A, *Mrkšić and Šljivančanin* Appeal Judgment, para. 159; IT-98-32/1-A, *Lukić and Lukić* Appeal Judgment, para. 440; IT-04-81-A, *Perišić* Appeal Judgment, para. 48; ICTR-01-68-A, *Ndahimana* Appeal Judgment, para. 157; ICTR-98-42-A, *Nyiramasuhuko et al.* Appeal Judgment, para. 2255; ICC-01/05-01/13, *Bemba et al.* Trial Judgment, para. 98; ICC-01/05-01/13 A, *Bemba et al.* Appeal Judgment, paras. 21, 1400.

principal's intent.<sup>341</sup> Furthermore, as Ventura highlighted, multiple cases identified the element of a prior agreement as one distinguishing the mode of liability of JCE from aiding and abetting<sup>342</sup> and, most cardinally, aiding and abetting liability is established “in terms of the accused's relationship with the crimes, not the perpetrators or the particular way in which the assistance was provided”.<sup>343</sup>

In the hypothesis of responsibility of Israeli jurists for assisting the commission of torture, it can not be said that a prior agreement existed between the perpetrators and the AG or the judges, unless one considers as such the AG guidelines on the application of necessity defense, which constituted a shared understanding *ex ante* of the path to follow to use torture and avoid criminal prosecution. A meaningful factor in this scenario would be possible agreements, exchanges and co-authoring of documents between the AG and the ISA.

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<sup>341</sup> IT-95-14/1-A, Aleksovski Appeal Judgment, para. 162; IT-97-25-A, Krnojelac Appeal Judgment, paras. 51–52; IT-98-33-A, Krstić Appeal Judgment, para. 140; IT-95-9-A, Simić Appeal Judgment, para. 86; SCSL-04-14-A, Fofana and Kondewa Appeal Judgment, para. 367; IT-04-84-A, Haradinaj et al. Appeal Judgment, para. 58; ECCC 001/18-07-2007/ECCC/TC, Kaing Trial Judgment, para. 535; STL, Interlocutory Decision on the Applicable Law, para. 225; ICTR-05-82-A, Ntawukulilyayo Appeal Judgment, para. 222; ICC-01/04-01/10, Mbarushimana Confirmation of Charges Decision, para. 281; ICTR-01-68-A, Ndahimana Appeal Judgment, para. 157; ICTR-99-54-A, Ngirabatware Appeal Judgment, para. 155.

<sup>342</sup> Ventura, "Aiding and Abetting", 232.

<sup>343</sup> Ventura, "Aiding and Abetting", 232.

## **Chapter IV - Paths to Accountability**

Having outlined in the previous chapters the responsibility of jurists for being complicit in torture, we still need to address the question of their accountability: is there a court competent to adjudicate on their alleged criminal responsibility?<sup>1</sup> If so, on the basis of what body of law? And what outcome can realistically be expected? The present chapter will try to give an overview on these issues.

### **1. Prospects of an Investigation Before the International Criminal Court: State of Play and Its Limits**

As it has been detailed,<sup>2</sup> the almost complete lack of accountability for the perpetrators of torture is a key feature of the system analyzed, and one of the main bases to hold the judiciary organs liable as complicit. Hence, the idea of establishing accountability for jurists through domestic, Israeli, courts is facetious, to say the least: the willingness of the Israeli institutions to prosecute international crimes seems virtually absent, as are the instruments to do so. To date, the only Israeli law specifically addressing international crimes is the one on Nazis and Nazi collaborators<sup>3</sup> and, notwithstanding the constant invitation of international bodies<sup>4</sup> and NGOs,<sup>5</sup> nothing suggests the situation will transform in the short term.

Therefore, to pursue accountability, it is necessary to consider which are the options of proceedings at the international level, and in particular before the International Criminal Court. Israel is not a State party to the ICC, but since 2015 Palestine is; thus, according to its complementary nature, the Court can intervene to investigate alleged crimes committed on the territory of a State party where the State is “unwilling or unable genuinely to carry

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<sup>1</sup> From another perspective, the same question was thoroughly analyzed in: Chantal Meloni, Gianni Tognoni (eds.), *Is There a Court for Gaza? A Test Bench for International Justice* (The Hague: T.M.C. Asser Press, 2012).

<sup>2</sup> See *supra* II: *Systematic Torture in Israel as a Progressive Seizure of Legal Opportunities*.

<sup>3</sup> See: Nazis and Nazi Collaborators (Punishment) Law, 5710-1950.

<sup>4</sup> See, for example: UN Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the UN Fact-Finding Mission on the Gaza Conflict*, A/HRC/12/48, paras. 121, 866, 1823; UN Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel*, CCPR/C/ISR/CO/4, paras. 6, 13, 15, 16. The UN Committee against Torture raised its concern on the lack of independent and effective investigations in many different occasions, amongst which: *Concluding Observations on the Fifth Periodic Report of Israel*, CAT/C/ISR/CO/5, paras. 30, 31, 33, 39.

<sup>5</sup> See *supra* II.1.a.i: *The Definition and Criminalization of Torture*.

out the investigation or prosecution”.<sup>6</sup> In fact, the Palestine situation is under consideration by the Office of the Prosecutor of the ICC since many years, and has finally reached the investigation stage, in 2021. Even though none of the claims manifestly aimed at the prosecution of Israeli jurists for their complicity in upholding criminal policies, summarizing the general situation of Palestine before the ICC can be useful in order, then, to turn to the possibility of assessing jurists’ complicity for torture in these proceedings.

#### **a. Palestine Attempts to Approach the ICC: 2009-2019**

Palestine first approached the ICC in 2009, prompted by the Israeli “Operation Cast Lead”, a military offensive on the Gaza Strip which, in only 22 days, resulted in the death of about 1,400 Palestinians, most of which civilians, and 13 Israelis (4 of them from friendly fire).<sup>7</sup> The Palestinian authorities thus lodged a declaration<sup>8</sup> pursuant to article 12(3) of the Rome Statute, which allows non-State parties to accept the jurisdiction of the ICC on an *ad hoc* basis,<sup>9</sup> asking the Court to open an investigation.

The Office of the Prosecutor (hereinafter: OTP) commenced a deliberation process on the jurisdiction of the Court, where then Prosecutor Luis Moreno-Ocampo received several scholars’ and experts’ opinions, but also had less formal consultations with Israeli and foreign diplomats, oriented towards a more political framing of the possible role of the ICC in the Middle East.<sup>10</sup> The result was an extremely brief decision, issued more than three years later, which stated that the OTP could not proceed because it was not sure that Palestine was “a State” for the purpose of article 12: even acknowledging the recognition of Palestine by more than 130 governments and different UN and international bodies, the OTP justified its position by pointing at the fact that the status of Palestine under the UNGA was that of an “observer” and not of a “non-member State”.<sup>11</sup> The Prosecutor, therefore, concluded that: “it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a

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<sup>6</sup> Rome Statute, art. 17(1)(a).

<sup>7</sup> UN Human Rights Council, A/HRC/12/48, paras. 30, 31.

<sup>8</sup> ICC, Office of the Prosecutor, *Visit of the Palestinian National Authority Minister of Foreign Affairs, Mr. Riad al-Malki, and Minister of Justice, Mr. Ali Khasan, to the Prosecutor of the ICC*, 13 February 2009.

<sup>9</sup> Rome Statute, art. 12(3).

<sup>10</sup> David Bosco, “Palestine in The Hague: Justice, Geopolitics and the International Criminal Court”, *Global Governance* 22 (2016): 157.

<sup>11</sup> ICC, Office of the Prosecutor, *Situation in Palestine*, 3 April 2012.

State for the purpose of acceding to the Rome Statute”,<sup>12</sup> substantially deferring the question to political entities. The decision was criticized by many commentators, for its lack of substantial analysis and self-contradicting argumentation,<sup>13</sup> for being incomplete<sup>14</sup> or simply erroneous.<sup>15</sup>

Few months after, through Resolution 67/19 on *The Status of Palestine in the United Nations*, the UNGA upgraded Palestine to the status of non-member State, expressing “the hope that the Security Council will consider favorably the application submitted” for admission to full membership.<sup>16</sup> However, the new ICC Prosecutor, Fatou Bensouda, did not take it as a confirmation to proceed on the previous request, or to open an examination *proprio motu*, and affirmed instead that Palestine had to lodge a new declaration under article 12(3) or access the Rome Statute.

Prompted by another brutal Israeli offensive on the Gaza Strip, “Operation Protective Edge”,<sup>17</sup> in January 2015 Palestine lodged another declaration pursuant to article 12(3) to accept the jurisdiction of the Court since June 2014,<sup>18</sup> and contemporarily acceded to the Rome Statute.<sup>19</sup>

The OTP then accordingly opened a preliminary examination on the situation,<sup>20</sup> which, however, did not conclude nor bring to any relevant development for years, even after Palestine submitted a State referral, asking the Prosecutor to investigate “in accordance

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<sup>12</sup> ICC, Office of the Prosecutor, *Situation in Palestine*, 3 April 2012, para. 6.

<sup>13</sup> Michael Kearney, “The Situation in Palestine”, *Opinio Juris* (5 April 2012).

<sup>14</sup> Dapo Akande, “ICC Prosecutor Decides that He Can’t Decide on the Statehood of Palestine. Is He Right?”, *EJIL: Talk!*, 5 April 2012.

<sup>15</sup> William Schabas, Yvonne McDermott, Niamh Hayes, “The Prosecutor and Palestine: Deference to the Security Council”, *PhD Studies in Human Rights*, 8 April 2012.

<sup>16</sup> UNGA, *Status of Palestine in the United Nations*, 4 December 2012, A/RES/67/19.

<sup>17</sup> UN Human Rights Council, *Report on the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, 24 June 2015, A/HRC/29/CRP4.

<sup>18</sup> ICC, *Palestine Declares Acceptance of ICC Jurisdiction since 13 June 2014*, 5 January 2015.

<sup>19</sup> ICC, *The State of Palestine Accedes to the Rome Statute*, 7 January 2015.

<sup>20</sup> ICC, *The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine*, 16 January 2015.

with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction".<sup>21</sup>

In December 2019, almost five years after the opening of the prosecutorial examination and more than ten years after the first request, the Prosecutor announced that the preliminary examination had concluded "with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation have been met".<sup>22</sup> However, at the same time, the Prosecutor turned to the Pre-Trial Chamber, asking for "a jurisdictional ruling on the scope of the territorial jurisdiction of the International Criminal Court ("ICC" or the "Court") under article 12(2)(a) of the Rome Statute in Palestine."<sup>23</sup>

### **b. The Conclusion of the Preliminary Examination and the Beginning of the Jurisdiction Issue**

The step undertaken by the Prosecutor was not a necessary one from a procedural point of view: given the State referral of 2018, the Rome Statute does not require a authorization from the Pre-Trial Chamber to open an investigation - authorization which is, in turn, required when the Prosecutor wants to start a *proprio motu* investigation.<sup>24</sup> On the contrary, and as the Prosecutor herself recognized in the request, "the Prosecutor is no longer required to seek the authorization of the Pre-Trial Chamber to open an investigation, under article 15(3) of the Statute, now that she is satisfied that the conditions under article 53(1) of the Statute have been met".<sup>25</sup> Yet, the request originated another complex and long process that, notwithstanding the initial invitation to issue the decision within 120 days,<sup>26</sup> was pending for more than one year and was answered by the Court only in February 2021.<sup>27</sup>

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<sup>21</sup> The State of Palestine, *Referral By the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute*, 15 May 2018, para. 9.

<sup>22</sup> ICC, *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction*, 20 December 2019.

<sup>23</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine* (22 January 2020), para. 18.

<sup>24</sup> Rome Statute, art. 15

<sup>25</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 4.

<sup>26</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 220.

<sup>27</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'* (5 February 2021).

### **i. The Request of the ICC Prosecutor: Content and Interpretation**

Even though the debate soon moved again to the question of statehood, the Prosecutor's position was clear on the fact that it was not the question to be vetted by the Court,<sup>28</sup> and that, even in the event of the issue arising, it was to be answered positively at least for the purpose of the Rome Statute.<sup>29</sup>

The object of the OTP request is, by its wording, explicitly different from the question of whether Palestine is a State: the Prosecution, immediately after recalling she did not need an authorization from the PTC,<sup>30</sup> specified she was seeking confirmation “*that the “territory” over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and Gaza.*”<sup>31</sup> As it was pointed out, the substantial question put in front of the PTC isn't whether Palestine is a State, “*but where, exactly, Palestinian statehood starts and stops*”,<sup>32</sup> what is the territory to be considered and if it corresponds with what is commonly denominated “*the Occupied Palestinian Territory*”.

It should also be considered that the purpose of the request, as it is asserted multiple times, was to obtain at the earliest opportunity a judicial resolution that could constitute a sound legal basis and, therefore, spare the Court from costly and prolonged disputes in the phase of cooperation.<sup>33</sup> The Prosecutor explained that the decision of the PTC on the point is not only desirable, but necessary, for it would have three distinct effects: first, it would serve judicial economy by closing now an issue that could otherwise originate a tedious contention in a later stage; second, it would be a strong basis to counter the potential opposition in the phases that will require cooperation from governmental entities; third, it would be an opportunity for victims, States, and all other parties to participate in the process leading to affirmation of the Court's jurisdiction, “*thereby endow its decision with greater legitimacy*”.<sup>34</sup>

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<sup>28</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 7.

<sup>29</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 182.

<sup>30</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 4.

<sup>31</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 5 (emphasis added).

<sup>32</sup> Mark Kersten, “ICC and Palestine Symposium: ‘Injustice Anywhere is a Threat to Justice Everywhere’ - Palestine, Israel and the ICC”, *Opinio Juris*, 3 February 2020.

<sup>33</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 5.

<sup>34</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 6.

This represents an objective that is clearly distinguished from that of assessing the status of Palestine in international law, and only serves an efficient and rational use of the Court's and the parties' resources.

Yet, the OTP notices the peculiarity of the case at stake and admits that the question of statehood does not appear to be resolved under international law,<sup>35</sup> thus anticipating the fact that the Court might want to preliminarily address the issue.

In this sense, the Prosecutor is very firm in stating that “[i]n order to exercise its jurisdiction in the territory of Palestine under article 12(2), the Court need not conduct a separate assessment of Palestine’s status (nor of its Statehood)”,<sup>36</sup> and that the identification of all the the causes and factors determining the current limitation of Palestinian authority lies beyond the competence of the Court.<sup>37</sup> Then, in the event of a decision of the Chamber to anyhow reconsider Palestine’s statehood, the Prosecutor provides a structured and unequivocal view on the point.

More specifically, the OTP submits that Palestine is to be considered a State for the purpose of article 12(2)(a) because of its status as a State Party of the ICC,<sup>38</sup> and also in light of the principles and rules of international law,<sup>39</sup> thus concluding that “Palestine is a State for the purposes of the Rome Statute”.<sup>40</sup>

At the end of a detailed argumentation, which appears to be an extremely diffused but necessary excursus, the Prosecutor recalls the attention to the authentic object of the request: what is the territorial extension of the jurisdiction of the ICC.

The OTP holds that the territory to be considered comprises the Occupied Palestinian Territory, as it is the territory associated to the Palestinian people right to self-determination by the UNGA and other UN bodies,<sup>41</sup> the territory constantly referred to to

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<sup>35</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 5.

<sup>36</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 7.

<sup>37</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 10.

<sup>38</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), paras. 103-123.

<sup>39</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), paras. 136-182.

<sup>40</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 182.

<sup>41</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), paras. 193-210.

define the Palestinian State,<sup>42</sup> and the territory considered by Palestine in the referral to the ICC.<sup>43</sup>

In her conclusion, hence, the Prosecutor reiterates the request for a confirmation that “the “territory” over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.”<sup>44</sup>

If it is clear that, technically, the primary object of the request was not the statehood of Palestine itself, the request still appears confusing: first, it is an unnecessary question posed in front of the Court by the Prosecutor herself, while it might hinder her own asserted intention – i.e. to open the investigation; second, it declares that Palestine’s statehood is not in doubt, but then it inconsistently dedicates most of the reasoning to it; third, it seems that the Prosecutor decided to undertake such an extraordinary path, and to halt the normal *cursus* at the ICC, in order to consult the Chamber on a matter that has little controversy (the geographical extension of the Palestinian territory) in a situation that has, instead, many points of vehement contrast.

This last point deserves some elucidation: there is little doubt, at least at the current state of things, that the international community intends the territory of the Palestine, even with all the *de facto* limitations it is now subject to, to be identified with the Occupied Palestinian Territory: it has been repeatedly stated, amongst others, by the UNGA,<sup>45</sup> the UNSC,<sup>46</sup> the

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<sup>42</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), paras. 211-215.

<sup>43</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 216.

<sup>44</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 220.

<sup>45</sup> See for example: UNGA *Question of Palestine*, 10 December 1982, A/RES/37/86 (A-E), Part E; UNGA *Question of Palestine*, 15 December 1988, A/RES/43/177, paras. 1-2; UNGA *Status of the Occupied Palestinian Territory, including East Jerusalem*, 17 May 2004, A/RES/58/292, para. 1; UNGA *Status of Palestine in the United Nations*, 4 December 2012, A/RES/67/19, para. 1; UNGA *Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Palestinian Territories*, 18 December 2018, A/RES/73/96, preamble. See also UNGA Resolution *Peaceful Settlement of the Question of Palestine*, 5 December 2018, A/RES/73/19, paras. 17, 22; UNGA *Peaceful Settlement of the Question of Palestine*, 7 December 2017, A/RES/72/14, paras. 19, 24; UNGA *Peaceful Settlement of the Question of Palestine*, 15 December 2016, A/RES/71/23, para. 22; UNGA *Peaceful Settlement of the Question of Palestine*, 4 December 2015, A/RES/70/15, para. 21; UNGA *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, 18 December 2018, A/RES/73/99, preamble; UNGA *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, 14 December 2017, A/RES/72/87, preamble; UNGA *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, 23 December 2016, A/RES/71/98, preamble; UNGA *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, 15 December 2015, A/RES/70/90, preamble.

<sup>46</sup> UNSC *Resolution 2334 (2016)*, 23 December 2016, S/RES/2334, paras. 3, 5.

UN Special Rapporteur,<sup>47</sup> the International Court of Justice,<sup>48</sup> the European Union,<sup>49</sup> the African Union,<sup>50</sup> the Organisation of Islamic Cooperation,<sup>51</sup> and the League of Arab States.<sup>52</sup>

Admittedly, different opinions exist in a broader political spectrum,<sup>53</sup> and some have argued the “two-State solution” is not the best nor just solution, especially nowadays;<sup>54</sup> yet, the fact the vast majority of actors still refers to this division of the territory makes it clearly the mainly accepted, or at least the most established frame.

Why, then, would the Prosecutor give the chance to the Court to halt her intention to investigate, in order to point to a question which already has an obvious answer in terms of *opinio juris*? Collecting her statements on the statehood of Palestine, the presence of the requisites under article 53(1) and 17,<sup>55</sup> and, most of all, the repeated purpose of the request, it is plausible that beyond and more than the explicit object, she was seeking a sort of *obiter dictum*, which could be used to counter all future contestations and oppositions to cooperate. To be clear, while the request makes it unambiguous that the OTP argues for

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<sup>47</sup> OHCHR, “Any Peace Plan for Israel and Palestine Will Fail Without Framework of International Law: UN Expert”, 28 June 2019.

<sup>48</sup> ICJ GL No. 131, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004).

<sup>49</sup> EU Council, *Council Conclusions on the Middle East Peace Process*, 22 July 2014, para. 6.

<sup>50</sup> AU Executive Council, *Report*, January 2016, p. 6, recommendation (1).

<sup>51</sup> OIC, “‘Hand in Hand toward the Future’: King Salman stresses centrality of Palestinian cause”, 1 June 2019.

<sup>52</sup> Arab League, *Arab Peace Initiative*, 28 March 2002, para. 2.

<sup>53</sup> It cannot be ignored that in the past 45 years Palestinians have been facing a conspicuous and increasing establishment of Israeli settlements inside the West Bank, in the pursuance of the project of constituting “Eretz Israel”, and that the US have been endorsing it (one of the major and most recent materialization of this support can be seen in the Trump “Peace to Prosperity” Plan); on the other hand, the concept of “historical Palestine”, embraced by actors like Hamas, intends Palestine to be comprehensive of all the territory where Palestinians lived, before they were forced to flee by the Israeli army, which ethnically cleansed the area to establish the State of Israel in 1948.

<sup>54</sup> See for example: Leila Farsakh, “The One-State Solution: A Breakthrough for Peace in the Israeli Palestinian Deadlock”, *Journal of Palestine Studies* 35, no. 4 (2006): 79-80; Ghada Karmi, “The One-State Solution: An Alternative Vision for Israeli-Palestinian Peace”, *Journal of Palestine Studies* 40, no. 2 (2011): 62-76; Yasmeen El Khoudary, Zaha Hassan, Yara Hawari, Amjad Iraqi, Inès Abdel Razek, “The Future of Palestine. Youth Views on the Two-State Paradigm”, *Al-Shabaka: The Palestinian Policy Network*, 28 May 2019; Yara Hawari, “Israel’s Annexation Drive Requires Fighting for Justice in One State”, *Middle East Eye*, 4 June 2019; Hugh Lovatt, “The End of Oslo: A New European Strategy on Israel-Palestine”, *European Council on Foreign Relations*, 9 December 2020.

<sup>55</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), paras. 93-102.

the statehood of Palestine and does not consider it as a point that should determine the Court's decision, if the PTC finally and firmly affirms its jurisdiction, through silently accepting the statehood of Palestine for the purpose of the ICC, potential opponents to the investigation will not be able to halt the Court's action on the collateral belief that Palestine is not a State.

This view is strongly consolidated by the reiterated statement that a resolution on the point is necessary "to facilitate a cost-effective and expeditious conduct of the Prosecution's investigation on the soundest legal foundation, including by ensuring State cooperation through the provision of an authoritative, clear and public ruling on the jurisdictional basis upon which the Prosecution may conduct the investigation in this situation".<sup>56</sup>

Interestingly, the Prosecutor seemed in this way to anticipate and somehow emulate the Israeli technique of fragmentation and "proceduralization", used to avoid substantial but inconvenient matters.<sup>57</sup> Predicting that the objections of Israel wouldn't have been based on the commission of the illicit acts, nor in their framing as international crimes, but rather on procedural issues (as contesting the jurisdiction of the Court, as well as the complementarity, gravity and interests of justice requirements),<sup>58</sup> the OTP tried to sweep them away at once, by obtaining a confirmation of her view on the territories interested by the purported investigation, which can provide a collateral but strong endorsement on the issue of statehood. In this light, it is less confusing to see that the Prosecutor elaborates extensively on the issue of statehood and its bases or that she mentions the irrelevance of factors as the Oslo agreements:<sup>59</sup> if all the potential grounds of opposition to the investigation are made explicit, when the Court will answer the Prosecutor's question – which, if approached punctually, can only realistically have an affirmative answer – all the oppositions will be blatantly weakened by the Court's decision.

## **ii. The Preemptive Response of the Israeli AG and the Contribution of the *Amici Curiae*: Main Issues and Criticisms**

The reaction of the Israeli institutions was not at odds with the prevision, and did not wait to come. Even though the Prosecutor's request was officially filed in January 2020, due to

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<sup>56</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 20.

<sup>57</sup> See *supra* II: *Systematic Torture in Israel as a Progressive Seizure of Legal Opportunities*.

<sup>58</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction over the so-called "situation in Palestine"*, para. 5.

<sup>59</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), paras. 183-189.

formal issues, it was first lodged on the 20th of December 2019, and anticipated by a few hours by the opinion of Israel's Attorney General, who released a memorandum challenging the jurisdiction of the ICC over Palestine.<sup>60</sup>

In particular, in his memorandum the AG denies that the ICC has any jurisdiction over the situation, based on the fact that the ICC does not operate by virtue of universal jurisdiction,<sup>61</sup> but it rather works through a system of delegation of criminal jurisdiction from States, that can happen through accession to the Rome Statute or through *ad hoc* declarations. Consequently, the AG finds that, if an actor wishes the Court to intervene, this can only happen through a delegation of jurisdiction to it.<sup>62</sup> The AG upholds that only sovereign States can delegate jurisdiction to the ICC; that, in order to be delegated, the jurisdiction must be possessed by the State; and that the delegation must happen validly.<sup>63</sup> The document then follows denying the presence of each of these elements.

The first point expressed by the AG is that the term "State" has the same meaning in international law and under the Rome Statute, therefore, even if just for the purposes of the Rome Statute, it has to be interpreted under the criteria of general international law, and therefore in the sense of sovereign State.<sup>64</sup>

Having set this as the standard to reach for a valid application of the Rome Statute, the memorandum proceeds confuting that "the Palestinian entity" has ever acquired this status for the purposes of the Rome Statute: it asserts that neither the accession to the Rome Statute,<sup>65</sup> nor the UNGA Resolution 67/19,<sup>66</sup> the position of the UNSG<sup>67</sup> or its participation to the Assembly of State Parties of the ICC<sup>68</sup> confer this status.

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<sup>60</sup> Israel Office of Legal Counsel and Legislative Affairs, "Israel's Attorney General is publishing today his legal opinion regarding the ICC's lack of jurisdiction", 20 December 2019.

<sup>61</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, para. 7.

<sup>62</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, para. 7.

<sup>63</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, para. 8.

<sup>64</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, para. 9.

<sup>65</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, paras. 17-20.

<sup>66</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, para. 21.

<sup>67</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, para. 22.

<sup>68</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, paras. 24-25.

Then, it holds that, even under general international law, Palestine cannot be considered a State: it has never been a State in the past,<sup>69</sup> it lacks effective control now,<sup>70</sup> and its aspiration to a future self-determination should not be confused with acquired statehood.<sup>71</sup> Finally, after briefly mentioning that, anyways, the scope of the hypothetical Palestinian territory is undefined,<sup>72</sup> it concludes that, even in the case that a non-State entity was able to delegate jurisdiction to the ICC, Palestine does not possess that jurisdiction over the Area C of the West Bank, the Israeli citizens on its territory and Jerusalem.<sup>73</sup>

The arguments upheld by the AG have been the object of criticisms from many scholars and, more directly, by the unprecedented number of *amici curiae* who intervened upon invitation of the PTC.<sup>74</sup> The following paragraphs will present the main objections raised against the AG Memorandum, with particular attention to those submitted by the victims' representative, scholars and organization involved in the ICC proceedings.

### **1. The Question of Statehood**

To start with, the AG Memorandum has been countered by many authoritative voices affirming that, at least for the purposes of the Rome Statute, Palestine is to be considered as a State. The doctrine is supported by the fact that, as of today, 139 States (amounting to the 72% of the total UN member States) recognized Palestine;<sup>75</sup> more significantly, their population represents more than 82% of the world population.<sup>76</sup> Out of these States, 78

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<sup>69</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, paras. 27-32.

<sup>70</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, paras. 33-39.

<sup>71</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, paras. 40-41.

<sup>72</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, paras. 49-54.

<sup>73</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, paras. 55-60.

<sup>74</sup> ICC 01/18-14, Pre-Trial Chamber I, *Order setting the Procedure and the Schedule for the Submission of Observations* (28 January 2020).

<sup>75</sup> Permanent Observer Mission of the State of Palestine to the United Nations New York, "Diplomatic Relations": <https://palestineun.org/about-palestine/diplomatic-relations/> (last accessed: 2 February 2021).

<sup>76</sup> <https://population.un.org/wpp/>

are also State Parties to the Rome Statute,<sup>77</sup> therefore representing 63% of the members of the Court.

William Schabas, for example, submitted that “[i]t is certainly possible for an entity to be a ‘State Party’ even if it is not a State”,<sup>78</sup> citing the Cook Islands as an example of State Party to the Rome Statute, “despite questions about whether it is genuinely a sovereign State”.<sup>79</sup>

Others have noticed that, after its accession to the Rome Statute, Palestine has been treated equally to any other State Party to the Rome Statute, participated in the discussion for the activation for the crime of aggression, contributed to the Court’s budget and votes and was elected to the Assembly of State Parties Bureau,<sup>80</sup> and, if any of the State Parties wanted to object to its membership to the ICC, they should have done so at an earlier stage and in different terms.<sup>81</sup> Moreover, scholars noted the irony of the possible decision of the Court to deny that Palestine is a State Party, after it followed meticulously all the steps to be recognized as such, as spelled out by the ICC itself.<sup>82</sup>

These opinions reflect the preference for a “functional approach”, suggesting that the Court should limit itself to a determination of the statehood of Palestine exclusively for the purposes of the Rome Statute.<sup>83</sup> However, further arguments have been proposed to demonstrate that, in any case, Palestine is a State under international law.

In this sense, John Quigley has, in several occasions, offered a detailed historical analysis of Palestine’s statehood. In his submission to the ICC as an *amicus*, in particular, he traced back elements that suggest that Palestine’s statehood began in 1923, when the Peace Treaty of Lausanne, by which the Ottoman Turkish Empire renounced to its Arab territories, referred to Palestine, Syria and Iraq as newly created States.<sup>84</sup> He then argued that

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<sup>77</sup> ICC Assembly of State Parties, “The State Parties to the Rome Statute”: [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited: 2 February 2021).

<sup>78</sup> ICC-01/18-71, Pre-Trial Chamber I, *Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence* (15 March 2020), para. 4.

<sup>79</sup> ICC-01/18-71, para. 4.

<sup>80</sup> ICC-01/18-107, Pre-Trial Chamber I, *Submission Pursuant to Rule 103 (Robert Henisch & Giulia Pinzauti)* (16 March 2020), paras. 15-18.

<sup>81</sup> ICC-01/18-107, paras. 25.

<sup>82</sup> Kersten, “ICC and Palestine Symposium”.

<sup>83</sup> ICC-01/18-85, Pre-Trial Chamber I, *Amicus Curiae Observations Submitted by The International Federation for Human Rights (FIDH); No Peace Without Justice (NPWJ); Women’s Initiatives for Gender Justice (WIGJ) and REDRESS pursuant to Rule 103* (16 March 2020), para. 9.

<sup>84</sup> ICC-01/18-66, Pre-Trial Chamber I, *Submission Pursuant to Rule 103 (John Quigley)* (3 March 2020), para. 2.

statehood continued, as recognized by different roadmaps to peace endorsed by States, including the United States<sup>85</sup> and Israel,<sup>86</sup> and international bodies as the European Union<sup>87</sup> and the UN.<sup>88</sup>

The theory, raised by Israel and other actors,<sup>89</sup> that the Montevideo criteria bar Palestine's statehood, was contested by Quigley by stating that the Montevideo Convention did not intend to create a test for statehood,<sup>90</sup> and were never considered as a determining factor by the international community,<sup>91</sup> while Richard Falk even named the application of these criteria "an *ultra vires* act by the Court, as well as being an overly rigid and ill-advised step".<sup>92</sup> Victims representatives on their side argued that, because Palestine's sovereignty has been impeded by successive military occupations (with the Israeli one still ongoing), "the application of the Montevideo Criteria to the characterization of Palestine's acquisition of statehood during occupation, is moot."<sup>93</sup>

## **2. The Occupation and the Oslo Agreements' Effects on Statehood and Jurisdiction**

In fact, the element of prolonged occupation is a central one in the debate on jurisdiction. Even though some seem to be "oblivious of the context of the occupation",<sup>94</sup> and, as Judge Elaraby expressed in his separate opinion in the ICJ notorious judgment on the wall:

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<sup>85</sup> ICC-01/18-66, para. 28.

<sup>86</sup> ICC-01/18-66, para. 30.

<sup>87</sup> ICC-01/18-66, para. 28.

<sup>88</sup> ICC-01/18-66, para. 32.

<sup>89</sup> See for example: ICC-01/18-69, Pre-Trial Chamber I, *Submission of Observations Pursuant to Rule 103* (12 March 2020), para. 3; ICC-01/18-89, Pre-Trial Chamber I, *Written Observations by Hungary Pursuant to Rule 103* (16 March 2020), para. 30; ICC-01/18-103, *Observations by the Federal Republic of Germany* (16 March 2020), para. 24; ICC-01/18-119, *The Observations of the Republic of Uganda Pursuant to Rule 103 of the Rules of Evidence and Procedure* (16 March 2020), para. 16.

<sup>90</sup> ICC-01/18-66, para. 37.

<sup>91</sup> ICC-01/18-66, para. 42.

<sup>92</sup> ICC-01/18-77, Pre-Trial Chamber I, *Amicus Curiae Submissions Pursuant to Rule 103* (16 March 2020), para. 11.

<sup>93</sup> ICC-01/18-46, Pre-Trial Chamber I, *Request for Leave to File Submissions Pursuant to Rule 103* (14 February 2020), para. 15.

<sup>94</sup> Alice Panepinto, "ICC and Palestine Symposium: Mind the Gap - The 'Palestine Situation' Before the ICC", *Opinio Juris*, 4 February 2020.

“[o]ccupation, as an illegal and temporary situation, is at the heart of the whole problem”.<sup>95</sup>

Preliminarily, it must be recalled that the abeyance of sovereignty due to military occupation does not diminish sovereignty. It is indeed a well established principle of International Humanitarian Law (IHL) under which, since the beginning of the XXth century, it is affirmed that: “there is not an atom of sovereignty in the authority of the occupant”<sup>96</sup> and that “the presence of the occupant is nothing more than a *de facto* event even without any legal effect on the legal powers of the lawful sovereign”.<sup>97</sup>

Despite the opposite claims,<sup>98</sup> this principle cannot be altered by the Oslo Agreements, since, as the Prosecutor<sup>99</sup> and others<sup>100</sup> mentioned, they constitute a “special agreement” within the terms of the Fourth Geneva Convention, which states that:

“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, *nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power*, nor by any annexation by the latter of the whole or part of the occupied territory.”<sup>101</sup>

As the ICRC Commentary specifies: “Agreements concluded with the authorities of the occupied territory represent a more subtle means by which the Occupying Power may try to free itself from the obligations incumbent on it under occupation law; the possibility of concluding such agreements is therefore strictly limited by Article 7, paragraph 1, and the

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<sup>95</sup> ICJ GL No. 131, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall*, Judge Elaraby Separate Opinion, p. 257.

<sup>96</sup> L. Oppenheim, “The Legal Relations Between an Occupying Power and the Inhabitants”, *Law Quarterly Review* 33, (1917): 363-364; endorsed by Y. Dinstein in *Israel Yearbook on Human Rights* 1978, volume 8, (1989), 106 and Martti Koskenniemi in “Occupied Zone – A Zone for Reasonableness”, *Israel Law Review* 13 (2008): 30. See also the doctrine cited by ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), footnote 474.

<sup>97</sup> Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation (Monograph Series of the Carnegie Endowment for International Peace, Division of International Law, No. 6)* (Buffalo: W.S. Hein, 2000), 136.

<sup>98</sup> ICC-01/18-69, paras. 12, 13; ICC-01/18-89, paras. 46, 50, 51; ICC-01/18-103, paras. 24, 27, 28; ICC-01/18-106, *Brazilian Observations on ICC Territorial Jurisdiction in Palestine* (16 March 2020), para. 14.

<sup>99</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 186.

<sup>100</sup> ICC-01/18-46, para. 18; ICC-01/18-77, para. 18.

<sup>101</sup> Geneva Convention IV, art. 47, emphasis added.

general rule expressed there is reaffirmed by the present provision.”<sup>102</sup> Notably, the Geneva Conventions, besides being universally recognized and therefore part of customary law, are included as applicable sources by the Rome Statute.<sup>103</sup>

The influence of the Oslo Agreements have further been denied to have “relinquished the right of self-determination and permanent sovereignty over natural resources inherent to the Palestinian people”,<sup>104</sup> and they were considered “not indicative of a transfer of jurisdiction from Israel to the PNA”.<sup>105</sup>

Some have more deeply questioned the validity of the Oslo Agreements themselves, based on the limited participation of Palestinian political representation to it and total exclusion of the Israeli and Palestinian people,<sup>106</sup> on the avoidance to regulate the most crucial issues from the accords (including the status of Jerusalem, the issue of settlements and borders),<sup>107</sup> and on the scarce respect both parties and the international arena showed for them over the years.<sup>108</sup>

Conclusively, it has been argued that the Oslo Agreements, and the occupation in general, might prevent a *de facto* jurisdiction (i.e. its enforcement), but do not undermine the *de jure* jurisdiction possessed by Palestine, which can be referred to as the “prescriptive” jurisdiction.<sup>109</sup>

Actually, the arguments of lack of control or abeyance of sovereignty upheld by Israel to deny Palestine’s statehood<sup>110</sup> are quite doubtful, considered that the purported lack of effective control is due to the occupation by the Israeli forces, which impedes a full exercise

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<sup>102</sup> ICRC, *Commentary on the Fourth Geneva Convention: Convention* (1958), p. 275.

<sup>103</sup> Rome Statute, art. 21.

<sup>104</sup> ICC-01/18-77, para. 18.

<sup>105</sup> ICC-01/18-107, para. 66.

<sup>106</sup> Jeff Handmaker, “ICC and Palestine Symposium: The (Non) Effects of Oslo on Rights and Status”, *Opinio Juris*, 6 February 2020.

<sup>107</sup> Handmaker, “ICC and Palestine Symposium”; ICC-01/18-107, para. 58.

<sup>108</sup> Violations have been constantly lamented by both Israel and Palestine. Moreover, the continuous growing of settlements and subsequent intention to annex part of the West Bank, as well as external endorsements like the Trump Peace Plan, can be seen as ultimate examples of the way these agreements have been overcome, in light of a reality that does not reflect them as an authoritative or even valid source.

<sup>109</sup> The term comes from the theorization found in Carsten Stahn, ‘Response: The ICC: Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Neo Dat Quod Non Habet Doctrine – A Reply to Michael Newton’, *Vanderbilt Journal of Transnational Law* 49, no. 2 (2016): 450. It is then extensively referenced in: ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), footnote 579.

<sup>110</sup> State of Israel, Office of the Attorney General, *The International Criminal Court’s lack of jurisdiction*, para. 27.

of authority in the occupied territories. This is particularly evident concerning the actual situation in Gaza, virtually isolated by the 13-years long land, sea and air blockade and its separation from the rest of Palestine. The causal connection between the policies implemented and the lack of effective control is confirmed even by the AG Memorandum itself, which enumerates a series of domains subtracted from the Palestinian Authority, namely: the control over external borders, the control of air space and major aspects of tax collection, part of control on the exercise of the criminal jurisdiction, the use of electromagnetic sphere, the establishment of telecommunication networks, the provision of monetary services.<sup>111</sup> All of these, as the references show, are in place by virtue of documents that are ascribable to impositions of the occupying power.

By the same token, mentioning the lack of jurisdiction on the area and population of the settlements and on Jerusalem as a deficit in the enforcement of jurisdiction almost constitutes a self-denunciation, since both the settlements expansion and the annexation of Jerusalem on behalf of Israel have been repeatedly denounced as “a flagrant violation under international law” by the UNSC,<sup>112</sup> the UNGA,<sup>113</sup> UN Fact-Finding Missions,<sup>114</sup> Special Rapporteurs<sup>115</sup> and treaty bodies,<sup>116</sup> the EU,<sup>117</sup> the ICJ<sup>118</sup> and several scholars.<sup>119</sup> It would therefore be ironic, to say the least, if the ICC accepted claims of internationally

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<sup>111</sup> State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction*, para. 35.

<sup>112</sup> UNSC Resolution 446 (1979), 22 March 1979, S/RES/446; UNSC Resolution 465 (1980), 1 March 1980, S/RES/465; UNSC Resolution 2334 (2016).

<sup>113</sup> UNGA Resolution 66/17 (2012).

<sup>114</sup> UN Human Rights Council, *Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian Territory, Including East Jerusalem*, 7 February 2013, HRC/22/63.

<sup>115</sup> OHCHR, “UN Expert Calls for Accountability as Israel Records Highest Rate of Illegal Settlement Approvals”, 30 October 2020.

<sup>116</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel*, 27 January 2020, CERD/C/ISR/CO/17-19.

<sup>117</sup> Office of the EU Representative (West Bank and Gaza Strip, UNRWA), *Six-Month Report on Israeli Settlements in the Occupied West Bank, Including East Jerusalem. Reporting Period July-December 2019*, 29 June 2020.

<sup>118</sup> ICJ GL No. 131, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall*, para. 120.

<sup>119</sup> See, for instance: Poissonnier, David, “Israeli Settlements in the West Bank, a War Crime?”; Katherine Gallagher, “ICC and Palestine Symposium: Prosecuting Settlements as War Crimes and Crimes against Humanity - The ICC's Jurisdiction over the Occupied Palestinian Territory”, *Opinio Juris* (7 February 2020); “B. Al-Haq, “State Responsibility in Connection with Israel's Illegal Settlement Enterprise in the Occupied Palestinian Territory”, Ramallah, 16 July 2012 (excerpts)”, *Journal of Palestine Studies* 42, no. 1 (2012).

condemned illegal actions as a basis to deny its jurisdiction, risking to encourage Israel's illegal activities.<sup>120</sup>

### 3. Territorial Scope and Legal Blackholes

Coherently with the previous argument, the attempts to dispute the consolidated identification of the Palestinian territories with the Occupied Palestinian Territory cannot affect the consistent and explicit opinion of the international community. Further, the fact that the specific borders of the area are disputed “does not preclude Palestine, nor the Court, from exercising full jurisdiction”,<sup>121</sup> as “the Rome Statute quite explicitly contemplates the exercise of territorial jurisdiction with respect to territory that is not under a State's sovereign authority”.<sup>122</sup>

Moreover, the confirmation of the Court's jurisdiction on the disputed areas can be seen as natural consequence of “the imperative of avoiding unnecessary impunity gaps”,<sup>123</sup> and to avoid leaving the Palestinian population in a “legal black hole”.<sup>124</sup> As many local NGOs<sup>125</sup> and scholars<sup>126</sup> have pointed out, the Rome Statute itself calls for an affirmative answer to the jurisdiction question.

On one hand, this would satisfy art. 21(3) of the Rome Statute, which states that “the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.<sup>127</sup> The Appeals Chamber clarified the status of article 21(3), stating that it “makes the interpretation as well as the application of the law

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<sup>120</sup> ICC-01/18-114, Pre-Trial Chamber I, *Submissions Pursuant to Rule 103 (Uri Weiss)* (16 March 2020), para. 8.

<sup>121</sup> ICC-01/18-77, para. 39.

<sup>122</sup> ICC-01/18-53, Pre-Trial Chamber I, *Request for Leave to Submit an Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence* (14 February 2020), para. 10.

<sup>123</sup> ICC-01/18-46, para. 16.

<sup>124</sup> Tom De Boer, “Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection”, *Journal of Refugee Studies* 28, no. 1 (2015): 118-134; Smadar Ben-Natan, “Constitutional Mindset: The Interrelations between Constitutional Law and International Law in the Extraterritorial Application of Human Rights”, *Israel Law Review* 50, no. 2 (2017): 139-176.

<sup>125</sup> See, for instance: the joint submission of PCHR, Al-Haq, Al-Mezan and Aldameer: ICC-01/18-46, para. 21; Adalah, *Challenging the Israeli Attorney General's Conception of Sovereignty: The Issue of Jurisdiction concerning the 'Situation of Palestine' before the International Criminal Court* (June 2020), p. 15.

<sup>126</sup> Panepinto, “ICC and Palestine Symposium: Mind the Gap”.

<sup>127</sup> For a comprehensive argumentation on the application of human rights in the interpretation of the Rome Statute, see ICC-02/17, Situation in the Republic of Afghanistan, *Amicus Curiae Observations by Kate Mackintosh and Göran Sluiter* (15 November 2019).

applicable under the Statute subject to internationally recognized human rights<sup>128</sup> and that “[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.”<sup>129</sup>

In this sense, access to justice and the right to an effective remedy for individuals whose fundamental rights have been violated represent a well-established human right: they are included in the International Covenant on Civil and Political Rights,<sup>130</sup> the Universal Declaration of Human Rights<sup>131</sup> and all the most relevant UN Conventions,<sup>132</sup> as well as in the fundamental provisions of IHL<sup>133</sup> and in the Rome Statute itself.<sup>134</sup> Based on the universal recognition of this principle, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>135</sup> adopted by the Commission on Human Rights.<sup>136</sup>

On the other hand, this is required by the general purpose of the ICC. In the words of Antonio Cassese: “[t]he main reason is that ICL has emerged with the specific purpose of being instrumental in stemming impunity (and this is still its main *raison d’être*)”.<sup>137</sup>

Notably, the ICC was established precisely to ensure that the most heinous crimes perpetrated amongst the international community do not go unpunished. The resolution to establish a permanent international criminal tribunal, in fact, was taken by the international

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<sup>128</sup> ICC-01/04-01/06-772, Appeals Chamber, Prosecutor v. Lubanga, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a)* (14 December 2006), paras. 36-37.

<sup>129</sup> ICC-01/04-01/06-772, Lubanga Appeal Judgment, paras. 36-37.

<sup>130</sup> International Covenant on Civil and Political Rights, art. 2(3).

<sup>131</sup> Universal Declaration of Human Rights, art. 8.

<sup>132</sup> CERD, art. 6; CAT, art. 14; and CRC, art. 39

<sup>133</sup> The Hague Convention respecting the Laws and Customs of War on Land, art. 3; the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, art. 91.

<sup>134</sup> Rome Statute, arts. 68 and 75.

<sup>135</sup> UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, A/RES/60/147.

<sup>136</sup> UN Commission on Human Rights, *Resolution 2005/35 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 19 April 2005, E/CN.4/RES/2005/35.

<sup>137</sup> Cassese, *The Oxford Companion to International Criminal Justice*, 219.

community as a consequence of the mass atrocities committed during the XXth century, in order to ensure accountability and prevent such crimes from occurring again. In this sense, the UN General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome, Italy, from 15 June to 17 July 1998, "to finalize and adopt a convention on the establishment of an international criminal court".<sup>138</sup> The documents from the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court<sup>139</sup> show that an intense debate occurred between the participants, which carefully discussed the different aspects of the Court to be instituted. However, no controversy rose as far as the aim of the Court was concerned, there being shared consensus on the determination to cease impunity for the gravest crimes of concern to the international community.

This harmony of intent was then reflected by the unequivocal wordings of what officially became the Preamble of the Rome Statute, stating that the State Parties "affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured" and are "determined to put an end to impunity for the perpetrators of these crimes".<sup>140</sup>

### **iii. The Pre-Trial Chamber's Decision**

After receiving the Prosecutor's request, the PTC decided to gather additional opinions from *amici curiae* of various nature, which mainly argued for or against the statehood of Palestine, followed by a further response of the Prosecutor.<sup>141</sup> The Chamber, however, kept being silent, until, in May, it took notice of President Abbas's declaration of suspension of "all the agreements and understandings with the American and Israeli governments and of all the commitments based on these understandings and agreements",<sup>142</sup> and requested Palestine to provide additional information on the point and its consequences on the Oslo agreements;<sup>143</sup> the Chamber, however, did not mention that

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<sup>138</sup> See the UNGA 52nd session, 16 September 1997, A/C.1/52/PV.1.

<sup>139</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June - 17 July 1998, A/CONF.183/13 (Vol.III).

<sup>140</sup> Rome Statute, Preamble.

<sup>141</sup> ICC-01/18-131, Office of the Prosecutor, *Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims and States* (30 April 2020).

<sup>142</sup> Wafa Palestine News Agency, "President Abbas declares end to agreements with Israel, US; turns over responsibility on occupied lands to Israel", 19 May 2020.

<sup>143</sup> ICC-01/18-134, Pre-Trial Chamber I, *Order Requesting Additional Information* (26 May 2020), para. 6.

the declaration came as a reaction to the announcement of annexation of the West Bank by Israel, which caused stark condemnations by the international community.<sup>144</sup>

After that moment, the PTC did not give any sign of being close to delivering a decision, neither in one direction nor the other. When, during the 19th Assembly of State Parties, the Prosecutor was asked if she was considering to set a deadline after which, the Chamber still silent, she would have proceeded to open the investigation, Bensouda confirmed that the important delay of the decision could force the OTP to decide by itself how to proceed – just before being contradicted on the point by the Vice-Prosecutor.<sup>145</sup> The 2020 Report on Preliminary Examination Activities, issued in December, only noted that “[t]he Office will continue to assess any new allegations” as well as “any information relevant to complementarity and gravity, pending a decision by the PTC on its request”.<sup>146</sup>

On the 5th of February 2021, the PTC finally issued the answer to the Prosecutor’s request.<sup>147</sup>

Preliminarily, the Chamber cleared that, besides the accusations and criticisms raised, the question at hand is a legal and not a political one,<sup>148</sup> and that by no means a decision on the jurisdiction in the Situation in Palestine can amount to the creation of a State,<sup>149</sup> nor to an official determination of borders.<sup>150</sup> In this respects, the Court recalled, quoting the Permanent Court of Justice,<sup>151</sup> that sometimes courts do have to determine the territoriality of criminal law, but that this does not equate to a determination on territorial sovereignty.<sup>152</sup> Moreover, the PTC acknowledged the peculiar position of the ICC, since “by the very nature of the core crimes under the Rome Statute, the facts and situations that

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<sup>144</sup> OHCHR, “Israeli Annexation of Parts of the Palestinian West Bank Would Break International Law - UN Experts Call on the International Community to Ensure Accountability”, 16 June 2020; *Joint Letter by 1.080 Parliamentarians from 25 European Countries\* to European Governments and Leaders Against Israeli Annexation of West Bank*.

<sup>145</sup> Chantal Meloni, Twitter post, 15 December 2020, 2:34 pm. <https://twitter.com/chamelons>

<sup>146</sup> ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities 2020* (14 December 2020), para. 229.

<sup>147</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021).

<sup>148</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 54.

<sup>149</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 54.

<sup>150</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 60.

<sup>151</sup> Permanent Court of International Justice, *The Case of the SS “Lotus”* (France v. Turkey), Judgment, 7 September 1927, P.C.I.J. Series A. No. 10.

<sup>152</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 62.

are brought before the Court arise from controversial contexts where political issues are sensitive and latent”;<sup>153</sup> therefore, in the Situation in Palestine as in the other cases, “[t]he judges can and must examine the emerging legal issues”,<sup>154</sup> while “the potential political outcomes alone should not pose any restrictions on the exercise of the jurisdictional activity.”<sup>155</sup>

The Chamber then turned to the procedural aspects of the request,<sup>156</sup> and namely to the applicability of a request pursuant to art. 19(3), which is normally applied at an earlier stage of the proceedings: either in the situation or once a case arises from the situation. The relevance of this part, however, carries much more substantial meaning and consequences than it might appear.

In fact, the Court had here to clarify in what phase the request of the Prosecutor lied, and it found that the request has to be considered as arisen in an investigation that is already initiated.<sup>157</sup> In fact, even though the Prosecutor did not declare the investigation open, she stated that she was satisfied there was a reasonable basis to initiate an investigation pursuant to art. 53(1), to believe that war crimes have been committed and that potential cases would be admissible and in the interest of justice.<sup>158</sup> The Chamber thus found that, based on the jurisprudence of the Appeals Chamber,<sup>159</sup> the Prosecutor is by this findings “obliged to initiate an investigation.”<sup>160</sup> Therefore, the moment the Prosecutor formulated the request, the investigation was in principle already initiated,<sup>161</sup> but the Court found that the art. 19(3) is nevertheless applicable.<sup>162</sup> In the conclusion of this reasoning, the PTC demonstrated to welcome the intent of the Prosecutor, and stated that, given the concrete ramifications of this decision and the obligation to cooperate on the State Parties, it is “all

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<sup>153</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 55.

<sup>154</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 56.

<sup>155</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 57.

<sup>156</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 63.

<sup>157</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 66.

<sup>158</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 2.

<sup>159</sup> ICC-02/17-138, Appeals Chamber, Situation in the Islamic Republic of Afghanistan, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* (5 March 2020), para. 28.

<sup>160</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 65.

<sup>161</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 66.

<sup>162</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 68.

the more necessary to place the present proceedings on a sound jurisdictional footing as early as possible”.<sup>163</sup>

Even though the PTC underlined that its conclusions “pertain to the current stage of the proceedings”,<sup>164</sup> reserving the power to “examine further questions of jurisdiction which may arise” after the issuance of a warrant of arrest or summons to appear,<sup>165</sup> the decision was enough for the Prosecutor to declare the investigations open.<sup>166</sup>

Coming to the merits of the decision, the Chamber identified two main issues to be solved: first, if Palestine can be considered the State on the territory of which the conduct occurred, within the meaning of art. 12(2)(a); second, the delineation of the territorial jurisdiction of the Court.<sup>167</sup> Before concluding, the judges also briefly touch on the issue of the potential effects of the Oslo Agreements, “for the sake of completeness”,<sup>168</sup> and simply affirm they are not pertinent to the present request.<sup>169</sup>

Regarding the first issue, the judges found that it is solved by referring solely to the Rome Statute,<sup>170</sup> and therefore excludes the application of subsidiary sources of international law,<sup>171</sup> thus cutting short on the debate over the Montevideo criteria. Most radically, they reminded that the assertion of jurisdiction requires Palestine to qualify as a State Party to the Rome Statute, “[i]t does not, however, require a determination as to whether that entity fulfills the prerequisites of statehood under general international law.”<sup>172</sup>

Hence, given that Palestine followed the correct and ordinary procedure of accession,<sup>173</sup> participated actively in the work of the Assembly of State Parties,<sup>174</sup> and the other

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<sup>163</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 86.

<sup>164</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 131.

<sup>165</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 131.

<sup>166</sup> ICC, “Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine”, 3 March 2021.

<sup>167</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 87.

<sup>168</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 124.

<sup>169</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 129.

<sup>170</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 88.

<sup>171</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 88.

<sup>172</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 93.

<sup>173</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 102.

<sup>174</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 100.

members - except Canada - never opposed the accession nor the active participation of Palestine to the ICC,<sup>175</sup> “it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute’s inherent effects over it.”<sup>176</sup> The PTC thus affirmed that Palestine is a State Party for the purposes of art. 12(2)(a),<sup>177</sup> this conclusion being independent from general international law issue and without prejudice to any matters of international law that lie beyond the Court’s scope and jurisdiction.<sup>178</sup>

The second question, “inextricably linked to the First Issue”,<sup>179</sup> is approached by the Court, in the first place, by reiterating that “disputed borders have never prevented a State from becoming a State Party to the Statute and, as such, cannot prevent the Court from exercising its jurisdiction.”<sup>180</sup> Based on the constant affirmations of the UNGA and UNSC,<sup>181</sup> the Court finds the right to self-determination of the Palestinian people to be identified with the territory of the Occupied Territory, and therefore that “the Court’s territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.”<sup>182</sup>

This conclusion is reached also in application of art. 21(3) of the Rome Statute, which demands that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.<sup>183</sup> In this light, the Court’s interpretation necessarily includes and implicate also the right to self-determination, which qualifies as a fundamental human right,<sup>184</sup> and which for Palestinians has been explicitly recognized to apply with reference to the Occupied Territory.<sup>185</sup>

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<sup>175</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 100.

<sup>176</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 102.

<sup>177</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 112.

<sup>178</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 113.

<sup>179</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 114.

<sup>180</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 115.

<sup>181</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), paras. 116, 117.

<sup>182</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 118.

<sup>183</sup> Rome Statute, art. 21(3).

<sup>184</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 120.

<sup>185</sup> ICC-01/18-143, Pre-Trial Chamber I, *Decision* (5 February 2021), para. 121.

#### iv. Reactions, Comments and Future Perspectives

Altogether, the decision had the merits of taking a clear position over the most debated points – as the irrelevance of statehood in terms of general international law, the ability of the Court to delineate the territoriality of the jurisdiction and the role of the Oslo agreements over this decision. It also set aside the accusations of politicization of the ICC, putting back at the center the legal questions that pertain the Court's work, but without denying the factual premises and consequences of it.

In fact, the pronouncement was welcomed by the victims' representatives and human rights groups. Raji Sourani, the director of PCHR, commented: "It's a decision who made history, for not he Palestinians only, not the Palestinian victims only, but for victims across the globe. I think, with this decision, we can assure that the independence and the credibility of the ICC is restored".<sup>186</sup> Similarly, Shawan Jabarin, director of Al Haq, defined the decision as "an important victory for the Palestinian people, who have been denied their right to self-determination for decades",<sup>187</sup> which affirms the court's "impartiality, credibility and its willingness to uphold the rule of law despite international pressure."<sup>188</sup>

Amnesty International stated that "[a]n ICC investigation marks a long-overdue step towards justice for victims, and is a chance to end the cycle of impunity that is at the heart of the human rights crisis in the OPT".<sup>189</sup> Michael Lynk, UN Special Rapporteur on human rights in the Palestinian territory, and Nils Melzer, UN Special Rapporteur on torture, also cherished the decision as a "major move towards ending impunity"<sup>190</sup> and urged the international community to support the ICC process.

Conversely, the Chamber's affirmation of jurisdiction prompted another aggressive reaction on behalf of Israel: Prime Minister Netanyahu declared that "[w]hen the ICC investigates Israel for fake war crimes – this is pure anti-Semitism";<sup>191</sup> the Foreign Minister rejected the decision, "given, among other reasons, that no sovereign Palestinian state exists

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<sup>186</sup> Amy Goodman, interview with Raji Sourani, "ICC's 'Landmark Decision' Could Open Door to Prosecuting Israel for War Crimes in Palestine", *DemocracyNow*, 8 February 2021.

<sup>187</sup> Jabarin, "Will a Landmark Ruling from the International Criminal Court Finally Get Justice for Palestinians?".

<sup>188</sup> Jabarin, "Will a Landmark Ruling from the International Criminal Court Finally Get Justice for Palestinians?".

<sup>189</sup> Amnesty International, "Israel/OPT: Historic ICC Ruling Brings New Hope to Victims of Crimes under International Law", 5 February 2021.

<sup>190</sup> UN OHCHR, "ICC Ruling on Jurisdiction in Occupied Palestinian Territory Welcome Step Towards Justice: UN Expert", 9 February 2021.

<sup>191</sup> Rina Bassist, "Netanyahu Accuses ICC of Anti-Semitism", *Al-Monitor*, 8 February 2021.

nor does any territory belonging to such an entity”<sup>192</sup> and announced that “Israel will take all necessary measures to protect its citizens and soldiers from this illegitimate decision”.<sup>193</sup> Apparently, the Foreign Ministry also instructed Israeli embassies worldwide “to request that their host countries deliver a ‘discreet message’ to the International Criminal Court’s chief prosecutor, over her recent ruling”.<sup>194</sup>

Notably, the role of States will be crucial in the next phases of the case. In fact, the Prosecutor will now have to submit applications for the issuance of warrants of arrest or summons to appear, which can only be enforced by domestic forces. Under this aspect, Israel primary allies have already opposed the ICC’s decision.<sup>195</sup>

Germany, as one of the most blatant examples, openly contradicted its previous position that “the Court is the competent treaty organ to make the above determinations”,<sup>196</sup> that “[a]ny attempt to undermine the independence of the Court should not be tolerated”<sup>197</sup> and its self-proclaimed role as “one of the ICC’s strongest supporters”.<sup>198</sup> On the contrary, it stated that “the International Criminal Court and its Office of the Prosecutor do not have jurisdiction because of Palestine’s lack of statehood in international law”.<sup>199</sup> Such an affirmation, released by a spokesperson for the Federal Foreign Office of Germany and echoed by the Federal Foreign Minister,<sup>200</sup> is quite concerning, for it “undermines the authority of the ICC and the international criminal justice system”:<sup>201</sup> not only it publicly objects the judgment of the Court, but it also plainly ignores the reasoning it put forward -

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<sup>192</sup> Israel Ministry of Foreign Affairs, “Israel Rejects the ICC’s Decision Regarding the Scope of Its Territorial Jurisdiction on the Israeli-Palestinian Conflict”, 7 February 2021.

<sup>193</sup> Israel Ministry of Foreign Affairs, “Israel Rejects the ICC’s Decision Regarding the Scope of Its Territorial Jurisdiction on the Israeli-Palestinian Conflict”, 7 February 2021.

<sup>194</sup> Toi Staff, “Israel Asking Allies to ‘Discreetly’ Pressure ICC Prosecutor - Report”, *The Times of Israel*, 7 February 2021.

<sup>195</sup> See for instance the declarations released by the Canadian Foreign Ministry, the Australian Foreign Ministry and the German Government.

<sup>196</sup> ICC-01/18-103, para. 20.

<sup>197</sup> Stefan Talmon, “Germany Publicly Objects to the International Criminal Court’s Ruling on Jurisdiction in Palestine”, *GPIL - German Practice in International Law*, 11 February 2021.

<sup>198</sup> Stefan Talmon, “Germany Publicly Objects to the International Criminal Court’s Ruling”.

<sup>199</sup> Stefan Talmon, “Germany Publicly Objects to the International Criminal Court’s Ruling”.

<sup>200</sup> Heiko Maas, Twitter post, 9 February 2021, 7:58pm <https://twitter.com/HeikoMaas/status/1359215215913623564>

<sup>201</sup> Stefan Talmon, “Germany Publicly Objects to the International Criminal Court’s Ruling”.

that the statehood of Palestine under international law is not relevant for the affirmation of jurisdiction.

More interestingly, while the decision was rightly welcomed as a historical achievement for the victims and organizations, who have ceaselessly worked for decades to seek justice, and predictably rejected by the Israeli side, consistently with its previous positions, some commentators have offered more faceted opinions.

Amongst them, the Palestinian American scholar Noura Erakat reminded that the Court deliberated for years on the issue, while, after the UNGA recognition and the accession to the Rome Statute, the assertion of jurisdiction “should have been a no-brainer”.<sup>202</sup> Even though acknowledging the victory of human rights defenders, Erakat brought the attention to the fact that it is still to be seen if and how the investigation will be opened, if the Palestinian leadership will pursue this track or subdue to possible incentives to abandon it, and warned to sustain the accomplishment, but at the same time to diminish the expectations of legal victory.<sup>203</sup>

UN Special Rapporteur Michael Lynk recalled the attention on the overlooked duties of the international community and stressed that “in the context of Israel’s protracted occupation, the international community has permitted a culture of exceptionalism to prevail. Had international legal obligations been purposively enforced years ago, the occupation and the conflict would have been justly resolved and there would have been no need for the ICC process.”<sup>204</sup>

The lawyer and historian Victor Kattan underlined the difficulties that the ICC will face, especially in the absence of States’ cooperation, and problematized the election of the new Prosecutor, Karim Khan, who will take Bensouda’s place in June.<sup>205</sup> All these elements together, Kattan argues, suggest that the investigation could likely target Hamas and Islamic Jihad leaders: while Israel enjoys the support of strong international allies, Hamas is headquartered in the territory of a State Party, and most members of its “diasporic leadership” are scattered around the world in other State parties, which is hard to imagine

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<sup>202</sup> Noura Erakat, Twitter post, 8 February 2021, 4:53 pm. <https://twitter.com/4noura/status/1358806087718363139>

<sup>203</sup> Erakat, Twitter post, 8 February 2021, 4:53 pm.

<sup>204</sup> UN OHCHR, “ICC Ruling on Jurisdiction in Occupied Palestinian Territory Welcome Step Towards Justice: UN Expert”, 9 February 2021.

<sup>205</sup> Victor Kattan, “Who Should Fear More the Long Arm of International Justice: Israel or Hamas?”, *Haaretz*, 20 February 2021.

“would be willing to breach its international obligations to proactively shield Hamas leaders from an arrest warrant”.<sup>206</sup>

The Israeli scholar Itamar Mann, instead, suggested that the absence of suspicions directed at the Palestinian Authority is problematic, for it bears the risk of ignoring the one-State reality “that exists on the ground, in which Israel and the Palestinian Authority are not entirely separate entities”.<sup>207</sup> Mann argues that torture, a crime that is rather overlooked in the Prosecutor’s analysis, could have the potential to “expose the wider power structure that enable such violence in the first place, and thus shed an important light on the apartheid reality that exists in Palestine and Israel”.<sup>208</sup> While the role of the PA as a subcontractor of torture, and other apartheid mechanisms, should not be taken as a diversion from Israel’s responsibility, this analysis is of crucial relevance to underline that “[i]t would be wrong for the court to bifurcate individual criminal responsibility from Israel’s larger project of solidifying non-democratic rule in the territories under its rule”.<sup>209</sup>

The latter point of view is particularly pertinent for the present study, since it highlights its two core arguments, and their questionable role in the Prosecutor’s request.

In fact, the crime of torture was rather unconsidered in the Prosecutor’s analysis: it is briefly mentioned only in the list of crimes presumably committed, and only on behalf of Hamas and Palestinian armed groups.<sup>210</sup> This shows not only an unbalanced view, that ignores the torture perpetrated by actors on the Israeli side, but it also reflects the short-sighted perspective adopted by the Prosecutor, which considers torture - and all other crimes to be investigated - in their punctual reality, and not in their wider and systemic nature.

A similar choice is understandable, for it allows the Prosecutor to aim at concrete results in an investigation that, otherwise, would have to cover an insurmountable number of facts, that have been happening daily for decades. However, for what is relevant here, this restricted approach translates into two problematic aspects. First, it implies that the criminal responsibility for torture acts perpetrated by the Israeli authorities will not be assessed, at least in a first phase of the proceedings. Second, it suggests that the

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<sup>206</sup> Kattan, “Who Should Fear More the Long Arm of International Justice: Israel or Hamas?”.

<sup>207</sup> Itamar Mann, “The Missing Link to Expose Israeli Apartheid at The Hague? Torture”, *+972 Magazine*, 18 February 2021.

<sup>208</sup> Mann, “The Missing Link to Expose Israeli Apartheid at The Hague? Torture”.

<sup>209</sup> Mann, “The Missing Link to Expose Israeli Apartheid at The Hague? Torture”.

<sup>210</sup> ICC 01/18-12, Office of the Prosecutor, *Prosecution Request* (22 January 2020), para. 94.

investigations will unlikely be directed against the legal system of impunity surrounding torture, and other crimes, in its entirety, while they will probably target principal perpetrators and specific episodes.

Conclusively, the ICC route does not seem to offer a decisive perspective at the moment. Given that, after 20 years since the institution of the Court, and after being stuck for more than a year in an unprecedented limbo between the closing of the preliminary examination and the opening of the investigation, on facts that have an extremely solid evidentiary and juridical basis, it would be naïf to expect a judgment of the Court on the responsibility of jurists as aider and abettors, actors who have scarcely been considered even in the previous jurisprudence of the Court.

It is therefore reasonable to think of alternative routes to implement the accountability of the jurists formulating, enforcing and justifying the unlawful policies analyzed in this dissertation.

## 2. Investigations before Third Countries' Courts Pursuant to the Principle of Universal Jurisdiction

### a. Universal Jurisdiction: Definition and Applicability

The main alternative is commonly sought in proceedings in a third Country, by virtue of the application of the principle of universal jurisdiction. According to the Princeton Principles,<sup>211</sup> universal jurisdiction is “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”<sup>212</sup> Thus, universal jurisdiction allows to prosecute the perpetrator of an international crime, even in a State that does not enjoy the traditional jurisdictional bases to (i.e. territoriality and active personality), responding to the necessity to expand the prosecution beyond national borders for those crimes which “express a sort of ‘system criminality’, in that they are normally perpetrated by states officials with the acquiescence, tolerance or support of the authorities of the state”.<sup>213</sup>

Despite the ground for this jurisdiction being in the crime itself, there is not unanimous understanding of what is the list of crimes to be considered under the principle. While it is generally reckoned that “[t]he exercise of universal jurisdiction is generally reserved for the most serious international crimes, such as war crimes, crimes against humanity and genocide”,<sup>214</sup> there is some disagreement on the acts to which it should be further extended. Most States accept that, also for historical reasons,<sup>215</sup> piracy is also included; in connection with it, slavery is also considered by scholars<sup>216</sup> and the Princeton Principles,<sup>217</sup>

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<sup>211</sup> Princeton Principles on Universal Jurisdiction (2001).

<sup>212</sup> Princeton Principles, p. 28

<sup>213</sup> Paola Gaeta, “The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes”, in *Realizing Utopia* by Antonio Cassese (Oxford: Oxford University Press, 2012), 597.

<sup>214</sup> M. Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice”, *Virginia Journal of International Law* 42, no. 1 (2001): 82.

<sup>215</sup> Devika Hovell, “The Authority of Universal Jurisdiction”, *The European Journal of International Law* 29, no. 2 (2018): 441.

<sup>216</sup> See for example: Bassiouni, “Universal Jurisdiction for International Crimes”: 112; Adeno Addis, “Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction”, *Human Rights Quarterly* 31 (2009): 136.

<sup>217</sup> Princeton Principles on Universal Jurisdiction, p. 45

but not by the expert group constituted by the African Union and the European Union on the issue of universal jurisdiction.<sup>218</sup>

What is interesting, though, for the scope of this dissertation, is that torture is almost unanimously recognized as a crime subject to universal jurisdiction, by scholars,<sup>219</sup> courts<sup>220</sup> and international agreements.<sup>221</sup> This might be based on the participation in the UNCAT, which demands State parties to establish their criminal jurisdiction “in cases where the alleged offender is present in any territory under its jurisdiction”,<sup>222</sup> even though making it conditional to the decision not to extradite; however, the UNCAT being participated by 171 State parties,<sup>223</sup> amounting to 88% of the total UN members. Moreover, a study from Amnesty International revealed that, already in 2012, at least 125 UN member States legislated to include torture acts under universal jurisdiction.<sup>224</sup>

Notwithstanding the diffused opinion that the application of universal jurisdiction is in decline,<sup>225</sup> data gathered from the past 60 years show that, on the contrary, universal jurisdiction has expanded numerically and geographically over the last decades.<sup>226</sup>

The quantitative research realized by Langer and Eason, in fact, shows that in recent years trials enacting universal jurisdiction have visibly grown in number and frequency: significantly, the number of cases initiated on the basis of universal jurisdiction went from 342, in the first decade analyzed, to 815 in the last decade, between 2008 and 2017;<sup>227</sup> meaningfully, this number almost equates to the number of cases initiated in the two

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<sup>218</sup> EU Council, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009, 8672/1/09.

<sup>219</sup> Bassiouni, “Universal Jurisdiction for International Crimes”: 123; Addis, “Imagining the International Community”: 136; Gaeta, “The Need Reasonably to Expand National Criminal Jurisdiction”, fn. 11; Princeton Principles, p. 29; Hovell, “The Authority of Universal Jurisdiction”: 442.

<sup>220</sup> US Court of Appeals for the Second Circuit 630 F. 2d 876, *Filártiga v. Peña-Irala*, (30 June 1980), para. 54; Central Criminal Court, London, 2013/05698, *R v. Kumar Lama* (1 August 2016); EWCA Crim. 279, *R. v. Faryadi Savar Zardad* (7 February 2007).

<sup>221</sup> EU-AU Expert Report, para. 9.

<sup>222</sup> UNCAT, art. 5(2).

<sup>223</sup> Data provided by OHCHR website: <https://indicators.ohchr.org/> (last accessed: 1 February 2021).

<sup>224</sup> Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World: 2012 Update* (2012), 13.

<sup>225</sup> Máximo Langer, Mackenzie Eason, “The Quiet Expansion of Universal Jurisdiction”, *The European Journal of International Law* 30, no. 3 (2019): 780.

<sup>226</sup> Langer, Eason, “The Quiet Expansion of Universal Jurisdiction”: 781.

<sup>227</sup> Langer, Eason, “The Quiet Expansion of Universal Jurisdiction”: 785.

previous decades combined.<sup>228</sup> Importantly, the trend does not reflect only a more intense activity in the initial phases, which could be rather inconsequential: on the contrary, the last ten years analyzed present a higher number of trials completed than the total amount of the previous 50 years.<sup>229</sup>

Another noteworthy element pertains to the geographical distribution of the trials. While trials have historically concentrated almost exclusively in Western States, and mostly in Western Europe, since 2009 there has been a constant growth of proceedings, and completed trials, in other areas of the world.<sup>230</sup> For example, in 2014, the South African Constitutional Court ruled that the South African Police Service had the obligation to open an investigation on high-ranking government and security officials in Zimbabwe, following complaints for torture performed by Zimbabwean authorities on their citizens.<sup>231</sup> In 2017, Senegal convicted Hissène Habré, former president of Chad, for the abuses committed against his political opponents and members of different ethnic groups.<sup>232</sup>

Even more encouraging is the trend in Argentina, which has become a new important hub for complaints over international crimes: the series started in 2010, with fruitful investigations against Spanish Franco-era officials;<sup>233</sup> later, Argentina requested Interpol to issue an arrest warrant for former Chinese President Jiang Zemin, after a four-year investigation on allegations of torture and genocide against Falun Gong members,<sup>234</sup> and was followed by Spain;<sup>235</sup> in 2013, a lawsuit was initiated against those responsible for the Paraguayan dictatorship,<sup>236</sup> and, prompted by Human Rights Watch, the Argentinian judiciary took steps towards the investigation of Saudi Crown Prince Mohammed bin Salaman, for alleged war crimes in Yemen and torture on Saudi citizens;<sup>237</sup> lastly, a criminal

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<sup>228</sup> Langer, Eason, “The Quiet Expansion of Universal Jurisdiction”: 785.

<sup>229</sup> Langer, Eason, “The Quiet Expansion of Universal Jurisdiction”: Figure 2, at 789.

<sup>230</sup> Langer, Eason, “The Quiet Expansion of Universal Jurisdiction”: 799.

<sup>231</sup> Kevin Jon Heller, “Huge Win in the Zimbabwe Torture Docket Case”, *Opinio Juris*, 30 October 2014.

<sup>232</sup> Langer, Eason, “The Quiet Expansion of Universal Jurisdiction”: 806.

<sup>233</sup> Langer, Eason, “The Quiet Expansion of Universal Jurisdiction”: 802.

<sup>234</sup> Luis Andres Henao, “Argentina Judge Asks China Arrests over Falun Gong”, *Reuters*, 22 December 2009.

<sup>235</sup> Richard Finney, “Spanish Court Orders Arrest Warrant For Ex-Chinese President”, *Radio Free Asia*, 19 November 2013.

<sup>236</sup> IWGIA - International Work Group for Indigenous Affairs, “Aché People of Paraguay: Madrid Conference on Forgotten Genocide”, *IWGIA.org*, 12 June 2014.

<sup>237</sup> Human Rights Watch, “G20: Argentine Probe of Saudi Crown Prince Advances”, 28 November 2018.

lawsuit was filed, in 2019, against Myanmar government and military officials for genocide, rapes and torture against the Rohingya communities.<sup>238</sup>

## **b. Previous Cases of Universal Jurisdiction Dealing with Crimes Committed against Palestinian Victims**

### **i. Torture Cases**

Over the years, Israeli officials have been the target of legal initiatives and proceedings under the universal jurisdiction principle.

The season was inaugurated in 2001, year of the “Gillon affair”,<sup>239</sup> set in Denmark. After having served as director of the Shin Bet, between 1995 and 1996, and having held high-ranking positions within the agency from 1988, Carmi Gillon was appointed Ambassador to Denmark in 2001.<sup>240</sup> Shortly after his appointment, Gillon released an interview with a local newspaper, stating that he was directly implicated in about 100 cases of “moderate physical pressure”.<sup>241</sup> Human Rights Watch, amongst others, asked to revoke the accreditation,<sup>242</sup> but the Danish Foreign Affairs Ministry refused to interfere in the decision of the Israeli Government,<sup>243</sup> and the Minister of Justice stated that Gillon could not be prosecuted due to his diplomatic immunity.<sup>244</sup>

A similar case took place in 2008 in the Netherlands, involving then Minister-without-Portfolio Ami Ayalon. Ayalon, in fact, was head of the Shin Bet between 1996 and 2000, and was therefore the object of a criminal complaint to the Dutch Prosecutor for his involvement in torture.<sup>245</sup> The complaint was completed with a request for urgency, since

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<sup>238</sup> M. Tyler Gillett, “Aung San Suu Kyi Named in Criminal Complaint of Genocide against Myanmar’s Rohingya”, [jurist.org](http://jurist.org), 15 November 2019.

<sup>239</sup> Jacques Hartmann, “I. The Gillon Affair”, *International and Comparative Law Quarterly* 54, no. 3 (2005): 745.

<sup>240</sup> Hartmann, “I. The Gillon Affair”: 746.

<sup>241</sup> Hartmann, “I. The Gillon Affair”: 746.

<sup>242</sup> Human Rights Watch, “Denmark/Israel: Former Security Chief Should Not Be Ambassador”, 18 July 2001.

<sup>243</sup> Hartmann, “I. The Gillon Affair”: 747.

<sup>244</sup> Hartmann, “I. The Gillon Affair”: 747.

<sup>245</sup> PCHR, “Torture Victim Seeks Prosecution of Former Head of Israeli General Security Services”, 6 October 2008.

Ayalon was going to visit the Netherlands only for five days;<sup>246</sup> nevertheless, the Dutch authorities failed to arrest him, delayed by the College of Procurators-General, which couldn't take a definitive decision on the potential presence of diplomatic immunity.<sup>247</sup> The College eventually found that Ayalon lacked immunity on the facts described, but the decision was reached only the day after he left the country, and the Prosecutor therefore decided that the investigation could not be initiated.<sup>248</sup>

The decision not to prosecute was challenged before the Court of Appeal in The Hague, where lawyers sought an order requiring a criminal investigation, supported by an extradition request or an international arrest warrant.<sup>249</sup> The Court of Appeal agreed that the presence of Ayalon in the country, however brief, was sufficient to establish Dutch jurisdiction, which lasts even after the alleged perpetrator has left the country;<sup>250</sup> at the same time, though, the Court argued that jurisdiction had to be activated by the Prosecutor, because the file lacked sufficient *prima facie* evidence.<sup>251</sup> Liesbeth Zegveld, main lawyer in the case, defined the Appeal ruling as “confusing”,<sup>252</sup> and pointed out the inherent illogicality of requiring the existence of a *prima facie* case to activate the jurisdiction, when the Prosecutor, who has the duty to find evidence, is denied jurisdiction to investigate.<sup>253</sup>

## ii. Cases Following Military Operations

Expanding the analysis outside of the cases on interrogational torture, attempts to activate universal jurisdiction have been numerous, mainly related to war crimes committed in the occasion of attacks on Lebanon or, more frequently, Gaza.

The first and most notorious attempt took place in 2001, when a criminal complaint was filed in Belgium against then Prime Minister Ariel Sharon, for the massacre of Sabra and

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<sup>246</sup> PCHR, “Torture Victim Seeks Prosecution of Former Head of Israeli General Security Services”.

<sup>247</sup> Salma Karmi-Ayyoub, “Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction Laws: Prospects for Success?”, *The Palestinian Yearbook of International Law* 19, no. 1 (2016): 112.

<sup>248</sup> Karmi-Ayyoub, “Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction”: 113

<sup>249</sup> Liesbeth Zegveld, Jeff Handmaker, “Universal Jurisdiction: State of Affairs and Ways Ahead”, *International Institute of Social Studies*, Working Paper No. 532 (Jan. 2012): 7.

<sup>250</sup> Zegveld, Handmaker, “Universal Jurisdiction: State of Affairs and Ways Ahead”: 8.

<sup>251</sup> Zegveld, Handmaker, “Universal Jurisdiction: State of Affairs and Ways Ahead”: 7.

<sup>252</sup> Zegveld, Handmaker, “Universal Jurisdiction: State of Affairs and Ways Ahead”: 7.

<sup>253</sup> Zegveld, Handmaker, “Universal Jurisdiction: State of Affairs and Ways Ahead”: 8.

Shatila,<sup>254</sup> of which even the dedicated Israeli Commission found Sharon was personally responsible, in his quality of Defence Minister.<sup>255</sup> The case was closed in 2002 by the Appeal Court, on the grounds that the suspects were not present on the Belgian soil;<sup>256</sup> the Court of Cassation quashed the judgment, stating that universal jurisdiction does not require the suspects to be present on the national territory to be prosecuted, and yet held that Sharon could not be an object of prosecution, by virtue of the personal immunity granted to prime ministers in office.<sup>257</sup>

After the 2006 war between Israel and Hezbollah, which was largely condemned for the huge cost it imposed on civilians and the war crimes committed by both sides,<sup>258</sup> several voices called again for accountability for international crimes,<sup>259</sup> also in political avenues.<sup>260</sup>

Even more conspicuous were the complaints asking for accountability of political and military figures responsible for the war crimes committed in Gaza.

In 2009, after PCHR filed 490 criminal complaints to the Israeli MAG for war crimes committed during Operation Cast Lead and no investigation was opened, victims sought justice in the UK, where an arrest warrant was issued against former Foreign Minister Tzipi Livni, who was a member of the war cabinet during the operation;<sup>261</sup> Livni consequently cancelled her trip, and the British Court then withdrew the arrest warrant, two days after it was issued.<sup>262</sup> In 2011, PCHR and the British law firm Hickman & Rose requested again the arrest of Livni, but she was granted temporary diplomatic immunity by the Foreign

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<sup>254</sup> For a comprehensive comment on the case, see *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, edited by John Borneman (Princeton: Princeton Institute for International and Regional Studies, 2004).

<sup>255</sup> See the Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (8 February 1983).

<sup>256</sup> Cour d'Appel de Bruxelles, Chambre des Mises en Accusation, *Sharon & Yaron* (26 June 2002).

<sup>257</sup> Cour de Cassation de Belgique, P.02.1139.F/2 (12 February 2003).

<sup>258</sup> Amnesty International, *Israel/Lebanon: Out of All Proportion - Civilians Bear the Brunt of the War*, November 2006, MDE 02/033/2006.

<sup>259</sup> Besides Amnesty International, see: Human Rights Watch, *Why They Died: Civilian Casualties in Lebanon during the 2006 War*, September 2007.

<sup>260</sup> In August 2006, for example, a Danish lawmaker asked that Israeli Foreign Minister Tzipi Livni was arrested over war crimes in Lebanon. See: Ynet, "Danish Lawmaker Wants Livni Arrested", 30 August 2006.

<sup>261</sup> Ian Black and Ian Cobain, "British Court Issued Gaza Arrest Warrant for Former Israeli Minister Tzipi Livni", *The Guardian*, 14 December 2009.

<sup>262</sup> Black and Cobain, "British Court Issued Gaza Arrest Warrant for Former Israeli Minister Tzipi Livni".

Commonwealth Office.<sup>263</sup> She was eventually summoned “on a voluntary basis”, on occasion of a visit to London in 2016; the summons was, however, cancelled after diplomatic talks between Israel and the UK.<sup>264</sup> Norway was also target of criminal filings against Livni,<sup>265</sup> but dismissed the case after few months because “there is no good reason” for the Norwegian authorities to investigate further.<sup>266</sup>

On a slightly more optimistic note, in 2010, victims launched a criminal complaint in Belgium with the Federal Prosecutors, against Livni and other Israeli officials;<sup>267</sup> the complaint produced its effects in 2017, when Livni cancelled her trip to Brussels, after the Belgian Prosecutor affirmed she could have been detained or questioned on arrival “to try and advance the investigation”.<sup>268</sup> In 2017, when she travelled to Lugano, she was also the object of a criminal complaint by a local NGO, and the Attorney General’s Office confirmed that the request was being examined.<sup>269</sup>

Operation Protective Edge, instead, caused some victims to file a complaint with the German Federal Public Prosecutor in 2014.<sup>270</sup> The filing was accompanied, at the same time, by a complaint to the Israeli authorities on behalf of PCHR, which ended up with a final decision not to investigate the case.<sup>271</sup> On the contrary, Germany opened a preliminary investigation on the facts, supported by further evidence provided by ECCHR and PCHR.<sup>272</sup>

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<sup>263</sup> Harriet Sherwood, “Israeli Minister Tzipi Livni Given Diplomatic Immunity for UK Visit”, *The Guardian*, 13 May 2014.

<sup>264</sup> BBC, “Israel Politician Tzipi Livni ‘Summoned by UK Police’”, 3 July 2016.

<sup>265</sup> Reuters, “Norway to Study Accusation of Israeli War Crimes”, 22 April 2009.

<sup>266</sup> The Norwegian American, “Norway Dismisses Israel War Crimes Complaint”, 9 November 2009.

<sup>267</sup> Al Jazeera, “Tzipi Livni Cancels Brussels Trip Amid Threat of Arrest”, 23 January 2017.

<sup>268</sup> Independent, “Former Israeli Foreign Minister Cancels Brussels Trip After Threat of Arrest for ‘War Crimes’”, 23 January 2017.

<sup>269</sup> Simon Bradley, “War Crimes Suit Filed in Switzerland Against Former Israeli Minister”, [swissinfo.ch](http://swissinfo.ch), 31 May 2017.

<sup>270</sup> More information can be found at the website of ECCHR, legal representative of the victim: <https://www.ecchr.eu/en/case/israeli-airstrikes-in-gaza-justice-in-the-kilani-case/> (last accessed: 16 January 2021).

<sup>271</sup> PCHR, “Israeli MAG Again Orders Closing Three Claims Relating to War Crimes” (15 June 2015).

<sup>272</sup> ECCHR, “Israeli Airstrikes in Gaza: Justice in the Kilani Case”.

## 1. The *al Daraj Case*

The al Daraj case deserves more attention, for it is particularly representative of all the phases that precede the application of universal jurisdiction, and of the obstacles that victims often encounter. The case sparked from the “targeted killing” of Hamas leader Salah Shehadeh, a one-ton bomb drop, which resulted in the death of 14 civilians (most of which children), injury of 140 and destruction of most houses in the residential neighborhood of al Daraj, in Gaza, one of the most densely populated residential areas in the world.<sup>273</sup>

Following the bombing of al Daraj, the victims and their families first sought justice by requiring the Military Attorney General to open a criminal investigation on the planners and executors of the operation,<sup>274</sup> which resulted in a negative answer, appealed by the victims to the Attorney General, who holds review power, and refused again to open an investigation.<sup>275</sup> The victims therefore submitted a petition to the HCJ, in September 2003, demanding the Court to review both the decisions.<sup>276</sup>

The HCJ was, in the same period, delivering a decision upon the legality of the “targeted killings” policy,<sup>277</sup> which they considered preliminary question to the *Al-Daraj* case;<sup>278</sup> the decision, however, came only more than three years later and without a definitive answer on the legality of the practice, arguing rather for a case-by-case approach.<sup>279</sup> Even though the *Targeted Killings* case was not dealing with individual criminal responsibility, but with the State’s responsibility, it meaningfully mentioned that: “if [soldiers] act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions.”<sup>280</sup>

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<sup>273</sup> Human Rights Watch, “Israeli Airstrike on Crowded Civilian Area Condemned” (22 July 2002).

<sup>274</sup> Sharon Weill, “The Targeted Killing of Salah Shehadeh”, *Journal of International Criminal Justice* 7, no. 3 (2009): 624.

<sup>275</sup> Weill, “The Targeted Killing of Salah Shehadeh”: 624.

<sup>276</sup> HCJ 8794/03, *Yoav Hass and others v. The Judge Advocate General* (23 December 2008), para. 2.

<sup>277</sup> HCJ 769/02, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.* (14 December 2004).

<sup>278</sup> HCJ 8794/03, *Yoav Hass and others v. The Judge Advocate General* (23 December 2008), para. 4.

<sup>279</sup> Judge Aaron Barak wrote in the judgment that: “The result arrived at is not that a pinpoint pre-emptive strike is always permitted nor is it always forbidden.”, HCJ 769/02, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.* (14 December 2004), para. 60.

<sup>280</sup> HCJ 769/02, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.* (14 December 2004), para. 19.

When the HCJ came back to the *Al Daraj* case, it stated that the action was in accordance with all the standards determined by the *Targeted Killings* case, and was therefore legal, but that “the difficult and tragic result of the harm to innocent people was the result of the intelligence at the time of the action, and which proved to be *post factum* erroneous.”<sup>281</sup> However, the Court did not order to initiate criminal proceedings, as requested, but asked the State if it was willing to establish an objective and independent authority to investigate upon the facts.<sup>282</sup>

The State agreed and established a commission, composed by two former military generals and a former Shin Bet official,<sup>283</sup> and operating on the basis of the Military Justice Law<sup>284</sup> and the GSS Law,<sup>285</sup> therefore being characterized as a military inquiry (or “operational debriefing”), all its procedure, testimonies and even the final report being confidential.<sup>286</sup> The petitioners complained that the composition and nature of the commission could not be estimated to be objective and to add anything to the previous military procedures, but the HCJ rejected the objections on the basis that “[t]he government’s discretion is very broad and applies not only to the decision to investigate but also as to the way of investigating”,<sup>287</sup> and considered the petitioners’ requests to be exhausted by the commission itself and its future findings, which could include criminal recommendations to the relevant authorities – even though its report, two years later, restated there should be no criminal investigation.<sup>288</sup>

In the meanwhile, in June 2008, the victims tried to assess the case pursuant to universal jurisdiction in Spain, where PCHR and Spanish human right lawyers filed a private complaint.<sup>289</sup> Six months later, the Court formally opened a criminal investigation, to which Israel responded with a dossier on the judicial proceedings ongoing in Israel, affirming the Spanish court should close the case, echoed by the Spanish State Prosecutor, who filed a

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<sup>281</sup> HCJ 8794/03, *Yoav Hass and others v. The Judge Advocate General* (23 December 2008), para. 8.

<sup>282</sup> HCJ 8794/03, *Yoav Hass and others v. The Judge Advocate General* (23 December 2008), para. 8.

<sup>283</sup> Weill, “The Targeted Killing of Salah Shehadeh”: 626.

<sup>284</sup> Military Justice Law, art. 539A.

<sup>285</sup> GSS Law, art. 17.

<sup>286</sup> Weill, “The Targeted Killing of Salah Shehadeh”: 626.

<sup>287</sup> HCJ 8794/03, *Yoav Hass and others v. The Judge Advocate General* (23 December 2008), para. 12.

<sup>288</sup> Karmi-Ayyoub, “Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction”: 109.

<sup>289</sup> Weill, “The Targeted Killing of Salah Shehadeh”: 619.

motion requesting the closure of the investigation.<sup>290</sup> The Court, however, maintained its position and expressed serious doubts about the genuineness of the proceedings and the functional separation from the executive of the MAG, the AG and the commission of enquiry.<sup>291</sup>

The State Prosecutor brought the decision in front of the Appeal Court, which accepted the appeal and ordered the investigation to close, based on the adequate proceedings still pending in Israel, where they would anyway be subject to judicial review.<sup>292</sup> The Appeal Court asserted that Israel's "struggle against terrorism is not implemented outside the law, but rather within the limits of the law, within the tools that the law provides to democratic states",<sup>293</sup> and that questioning the independence of the MAG, the AG and the commission of inquiry "implies ignoring the evidence of the existence of a social and democratic rule of law, under which the members of the executive and judicial branches are subject to the law".<sup>294</sup>

PCHR appealed this decision to the Supreme Court, contesting, *inter alia*, that the proceedings pending in Israel were not of a criminal nature, and therefore the Spanish court had to pursue the investigation in observance of the right to effective judicial protection.<sup>295</sup> The Supreme Court, however, upheld the Appeal's decision, confirmed the status of investigations in Israel was reasonable, and maintained the investigation should not be opened in Spain.<sup>296</sup>

Despite the judicial failure, the case gained international attention and resulted in some restrictions for the key Israeli authorities involved. Avi Dichter, then Public Security Minister and former director of the Shin Bet, canceled a trip to the UK, upon warning

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<sup>290</sup> Karmi-Ayyoub, "Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction": 109.

<sup>291</sup> Karmi-Ayyoub, "Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction": 110.

<sup>292</sup> Karmi-Ayyoub, "Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction": 110.

<sup>293</sup> National High Court, Appeal No. 31/09 (7 September 2009), 12.

<sup>294</sup> National High Court, Appeal No. 31/09 (7 September 2009), 17.

<sup>295</sup> Karmi-Ayyoub, "Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction": 110.

<sup>296</sup> Karmi-Ayyoub, "Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction": 111.

from the Justice and Foreign Affairs Ministry that he could be arrested for war crimes.<sup>297</sup> Upon the same facts, retired general Doron Almog risked arrest upon arrival at Heathrow airport, former military chief Moshe Ya'alon canceled a trip to London for fear of arrest and chief of staff Dan Halutz was advised not to travel to the UK.<sup>298</sup>

Altogether, this case is probably the most telling example of the difficulty Palestinian victims encounter when seeking justice abroad, even in countries which are usually more willing to enforce international criminal justice through universal jurisdiction.

### **c. Is Universal Jurisdiction a Tool to Deal with the Alleged Crimes Committed in Palestine?**

The selective use of universal jurisdiction, hence, brings to skepticism as to whether this is an applicable option for the Israeli responsibilities, but also to the more meaningful question: is it a *desirable* option?

The question was approached in these terms, in 2007, by Lama Abu-Odeh.<sup>299</sup> The author frames her opinion, responding to Noah Feldman's legal cosmopolitanism,<sup>300</sup> in the question of whether it is desirable for universal jurisdiction to become a binding principle under international law: applying this hypothetical scenario to the Palestinian-Israeli context, she comes to quite drastic conclusions. In particular, when asking herself what crimes would be judged, Abu-Odeh points at the fact that, while "the 'Palestinian Terrorism' of suicide bombing"<sup>301</sup> is generally condemned by rich countries, which she argues would be the ones likely to enforce universal jurisdiction, the same judges would be far less likely to prosecute "the 'Israeli Terrorism' of assassinating Palestinians through air strikes".<sup>302</sup> Consequently, these judgments would have the effect of shifting the balance of power even more to the side which benefits Israelis and decreases the Palestinian capacity to resist the colonial power.<sup>303</sup> Abu-Odeh criticizes Feldman's conception, for "he does not adequately recognize that consensus over which crimes are 'heinous' still works within a

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<sup>297</sup> Rory McCarthy, "Israeli Minister Cancels UK Trip in Fear of Arrest", *The Guardian*, 7 December 2007.

<sup>298</sup> McCarthy, "Israeli Minister Cancels UK Trip in Fear of Arrest".

<sup>299</sup> Lama Abu-Odeh, "A Radical Rejection of Universal Jurisdiction", *Yale Law Journal Pocket Part* 116 (2007).

<sup>300</sup> Noah Feldman, "Review: Cosmopolitan Law?", *The Yale Law Journal* 116, no. 5 (2007): 1022-1070.

<sup>301</sup> Abu-Odeh, "A Radical Rejection of Universal Jurisdiction".

<sup>302</sup> Abu-Odeh, "A Radical Rejection of Universal Jurisdiction".

<sup>303</sup> Abu-Odeh, "A Radical Rejection of Universal Jurisdiction".

context of power in the world”,<sup>304</sup> and mentions, to support her view, the US experience in civil cases related to the Palestinian-Israeli context.

Namely, she refers to the *Almog v. Arab Bank* case,<sup>305</sup> where the Arab Bank was condemned to compensate Israeli victims of terroristic attacks, for providing financial services to organizations considered terroristic under the US legislation, and for providing services to the donors to the families of dead militants.<sup>306</sup> In confirmation of her view, one cannot overlook the case of 2005, when PCHR and the Center for Constitutional Rights (CCR) filed a class action lawsuit to a US District Court, for the al Daraj bombing.<sup>307</sup> The plaintiffs were, in this trial, seeking compensatory and punitive damages against Dichter, under the Alien Tort Statute and Torture Victim Protection Act. The case was dismissed in 2007, after also the State filed a Statement of Interest, arguing that the defendant was immune from suit for the official acts alleged,<sup>308</sup> on grounds of immunity for official acts,<sup>309</sup> and confirmed in appeal.<sup>310</sup>

#### **d. Alternative and Complementary Remedies**

In light of the above, true concerns rise on the point: it seems like, so far, the requests to apply universal jurisdiction to Israeli officials involved in war crimes and crimes against humanity have been either ignored or rejected, with argumentations that reinforce the Israeli narrative of being a democratic State upholding the rule of law.<sup>311</sup> Therefore, one may conclude that universal jurisdiction in this context is an undesirable tool, due to the estimated failure of an even application.

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<sup>304</sup> Abu-Odeh, “A Radical Rejection of Universal Jurisdiction”.

<sup>305</sup> US District Court for the Eastern District of New York, No. 04-2799, *Almog v. Arab Bank* (29 January 2007).

<sup>306</sup> Nate Raymond, Joseph Ax, “Arab Bank Settles US Litigation Over Attacks by Militants”, *Reuters* (14 August 2015).

<sup>307</sup> US District Court for the Southern District of New York, No. 05-10270, *Ra’ed Mohamad Ibrahim Matar et al. v. Avraham Dichter*, Complaint (7 December 2005).

<sup>308</sup> US District Court for the Southern District of New York, No. 05-10270.

<sup>309</sup> US District Court for the Southern District of New York, No. 05-10270.

<sup>310</sup> US Court of Appeals for the Second Circuit 07-2579-cv, *Raied Mohamad Ibrahim Matar et al. v. Avraham Dichter*, Decision (16 April 2009).

<sup>311</sup> See the judgment from the Spanish Court of Appeal (*supra* at 226), where the judges defended Israel’s democratic nature and praised its observance for the rule of law.

A useful suggestion is the one that, adopting a different perspective, does not consider universal jurisdiction as the main route to accountability. In this sense, the human rights lawyer Wolfgang Kaleck recognized the importance of universal jurisdiction, but yet pointed at its overestimated status, and at the necessity to use it alongside other remedies.<sup>312</sup> Kaleck proposes, in particular, three alternative or complementary tools to universal jurisdiction: territorial jurisdiction or active personality, in another State, regional mechanisms and civil suits.

The first proposal aims at celebrating the trial in a different State from the one(s) directly involved in the crime, but instead of doing so through universal jurisdiction, it gets to the same result by exploiting the traditional jurisdictional basis of a third Country, like the territorial or personality one. The mechanism is well exemplified through the CIA rendition cases, where third Countries were used as proxies to arrest, transfer or detain the suspects.<sup>313</sup> In the case of Israel's torture on Palestinians, however, there are no third countries involved in any stage: suspects are arrested mainly in the Occupied Territory and transferred to Israel by the Israeli authorities, wherefore it is unlikely to see a traditional basis activating the jurisdiction of a third State.

The second way consists in seeking justice through a regional instrument, as the European Court of Human Rights or the Inter-American Court of Human Rights. Also this remedy is not directly available, since there is not a regional instrument having enforcement or even pressuring powers on Israel.

Finally, Kaleck turns to civil suits in third States to ensure compensation and justice to victims. In the past, this happened mainly in the US through the Alien Tort Statute, which, as mentioned, has not represented a successful venue for Palestinian victims of abuses from the Israeli authorities. A similar strategy, gaining more frequency in the last years, is the one suing foreign companies, in the State of their headquarters, for their participation in international crimes: for instance, the Palestinian legal organization Al Haq, has been trying to obtain the prosecution of foreign companies providing services for the construction of the Wall, the demolition of Palestinian houses or the building of settlements;<sup>314</sup> Amnesty International, instead, has addressed Booking.com, Expedia,

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<sup>312</sup> Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", *Michigan Journal of International Law* 30, no. 3 (2009): 980.

<sup>313</sup> Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008": 965.

<sup>314</sup> See for instance: Maha Abdallah, Lydia de Leeuw, *Violations Set in Stone: HeidelbergCement in the Occupied Palestinian Territory*, Somo and Al Haq (2020). For a general overview: Marya Farah, Maha Abdallah, "Security Business and Human Rights in the Occupied Palestinian Territory", *Business and Human Rights Journal* 4, no. 1 (2019): 7-31.

Airbnb and TripAdvisor for their complicity in providing settlement expansion and for making profit out of international crimes.<sup>315</sup>

In 2020, the UN Human Rights Council issued a report on business activities related to settlements in the Occupied Territory, including 18 businesses domiciled in foreign countries;<sup>316</sup> while the list does not have legal implications, its impact is proved by the reaction of the Israeli Ministry of Foreign Affairs, which decided to stop issuing visas for foreign nationals employed by the UN Office of the High Commissioner for Human Rights.<sup>317</sup>

While the same logic could, perhaps, be applied to sue companies involved in the torture system intended widely (for example companies providing surveillance tools), it does not suit the prosecution of accomplices like judges or State attorneys.

Therefore, all together, the opportunities to effectively assess the responsibility of Israel's legal professionals for their complicity in torture are scarce. However, as argued by some commentators,<sup>318</sup> resorting to instruments like universal jurisdiction and the ICC still represents a desirable and necessary action.

In fact, through media coverage, all these tools have the effect of raising awareness both on the crimes committed against Palestinians, and on the unavailability of judicial remedies they face in the Israeli system. Moreover, as previously detailed,<sup>319</sup> some cases came to the point of practically impeding officials' international movements through *de facto* travel bans, which can be interpreted as both a signal and a cause of distancing on behalf of other States. From another perspective, several companies in the last decade have divested from Israeli operations linked to the Occupied Territories, and in particular to Israeli

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<sup>315</sup> Amnesty International, *Destination: Occupation - Digital Tourism and Israel's Illegal Settlements in the Occupied Palestinian Territories* (2019).

<sup>316</sup> UN Human Rights Council, *Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, Including East Jerusalem*, Report of the United Nations High Commissioner for Human Rights, 12 February 2020, A/HRC/43/71.

<sup>317</sup> Al Jazeera, "Israel Stops Issuing Visas to UN Human Rights Agency" (16 October 2020).

<sup>318</sup> See for instance: Raji Sourani, "The Palestinian Case at the ICC is Legal, Not Political", *Al Jazeera*, 5 December 2020; Ardi Imseis, Halla Shoaibi, "Palestine at the ICC: Prospects and Limitations", *Al-Shabaka: The Palestinian Policy Network*, 22 April 2020; George Bisharat, Jeff Handmaker, Ghada Karmi, Alaa Tartir, "Mobilizing International Law in the Palestinian Struggle for Justice", *Global Jurist* 18, no. 3 (2018); UNGA, "Experts Suggest Invoking Universal Jurisdiction among Legal Options to Address Israeli Settlements, as International Meeting on Palestine Question Continues", 8 September 2015, GA/PAL/1346.

<sup>319</sup> See *supra* IV.2.b: *Previous Cases of Universal Jurisdiction Dealing with Crimes Committed against Palestinian Victims*.

settlements,<sup>320</sup> and some banks and pension funds have taken steps to exclude companies from their investment portfolios, concerned about the legal and ethical implications of the activity performed.<sup>321</sup>

It is true that, despite the encouraging trends just highlighted, the overall situation on the ground does not seem to be significantly changed; however, the most relevant achievement of these legal battles is probably to be found in the contextual affirmation of truth and public condemnation, as a first step towards accountability, “a paramount need for Palestinians, given their subjugation to an on-going regime of widespread and systematic human rights abuse”.<sup>322</sup>

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<sup>320</sup> Amnesty International, *Think Twice: Can Companies Do Business with Israeli Settlements in the Occupied Territories While Respecting Human Rights?* (2019), 30-31.

<sup>321</sup> Amnesty International, *Think Twice*, 31-32.

<sup>322</sup> Karmi-Ayyoub, “Prosecuting Israeli Perpetrators of International Crimes under Universal Jurisdiction”: 126.

## Conclusions

The present dissertation explored the system of torture applied by Israel on Palestinians, and highlighted the key role jurists play in it.

The preliminary analysis of the Israeli institutions involved tried to explain the influence each of them has, or could have, in the mechanisms of State torture.

In particular, the High Court of Justice (HCJ) holds an extremely powerful position, due to its competence but also to its much celebrated independence and public support. However, as empirical researches proved, the Court is greatly reluctant in taking a critical position towards policies applied in cases classified as “security” ones. In the latter, the Attorney General (AG) holds an almost unsupervised authority, since the judicial review is very scarcely applied by the Court. Thus, if it is true that the HCJ is a judicial avenue open also to the Palestinians in the Occupied Territories, the fact that this area is almost completely subject to the rules of the military and/or security domain makes of the accessibility to judicial remedies through the Court only a formal one.

The other bodies meant to supervise and intervene on infringements of the rule of law and other democratic values, as the Commissions of Inquiry and the State Comptroller, are even less effective to this end. While proclaiming high respect for the rule of law and primary attention to human rights, their reports seem to fail to adopt a critical assessment of the executive’s action; instead, they seem to be the tool to indicate more formally accurate means to keep perpetrating the same actions. As the dissertation exemplifies, the most notorious example of this mechanism can be seen in the Landau Report – which suggested to keep using torture, but to enshrine it in a manual first –, but the same dynamic was repeated in more recent episodes, and also with regards to other international crimes.

As a consequence, the Israel Security Agency (ISA) becomes eventually the only real authority at the summit of the “security theology”. Throughout the years, the ISA’s paradigm has successfully taken over, transforming the whole Palestinian population in an “objective enemy”, and to conceal it behind a wall of a classification and management accessible only to the security authorities themselves. By contrast, the wall that physically confines the Palestinian population in the Occupied Territories, constitutes a tangible but penetrable barrier that, together with many others, serves as a *dispositif de sécurité*, granting a constant subjection to the occupying power. Torture lies amongst these security dispositives, and is somehow the extreme form of it, bringing the interrogees not only to

interiorize the gaze of surveillance, but also to experience a form of self-condemnation, where bodies hurt their owners, to the point of denying their own will.

Being an element in the realm of security tools, torture becomes part of bureaucracy, and is regulated and treated like any checkpoint, airport vetting, or strip search. Although it is used in way less recurrent situations, it is similarly applied in specific modalities and techniques, on a certain but over-reaching category of individuals, and through specific administrative procedures. Similarly, it does not aim to act upon a specific threat, but to scrutinize every potential threat to prevent risks that *might* arise. As a result, violence is routinized as an evil depicted as necessary by the security apparatus, tolerated by the Israeli population, and applied exclusively on Palestinians.

Parallel to the systematic management of torture, the institutions built a combination of mechanisms to systematically shield from prosecution those responsible of torture. Because Israel fervently depicts itself as a democracy, this does not happen through plain disregard or denial, but rather through legal mechanisms that dress State torture as a lawful tool.

Namely, the HCJ has been shaping a definition of torture that does not include the techniques used by the ISA, notwithstanding the fact that the same techniques were condemned repeatedly as torture by all the relevant sources in the international community. Through a different approach, when the methods of interrogations are too blatantly infringing national and international provisions, facts are mystified through biased investigation mechanisms and a denial of evidence, which are either made unavailable or rejected as unreliable.

When, exceptionally, the evidence provided are considered strong enough to bring the case in front of a Court, the interrogators can enjoy the justification of having perpetrated torture out of necessity. The necessity defense, which should in any case be ruled out for the cases of torture, is purportedly applied only to “ticking-bomb” scenarios; however, the analysis of the case-law provided proves that the defense is available to the perpetrators regardless the circumstances, justified by the security paradigm, that makes of all Palestinian interrogees “potentially-ticking-bombs”.

The State - mainly in the vest of the AG, but actually through a constant shaping that involves all the relevant institutions - realized a bureaucratic structure of guidelines and authorizations where torture can be used and not prosecuted. This process brings with it two major consequences: on one hand, it gives the application of torture and its un-prosecution a precise and certain framework, enshrined in normative sources, thus dressing it as a lawful action; on the other hand, it moves the framework from a constitutional and

legal ground, to the ground of judicial authority and eventually back to the executive, which becomes the author, ruler and comptroller of its own policy.

Even though the executive is the start and end point of State torture, the mechanisms that allow this circle to close without interference, and with an appearance of legality and democracy, are the legal and judicial ones just mentioned. For this reason, this dissertation raises the question: can the actions of the legal professionals, who progressively shape this framework, be translated in responsibility for aiding and abetting torture?

To provide an answer, a first reasoning is dedicated to better clarify in what ways legal professionals can be – and have been – considered responsible for criminal actions perpetrated by a State, thanks to their legal advice. The experience is drawn by the role of jurists in the Nazi regime and by the US experience with the post 9/11 policies and the *Torture Memos*.

While the first case resulted in a stark and substantive condemnation of the accused, for designing and implementing State policies that constituted international crimes, the second case was evaluated with a far more reticent approach. In fact, the authors of the *Torture Memos*, which defined and justified the use of torture against al-Qaeda suspects, tried to make of law and ethics two parallel realms. The main argument, similarly to the one used by the Nazi officials, was that the lawyers at the Department of Justice were merely serving the interest of the State, as their job required, and had no *Spielraum* to contradict the executive's policy.

Coming back to the case of Israel, the elements analyzed show that the Israeli judiciary *does* have appreciable *Spielraum*, and opportunities to intervene to prevent or punish torture. This happens to be particularly evident in the case of the AG: being independent from the Government and able to oppose it effectively, being subject to a very limited judicial review – especially in these matters –, and supervising even the security and military branches, the AG *de facto* holds the fate of the rule of law.

Turning to the mode of liability chosen, the analysis of aiding and abetting is based on an international criminal law perspective. Confronting the experience gathered from the WWII trials, the *ad hoc* and hybrid tribunals and the International Criminal Court (ICC), the dissertation provides a complete interpretation on the elements constituting this form of complicity. Applied to the case of the Israeli judiciary and its involvement in the crime of torture, the study finds that their responsibility as aiders or abettors could be established.

As a consequence, another question arises pertaining the possible avenues to ensure accountability for these actors, under international criminal law.

The first option considered is the ICC, a forum approached by Palestine since 2009. The Court delayed the opening of the case for many years and on different grounds, until, in 2020, the Prosecutor decided to open an investigation.

The case, however, appears slowed down and hindered on many levels, even at this early stage. In fact, the conclusion of the preliminary examination announced by the Prosecutor was not accompanied by an explicit opening of the investigation. Rather, the Prosecutor felt the need to request a further and unequivocal decision to the Pre-Trial Chamber (PTC), to assert the Court's jurisdiction over the situation in Palestine. While the confirmation, at this point and with these precedents, should have been almost automatic, the PTC took over one year to deliver its decision. Over this time, the question was approached by an unprecedented number of other parties – including victims, States, NGOs and scholars –, who engaged in a debate that touched on long-standing issues as Palestine's statehood, the Oslo Agreements and the territorial delineation of the Palestinian territory.

Even though the decision of the PTC was encouraging, for it affirmed the Court's jurisdiction and dismissed most of the irrelevant questions raised, the steps to be taken to establish accountability are still many, and the outcome hardly foreseeable.

Amongst all doubts on the efficacy of this Court, a particularly pertinent one for this dissertation lies on the fact that torture does not appear as properly addressed by the Prosecutor, who seems more focused on the crimes perpetrated – both by the Israeli army and Hamas – in the context of military operations in the Gaza Strip, and on the settlement activity in the West Bank. Cumulatively, these two leading points reveal a punctual approach, aiming at bringing justice over the most palpable and unmistakable crimes, that the international community has explicitly been condemning for decades. While this objective is still praiseworthy, the Prosecution seems to lack a more comprehensive approach, mindful of the wider frame of systematic and constant vexation of the Palestinian people, and the apartheid-like regime they are subject to.

Hence, it is not likely that the case, even if coming to a later stage, will address the responsibility of the jurists designing the criminal policies of “ordinary” torture.

To explore a different path to accountability, the dissertation concludes with the analysis of universal jurisdiction, and its applicability to the case at hand. Based on the precedents available, and on the political and diplomatic state of things, also this route does not seem to offer tangible outcomes in the near future. However, it is our opinion that universal jurisdiction constitutes an important leverage tool, to be used in conjunction with other

complementary remedies. In fact, besides the hope for different outcomes that are alimmented by the positive trend of the last years, the pursuit of universal jurisdiction offers several positive by-products. For example, even where prosecutions are not successful, they bring publicity and media coverage over cases that are otherwise less considered; they sometimes provide confirmation of facts – even if not getting to criminal accountability – given the strong evidence presented; they cause some States to take diplomatic stances – provoking for example *de facto* travel bans –, and some companies to divest from illegal enterprises, like the one surrounding the settlements in the Occupied Territories. Thus, somehow, these proceedings have a higher chance to diffuse a more comprehensive understanding of the situation.

If one wants to take a strictly technical approach, this work opens many questions to be further examined. For example: is it more suitable to classify Israel’s State torture as a war crime, a crime against humanity, or as one of the acts entailing the crime of apartheid? How will the ICC answer the potential questions on the admissibility of the case, or how will it overcome the refusal of States to cooperate in the execution of the arrest warrants and summons to appear it will issue? Is there a suitable forum, perhaps in the MENA region itself, that could be targeted for a successful application of universal jurisdiction? Or, keeping the focus on the role of jurists in perpetrating international crimes, is the lack of guidelines on legal professionals’ responsibility an issue to be solved? Should legal judgment be completely separated form ethical judgment, even when it comes to such atrocious ends?

However, the objective of this study is limited to highlight the relevance of the legal and juridical activity in the commission of mass atrocities, especially in the context of assertedly democratic States.

While some hold that legal professionals should be exempted from criminal responsibility, related to the acts of the State they work for, given their peculiar role and position, this dissertation wishes to hold the opposite view: that legal professionals are, in the case at hand, even more influential than political and military chiefs.

To fully understand this view, a very close understanding of the situation is needed. The Palestinian scholar Tareq Baconi talks about Gaza as a place where “[t]ragedy has become routinized”:<sup>1</sup> while this expression certainly captures the reality of a land besieged for 13

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<sup>1</sup> Tareq Baconi, *Hamas Contained: The Raise and Pacification of Palestinian Resistance* (Stanford: Stanford University Press, 2018), xii.

years and constant target of brutal military operations, it can also be applied to a wider context. The reality of Gaza should not be approached as dissociated from the rest of the Occupied Territories, but its peculiarity should not either wipe out the other aspects of the occupation, which equally pervade the West Bank and Gaza itself. Alongside the gruesome bombardments and shootings, a more subtle but constant destruction is making of tragedy a routine in all Palestinians' lives. This reality is the one that froze all the Occupied Territories in time, that made of both Gaza and the West Bank open air prisons, where the most basic actions have to be "permitted" to Palestinians by the Israeli authority. Life rolls out in what appears as daily normalcy, but only as long as individuals stick to the rule dictated by Israel. Crucially, all of the rules that, one piece at a time, deprive Palestinians of their fundamental freedoms and rights are defined by "laws". Under the Israeli occupation, law becomes the tool for the most outrageous form of violence: a denial of existence, dressed as legitimate because lawful.

Truly, the fact that the judicial system appears irretrievably unwilling and unable to deliver justice is often considered as an insurmountable obstacle, that constitutes a dead end in the quest for accountability. This work wishes to promote an opposite perspective: by acknowledging the inherent injustice of the Israeli legal framework, it underpins the need to make its authors and main agents the first target of accountability.

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