



The Public Committee Against Torture in Israel (PCATI)

Periodic Report: June 2008

No Defense:

Soldier Violence against Palestinian Detainees

THE PUBLIC COMMITTEE AGAINST

TORTURE
IN ISRAEL

The Public Committee Against Torture in Israel (PCATI) believes that torture and ill-treatment of any kind whatsoever, under any circumstances, are incompatible and inconsistent with ethicality, democracy, and the rule of law. PCATI was established in 1990 in response to the years-long government policy that enabled systematic use of torture and ill-treatment during GSS interrogations.

In September 1999, following lawsuits filed by PCATI and other human rights organizations, the High Court of Justice ruled against a number of methods of torture and ill-treatment that had been used to date. This ruling was a significant advance, but left an opening for the use of torture and ill-treatment in Israel. PCATI works towards the protection of detainees' and prisoners' rights, and the implementation of a complete prohibition against torture, as required by the values of ethics and democracy, and the provisions of international law.

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“How common is the phenomenon of beating shackled Palestinians prisoners?”

“Unfortunately I want to admit something that we are not fully aware of. These cases are not all that exceptional in their quantity. It is simply that some of them remain shrouded in silence. Some are also committed in more sophisticated and more criminal ways... These cases, in which Palestinian detainees are beaten by soldiers and police officers, happen occasionally, to my great regret. Many of them are not the subject of any complaint and are cloaked in various kinds of conspiracies of silence. Sometimes we only learn of them years after the event, and usually only through anonymous statements from Breaking the Silence and others, through the media, or by other means.”

Brig. Gen. Yossi Bachar, former commander of the Paratroopers Brigade, testifying at the trial of one of his soldiers being prosecuted for abusing a shackled Palestinian detainee, 11 April 2006.

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1. Introduction

This report describes the ill treatment of shackled Palestinian detainees by Israeli soldiers.¹ The goals of the report are: to describe the scope and frequency of this phenomenon; to emphasize its moral, legal, and practical gravity; to publicize the phenomenon; to examine the manner in which the military system and those responsible for the system address the phenomenon; to clarify the absolute prohibition against the phenomenon under Israeli and international law; and to demand the uprooting of the phenomenon by providing the relevant bodies with useful information and tools.

The report is based on the testimonies of Palestinians detained by Israeli soldiers and of soldiers who participated in arrests during the course of their military service; on information published in the media and provided by the Israeli army; and on the comments of military and political figures in Israel regarding the phenomenon.

The report is based on 90 testimonies received by the Public Committee Against Torture in Israel (PCATI) describing various forms of ill treatment that occurred during arrests of Palestinians in the period June 2006 through October 2007. These testimonies described various forms of ill treatment against the detainees. While the large number of cases is grave in itself, it reflects a much broader phenomenon. Many Palestinians abused during or after their arrest refrain from submitting complaints,² and not all those who make complaints do so through PCATI. Moreover, Processing of cases relating exclusively to the recent period, with the goal of emphasizing the urgent need for attention to this phenomenon, also reflects the presence of many additional cases of ill treatment of detainees. As will be illustrated in the report, the phenomenon of the ill treatment of Palestinian detainees by Israeli soldiers began long before 2006, and testimonies confirming its existence date back over many decades. Moreover, since the beginning of the second intifada the number of arrests has been unprecedented. Thousands of Palestinians are arrested each year;³ operations take place throughout the year and are executed by a large number of combat units in the Israeli military. Clearly, therefore, the cases discussed here are no more than the tip of the iceberg, reflecting a much broader, more common, and ongoing phenomenon that has been particularly severe over the past eight years.

Chapter One of this report offers a description of the phenomenon. We will distinguish between cases when detainees are abused immediately after their arrest; during transportation; and while being held at military bases prior to their transfer to the incarceration or other authorities. The phenomenon is seen to be general and comprehensive in nature, and not restricted to any particular time period, geographical area, or specific military unit. In order to illustrate the phenomenon, we will describe common forms of ill treatment of Palestinian detainees by Israeli soldiers. The division of the phenomenon into distinct stages is intended to highlight key weaknesses and opportunities to address the phenomenon; on the ground, ill treatment sometimes continues from the moment of arrest and through to the transfer of the

¹ Soldiers serving in the Border Guard also carry out arrests in the Occupied Territories, and detainees are sometimes abused during these operations. This report relates solely to the Israeli army in order to focus the examination and the systemic recommendations included in the report.

² Palestinians decline to complain for various reasons, including among others the restrictions on movement imposed by Israel; the negative attitude of security force personnel they encounter while submitting a complaint; and the tendency on the part of the authorities to prefer the versions of security force personnel involved in these incident rather than those of the complainants. See: **2007 Annual Report: Human Rights in the Occupied Territories**, B'Tselem, January 2008, pp. 28-29.

³ The General Security Service ("Shabak," hereinafter in this report: GSS) reports that some 4,000 Palestinians were arrested in the occupied West Bank during the period January – October 2007, and some 5,000 during 2006. See p. 12 in the document "2007 Summary: Data and Trends in Palestinian Terror" (in Hebrew): <http://www.pmo.gov.il/PMO/Communication/Spokesman/sbkspoke/shabter010108.htm>. These figures are similar to the total figures for arrests as quoted on the website of the IDF Spokesperson.

detainee from the military to another authority. As we will see, minor detainees are also subjected to soldier violence. We will also consider the phenomenon of the ill treatment of detainees by means of the Israeli military's assault and tracker dogs.

Chapter Two examines the provisions of Israeli law relating to the phenomenon. We will show that military orders, military law, and Israeli law applying in the Territories prohibit all forms of ill treatment of detainees absolutely and regardless of the circumstances, and regard the phenomenon with the utmost severity.

In Chapter Three we will describe the manner in which, despite the clear moral and legal severity of this phenomenon, the ill treatment of detainees is supported by a feeble enforcement system that is reluctant to initiate investigations or serve indictments. Among other sources, this chapter is based on relevant data received from the Israeli military.

Chapter Four examines the attitude of the Israel Defense Forces (IDF), the Ministry of Defense, and the Knesset to the phenomenon of the ill treatment of Palestinian detainees. It emerges that the military refuses to recognize the phenomenon of ill treatment of detainees, insisting that the cases involved are exceptional. This denial impairs the chances of addressing the phenomenon properly. Similarly, the clear impression is that both the Ministry of Defense and the Knesset have refrained from supervising the military on these matters; accordingly, these bodies share responsibility for the phenomenon and effectively support it.

Thus Chapters Three and Four describe the normative and practical defects that underpin the phenomenon of ill treatment. As emphasized in these chapters, all branches of the establishment have failed to confront this phenomenon. Even if the Israeli military does not want its soldiers to abuse Palestinian detainees, in practice the military is marred by grave and protracted failings on all practical levels relating to this phenomenon. The chief failing is the total absence of procedures and operational instructions concerning the treatment of detainees prior to their incarceration in a proper facility.

Chapter Five, the final chapter in the report, presents a series of practical recommendations to all the bodies involved in the phenomenon – the military, the Ministry of Defense, the Knesset, and the public. The recommendations outline ways to uproot the phenomenon of the ill treatment of detainees on the basis of the information presented in the previous chapters, as well as on Israeli and international law.

The phenomenon of ill treatment of detainees cannot be divorced from other phenomena relating to the ill treatment of force against Palestinians, such as harassment at the checkpoints and torture during interrogation. Nevertheless, this phenomenon deserves separate attention, both because of its unique characteristics and because of the need for an in-depth examination that can enable a tangible improvement in the situation. The first step in addressing and eliminating the phenomenon must be to acknowledge its existence. We hope that the mirror the report presents before the military and the public will advance recognition of the unpleasant truth that for many years Israeli soldiers have been abusing Palestinian detainees throughout the Territories on a routine basis. This recognition is a first and vital step toward uprooting the phenomenon.

2. Description of Ill Treatment at Arrest

The arrest of Palestinians by Israeli military forces is almost always accompanied by the use of force; this raises questions regarding the need for force and the extent to which it is applied. These factors vary according to the circumstances at the time of arrest; such situations may be open to different descriptions and interpretations. These circumstances are dominated by the broader political, legal, and value-based problem inherent in the continued presence of the Israeli military in the Territories and the ongoing Israeli control over the Palestinian civilian population.

The phenomenon described in this report, however, is not subject to interpretation and does not depend on any of the doubts or questions concerning the situation in the Territories. Once detainees no longer pose a threat to those executing the arrest, it is absolutely prohibited to harm them. At this point they are in custody and the soldiers are responsible to guarantee their safety pending transfer to detention or to another authority, or pending their release. The soldiers are responsible for protecting the dignity and physical integrity of detainees along with their other basic rights. Numerous testimonies show that as far as the arrest of Palestinians by Israeli military forces is concerned, the reality on the ground is the opposite: Israeli soldiers routinely expose Palestinian detainees to ill treatment and humiliation.

In order to assist the bodies responsible for the ill treatment of detainees in combating this phenomenon, we decided to analyze cases of ill treatment at three distinct stages, each of which has its own weak points that heighten the danger faced by the detainees: immediately after arrest; during the transportation of detainees; and at military bases and installations pending transfer to a proper detention facility.⁴

A. Ill Treatment Immediately Following Arrest

Soldiers often beat detainees during arrest shortly after shackling them. Many detainees are subject to *painful shackling*: the detainee's hands are shackled with plastic handcuffs that can only be tightened, and not released or loosened. In 30 of the 90 cases of ill treatment we examined, the detainees testified that they were subjected to painful shackling. The soldiers often leave the detainee shackled for a protracted period – frequently for many hours, which is painful and liable to cause permanent injury.⁵

Complaints of pain often provoke further abuse, as testified by Rami Mufid Jum`ah:

“... Inside the jeep I was attacked by soldiers who kicked me and hit my shoulders with the butts of their rifles after I complained that the handcuffs were causing me pain.”⁶

⁴ A “proper detention facility” refers here to a prison, an incarceration facility of the GSS, or an incarceration facility in the Territories intended for this purpose.

⁵ Even the official position of the State of Israel has recognized that “protracted shackling... is liable to cause injuries to the interrogee’s hands and legs.” See HCJ 5100/94, **Public Committee Against Torture in Israel et al. v Government of Israel, Head of the General Security Service, et al.**, para. 12. This comment applies even more sharply in the case of tight shackling and the use of plastic handcuffs.

⁶ From his affidavit dated 13 June 2007, taken by Attorney Maher Talahmi of PCATI.

An Israeli soldier who participated in numerous arrests in Hebron describes very similar behavior relating to arrests executed during the summer of 2006:

“[One of the soldiers] took him [the detainee], put him into the *Abir* [a vehicle used by the military]. Boom! He banged him onto the step. This guy wanted to cry, he couldn’t see anything, and they used to tighten the blindfold, I mean tighten it until his eyes bulged out. They would tighten the handcuff, one of the guys who used to go too far, so every time someone had to cut it off and put a new one on. He would tighten it on his legs, I’m telling you, he would take him by the legs and he would cry out ‘It hurts, it’s hurting me.’ He would say, ‘Good, it’s not hurting you for nothing.’ I’m telling you, he would close it and every time the guy cried he slapped him. If he cried then he would tighten the blindfold. He used to hurt them deliberately.”⁷

In response to requests from PCATI, the IDF Spokesperson was unable to provide any regulations, procedures, or orders relating to the use of plastic handcuffs. As we will see repeatedly in this report, the arrest operations executed by the military are characterized by the absence of guidelines regarding the treatment of detainees.⁸ Order No. 9810 of the Chief Military Police Officer discusses the use of shackles in detail, but solely with regard to detainees who have already been placed in a detention facility. This order emphasizes that “only metal shackles are to be used,” and that “the tightening of the shackles should be undertaken in such manner as to prevent injury to the detainee (particularly to blood vessels).” As we have seen, the fact that these provisions do not apply at all stages of arrest has regrettable ramifications.

A further practice is *violence and threats*. These sometimes form part of the impromptu interrogation undertaken by soldiers in the field, while in other cases they have no discernible function. Thus, for example, Samih Alhoh describes the events that transpired in his home in the Old City of Nablus on the morning of 26 April 2007 after Israeli soldiers entered the premises:

“They took me into one of the rooms in the house, made me squat down, and shackled my hands behind my back with plastic handcuffs. They blindfolded me and began to ask questions... One of the soldiers pointed a pistol at my head, cocked it, and told me that I had a pistol and that he wanted it. I told him that I did not have a pistol. They searched the house and found nothing.”⁹

Radwan Sweidan was arrested at his home in Nablus on 15 January 2007. He stated:

“... I told one of the soldiers that I was not hiding suicide attackers in my home. He took me into my room and began to interrogate me about incendiary devices. When I told him that I had no such devices and did not know any wanted persons or suicide attackers, he called three more soldiers.

⁷ From the testimony of a staff sergeant, stationed in Hebron through mid-2007. The testimony was forwarded by the organization Breaking the Silence.

⁸ PCATI submitted two series of questions to the IDF Spokesperson during the preparation of this report, the first on 20 October 2007 and the second on 17 February 2008. PCATI waited for a period of over six months for replies (during which time reminders were also sent). These are the “requests for information submitted to the military by PCATI” that are referred to in the report.

⁹ From his affidavit dated 1 July 2007, taken by Attorney Tagrid Shbeita for PCATI.

After slapping me twice on my face they came in and began to shout in Hebrew and to beat me with their fists and kick me on my head and mainly on my back and legs. This went on for several minutes and it was terrible.”¹⁰

“I told them again that I did not have anything. The officer took a knife out of his pocket, put it against my neck and said: ‘I’m going to kill you now.’ But when this threat failed to help them, he told the soldiers in Arabic, ‘Now break the house and burn it.’”¹¹

Ahmad Yassin, also from Nablus, describes his arrest on 10 July 2006:

“I was arrested by soldiers and Intelligence officers at Dir Sharaf cemetery... They threw me onto the ground on my stomach and began to kick me, particularly on my thighs... They led me to a car and suddenly one of the soldiers hit me on the middle of my back...

“The jeep must have been delayed, and while we were standing on the sidewalk they amused themselves by taking turns hitting my neck. They made me sit on the ground and one of them hit me hard on my left ear. I couldn’t feel my ear for about fifteen minutes. The jeep still had not arrived. They took me away from the road to a deserted area parallel to the road with my back to them. They threw stones at me and competed to see who could hit me on the head... Each of them threw several stones at me.”¹²

When the arrest takes place at a checkpoint, the detainees are at the mercy of the soldiers until they are transferred to a place of detention. In the small rooms at the checkpoint or in a concealed spot, many detainees are subjected to grave ill treatment.

A soldier who served in Hebron during a certain period between 2005 and 2007 relates:

“Two brothers went through the ‘pharmacy checkpoint,’ which is a kind of scanning machine. They went through and simply passed on. The machine beeped so they shouted at them to stop and come back, but they didn’t hear it or didn’t want to hear it. One of the guys there ran after him, grabbed him... there is this kind of metal pole there at the side... he pushed him in, beat him for about five minutes, and left. The boy [aged ten] went... he walked out of there after about fifteen minutes, unsteady on his feet.”¹³

Abdullah Salim, who was arrested on 26 December 2006 at the “Container Checkpoint,” suffered similar treatment:

“I was left at the checkpoint in the freezing cold and rain for almost three hours until an Israeli police patrol vehicle arrived... The soldiers who were

¹⁰ From his affidavit dated 20 February 2007, taken by Attorney Mohammed Abu Riya for PCATI.

¹¹ From his affidavit dated 10 October 2007, taken by Attorney Samer Sam’an for PCATI.

¹² From his affidavit dated 13 August 2006, taken by Attorney Uqah Loui for PCATI.

¹³ Testimony No. 89, p. 100, in the Breaking the Silence collection of testimonies from Hebron, 2005-2007:

http://www.shovrimshatika.org/UserFiles/File/Shovrim_Shtika_Heb_Int.pdf.

there beat me while I was blindfolded and my hands were shackled behind my back with plastic handcuffs. They beat me on my legs and buttocks several times with batons. Each time I protested at the abuse they responded by beating me. They also punched my face and particularly my mouth, which started to bleed, but this did not have the slightest effect on them.”¹⁴

B. Ill Treatment During Transport of Detainee

The transportation of detainees from the place of arrest to detention facilities, sometimes with intermediate stops, is a further stage of ill treatment and humiliation. We will again concentrate on the commonest forms of ill treatment, though these do not cover the full range of injuries described by the detainees.

Firstly, it emerges that the standard method of transportation of Palestinian detainees in military vehicles is on the floor of the passenger section of the vehicle. In almost all cases the detainees state that they were made to sit or lie on the floor of the vehicle or thrown onto the floor. The soldiers seem to regard this as a norm and may not even give any thought to the matter. Apart from the *inherent humiliation of being placed on the floor*, this practice also constitutes fertile ground for further ill treatment. In many cases *the soldiers place their feet on the detainee's body or head. Friction against the bare floor of the vehicle*, which is usually hot, leads to injuries and abrasions. Once again, the IDF Spokesperson could find no orders or procedures regulating the manner in which detainees are to be transported.

The circumstances in which detainees are transferred from the place of their arrest, as generally implemented by the military, facilitate the ill treatment. The detainee is closed up in a small space together with the soldiers; it is difficult to distinguish after the event between injuries caused during arrest and those caused during the journey; the soldiers travel in a group and a dynamic of humiliation and ill treatment often emerges; the commander usually travels alongside the driver and the soldiers are not subject to even cursory supervision; the detainee's voice is covered by the soldiers and the noise of the engine and in any case cannot be heard outside the vehicle; and there is not even the slightest fear of external supervision.

A combat soldier from the paratroopers patrol unit who participated in many arrest missions explained:

“The commander usually sits up front and is separated from the detail, who sits in the back. The detainee is together with the team. I started to hear that two guys from the team here used to hit [the detainees] and to slap and kick them here and there. I also heard about worse cases... I continued with the operational activities and everything was more or less ok. When we completed an arrest and were on our way back, at least when I was around, then there were all kinds of minor beatings and kickings... I put a stop to it and this led to a lot of tension within the team... What are you worrying about them for? The guy is a terrorist... And all kinds of comments like that... Later I realized that they would sometimes take a rifle bullet and put it on the guy's ear and twist it and then I didn't see [what happened]. The detainee would not shout because he was afraid... Basically it was just a matter of minor beatings, it wasn't what you usually hear about, guys really being injured and beaten.

¹⁴ From his affidavit dated 4 January 2007, taken by Attorney Fahami Awewi of PCATI.

Once we undertook an arrest in Nablus... We put him [the detainee] in the Abir and left Nablus... Suddenly we heard a bang as if someone had been hit real hard... Then everyone jumped up and we got out... and we see this guy and another one with the detainee outside the vehicles. The detainee has a pretty serious cut on his forehead.... Then everyone... says: No, he fell off the step of the Safari [a truck used by the military]. From the outset it all seemed pretty far-fetched... the guy was tied up with his hands behind his back. I think he had a cloth over his eyes too... Later we found out that this guy and another man from my team came to the Abir where the detainee was being held with soldiers from another team... and they asked for the detainee... they said they just wanted to take their picture with him... I gather they took his picture twice... then he stood next to the step of the Safari and the guy from my team stood on the step, which is at a height of 1.30 meters, and he just kicked the guy in the head from the step of the Safari...”¹⁵

Similar features emerge when `Abd-Al-`Aziz `Amariyah relates the events of his own arrest:

“... they shackled my hands behind my back with plastic handcuffs, blindfolded me with a strip of cloth, and put me into a military jeep that took me to Etzion base... While they were taking me to Etzion base they beat me in a painful and humiliating way. They punched my head and beat me on the back with the butts of their rifles. On the way they took me out of the military jeep and put me into an army truck, and inside the truck they also beat me. They kicked me all over my body and beat the back of my neck with their hands...

“When I got to Etzion base my hands were shackled behind my back and my eyes were blindfolded with a white strip of cloth. They dragged me off the truck because I couldn’t see anything and so I walked along the truck until I fell onto the ground because they did not warn me that the truck was high up and I was near the edge. I fell onto the ground on my face and knees and they jumped on me, kicking my back, stomach, and legs and punching my face until I got to the interrogator’s room.”¹⁶

Yusuf Sahali, who was arrested at his home in Balata refugee camp on 6 January 2007, also suffered ill treatment during transportation. When the jeep he was traveling in stopped at Shavei Shomron base, Sahali tried to look outside:

“A soldier in the jeep hit me on the back with the butt of his rifle. While we were traveling the soldiers asked my name, and then they would beat me for no reason. They beat my face and my nose and mouth bled. They also pulled me up and then my head hit the roof of the jeep, so I also cut my head and it was bleeding.”¹⁷

C. III Treatment While Detainee is Temporarily Held in Army Base

¹⁵ From the testimony of a combat soldier in the Paratroopers patrol unit who completed his military service in November 2005, the testimony was forwarded by Breaking the Silence.

¹⁶ From his affidavit dated 5 January 2007, taken by Attorney Fahami Awewi for PCATI.

¹⁷ From his affidavit dated 20 May 2007, taken by Attorney Maher Talahmi for PCATI.

Before being taken to GSS facilities or the Israel Prison Service, or being released, detainees are often held at makeshift detention facilities such as a room or container in military bases. The testimonies reveal that the pattern of ill treatment of shackled detainees continues at this stage.

Munsar Na`irat was arrested at Qabatiya Checkpoint on 31 March 2007. He states:

“... they put me into another jeep and took me to another base. They said it was Salem base. They dropped me off there for two or three hours. At this base I was put into a small room and they beat my legs. They put me on the floor. Then I felt one of the soldiers take something from the floor and beat me on my head and shoulders... Then they took me out into a concrete yard and tied my handcuffs to a concrete pole and made me sit on the ground and they beat me. Every hour or half hour they would beat me on the face...”¹⁸

Brig. Gen. Yossi Bachar, former commander of the Paratroopers brigade, adds that in one of many cases of the ill treatment of Palestinian detainees he took disciplinary action against an officer because the officer:

“... gave an order to tie one of these detainees to a fence because there was no vehicle to take the detainee. The detail had finished an operation and had not slept all night, and in the morning there was no-one to take him, so they just tied him to the fence by the entrance gate to the base.”¹⁹

Once again, the circumstances almost seem to “invite” ill treatment. No-one on the scene bears responsibility for the wellbeing of the detainees, who are often left for hours and even days outside or in makeshift conditions. Any soldier can wield authority against the detainee: during the transitional stays in military bases, Palestinian detainees are arbitrarily exposed to the abuse of any passer-by who happens to be wearing a uniform.

D. Protracted Ill Treatment

As noted above, the objective of our stage-by-stage description of the ill treatment is to highlight the inherent faults in this process and to compel those responsible to address this systemic problem and eliminate the practice. However, this division into separate stages must not obscure the fact that in many cases detainees suffer humiliation and ill treatment throughout the arrest process. It goes without saying that neither victim nor abuser make any such distinctions.

By way of example, `Iz-a-Din Waqad, who was arrested on 13 September 2006, was assaulted both in the vehicle used in the arrest and at the military base in which he was held:

“After they arrested me, the soldiers shackled my hands behind my back with plastic handcuffs and blindfolded me. The soldiers left me at the checkpoint for nearly an hour and then put me into a military jeep. In the jeep two soldiers who I managed to see through the piece of cloth they used to blindfold me attacked me and kicked me... They also threw garbage at

¹⁸ From his affidavit dated 28 May 2007, taken by Attorney Samer Sam`an for PCATI.

¹⁹ From his testimony at an evidentiary hearing in the trial of Private Nir, 11 April 2006. The IDF Spokesperson at the request of PCATI forwarded the minutes of the hearing.

me. I state that I can identify these two soldiers if I have the opportunity to do so...

“After ten minutes they put me in another jeep and transferred me to Shavei Shomron, where one of the soldiers I cannot identify took me into a room. He put me on a treadmill and turned it on, although my hands were shackled behind my back. I lost my balance and fell backwards, causing pain in my back, and the soldier would laugh at me.

“They left me handcuffed and blindfolded in this room until the next day. At about seven o’clock in the evening seven soldiers came into the room and stayed there until the morning. The soldiers who were with me in the room until the morning mocked and laughed at me, and each one pushed his fellow off of me.”²⁰

‘Abd-al-Hakim Qabani was arrested on 28 September 2006 in ‘Uqba refugee camp. He suffered ill treatment from the moment of arrest until he was removed from the vehicle in which he was transported:

“... they asked me to come out of my home and made me take off all the clothes I was wearing, except for my underpants... I went to a nearby fence and they handcuffed and blindfolded me. I walked about six hundred meters naked, handcuffed, and blindfolded.

“Then they put me into a vehicle that seemed to me to be a vehicle for transporting soldiers. There was one soldier in the vehicle and he had a police dog. He attacked me and beat me with his gun several times on my right shoulder and left thigh. Then he let the dog step on me while I was lying on my stomach on the floor of the vehicle. This went on for about fifteen to thirty minutes. Then they changed the vehicle and when I got out the soldier made me kneel on the ground, my face between the dog’s hind legs...

“After the interrogation they transferred me to a military jeep... the floor of the jeep was very hot. There were several soldiers in the jeep eating and singing, and they threw garbage and the remains of their food on me. When I told them that the floor of the jeep was very hot one of the soldiers would step on my back as I lay on my stomach on the floor of the jeep, so that my entire body touched the hot floor...”²¹

The case of Nidal Shataya from Kafr Salem, who was arrested in his home with two of his brothers on the night of 8 October 2006, is equally egregious:

“... After the soldiers searched the house and the entire building, they arrested me and my brothers... They put us into a military jeep using force and violence and shoves. They shouted at us and cursed us... They put us on the floor of the jeep, handcuffed and blindfolded. It emerged that they were taking us to Hawara base to the south of Nablus, where we were interrogated by Intelligence officers... The soldiers beat us while we were waiting in the outer yard. Every soldier that walked past us would beat and curse us. We

²⁰ From his affidavit dated 12 October 2006, taken by Attorney Maher Talahmi for PCATI.

²¹ From his affidavit dated 29 January 2007, taken by Attorney Fahami Shaqirat for PCATI.

were not allowed to lean or to sleep. Some of the soldiers said to us ‘we haven’t slept or rested so you also won’t sleep or rest...’

“Then they took us to Hawara military checkpoint... they put us on the floor in a small, dirty room next to the checkpoint. The soldiers handcuffed us very tightly and blindfolded us. My hands and eyes hurt a lot and we could not... stand this situation any longer. Somehow we managed to loosen the handcuffs a little.

“Then the soldiers came and started to beat us with their army boots and their weapons. The beatings were repeated three times. The first time it went on for about fifteen minutes; the second time was the same; and the third time it went on for more than ten minutes, continuously and without any interruption. We shouted out in a loud voice. The people who were passing through the checkpoint could hear us shouting... Then the Israeli soldiers dragged and pulled us along the road to the other side of the checkpoint, in the direction of Nablus, and they threw us on the road there. There were taxi drivers there who called for an ambulance and they took us to hospital. We were almost unconscious...”²²

Nidal and his brothers were released approximately ten hours after their arrest.

E. Ill Treatment Use of Dogs

One form of ill treatment that is not confined to any particular stage of the arrest process is the humiliation and ill treatment of detainees by means of the dogs used by the military.

Since September 2000, the military has increased the use of dogs in the Occupied Territories. The dogs are trained and operate under the Sting (“*Oketz*”) unit. The original purpose of the unit was to use the dogs in rescue operations.²³ The dogs are held at the checkpoints and military bases and accompany soldiers in numerous operations, including arrests. One soldier by the name of Michael who served as a team commander in the Sting unit was interviewed in an article on the NRG website. Michael stated: “Today, the dogs in the unit are trained for one of five capabilities: Assault, identification of explosives, scouting, weapons and ammunitions searches, or rescue and release.”²⁴

In a letter to the Judge Advocate General, Attorney Yaara Kalmanovich of PCATI noted two key aspects relating to attacks by dogs on Palestinian detainees:

“The... graver aspect is the phenomenon of deliberate ill treatment with the means of dogs. These cases... are shocking and they must be quickly and effectively eliminated.

“[In addition] the mere contact with the dogs may be terrifying and humiliating. According to Islam, the dog is an impure animal, and accordingly many Muslims feel humiliated and dishonored whenever a dog is close to their person or touches them... The soldiers... should

²² From his affidavit dated 13 November 2006, taken by Attorney Ali Darajma for PCATI.

²³ For example, see: Adi Shalem, **An Instructive Story**, NRG website: <http://www.nrg.co.il/online/35/ART/946/513.html>.

²⁴ Billy Frankel, **The Best Dog My Team Ever Had**, NRG website, 15 June 2007: <http://www.nrg.co.il/online/ART1/595/614.html>.

be required to keep the dogs in such a manner that they will not come into contact with the detainees whenever there is no tangible operational need for this...²⁵

In its reply to PCATI's questions, the military denied the allegations in the letter as quoted above. Regarding the interaction between the detainees and the dogs on their return from arrest, the IDF Spokesperson confirmed that "combat soldiers in the Sting unit travel together with their dogs in the combat vehicles," which are also used to transport the detainees. However, the Spokesperson adds: "During the entire journey there is no physical contact between the dogs and the Palestinian detainees."²⁶ Regarding injuries to Palestinians, including detainees, the IDF Spokesperson states that in recent years dogs have been used in thousands of tasks in the Territories; with the exception of just three cases, they have never attacked "innocent persons."²⁷

However, the testimonies of combat soldiers from the Sting unit regarding the manner of use of the dogs are inconsonant with the official responses. The soldier mentioned above by the name of Michael, who spent his military service in the assault track of the Sting unit, states that the dogs trained specifically for assault "are trained to seek humans using their scent." Another soldier with the rank of staff sergeant who served in the unit revealed that the assault dogs are not kept close by the combat soldiers, and are not as disciplined as the dogs trained to locate explosives; in fact, they "work completely independently." The soldier noted that these dogs have attacked people "more than once, because these are dogs – this is an assault dog that can get confused..."²⁸

In light of these testimonies it is difficult to take seriously the military's claim that the dogs are capable while working independently to distinguish between "innocent persons" and others. What history of "criminality" can the dogs be trained to distinguish? Moreover, even if a person is suspected of a serious offense this cannot justify their exposure to assault. According to the military's response, the legitimacy of the assault is based not on the extent of the threat posed by the potential detainee, but rather on the fact that he is assumed to be an offender by the detaining force.

Concern that the military's response may be marred by inaccuracies is heightened in light of an incident in which a soldier was assaulted by a dog from the Sting unit during an operation in Nablus in January 2004. The assault was described in the following terms on the Ynet website:

"The dog, which had been trained to charge on hearing gunfire, attacked the platoon sergeant, biting him on the palm of his hand... The operator of the Belgian shepherd dog from the Sting unit, who was a few dozen meters away from the incident, presumably did not have time to give his dog the order that might have prevented this tragedy..."

²⁵ Letter from **Attorney Yaara Kalmanovich** of PCATI to Brig. Gen. Avihai Mandelblit, Judge Advocate General, dated 31 December 2007.

²⁶ From the reply of the IDF Spokesperson to the inquiry from PCATI, 3 February 2008, para. 6.

²⁷ Yehonatan Liss and Arnon Regular, **IDF Dog Seeking a Wanted Person Bites Palestinian Boy**, *Ha'aretz*, 1 December 2005.

²⁸ See the soldier's affidavit, **50,000 Children**, on the Breaking the Silence website: <http://www.shovrimshatika.org/testimonies.asp?cat=17>.

In response to the attack, the bitten soldier shot the dog, injuring it in the leg. Despite this, the dog continued to attack the soldier until it was shot again by another soldier present on the scene.²⁹

The above description highlights three serious facts: **Firstly**, the Sting dogs are trained to attack on the basis of indicators such as gunshots or smells; these do not depend on an order reflecting human consideration. **Secondly**, the dogs move at some distance from their operators, alongside soldiers who are not trained to handle them and who do not always know how to control them. **Thirdly**, the dogs cause serious injury, and they are trained to a very high level of aggression and determination.

This impression is consonant with the information provided by Lt. Col. Arik, who served as the commander of the Sting unit in 2003: “The purpose of the assault dogs is to neutralize and attack hostile elements within any given territory... An assault dog who seizes the terrorist will not let him go.”³⁰ It is not difficult to imagine the level of terror caused by the contact with such a dog for a person who – by virtue of their being Palestinian and under arrest – constitutes a potential target, and all the more so if they are handcuffed and blindfolded at the time.

Yet despite all this, the military still insists on denying the clear conclusion from the testimonies of Palestinians and combat soldiers, and from the press articles: that the assault dogs it uses present a clear and present danger to any person in the vicinity who is identified as a target. PCATI has testimonies of events in which the children of those defined as “wanted persons” were assaulted, and of cases in which wanted persons who had already been shot and injured were attacked by dogs sent to their home. The testimonies presented here relate directly to the subject of the present report – the use of assault dogs against shackled detainees during various stages of arrest.

One such case is that of Jamil Shehada Ja`ub, a resident of a refugee camp in Jenin. Ja`ub was arrested while traveling to Ramallah. After being handcuffed and blindfolded, he was taken to a nearby olive grove and beaten severely by soldiers. During the abuse, he states, “a dog would bite us on our legs.” While giving testimony, Ja`ub lowered his pants and showed the attorney the signs of bite wounds on his right thigh.³¹

Abdullah Nablusi was arrested at his home in Nablus on 18 May 2007. He stated that after the soldiers threatened to slaughter and shoot him, they shackled him with plastic handcuffs, placed iron cuffs on his legs, and blindfolded him with a piece of cloth. He was then placed in a detention vehicle:

“...They threw me into an army vehicle. Between 10 and 13 soldiers came in with me. They put me on the floor of the army truck, but I could not lie on the floor of the truck because they placed a large dog on my back. I had seen the dog before when they brought it into the house while they were searching it, when they made a mess

²⁹ Hanan Greenberg, **Mourning in the Sting Unit: Dog Who Attacked Soldier Is Shot and Killed**, Ynet, 1 January 2004, <http://www.ynet.co.il/articles/0.7430.L-2852568.00.html>.

³⁰ Itai Asher, **A Dog's Heart**, NRG website, 18 April 2003, <http://www.nrg.co.il/online/archive/ART/466/105.html>.

³¹ From his affidavit dated 15 August 2006, taken by Attorney Mohammed Abu Riya for PCATI.

there. I am very scared of dogs, so imagine that they put it on my back and every so often I could feel its face against my neck...³²

“... My hands were shackled behind my back. I was sitting on the floor of the truck bending forward, and I bent over further because of the dog, so the handcuffs hurt me even more. I kept shouting at them to take the dog off me and all the soldiers mocked me and laughed at me, amusing themselves by scaring me with the dog. One of them told me that the dog didn’t usually harm people, but he would ask it to eat me... In the middle of the journey, after yelling a lot, they moved the dog to my legs. I sat on the floor of the truck, my legs shackled in front of me and my hands shackled behind my back. The dog sat on my legs, pinning them down to the floor. It was really painful with my legs shackled and a large, heavy dog [sitting on them]. The dog barked and growled.”³³

Mohammed Jalab from Tulkarem refugee camp was arrested on 21 March 2007 at a checkpoint between Qalqilya and Tulkarem. According to his testimony:

“... They took me into a room where there were [male] soldiers and one female soldier and she had a dog she talked to as I sat on the chair, handcuffed and blindfolded. The dog would walk around me and when the soldier spoke to him he would attack me and bark. I didn’t understand what the soldier said, but [I realized that] she said to the dog, ‘Arab, Arab,’ and then it would attack me.

“The dog didn’t bite me; I guess they had muzzled it. I felt the muzzle when it attacked me and touched me. I asked to be allowed to pray. After refusing, the woman soldier said, ‘Well then, go ahead and pray,’ and they made room for me to pray. I asked them to unshackle me so that I could pray but they refused. As I began to pray the woman soldier talked to the dog again and it began to attack me from the front and the back as I prayed.”

In conclusion, as Attorney Kalmanovich wrote to the judge advocate general, the military use the dogs in manner that exploits them “... to assault or to humiliate civilians and detainees, thereby committing an offense of the maltreatment of a person held in custody in violation of Article 65 of the Military Justice Code, 5715-1955.”³⁴

PCATI contacted the IDF Spokesperson and asked the following question: “Are there any explicit orders or procedures relating to the subject of contact between dogs and Palestinian detainees?”³⁵ In its reply, the Spokesperson mentioned just one procedure: “The Sting dogs are muzzled over the mouth at all times while traveling in vehicles, so that there is no possibility of injury to a Palestinian detainee or to a soldier in the operational force.”³⁶ The Spokesperson failed to respond to a follow-up question inquiring whether there are any additional orders of procedures relating to “the use of dogs by the military during and after arrest.”³⁷ In the absence of relevant procedures, it is not difficult to understand how the cases detailed above can occur. This situation creates fertile ground for the use of the dogs to abuse detainees.

³² From his affidavit dated 24 June 2007, taken by Attorney Tagrid Shbeita for PCATI.

³³ From his affidavit dated 10 October 2007, taken by Attorney Tagrid Shbeita for PCATI.

³⁴ In her letter to the judge advocate general, see note 25 above.

³⁵ Request for information submitted by PCATI to the IDF Spokesperson, 20 October 2007, para. 9.

³⁶ Reply of the IDF Spokesperson to the inquiry from PCATI, 3 February 2008, para. 6.

³⁷ Request for information submitted by PCATI to the IDF Spokesperson, 17 February 2008, para. 2.

F. III Treatment of Minors

A further practice that is not restricted to any particular stage of the arrest process is the ill treatment of minors. The 90 testimonies that form basis of this report include complaints from minors – Palestinians under the age of 18 who were the victims of ill treatment by soldiers after their arrest.

Israeli law and the Convention on the Rights of the Child define a “minor” as any person who has not yet reached the age of 18.³⁸ In some of the provisions of the military orders applying in the Territories, a minor is defined as a person who has not yet reached the age of 16; youths aged 16 and 17 are tried as adults.³⁹ However, the military law in the Territories cannot derogate from Israeli law. If a person abuses a child who has not yet reached the age of 18 – even if that child is a detainee who is a resident of the Territories – the offense of ill treatment of a minor will have been committed in accordance with the Israeli penal code. The Military Court of Appeals has also taken the position that the fact that a victim of torture is a minor constitutes an aggregating factor justifying a harsher penalty against the abusing soldier.⁴⁰

Minors enjoy special protection in Israeli law. The best interests of the child are considered the overriding principle that should guide the actions of the authorities and the relations between parents and their children.⁴¹ Protection of the child is clearly reflected in the range of criminal prohibitions concerning injury to children. These prohibitions are broader than those pertaining to offenses against adults; they also criminalize humiliating and causing psychological injury to a child, as well as failure to attend to a child’s needs. The penalties for such violations are particularly severe. The law also imposes an obligation on any person to report an offense committed against a minor, if the person has reasonable grounds to believe that a person in a position of authority injured the minor.⁴² In addition, Israel is party to the Convention on the Rights of the Child, which establishes that the “best interests of the child” will be a primary consideration in all actions concerning children, and that the state is to ensure such protection and care as is necessary for their well-being; that all measures shall be taken to protect the child from physical or mental violence, exploitation, or ill treatment; that a child deprived of liberty shall be treated with humanity and that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment; and that in an armed

³⁸ Article 3 of the Legal Capacity and Guardianship Law; Article 1 of the Youth Law (Adjudication, Punishment and Methods of Treatment), 5731-1971; Article 1 of the Convention on the Rights of the Child. Some of the provisions in the Geneva Convention relate to a child up to the age of 15.

³⁹ Adjudication of Young Offenders Order (West Bank Area) (No. 132), 5727-1967. This order establishes that a child who has reached the age of 12 bears criminal responsibility (as is the case in Israel) and includes special rules regarding the punishment of youths under the age of 16. The determining age is the defendant’s age at the time of sentencing. There is no separate system of military juvenile courts.

⁴⁰ For example, see A/128/03, 146/03, Chief Military Prosecutor v Rosner and Lieberman, ruling dated 21 August 2003, para. 14.

⁴¹ This approach is seen with regard to punishment, custody, migration, education, adoption, hospitalization, and other aspects. See: “The principle of the best interests of the child, which dominates any other aspect in the relations between parents and children as viewed by the law,” in AA 27/06, **Anonymous v Anonymous** (unpublished, ruling dated 1 May 2006), para. 11 of the ruling of Judge Arbel. Legislative provisions relating to the good of the child may be found in the Legal Capacity and Custody Law, 5722-1962 (Articles 17, 22-25, 69) and in additional laws. The principle derives from case law.

⁴² Article 368D of the penal code. A person holding a detained minor may be considered to be “responsible” for the minor.

conflict the protection and care of children shall be ensured by all possible means in accordance with international humanitarian law.

International humanitarian law protects civilians against violence or threats of violence. A belligerent or occupying force must ensure that civilians are treated humanely at all times; an absolute prohibition applies against cruelty and humiliating or degrading treatment.⁴³ Special protections are granted to children in an armed conflict: “Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.”⁴⁴

Despite all the obligations detailed above, the clear impression is that when arresting and detaining minors, soldiers do not exercise special caution; in some cases, as the disturbing testimonies suggest, they may even exploit the children’s weakness. This suspicion is supported by the testimony of a soldier with the rank of staff sergeant:

“One day there was some kind of disturbance... and I went in with the jeep and saw the youth running toward the house throwing a block at us, and there were burning tires and a real mess... I took him out of the house and arrested him and took him to the post, something I am permitted to do, and I was real mad, real mad, and I could already tell I was going to explode. And when I got to the post I put him in the booth... and when I put him in the booth and went to take off my battle vest and wash my face, I told the guard to watch him. We took him and blindfolded him according to the usual procedure. When I came back I saw a group of four or five soldiers laying into him, hitting his face, throwing those heavy telephones (military field phones) at him, just taking them and throwing them at him, and he was this 15-year old kid who had been throwing stones...

Look, everyone knew, the deputy company sergeant and the commanders – they all knew and some of them had no problem joining in... What’s really amazing is that the same guy who could do something really humane – like for example say there is a curfew and you see old women aged 90, so you take them in the jeep... and take them to hospital, because it’s two old women aged 90 and they’re not going to do anything, which is a real fine and human thing, but then on the other hand [the same soldier] can take a 15-year old boy and beat him up and take out all your aggression on him after you haven’t slept or eaten or showered for two weeks and people are shooting at you all the time and everyone’s on top of each other all the time, so you just take a 15-year old kid and take out all your anger on him...

I saw the kid that they were beating up and I just went over there and threw them off, and took the kid for a medical check. The doctor examined him. The boy was shaking and hugged me because if it hadn’t been for me... he

⁴³ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 3 (the article appears in all four Geneva Conventions and reflects international custom law that is binding in any armed conflict) and Article 27.

⁴⁴ Article 77(1) of Protocol I to the Fourth Geneva Convention of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, dated 8 June 1977; Israel is not a party to the Additional Protocol. The Fourth Geneva Convention, 1949, includes a series of provisions relating to the special treatment of children in such areas as evacuation, education, nutrition, medical treatment, and so forth – Articles 14, 17, 24, 38, 50, 94.

just came over and hugged me and I just took him and you know what? He just shook like a leaf blowing in the wind.”⁴⁵

This case is just one of many. In February 2008, Ynet reported that three soldiers from the Haruv battalion had been arrested on suspicion of abusing two Palestinian youths at Shavei Shomron base. The charge sheet stated that “three soldiers with the rank of staff sergeant were charged with the task of guarding detainees who were blindfolded and handcuffed in the command room. At some stage two of them slapped and hit the Palestinian youths on their shoulder, while the third looked on and laughed... Two of the soldiers then hit the detainees strongly on the back of their head, while shouting at them to ‘shut your mouths.’ One of the soldiers then placed a working convector heater close to the face of one of the Palestinians and said, ‘He’s going to be hot now.’... During the incident the soldiers beat the detainees hard with the handcuffs... Throughout the entire incident the defendants cursed the complainants and kicked their thighs and arms.”⁴⁶

The victims’ affidavits describing the ill treatment they experienced during their arrest corroborated the soldiers’ testimonies. `A., aged 16½, was a 10th grade student in the summer of 2007. He was arrested and shackled with plastic handcuffs for approximately twelve hours:

“My mother woke me up and told me that the soldiers had come to take me... The soldiers shackled my hands behind my back with plastic handcuffs real hard and they also blindfolded me before they took me out of my home. I complained all the time that the handcuffs were very tight and my hands were hurting. The soldier scolded me and told me to shut up... When they took off the blindfold at Hawara I saw that my left hand was real swollen and had turned blue, and where the handcuff was fixed to my wrist there was a big red swelling. My right hand also hurt me and it was red where the handcuff was fastened, but that hand wasn’t swollen.

Throughout this time and while I was at Hawara... and all night until the next morning, I did not have any food or drink. My friends asked to go to the bathroom but they did not let them.”⁴⁷

M., an 11th grade student, was arrested at the beginning of 2007, two months after he turned 17. As is often the case, he was arrested at his home at night:

“The soldiers arrested me and my brother Raed, who is 19. They shackled our hands in front of our bodies with plastic handcuffs, which they fastened real tight and they blindfolded us with cloths. Then the soldiers put us in a military jeep and made us squat like frogs on the floor of the jeep. On the way, the soldiers – there were about twelve of them – shoved us with their legs and made fun of us. One of the soldiers would hit me on the head with the butt of his rifle – not hard blows... The soldiers took us to the DCO [District Coordination Office] where they held me and my brother and

⁴⁵ From the Breaking the Silence website:
<http://www.shovrimshatika.org/testimonies.asp?cat=17>.

⁴⁶ Hanan Greenberg, **Charge: Three Soldiers Committed Abuse; One Put Heater Next to Detainee**, Ynet, 12 February 2008, <http://www.ynet.co.il/articles/0,7340,L-3505577,00.html>.

⁴⁷ From his affidavit dated 19 September 2007, taken by Attorney Tagrid Shbeita for PCATI.

another detainee from the neighborhood in the yard of the DCO, close to the gate, in the freezing cold without agreeing to give me water when I asked.”⁴⁸

F. was aged 17 at the time of his arrest at the beginning of 2007. He testified:

“... After school ended and I was on my way out, I tried to get a taxi to take me home... Before I got to the taxi, I suddenly ran into some guys who were throwing stones and the Israeli soldiers and the soldiers were firing tear gas... I went down a side street and there were soldiers there. I stopped in my tracks. The soldiers took me and began to beat my left leg with their weapons. They also hit my right eye. The soldiers went on beating me on all parts of my body. Then the soldiers started to drag me along the main street. They dragged me about twenty meters until I got to the middle of the street, and they left me lying there in the middle of the street for almost half an hour. Then they made me stand up... When they saw that I couldn't stand up they brought the army jeep and put me inside, and they took [me] to the police station at Jabal Mukabar... [where] they beat me again all over my body... After the doctor came he asked them to send me for x-rays and the x-rays showed that I had three fractures in my left leg. They told me that I would have to have an operation.”⁴⁹

The harsh treatment of minor Palestinian detainees forms just one link in a chain. The conditions of arrest, judging, and incarceration also fail to meet accepted legal and moral standards in the State of Israel. Thus, for example, the Yesh Din report shows that Palestinians under the age of 16 are prosecuted as adults under the military law applied in the Territories by Israel, since there are no military juvenile courts; as with adult detainees, minors are only rarely released from detention; and in the hearing, neither prosecutors nor judges generally make any reference to their age.⁵⁰ Accordingly, the ill treatment of minor Palestinian detainees constitutes the most extreme manifestation of a broader phenomenon whereby the various state authorities that implement the occupation routinely treat minor detainees as adults, ignoring the legal and human obligations to ensure special safeguarding and protection for those who have not yet reached the age of eighteen.

As part of PCATI's request to receive information, the IDF Spokesperson was asked to clarify whether any special orders or procedures exist regarding minor detainees.⁵¹ The response from the Spokesperson did not include any mention of this question. The failure of the military procedures to distinguish between adults and minors is consonant with the reality that emerges from the testimonies. The military orders its soldiers to arrest minors without any special consideration and without monitoring or special guidelines. The grave consequences of this action can be anticipated in advance.

⁴⁸ From his affidavit dated 29 March 2007, taken by Attorney Maher Talahmi for PCATI.

⁴⁹ From his affidavit to Attorney Shirin Nasser from the organization Nadi Al-Asir, 14 February 2007.

⁵⁰ The report was based on over 800 observations undertaken by the organization's volunteers in the hearings of military courts in the Territories. See: Lior Yavne, **Backyard Trials**, Yesh Din, December 2007, pp. 119-127.

⁵¹ Request for information submitted by PCATI to the IDF Spokesperson, 17 February 2008, para. 2.

G. The Scope of the Phenomenon

The phenomenon of the ill treatment of Palestinian detainees after their arrest is not confined to any particular military unit or geographical area. The ninety testimonies on which this report is based describes instances of violence and humiliation from all the cities of the West Bank and from a large number of villages; from the military bases of Dotan, Bet El, Salem, Etzion, Shavei Shomron, Tsufin, and Ofer; from checkpoints close to Jerusalem and Nablus; on the way to the DCO in Tulkarem, Etzion, Salem, Dotan, Kiryat Arba, Kedumim, and elsewhere. The testimonies of soldiers and the press articles mentioned in the report also reflect the wide dispersion of the cases – from the Binyamin brigade camp, from Hebron, from the outskirts of Nablus and a base near Nablus, from the Shavei Shomron base, and along roads. The cases revealed in the articles and in the soldiers' testimonies also show that the problem of ill treatment is not confined to one or two military units. The abusers come from the Duchifat, Haruv, and Paratroopers battalions and from the Paratroopers patrol unit, from the military police, and from the Givati brigade. As noted above, these data merely offer an indication of a much broader phenomenon; it can be assumed that the dispersion of cases is even wider.

The ninety cases examined here were selected from among complaints received by PCATI, relating solely to arrests executed from the second half of 2006 through October 2007. However, in the testimony of the combat soldier in the Paratroopers quoted above, we saw that the ill treatment of shackled detainees was also common practice during 2005. In addition, during the period 2005-2008 PCATI has referred 36 additional complaints to the military prosecutor relating to cases of ill treatment of detainees not covered in this report. A chapter devoted to this subject in the **B'Tselem** report "Absolute Prohibition,"⁵² relates to a sample of 73 Palestinians arrested between July 2005 and January 2006. The report finds that 49 percent of these detainees suffered at least one form of injury between the time of their arrest and their arrival for interrogation. Similar testimonies are available relating to earlier years.⁵³ A clarification of the roots of this phenomenon must go back many years.⁵⁴ Once again, therefore, we see that the phenomenon cannot be limited to any particular period, and does not necessarily constitute a response (whether localized or systemic) to any specific incident.

In a report on Israel Radio regarding two cases of ill treatment of Palestinian detainees, military affairs correspondent Carmella Menashe agrees that this is a phenomenon rather than a localized incident:

"How can it be that we have been in the Intifada for 20 years, we have been involved in these operations in the Territories for 20 years, and these events

⁵² Lein, Yechezkel, **Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees**, B'Tselem, May 2007, Chapter 2, pp. 25-32.

⁵³ See, for example, the conviction (which is currently the subject of an appeal) of Lt. H. for beating a Palestinian detainee – case 63/06/A; the confession by Corporal V. of kicking a shackled and blindfolded detainee – case 274/06/MR – <http://www.aka.idf.il/patzar/klali/default.asp?catId=58094&docId=62132>.

⁵⁴ By way of example, see the case of Col. Yehuda Meir, commander of the Nablus Division in 1988, who ordered that the bones of twelve shackled Palestinians be broken, as well as documentation from the same period describing the beating of shackled Palestinians in Hebron: Beer, Yizhar, *The Normalization of the Exceptional*, in: Menuhin, Yishai (ed.), **On Democracy and Obedience**, Yesh Gvul and Siman Kriah Books, Jerusalem, 1990, pp. 171-182; the testimony of a colonel in the Israeli military regarding an order to beat detainees in the early 1990s – <http://www.soldierstestimony.org/Israel/1987-1999/Document.2004-07-18.5702>; and testimonies regarding the second intifada: www.shovrimshatika.org.

keep repeating themselves and ... no-one is bothered... And this is the morality of the IDF, these are the most basic values to which soldiers should be educated from the first day they join the army, it isn't [a matter of] a Palestinian, that has nothing to do with it – it is about normative behavior, it's the most basic things... The main question is [how] a soldier in the IDF comes to the point that he abuses, humiliates, and photographs it, and this is the key question that the military authorities must deal with quickly, and according to the military figures there is an increase now in the number of complaints by Palestinians. And I can tell you that there are many complaints that are not received and there are behaviors and cruelties that are not published, and the Palestinians don't go to complain about every cruelty or every minor blow they get from some soldiers in the Territories... and they do not do enough [about it], it is some kind of disregard for the lives of Palestinians.”⁵⁵

Col. (ret.) Gadi Amir, who formerly served as the head of the military's Behavioral Sciences Unit, was interviewed in the same report. His comments reinforce those of Carmella Menashe:

“The man phenomenon that occurs is the dehumanization of the enemy, that means that the enemy is regarded as an object... and if he is an object, I can do anything I want with him... What actually happens through a long process, unfortunately, is that we become jaded and phenomena that we once considered horrifying we now seem to have become accustomed to... Today it doesn't reach the headlines, it doesn't interest anyone – another Palestinian who was hit or beaten, it just passes over us, nothing happened, it doesn't count. The humiliation of a Palestinian doesn't count... They [the soldiers] go through some kind of process, I would even say some kind of dynamics, whereby they create norms that enable them to cope with the situation and also enable them to create a very specific kind of language and cohesion.”

For its part, the military establishment refuses to recognize the phenomenon, and by so doing it encourages and reinforces the phenomenon. In the following chapters we will review the legal prohibitions against the ill treatment of detainees; the ramifications of these prohibitions; and the manner in which the different systems address the phenomenon – the enforcement system within the military, the military command echelons, the Ministry of Defense, and the Knesset.

⁵⁵ On the program **Another Matter**, Reshet Bet, 29 January 2008, 09:11.

3. Ill Treatment After Arrest – The Israeli Law

“Ill treatment” is the term that springs to mind when examining the attacks by soldiers on shackled detainees described in this report. Israeli military law has indeed established a specific offense of “ill treatment.” This offense prohibits the beating or other abuse of any person in the soldier’s custody. A soldier committing ill treatment is liable to three years’ imprisonment; if the offense is committed in “aggravating circumstances,” the penalty may be up to seven years’ imprisonment.⁵⁶

This report will not examine the question as whether such attacks may be defined as “torture.” Such a definition depends on the deliberate nature of the abuse; the severity of the suffering endured by the victims; the presence of an improper motive on the part of the abusers; and the causing of the attacks by or with the consent of a public employee. It may be noted, however, that in a significant number of the cases on which this report is based, and in many of the instances quoted here, the abuse indeed amounts to “torture.”⁵⁷

A. What is Ill Treatment in Military Law?

The military offense of ill treatment may be committed by a soldier against another soldier or against a person other than a soldier who is “in custody for which the soldier is responsible.” The offense against a person other than a soldier is characterized by the denial of the victim’s liberty: The victim’s fate rests with those who are abusing him, and he cannot escape or resist. One question that arises regards the point in time at which a detainee is considered to be “in custody for which the soldier is responsible,” as required in the definition of the offense of ill treatment. A further question, to which there is no obvious answer, is the type of injurious behavior toward a detainee that reaches the level of “ill treatment.”

The Military Court of Appeals has taken an expansive approach in terms of the required attitude of the abusive soldier toward the person held in custody, noting:

“The protected interest of guarding the dignity of detainees, even if these are suspected of grave crimes, and of refraining from oppressing and humiliating them unnecessarily, demands that a person under the supervision of soldiers who have raided his home during the course of an operational action and arrested him, as in this case, be considered to be under their custody.”⁵⁸

In accordance with this approach, the military courts have considered any soldier who has arrested a person, detained him at a checkpoint, or accompanied him as a soldier responsible for the custody of the detainee. The relationship of dependency between the detainee and the soldier, who can act as he chooses regarding the detainee, creates the danger of ill treatment. The purpose of this offense is to restrict the power of the soldier vis-à-vis the detainee subject to his authority and mercy. As the Military Court of Appeals has noted:

“A clear characteristic of ill treatment is a situation in which the victim is in a position of inferiority or dependence vis-à-vis the person committing offensive actions against him. The discrepancy of powers and status between the person wielding control and authority and the person lacking the ability

⁵⁶ See: Military Adjudication Law, 5715-1955, Article 65.

⁵⁷ This definition requires reference to international law. For further details, see **Absolute Prohibition**, B’Tselem (note 53 above), Chapters 1-2.

⁵⁸ 63/06/A **Nir Haimowitz v Chief Military Prosecutor**, para. 10 (unpublished, 19 June 2007).

to resist leaves the victim defenseless against the abuse of the power held by the person in authority.”⁵⁹

The approach that the prohibition against ill treatment serves as an important barrier to the danger inherent in a hierarchical and power-based military system that force will be exercised in an arbitrary and unrestrained manner also informs the interpretation of the Military Court of Appeals regarding the definition of the concept of ill treatment. A discrepancy of power between abuser and victim; the fact that the victim is helpless and defenseless; and the humiliation involved in the use of violence through the abuse of discrepancies of power are among the hallmarks of the offense of ill treatment as interpreted by the court.⁶⁰

The Military Court of Appeals has not yet answered the question as to the minimum threshold distinguishing ill treatment from the lesser offense of assault, or the question as to whether a soldier who beats a detainee has necessarily committed the offense of ill treatment. However, the distinction between ill treatment and other offenses of violence has almost no impact on the classification of the cases forming the basis of this report.

Exploitation of discrepancies of power exists whenever a soldier uses violence and acts in an arrogant manner against a shackled, often blindfolded and defenseless detainee, denigrating his human dignity. The types of violence that characterize the cases on which this report is based – from placing feet on the body of a detainee who has been forced to lie on the floor of an army vehicle, through photographing a shackled detainee in embarrassing poses, and on to full-fledged beating – almost always reflect a conscious intention to humiliate the detainee, generally in full view.⁶¹

B. Alternative offenses

It is prohibited in any case for soldiers to assault detainees; the criminal nature of such actions is not confined to the specific military offense of ill treatment. Additional military offenses may also apply to such actions, including: Deviation from authority liable to endanger the life or health of another; the transgression of provisions and orders relating to arrest or to the holding of a person in custody; and offenses derived from the behavior of a soldier while committing a specific offense, such as unbecoming behavior and failure to observe binding military instructions.⁶²

⁵⁹ 87/05/A **Nethanel Sofer v Military Prosecutor**, para. 47 (unpublished, 27 March 2006). Quotation marks were deleted referring to the ruling of Justice Beinisch in CA 1752/00 **State of Israel v Eran Nakash** *Piskei Din* 54(2) 80. The ruling relates to hazing and cruel exercises that led to the death of a soldier.

⁶⁰ 63/06/A **Nir Haimowitz v Chief Military Prosecutor**, paras. 8-9 (unpublished, 19 June 2007). This interpretation of the offense of ill treatment, which emphasizes the humiliating attitude and the inherent inferiority of the victim, is derived from rulings of the Supreme Court concerning the offense of ill treatment against a minor or defenseless person in accordance with Article 368A of the penal code. However, the Military Court of Appeals seems to place special emphasis on the purpose of restricting arbitrary power.

⁶¹ In the above-mentioned ruling in the **Haimowitz** case, the Military Court of Appeals noted the fact that the detainee was kicked as well as hit and that the violence was exercised in full view of others as characteristics of the humiliation inherent in this case that epitomize the offense of ill treatment. **Ibid.**, para. 9.

⁶² See Military Justice Code, Articles 72, 115, 130, and 133 respectively.

In addition, the regular offenses established in the penal code apply to everyone in Israel, including soldiers serving in the army. In almost all the cases in this report, the soldiers committed the offense of assault or assault in aggravating circumstances (including together with others, or through the use of firearms), in addition to the military offense of ill treatment; these civilian offenses relate to articles 378-382 of the penal code. Many of the cases also reflect other offenses of violence under the penal code, such as injury, battery, forcible extortion, ill treatment of a minor, and so forth. When two parallel offenses, one military and the other “civilian,” apply to a single action, the military advocate general has the discretion to choose the offense with which the soldier is to be charged.⁶³

In some of the cases in which the military prosecution indicted soldiers for abusing Palestinian detainees, it chose to confine itself to the parallel offenses listed above, rather than charge the soldier with the military offense of ill treatment. In any case, however, violence by soldiers against shackled detainees is a criminal phenomenon penalized under an entire system of offenses in Israeli criminal law.

C. Values and Punishment

The importance of the values protected by the offense of ill treatment and the inherent dangers of this offense to the detainee and to the army and Israeli society in general has been noted by the Military Court of Appeals in recent years whenever it has heard cases of ill treatment. However, a disturbing discrepancy can be observed between the grave view of the offense taken by the judges in the Military Court of Appeals and the penalties actually imposed on offenders. Even when these penalties have been increased during appeals, they are still lax by comparison to the practice in civil courts regarding serious offenses of violence.

Whatever the proper standard of punishment, the comments of the judges in the Military Court of Appeals should serve as a clarion call to army commanders, the Defense Ministry, and the Knesset to take decisive action in order to eliminate the growing scourge of soldiers’ violence:

“It is impossible to disregard the matter of the abuse of power by IDF soldiers against helpless persons manifested in the grave assault of these persons. These cases involve groundless beating and humiliation. A black mark of prohibition hovers over actions such as those of the respondent. The behavior of soldiers as an unbridled pack cannot be accepted. The actions of beating and humiliation [...] impose a stain on the character of the army and the image of its soldiers... Injuring the person and dignity of a local resident without any substantive justification inflames hatred, heightens enmity, and distances peace.”⁶⁴

“Scrupulous adherence to behavior that internalizes human dignity – of any person, friend or foe – is demanded of every soldier. It is demanded, first and foremost, by his inherent humanity, insofar as it protects his inherent humanity; but it also grants him professional and moral advantages as a soldier and as a commander toward his peers and subordinates, and also toward his enemies [...]

⁶³ Military Justice Code, Article 14.

⁶⁴ A/27/02 **Chief Military Prosecutor v Sergeant Hazan**, Tak-Tzv 2003(1) 1, para. 6.

“The wound the respondents caused by their actions is not limited to the bruises and pains suffered by the detainees. This is an ugly wound to the fabric of life and society in Israel. The obligation to heal this wound – which must begin with a total war against this scourge – rests, first and foremost, with the IDF and its commanders. The military courts have also made, and shall continue to make, their own contribution to uprooting this scourge.”⁶⁵

“This war, which concerns the imposition of value-based and moral restrictions on the exercising of power, is, first and foremost, the obligation, craft, and war of the commanders. They must wage it on the strength of their leadership and on the basis of educational, command, and – insofar as necessary – disciplinary and legal measures. The responsibility of the commander, however, does not derogate in legal and moral terms from the responsibility of the soldier committing the offense.”⁶⁶

D. Superior Orders and the Duty to Protect Detainees

In the rulings quoted above, the Military Court of Appeals emphasized that commanders are responsible for preventing the phenomenon of the ill treatment of detainees. To what extent does a commander bear criminal responsibility if his subordinates harm a detainee?

The commander’s responsibility is direct and absolute if he himself ordered his soldiers to harm a detainee. A soldier must obey orders and commits a military offense if he refuses or fails to obey an order. It is important to recall, however, that if an order is clearly and patently unlawful, the soldier will not bear criminal responsibility on account of his refusal to obey. Moreover, if a soldier obeys a patently unlawful order, he will also bear criminal responsibility on account of the offense, as will the commander who gave the order and caused the soldier to commit the offense.⁶⁷

An order by an army commander to harm detainees after their arrest and to abuse them in any way undoubtedly constitutes a manifestly unlawful order that must not be obeyed. This was clarified in the clearest possible manner in the case of **Yehuda Meir**, a battalion commander who, at the beginning of the first intifada, ordered his soldiers to beat young detainees and break their limbs. The High Court of Justice disqualified the decision of the military advocate general not to prosecute Meir, and commented on the order he gave to his subordinates:

“We must assume that the first period of the uprising was particularly difficult for commanders and soldiers alike, and that they did not know how to cope with it. Yet it is impossible to accept grounds based on ‘lack of clarity and the obscure situation pertaining in the field at the time regarding the instructions for manner of use of force and the methods for its application...’ Can there even be any talk of ‘lack of clarity’ and ‘obscurity’ when it comes to an order to remove persons from their home, shackle their hands and gag them, and to beat them with batons in order to break their hands and legs? What lack of clarity could exist regarding such a flagrantly

⁶⁵ A/128/03, 146/03 **Chief Military Prosecutor v Rosner and Lieberman** (unpublished, 21 August 2003).

⁶⁶ A/62/03 **Chief Military Prosecutor v Sergeant Ilin**, pp. 6-7. This ruling concerns a case of looting, but also discusses the phenomenon of violence against civilians.

⁶⁷ Military Justice Code, Articles 122, 123.

unlawful command, over which – as the military advocate general noted – ‘a black flag flies,’ and which, indeed, a soldier is forbidden to obey? Such actions appall any civilized person and cannot be cloaked by any vagueness or lack of clarity, and certainly so when such a command is given by a senior commander who should be aware that the moral standard of the IDF sharply prohibits such behavior.”⁶⁸

Various tests exist for determining that a given military order is “flagrantly” unlawful and must not be obeyed. However, there can be no disagreement as to the clear illegality of an order to harm persons not involved in combat, or removed, and the obligation not to obey such an order.⁶⁹

E. Command Responsibility

A commander who abuses a detainee bears criminal responsibility for his actions as does any other soldier. However, his actions are particularly grave since he serves as a role model for his subordinates. In a case when a group of soldiers detained and abused taxi drivers and passengers, the military court discussed the role of the commander of the force who took part in the actions:⁷⁰

“The matter of the respondent [the commander of the force] is particularly serious, given his status as a commander. The commander must serve as a role model for his subordinates, as it were ‘Look on me, and do likewise’ (Judges 7:17). The Israel Defense Forces educates its commanders to set a personal example, and educates subordinates to obey the commander’s orders and accept his authority.

The authority invested in the commander also entails the imposition of responsibility. The matter before us constitutes a clear case of profound failure of command; the commander did not prevent his subordinates from committing acts of senseless violence and humiliation, and even took part therein.”

A commander who orders his subordinates to abuse a detainee also bears direct responsibility for the offense, as a procurer who led others to harm the detainee. The level of guilt he bears is vastly greater than that borne by the soldiers who obeyed his unlawful command, since he caused his soldiers to act wrongly and commit a crime; Brig. Gen. Meir is an example of this.

The Military Court of Appeals has ruled in the past that a senior field commander who sees soldiers abusing a detainee must intervene and stop them, even if he is not their commander.

⁶⁸ HCJ 425/89 **Jamal Sufan v Military advocate General**, *Piskei Din* 43(4) 718, 730-731, 735 (Justice Moshe Beisky).

⁶⁹ Ziv Borer, **The Protection of the Justification of Obeying an Order and Flagrantly Unlawful Orders**, in: “Criminal Law in the IDF,” ed. Orna Fein, School of Military Law, Military Prosecution, Defense Ministry Publications, 5766-2006, pp. 324-328 (in Hebrew); Ziv Borer, **Clear and Obvious? How Is a Soldier to Identify a Flagrantly Illegal Order?** In “Law and Army,” issue 17: http://www.aka.idf.il/SIP_STORAGE/FILES/7/59627 (in Hebrew).

⁷⁰ A/38/02 **Chief Military Prosecutor v Sergeant Avi Levy**, para. 8 (unpublished, 24 June 2002).

His mere presence in the field at the time the crime is committed constitutes approval and makes him an accessory and a partner in the assault. The court added:⁷¹

“As a rule, it may be deduced from the mere presence of a commander while his subordinates commit a criminal action, even if he is completely passive, that he supports and encourages them. This derives from the obligation regarding discipline pertaining to the army, in accordance with which the commander bears special status vis-à-vis those of inferior rank, who must obey him.”

The question also arises as to the situation in which an officer did not participate in abuse, and did not see his subordinates abusing a detainee in his presence, but was aware of circumstances and of a social dynamic in his unit that would have led a reasonable officer in his position to anticipate that his soldiers were liable to abuse a wanted person after his arrest. Does such an officer also bear responsibility for the actions of his subordinates if he failed to take reasonable action to prevent the injury to the detainee? Does the officer in such a situation also bear criminal responsibility due to the violation of the obligation to ensure the wellbeing of the detainee and to supervise his soldiers?

In situations similar to this, the courts have ruled that the commanding officer indeed bears such responsibility. Thus, for example, it has been established that a commander's responsibility for the actions of his subordinates may be based on negligence in performing a duty, or on lack of caution;⁷² the military advocate general indicted an officer and commanders who failed to plan properly a mobile checkpoint on a road in the Territories; as a result, soldiers shot a driver who failed to notice the checkpoint. In this case it was ruled that the indictment attributing criminal responsibility to the officer and other commanders was proper and based on correct legal policy considerations.⁷³

Given the reality faced by military forces charged with arresting wanted persons and maintaining routine security, including friction with the Palestinian population, many of those involved complain that they become jaded as they perform their task. Many soldiers report that Palestinian detainees come to be seen as “deserving punishment,” and state that cases of ill treatment that are publicized or come to trial represent no more than the tip of the iceberg. The same conclusion emerges from the current report and from previous reports on this subject. Given such a reality, any person who is aware of his surroundings must recognize the high level of danger that arrested or detained persons will be subject to violence. Accordingly, a reasonable officer must anticipate the tangible possibility that a detainee will be abused after arrest. It thus follows that if the commander of a force, or a senior commander, fails to take reasonable measures in terms of training, supervision, and monitoring in order to prevent such anticipated abuse, they may face criminal responsibility on the grounds of negligence for acts of assault committed by their subordinates.

The enforcement authorities must pay proper attention to the responsibility of commanders for the phenomenon of ill treatment, both during interrogation and in reaching decisions regarding prosecution and charge offenses. As is apparent from our analysis of the rapid developments in international humanitarian law over the past decade concerning the

⁷¹ A/78/88 **Master Sergeant Danino v Chief Military Prosecutor**, Pak-Tzv 1988, 277.

⁷² Irene Fein, Ziv Borer, **A Commander: Criminal Responsibility in Offenses of Negligence** in “Criminal Law in the IDF,” pp. 151-233 (in Hebrew).

⁷³ HCJ 2702/97 **Anonymous v Defense Minister et al.**, *Piskei Din* 53(4) 97.

responsibility of commanders (see the appendix), it is vital that the authorities pursue the law to its full extent with regard to army commanders responsible for flaws in supervision and training that enable injury to defenseless detainees. This is vital not only for moral and humanitarian reasons, but also in order to meet desirable standards of responsibility as recognized by the new institutions of international criminal law.

F. Coercive Field Interrogations

Are soldiers permitted, in special circumstances, to interrogate detainees in the field, shortly after their seizure, and to use physical force in order to extract information? In some of the cases of ill treatment on which this report is based, and in earlier complaints submitted by PCATI to the military prosecution, soldiers claimed that they had employed beating, humiliation, and intimidation in order to “interrogate” a shackled detainee before his transfer to a proper imprisonment and interrogation facility.

The Military Justice Code includes a specific military offense relating to the use of violence, threats, or other improper means during interrogation.⁷⁴ There is no operational need that can justify the beating or ill treatment of a shackled detainee by the soldiers in the arresting detail. The Military Court of Appeals discussed the case of a regiment commander in the reserves who attempted to secure information about a wanted persons and firearms by stripping the person’s son naked in public, threatening at gunpoint to kill him, attaching burning paper and a lighter to his penis, and making him sit with his genitals on a bottle. The court noted that, in these actions, the commander violated absolute prohibitions against torture and cruel, inhuman, and humiliating treatment, and added:

“As a general rule, securing a military goal does not, in itself, render any criminal action proper. The professional obligation to adhere to the task and the goal— which constitutes a basic principle in the IDF, and is part of its ten principles of war— is not without limit. A commander who adopts an illegitimate course of action thereby commits a grave failure. This failure is professional, moral, legal, grave and personal, and is aggravated if it was committed by a senior commander. The extent of the failure of command is commensurate with the gravity of the failure of command.”⁷⁵

These comments are consonant with the provisions of the Fourth Geneva Convention, which is also binding on Israeli soldiers in accordance with the General Staff orders, and the Military Justice Code.⁷⁶ The convention states unequivocally that physical or psychological coercion may not be used against a person who is a resident of an area subject to belligerent occupation in order to secure information. Torture, brutal acts, the causing of physical suffering, cruel

⁷⁴ Military Justice Code, Article 119.

⁷⁵ A/153/03 **Geva Sagi v Military advocate General**, para. 38 (unpublished, 5 August 2004). The appellant also used a migrant worker as a human shield. The court attached the greatest severity to his actions, yet he was sentenced to just 60 days imprisonment performing military works (a penalty that was not the subject of appeal) and to demotion. See also A/247/96 **Chief Military Prosecutor v Captain Brosh**, Tak-Tzv 1996, 417, in which it was ruled that the use of violence in interrogating residents in order to locate arms is contrary to the law and to the instructions.

⁷⁶ General Staff Order 33.0133. See website of the IDF Spokesperson: <http://dover/idf/il/NR/rdonlyres/B5826073-83DD-4244-837CC107F37D9F84/0/60855.doc>. See also: Military Justice Code, Articles 3 and 133.

treatment, or denigrating or humiliating treatment are all prohibited by the convention, which, on these matters is customary law binding on all states.⁷⁷

Justice Barak summarized the guiding principle preventing coercion against a resident of the Territories in his ruling on the subject of human shields:

“A basic principle that runs like a thread through the laws of belligerent seizure is the prohibition against the use of protected residents as part of the war effort of the seizing army. The civilian population is not to be abused for the military needs of the seizing army.”⁷⁸

In practice, the military enforcement and legal authorities do not relate to the absolute prohibition against the ill treatment of a detainee as a means of “interrogation,” as required in accordance with international law.⁷⁹

Are the legal principles outlined above applied by the Israeli military and by other State authorities in relation to the ill treatment of Palestinian detainees? If so, in what way? The following chapters will examine these questions.

⁷⁷ For more detailed discussion, see the appendix “International Law” below.

⁷⁸ H CJ 3799/02 **Adala – Legal Center for the Rights of the Arab Minority in Israel v Commander GOC Central Command of the IDF**, para. 24 of President Barak’s ruling (unpublished, 6 October 2005).

⁷⁹ Thus, for example, in one case that reached of PCATI, the military prosecution closed an investigation against an officer who beat a detainee, knocking him over and injuring him in the face while he was shackled and blindfolded. The prosecution chose not to pursue the matter beyond the disciplinary hearing for behavior unbecoming an officer, “due to the urgent need to secure information [regarding a wanted person] with the utmost urgency, and after other attempts to secure answers from the detainee had proved unsuccessful;” letter to PCATI dated 29 January 2008 from the Northern Command Judge Advocate Sharon Springer-Nakar.

4. Failure to Enforce

A. Military Investigatory Bodies

In order to examine whether the blanket prohibition against the ill treatment of detainees is manifested in practical terms in enforcement operations, we will briefly review the authorities within the Israeli military responsible for interrogation and prosecution.

The Military Justice Code (hereinafter, in this section, “the Law”) establishes three authorities within the military for the purpose of interrogation: An examining officer; the Military Police Investigation Unit (MIU); and an investigative judge. The investigative operations of these authorities are explicitly separate from the debriefings undertaken by those involved in the investigated incidents and by their commanders (which are generally referred to as “operational debriefings.”) In order to encourage the credibility of the debriefing and enhance the ability to learn lessons from events, the Law establishes that the debriefing material is not to be transferred to any investigative body other than the military advocate general (hereinafter – “MAG”) or his representative. The latter, in turn, are to decide whether the debriefing raises concern that an offense has been committed and, accordingly, decide whether to recommend an investigation by an investigative authority. According to the Law, if it is decided to launch an investigation, “the debriefing material, or a summary of its findings, shall not be transferred to a person undertaking a criminal investigation in accordance with the law.” The decision to launch the investigation is not to be accompanied by material from the debriefing, and neither “shall it indicate suspicion against any person involved in the incident.”⁸⁰

With certain exceptions, in order for a person to be prosecuted before a military court (excluding traffic offenses), the alleged offense must be examined by an examining officer or investigated by a investigative judge.⁸¹ The institution of the “investigative judge” is rarely used by the military, and only in cases involving deaths; accordingly, this function is not relevant for the purposes of our discussion. An “examining officer” may be a senior adjudicating officer in the military who has received a complaint of an offense; an officer appointed by a senior adjudicating officer; or a military policeperson empowered by the MAG to undertake the examination. The examining officer is entitled to hear witnesses, examine evidence, and even to arrest suspects in the investigated offense; his function, however, is not to rule in the case before him, but to decide whether to recommend prosecution.⁸² His conclusions are forwarded to the MAG, who decides whether or not to prosecute. In practice, most examinations relevant to our subject here are undertaken by investigators from the MIU.

As emerges from the definitions, the institution of the “examining officer” – insofar as this refers not to an MIU investigator appointed to the case, but to an ordinary army officer – is a non-professional institution, to put it mildly. As early as 1993 the State Ombudsman strongly

⁸⁰ Military Justice Code, 5715-1955, Article 539, see: <http://www.aka.idf.il/SIP-STORAGE/FILES/7/48397.pdf>.

⁸¹ Military Justice Code, 5715-1955, Article 251.

⁸² Or, in an aspect that does not relate to our subject here, to investigate the circumstances surrounding the death of a soldier in certain conditions; see the Military Justice Code, 5715-1955, Article 298A. For the regulation of the function of the examining officer, see Articles 252-277; for the regulation of the function of the investigating judge, see Articles 283-298.

criticized the operation of this institution.⁸³ In matters raising suspicion that soldiers have engaged in criminal behavior toward Palestinians, the fact that an investigating officer –who is generally part of the combat forces – addresses the matter is particularly problematic. The conflict of interests and the national bias are obvious, adding to the undeniable lack of professionalism.

In any case, the General Staff order establishes that the offense of ill treatment is one of the offenses regarding which, if it is suspected that the offense has been committed, a preliminary examination is not to be undertaken by the investigating officer, but the case is to be referred directly to the MIU.⁸⁴ Accordingly, in theory at least, this institution should not be relevant for our purposes.

B. Forms of Investigations and their Problems

Accordingly, an “MIU investigation” is the only practical and professional option for clarifying cases of the ill treatment of Palestinians by soldiers. However, the investigation of such cases by the MIU is insufficiently common. According to Menachem Finkelstein, who served as the MAG during the early years of the intifada, and according to his successor, the current MAG, Brig. Gen. Avichai Mandelblit, “regarding complaints concerning deliberate violence against civilians or property [...], when suspicion arises that a criminal offense of this type has been committed, the investigative authorities are instructed to investigate the circumstances of the case.”⁸⁵

However, the responses of the IDF Spokesperson to the questions submitted by PCATI suggest the presence of a military procedure requiring that an investigation be launched by the MIU when injuries are found on the bodies of Palestinian detainees.

In many cases, the military is inclined to rely on the operational debriefings undertaken by the forces that participated in an incident after its conclusion, or on debriefings undertaken by more senior echelons in the command structure, in deciding whether it is reasonable to assume that civilians were injured without justification. In addition to the legal restriction noted above, which prevents the possibility of relying on the findings of a debriefing in a criminal investigation, these debriefings are marred by an additional substantive defect. As the former deputy MAG, Col. (reserves) Ilan Katz, explained, the operational debriefings are unreliable; relying on these documents dramatically reduces the number of cases of ill treatment against detainees that are investigated by the MIU. This naturally also reduces the number of cases brought to the attention of the legal system, the number of individuals prosecuted, and the number of offenders convicted for abusing detainees.

⁸³ See B’Tselem report, **Standard Routine: Beatings and Abuse of Palestinians by Israeli Security Forces during the Al-Aqsa Intifada**, May 2001, pp. 5-6.

⁸⁴ See General Staff Order 33.0304 “Examination and Investigation by MIU,” section 62(A): <http://dover.idf.il/NR/rdonlyres/426D4977636B-4649-82D0-5D5C42918A21/0/60877.doc>. The same applies to ordinary offenses in accordance with the penal code, such as assault and injury, for which there is no parallel military offense.

⁸⁵ Menachem Finkelstein, **Law during a Period of Combat**, in: “Law and Army,” issue 16A, 5762, p. 15 (in Hebrew). See a similar comment by Mandelblit during a session of the Knesset Constitution, Law, and Justice Committee, 14 February 2007; for the protocols of the meeting, see: <http://www.knesset.gov.il/protocols/data/html/huka/2007-02-14.html>.

In an article published on the NRG website in November 2004, Col. Katz stated:

“The debriefings in the army have become bankrupt [...] Something should be done urgently, because it is no longer possible to have confidence in the military debriefings [...] The operational debriefing has become a means for commanders to prevent MIU investigations [...] After weeks or months, when the military debriefing is completed, if the MAG decides on the basis of the findings that it is appropriate to launch an MIU investigation, the episode has usually been forgotten. It is very difficult to collect evidence in the field, and the commanders are preoccupied with other problems relating to the war in the field.”⁸⁶

During a discussion held by the Knesset Constitution, Law, and Justice Committee in 2007 on the subject of cases when Palestinians were shot and killed by army fire, MAG Brig. Gen. Avichai Mandelblit noted that the operational debriefings “failed to arrive on time, and the report I received was sometimes too late.”⁸⁷

During another discussion in the committee, law Professor Mordechai Kremnitzer underscored the inherently problematic nature of this practice: “... There are two problems with the operational debriefing,” he explained. “Firstly, the person who undertakes it is not a professional investigator, with all due respect to the military commanders. [Secondly,] when people have acted unlawfully, they have a natural motivation not to admit this, to deny it, to tell incorrect stories, and to back up each other’s incorrect stories.”⁸⁸

During the same meeting, MK Ophir Paz-Pines declared: “We have lost confidence in the IDF debriefing, and this is not a small problem – it is a big problem.”⁸⁹ The credibility of the military operational debriefings has deteriorated to the point that during the period 2003-2005 the Preparedness and Routine Security Subcommittee of the Knesset Foreign Affairs and Defense Committee focused on the subject of the operational debriefing, “out of concern that a continuation of this trend will lead to the debriefing being removed from the [responsibility of the] military.”⁹⁰

In 2006 the MIU established a new investigations base close to Netanya (the “Sharon-Samaria” base) . Among other functions, this base is intended for the investigation of complaints submitted by Palestinians. According to the reply of the IDF Spokesperson dated 1 May 2008 to the questions posed by PCATI, the result was “an increase in the quantity of

⁸⁶ See Amir Rappoport, **It Is No Longer Possible to Have Confidence in the Military Debriefings**, NRG website, 19 November 2004: <http://www.nrg.co.il/online/1/ART/823/395.html>.

⁸⁷ Session of the Knesset Constitution, Law, and Justice Constitution, Law, and Justice Committee, 14 February 2007; for the protocols of the meeting, see: <http://www.knesset.gov.il/protocols/data/html/huka/2007-02-14.html>.

⁸⁸ Session of the Knesset Constitution, Law, and Justice Constitution, Law, and Justice Committee, 6 December 2004; p. 9 of the protocols of the meeting, <http://www.knesset.gov.il/protocols/data/html/huka/2004-12-06.html>. The following chapter presents examples of lies that have appeared in debriefings relating directly to the abuse of detainees.

⁸⁹ **Ibid.**, p. 17.

⁹⁰ See the section on the subcommittees in the concluding report on the Committee’s work during the period 2003-2005: <http://www.knesset.gov.il/committees/heb/docs/confidence6.pdf>, at p. 4.

files and the possibility of processing complaints of locals in an optimum manner.”⁹¹ This is naturally a positive development; however, in the absence of attention to the fundamental problems of the debriefing institutions in the military, it is difficult to anticipate any substantive change in terms of the enforcement of the law against soldiers who ill treatment Palestinians. Thus, for example, of 40 complaints forwarded by PCATI to the MAG’s office during the period 2005-2008 relating to the ill treatment of detainees, notification of the opening of an investigation was received in just 21 cases. Fourteen investigations were closed, mainly due to “lack of evidence” or because the soldiers’ version of events was preferred over that of the complainants. Just one indictment was served.⁹²

A petition on this matter submitted to the Supreme Court by B’Tselem and the Association for Civil Rights in Israel notes:

“The investigation policy, based on the flimsy operational debriefings, conveys the message to soldiers that Palestinian life is cheap, and that the killing of civilians is permissible – and not only in the context of self-defense, but also for the sake of operational convenience.”⁹³

C. Prosecution, Convictions, Punishment – Soldiers and Commanders

The figures forwarded by the IDF Spokesperson show that investigations into the ill treatment of detainees are not only insufficiently frequent, but also almost never lead to prosecution, let alone conviction. During the period December 2000 – June 2007, for example, the MIU launched 427 investigations relating to offenses of violence against Palestinians. Only in 35 of these cases was an indictment served;⁹⁴ only fifteen of the indictments related to the offense of ill treatment (Article 65A in the Law).⁹⁵ This represents an average of approximately two indictments a year throughout the period of the intifada.

Regarding the period around the dates of occurrence of the cases on which this report is based, the IDF Spokesperson stated that between 1 January 2005 and 1 July 2007, the military received 138 complaints relating to the injuring of Palestinian detainees by soldiers. Three of these ended in disciplinary proceedings – two acquittals, and one penalty of ten days’ imprisonment. A total of 77 MIU investigations were launched. In 52, an opinion was given ordering the closure of the case without prosecution; only in seven investigations were indictments served, and these led to six convictions. The IDF Spokesperson did not state whether and how the remaining 58 complaints were processed.⁹⁶

⁹¹ Appendix A to the replies.

⁹² Details of the complaints are held at PCATI’s offices.

⁹³ From HCJ 9594/03 **B’Tselem and the Association for Civil Rights in Israel v Military Advocate General**, appellants’ response to the complementary notice on behalf of the respondent, para. 17. See: <http://www.acri.org.il/Story.aspx?id=1014>.

⁹⁴ See the figures provided by the IDF Spokesperson to Yesh Din: <http://www.yesh-din.org/site/images/ds1heb.pdf>.

⁹⁵ According to the reply of the IDF Spokesperson to the questions forwarded by PCATI on 4 February 2008.

⁹⁶ According to the reply of the IDF Spokesperson to the questions forwarded by PCATI on 19 December 2007, para. 14, and the complementary reply dated 1 May 2008, third item in the appendix.

The military legal system shows a particular reluctance to prosecute commander for their responsibility for acts of ill treatment committed by soldiers under their command. The IDF Spokesperson was able to refer PCATI to just two instances in which commanders were prosecuted in such circumstances. In one of these, case MT/47/06, the criminal indictment against a commander was deleted, and he was instead brought before a disciplinary hearing. In the other, case MR/386/03, a commander was convicted of behavior unbecoming of an officer; he received a suspended sentence and was demoted.⁹⁷ In both cases, the commanders were accused of being involved in the ill treatment, either as observers or as participants, rather than merely responsible for those who committed ill treatment. It thus emerges that the military takes a particularly lenient view regarding the responsibility of its commanders in the context of the ill treatment of Palestinian detainees. It hardly needs to be added that no senior commanders have been prosecuted on account of acts of ill treatment committed by their subordinates.

A clue to the source of this lenient approach may be found, perhaps, in the reply of the IDF Spokesperson: "In those cases in which any affinity was present between the instance of ill treatment and the command responsibility of the commander," the Office noted, "a criminal or disciplinary sanction was imposed on the commander due to his soldiers' ill treatment of a Palestinian detainee."⁹⁸ It thus emerges that as far as the ill treatment of detainees is concerned, "command responsibility" is an extremely restricted concept. The Israeli army usually educates its commanders to accept broad-based responsibility for the entire task, including attention to norms, behavior, and problems in their field of responsibility. International law and the relevant rulings of the Israeli military courts impose responsibility on commanders for acts of ill treatment committed by their subordinates – not only if the commander participated in the ill treatment or ordered it to be carried out, but also in cases when a reasonable commander would have anticipated that his soldiers were liable to abuse a wanted person following his arrest.⁹⁹

Lt. Col. (reserves) Amos Guiora, who served as commander of the IDF School of Military Law, explained:

However, it must be understood from the outset that the ultimate responsibility of morality and ethics is the commander's, in terms of both words and action. If the commander is unwilling to go beyond talking the talk," or if his actions contradict what he has instructed his forces regarding issues of morality, the potential for violations by his forces are great. The military educator, who comes from outside the unit and is therefore not a member of the immediate family (though he serves in the same army), literally and figuratively, leaves after speaking to a unit on issues of morality. The commander must be both the role model and teacher of morality and ethics; an absolute commitment on the part of the commander is the single, most critical component of the teaching of morality in armed conflict.¹⁰⁰

⁹⁷ According to the reply of the IDF Spokesperson dated 1 May 2008 to the questions forwarded by PCATI, second item in the appendix.

⁹⁸ *Ibid.*, *ibid.*

⁹⁹ See Chapter Three above and the appendix below on the subject of international law.

¹⁰⁰ Guiora, Amos N., **Teaching Morality in Armed Conflict – Israel Defence Forces Model**, Working Paper 05-24, CASE School of Law, p. 1: <http://ssrn.com/abstract=783985>.

The requirement for an “affinity” above and beyond regular command responsibility denudes the concept of command responsibility of its special meaning. According to the response of the IDF Spokesperson, the commander must be part of the act of ill treatment – or, at least, must knowingly fail to prevent it – in order to bear responsibility for it. This approach leads to the removal of responsibility, since the result is that acts of ill treatment that occur without the commander’s knowledge are “orphaned” – non-one bears responsibility for their occurrence, and certainly not the commander. Thus the military removes another obstacle to the ill treatment of detainees.

It might be posited, however, that the absence of convictions actually reflects an absence of ill treatment. Numerous voices from within the military system have raised grave doubts as to the professionalism of the MIU investigators and their ability to investigate complex events. These voices suggest that even extensive phenomena of illegality are liable to remain undiscovered by the negligent MIU investigations. Col. Katz (who formerly served as deputy MAG) argues that the MIU is:

“A unit that simply doesn’t know how to do the job [...] Cases drag on month after month because of the lack of personnel and because of inability that turns into impotence [...] From my acquaintance with how things work, I know that the MIU was simply incapable of investigating. For example, when they needed to investigate the behavior of reserve duty soldiers in the Territories, it would take the months just to locate all the reserve duty soldiers who had already returned to civilian life [...] A situation was created in which many investigations came to an impasse.”¹⁰¹

Similarly, Col. Motti Levy, a judge in the Military Court of Appeals who heard the cases of three soldiers who severely beat three Palestinians, determined that the MIU investigation in their case “was pursued at a leisurely pace, and this is to be regarded severely.” After encountering further cases, Col. Levy wrote that action must be taken to change “the current policy regarding the investigation of exceptional actions in the Territories in order to ensure that the investigations are effective, vigorous, and exhaustive, so as to uproot the offenses or, at the least, prevent their diffusion.”¹⁰²

In a publication on the subject of beatings and abuse, B’Tselem added:

“[...] Many of the complaints are closed due to various defects during the processing of the case. In most cases, for example, months pass between the submission of the complaint and the transfer of the case to the MIU for investigation [...] Moreover [...] the MIU has virtually no Arabic-speakers who can collect testimonies [...] Often [...] the processing of a given investigation passes between different investigators, each of whom has to study the case from the outset [...] The conclusion from all this is that the system does not attach the necessary importance to investigating cases of violence by security force personnel against Palestinian residents and to

¹⁰¹ Amir Rappoport, “MIU Does Not Know How to Do the Job,” NRB website, 1 January 2005; <http://www.neg.co.il/online/1/ART/844/919.html>.

¹⁰² *Ibid.* See also similar comments regarding the lethargic, clumsy, and negligent handling of the investigation into the abuse of a detainee in AA/24/08 **Sgt. A.M. v Military Prosecutor** (the decision of Maj. Gen. Doron Pilas dated 10 March 2008).

ensuring that justice is meted out to those responsible. This conveys a lenient message to those in the field that such actions are not regarded as severe.”¹⁰³

Moreover, most of the above-mentioned MIU investigations into complaints forwarded by PCATI lasted for at least one year after the complaint was submitted, during which time many of those involved in ill treatment completed their compulsory service; the complainants themselves despaired of the handling of the complaint; and the chances of securing findings was negligible. By way of example, all but one of the complaints filed since August 2006 are still pending at the time of writing this report – no decision has been reached to prosecute offenders or even to close the case.¹⁰⁴

D. Punishment and Failed Deterrence

As if all the above were not enough, the military courts add their part to the process. The result is that even when the system decides to investigate and prosecute offenders, and even in the small number of cases in which the abusers are convicted, they receive particularly light sentences. In the cases mentioned above, which as noted relate to complaints received by the military between 1 January 2005 and 1 July 2007, abusers were convicted of the offenses of ill treatment and assault. According to the IDF Spokesperson, the penalties received did not exceed four months actual imprisonment, with the addition of suspended sentences of up to five months. In most cases, the convicted offenders were also demoted.¹⁰⁵ This compares with the penalties permitted by law – up to twenty years’ imprisonment following conviction of the relevant offenses in the penal code,¹⁰⁶ and imprisonment of up to three years and, in aggravating circumstances, seven years under the Military Justice Code.¹⁰⁷

We should note that the Military Court of Appeals has repeatedly intervened in the penalties imposed by the military courts on soldiers convicted of abusing Palestinians. The appeals court considers the penalties excessively lenient; however, in keeping with its policy not to intervene excessively in sentencing, the appeals court has also refrained from imposing sentences of more than ten months’ imprisonment.¹⁰⁸ Relative to the severity of the offences, this constitutes lenient penalization. In a case in which the Military Court of Appeals increased the penalty from five months’ imprisonment to ten months, the offender, CPL

¹⁰³ From the page “**Beatings and Abuse**” on the Hebrew-language website of B’Tselem: http://www.btselem.org/hebrew/Beating_and_Abuse/20060821_Rise_in_security_forces_violence.asp

¹⁰⁴ For details of typical defects in the law enforcement policy regarding soldiers in the Territories and MIU investigations, see also Human Rights Watch, **Promoting Impunity**, 2005, and in particular chapters two and seven: <http://hrw.org/reports/2005/iopt0605>.

¹⁰⁵ Reply of the IDF Spokesperson to the questions forwarded by PCATI on 19 December 2007, para. 14, and the complementary reply dated 1 May 2008, third item in the appendix.

¹⁰⁶ Thus, for example, a sentence of up to twenty years may be imposed for conviction of premeditated and aggravated battery (Article 329), and up to ten years for serious battery (Article 333), or twenty years if the offender is armed (Article 335). It should be noted that according to the penal code, a person defined as responsible for a “defenseless person” – which, according to the law, includes a person in detention, “shall be considered to have caused the results to the life or health” of the defenseless person. In other words, criminal responsibility is, prima facie, imposed on the task commanders, even if they were not involved in the abuse and, indeed, even if they acted to prevent it. See the Penal Code, 5733-1973.

¹⁰⁷ Military Justice Code, 5715-1955, Article 65.

¹⁰⁸ See A/146/03 **Chief Military Prosecutor v Roi Rosner**.

Rosner, had abused two brothers aged fifteen and seventeen during their transportation after arrest. The brothers were shackled and blindfolded at the time. CPL Rosner:

“Beat the seventeen-year old detainee, Mohammed Al-Rish, hard on the back of his neck and on his stomach, right shoulder, and ribs. When the detainee moved, the defendant held him firmly in place, causing injuries to his body from metal parts of the vehicle. He then slapped him and, when he failed to respond, slapped him again. When the detainee fell on him due to the shaking of the journey, the defendant hit the detainee on his knee with his helmet. The detainee stirred in his place and mumbled, and the defendant hit him hard on his leg using the end of the barrel of his weapon [...] As a result of the actions of the defendant and his friend, both detainees sustained bruising, swelling, reddishness, and sensitivity on the parts of their bodies where they had been beaten [...] The defendant added that during the course of previous tasks involving the accompaniment of detainees, he had slapped wanted persons who ‘made problems.’”¹⁰⁹

Ten months’ imprisonment is no trivial matter, but in the case of the grave and protracted ill treatment of shackled minors it constitutes a lenient penalty, sending a message of disregard for the lives, physical integrity, and dignity of detainees. Indeed, such a penalty “**completely misses** the objective of penalization,” as the appeal judges argued with regard to the five month sentence imposed by the district court.¹¹⁰

E. Possible Solution: Remove Investigations from Army Responsibility

A potential solution has already been raised in response to this situation of legal disarray, which exacerbates the disarray in the field. The proposed solution is to end the military’s responsibility for undertaking investigations.

One of the main arguments against this possibility is that a debriefing relating to a military incident must be “professional” in nature.¹¹¹ As we have seen above, however, the operational debriefing fails to meet the professional standards for an investigation. An “operational debriefing” may be an appropriate tool for drawing conclusions relating to the tactical and military aspects of an incident, but when the objective is broader, touching on aspects of enforcement, penalization, and deterrence, it would be more reasonable to appoint a body with expertise in investigations that would also have the necessary specialization to examine military aspects required in order to understand the operational circumstances. Such a body would be able to undertake a professional and impartial investigation.

Another argument against ending the military’s responsibility for investigations is that the High Court of Justice reviews unreasonable decisions to refrain from launching investigations. MK Michael Eitan responded on this point:

“The answer that the High Court of Justice reviews the decisions is no answer – the High Court of Justice reviews everything. This does not

¹⁰⁹ From the grounds for sentencing, District MR/222A/03 **Military Prosecutor v CPL Roi Rosner**, 28 July 2003.

¹¹⁰ See note 108 above.

¹¹¹ For example, see the protocols of a session of the Knesset Constitution, Law, and Justice Committee on 6 July 2003, p. 32: <http://www.knesset.gov.il/protocols/data/html/huka/2003-07-06.html>.

constitute an internal means of monitoring. Our goal is not that once a year the High Court of Justice will proclaim that the army did or did not act reasonably. There has to be some kind of internal dialogue based on a clarification of the facts and the creation of patterns of work and understanding. I do not think that the effectiveness of the GSS is impaired in the slightest if there is some form of external supervision. The same may also be true of the army.”¹¹²

As noted in the Human Rights Watch report, “a consensus is emerging in international law that military personnel should not be tried in military courts in cases when the victims are civilians, and that military jurisdiction systems should relate solely to offenses of a clearly military nature.”¹¹³

We will not repeat here aspects that have already been discussed in depth.¹¹⁴ We would only note that our own specific study, relating to the ill treatment of Palestinian detainees by soldiers, supports the conclusion that the investigation of incidents that occur during military operations and raise suspicion of criminal acts should be removed from the army's purview. The existing military investigation bodies have repeatedly failed to tackle this phenomenon.

To conclude this chapter, it may be stated that the military legal system fails in every relevant parameter relating to acts of ill treatment against detainees. It implements a policy of refraining from launching investigations; it frequently relies on non-professional debriefing institutions that are marred by a clear conflict of interests and a documented record of false reporting; it manages the small number of MIU investigations that are launched in an unprofessional and unsuccessful manner; it rarely indicts offenders for offenses of ill treatment; and when offenders are convicted, it imposes lenient penalties.

¹¹² Session of the Knesset Constitution, Law, and Justice Committee, 22 June 2003, p. 32 in the protocols of the session: <http://www.knesset.gov.il/protocols/data/html/huka/2003-06-22.html>.

¹¹³ Human Rights Watch report, note 104 above, chapter two.

¹¹⁴ For example, see the article by legal expert Moshe Negbi. Negbi argues (not specifically in the context of abuse by soldiers) that the approach whereby “the IDF investigates and judges itself” is absurd, particularly since junior commanders and soldiers fail to understand that abuse and humiliation are flagrantly unlawful acts: “This is a failure on the part of the office of the military advocate general, which is responsible for inculcating awareness of the ‘black flag’ among soldiers,” Negbi wrote. Accordingly, the senior military echelon, including the senior staff in the MAG’s office, “are, prima facie, the main suspect” – and yet are also responsible for investigations. See the article in Ha’aretz, 9 September 2002: <http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=206192&contrassID=2&subContrassID=3&sbSubContrassID=0>.

Army officers have also raised concern that the internal investigation of operational events may be marred by extraneous interests, including internal army politics, and that the desirable alternative is an external investigation. This followed the appointment of a brigadier general to investigate the kidnapping of soldiers on the Lebanese border in 2006: <http://ynet.co.il/articles/0.7340.L-3275510.00/html>.

5. Evading the Issue

A. The military: Disregard and Denial

According to the response received from the IDF Spokesperson regarding the ill treatment of detainees and PCATI's questions on the subject, the military views such offenses with great severity. Our study shows, however, that the military has not attempted to cope with the ill treatment of detainees on a systemic basis. The clearest and gravest evidence of this is the lack of any operational instructions defining the manner in which detainees are to be treated before such time as they reach a proper detention facility.

To illustrate the gravity of this situation, we will quote an excerpt from the reply forwarded by the IDF Spokesperson to PCATI's request for information:

“The IDF undertakes routine operational activities to arrest terrorist elements in the Judea and Samaria Area and in the Gaza Strip in order to ensure the wellbeing and security of the citizens of the State of Israel. In the Judea and Samaria Area, as in Israel, to the best of our knowledge, there are no legislative arrangements (in law or regulations) regulating the handling of detainees during the period from their arrest and until they are taken to the police station / place of detention. However, the fact that there are no procedures applying specifically to the handling of detainees during the time from their arrest and until their transfer to the imprisonment authorities does not mean that it is a “free for all.” **IDF soldiers are bound by the values of the IDF, which prohibit injury to the dignity or person of detainees or of persons held in the custody of the IDF** – this prohibition is conveyed to the soldiers on a routine basis, in training and **before departing on operations**, and it obliges them. Moreover, injury to the person or dignity of detainees or persons held in custody constitutes a criminal offense in accordance with the Military Justice Code (which includes the prohibition of ill treatment, assault, etc.)¹¹⁵

The fact that the limited and negligent legal attention reviewed above is presented in this response as a key impediment to the ill treatment of detainees by soldiers is powerful evidence of the main failing in this context. Since its existence, and particularly in recent years, as the military has undertaken thousands of arrests a year, it has not been required to consider what behaviors and actions are permissible or prohibited during the course of arrest. The military has not considered potential weak points in the treatment of detainees, and it has not translated such weak points into practical operational guidelines. Some of the consequences of the lack of such guidelines have already been noted in the chapters examining injurious shackling, the use of dogs to abuse detainees, and the arrest of minors.

The hollow rhetorical illusion constructed by the IDF Spokesperson in its response above could lead to ludicrous conclusions. For example, it is well known that the Israeli army sees its declared values as guidelines for all its operations, and that every operation is also subject to the Military Justice Code. By the same logic, then, the military also has no need for procedures or briefings of any kind. Why draft instructions for opening fire? Why waste time formulating guidelines for operations at checkpoints? And with regard to simpler activities, is

¹¹⁵ Reply of the IDF Spokesperson dated 1 May 2008 to the questions forwarded by PCATI, first item in the appendix (emphases in original).

it really necessary to brief a driver before he undertakes a journey, given that it is obvious that the driver is conscious of the value of “human dignity” and the value of human life, while the Military Justice Code and the law of the state dictate the maximum permitted traveling speed? Yet the reality is that the military indeed prepares special procedures and instructions (although in some cases, as in the first two examples in our list, they have done so only after forceful encouragement from human rights organizations). The purpose of such procedures and instructions is to ensure that the task is executed properly, including attention to complex aspects and potential weak points.

The claim that the “values of the IDF” are sufficient to regulate arrest operations seeks to mask an almost incredible failing that opens the door wide to the ill treatment of detainees: the absence of explicit and detailed instructions ensuring their wellbeing. As we have seen, a diverse range of abuses pass through this open door. The absence of specific orders and procedures naturally also mitigates against the possibility of implementing “reasonable training, supervision, and monitoring steps” to prevent ill treatment as required given the responsibility of the military command echelons for arrest operations (see Chapter Three above).

The claim that broad moral principles, even if combined with general legal provisions, can and should constitute the sole normative framework for a common and ongoing operational activity is gravely alarming in both professional and moral terms. This complete abdication of responsibility is also exceptional by comparison to other armed forces around the world, which have expressly addressed the question as to how detainees are to be treated from the moment of their arrest and through to their arrival at the imprisonment authority, defining this period as a particularly sensitive stage liable to provoke disorder and ill treatment.¹¹⁶

PCATI’s questions exposed the outrageous situation prevailing in the Israeli military in terms of the lack of specific instructions and orders relating to the handling of detainees through to their transfer to detention facilities. Even if we assume that this is the first time the military has been exposed to this reality – a highly problematic assumption in terms of the function of the military headquarters – the response as quoted above still reflects a state of denial and a reluctance to confront reality. The military place the responsibility for ill treatment on the shoulders of the rank-and-file soldiers who carry out arrests. Not only does it fail to punish commanders for their responsibility (as we saw in the previous chapter), but it also refrains from formulating binding guidelines for the handling of detainees, confining itself to paying lip-service to “the spirit of the IDF.”

Given this reality, it is hardly surprising that an examination of the actual behavior of the military, as distinct from its declarations, also reveals denial, evasion, and obfuscation.

In December 2007, Yediot Acharonot published a survey initiated by the military and conducted among thousands of combat soldiers. The survey found that at least 25 percent of the soldiers have been or are still involved in the ill treatment of Palestinians during the course of inspections at checkpoints, or have witnessed such abuse. A soldier interviewed for the article explained why this phenomenon is unavoidable: “When you deny thousands of people a day freedom of movement, it is impossible to do it in a nice way.”¹¹⁷ The decision to

¹¹⁶ See the Recommendations chapter.

¹¹⁷ Yediot Acharonot, 16 December 2007, pp. 4-5.

investigate and publicize this phenomenon is laudable. The same approach should form the foundation for effective attention to defective norms that have become widespread, including the phenomenon examined by this report.

It should be recalled, however, that the phenomenon of the ill treatment of Palestinians by soldiers at the checkpoints has existed for years. Over these years the security establishment and the political echelon fiercely denied the existence of the problem. Prompt and serious attention to reports and complaints by Palestinians, soldiers, and human rights organizations – which warned over the years that ill treatment had become endemic at the checkpoints¹¹⁸ – could have prevented hundreds or even thousands of cases of ill treatment and humiliation. Instead, the military and those responsible for it chose repeatedly to claim that abuse at the checkpoints was an exceptional and localized phenomenon. For example, Moshe (“Bogie”) Ya’alon claimed during his period of service as chief-of-staff that “there are more articles than incidents.” Then Defense Minister Shaul Mofaz was a key proponent of the ostrich-like policy: “Above all people do not see what the IDF does, or what it refrains from doing, but only the mishaps, errors, and exceptions.”¹¹⁹

The current pattern of denial in the military establishment regarding the phenomenon of the ill treatment of detainees is very similar to the denial of abuse at the checkpoints over many years. For example, on the same day that the above-mentioned article appeared, in which the IDF Spokesperson recognized the phenomenon of abuse at the checkpoints, Channel Two television screened a report by Nir Dvori including footage of soldiers humiliating Palestinian detainees.¹²⁰ The responses of the IDF Spokesperson to the report about the detainees and to other similar reports show that the military has not yet accepted that exposing and addressing a problem is preferable to denying it: “The pictures,” the IDF Spokesperson noted, “reflect a serious and localized failure of values that is contrary to the spirit and values of the IDF [...] The soldiers will be subject to a disciplinary hearing.”¹²¹ Responding to an incident in which soldiers abused fourteen-year old Palestinian youths, the Spokesperson stated: “Any deviation from the norms and values of the IDF is investigated and dealt with exhaustively.”¹²²

¹¹⁸ For just a sample of the countless reports, see: Breaking The Silence, from February 2004: <http://www.shovrimshatika.org/publications/asp>; the reports of Machsom Watch from 2001: <http://www.machsomwatch.org/en>; and studies by B’Tselem focusing on beating and abuse from the mid-1990s: http://www.btselem.org/Hebrew/Beating_and_Abuse.

¹¹⁹ Both quotes are taken from an article by Hanan Greenberg, **The Chief-of-Staff Shoots Back: “There Are More Articles than Incidents,”** Ynet website, 12 December 2004. See <http://ynet.co.il/articles/0,7340,L-3017008,00.html>. This is a typical example of the genre. For example, after a case of abuse at a checkpoint, Col. Bechar, a former commander of the paratroopers brigade in which the abuser served, stated: “The event [...] and others like it are isolated incidents [...] factually, this is an exception” (Chen Kots-Bar and Eitan Rabin, **“You Can’t Be Moral at the Checkpoint,”** Maariv, 6 August 2004, see: <http://www.nrg.co.il/online/1/ART/765/083.html>). Col. Harel Knafu, a former battalion commander in the Nablus district, also commented on the operations at the checkpoint after leaving his position: “When it comes to moral behavior I have no feelings of inferiority compared to any other people in the world [...] A further indicator is the number of incidents we define as exceptional. During my period in the position here, we discovered 30 such incidents. That is nothing compared to the quantity that could be expected if we had not responded forcefully to the incidents” (from the “Tkuma” website: http://tkuma.org.il/last_news.asp?id=1437, 27 August 2004). Further examples abound.

¹²⁰ See the report by Nir Dvori on 16 December 2007: <http://www.reshet-tv.com/VideoPage.aspx?MediaID=28523&CatID=375>.

¹²¹ **Ibid.**

¹²² See note 46 above.

Similarly, after an officer who had served as commander of the Hawara checkpoint in 2004 admitted that he had abused Palestinians, some of them shackled, as they crossed the checkpoint, “military sources” chose to comment that the military expects “as high standard of values” from its commanders and “deals forcefully with exceptional cases.”¹²³

The insistence that cases of ill treatment are “exceptional” is particularly strange in light of the reports issued by the military itself describing the increasing number of complaints against soldiers following the opening of the new MIU base, and the “sharp rise in investigations relating to the abuse of Palestinians” in 2007.¹²⁴ Although productive in terms of public relations, such declarations are incompatible with military claims that abusers are “exceptions,” “bad apples” and so forth.

It is worth noting in this context that in the small number of cases that come to trial, the military court also accepts the version that depicts ill treatment as exceptional and unusual. The descriptions present operational routine as functional, while the court’s comments categorize ill treatment as exceptions that blemish the usually impeccable moral standards of operations: “The soldiers are briefed before every task regarding the manner in which they are to behave toward the target population and the duty to behave decently.” The military courts often quote a ruling declaring that “the basic rules of human morality and human dignity guide the Israel Defense Forces. Deviation therefrom, even if it is isolated, damages the entire force.”¹²⁵ In contrast to the approach of the district military courts, the position of the Military Court of Appeals is unusual: it raises the possibility that the ill treatment of detainees by soldiers constitutes “common behavior.” Responding to the cases brought before it, the appeals court notes many of the problems that are discussed in this report: The tendency of colleagues and commanders to turn a blind eye to ill treatment; the absence of command responsibility; the slow pace of MIU investigations; the suitability or otherwise of the training provided for soldiers and commanders; and so forth.¹²⁶

The claims by official military sources that cases of abuse of detainees are exceptional and isolated incidents are inconsistent with the testimonies and reports from the field, which leave no doubt that the phenomenon has become widespread.¹²⁷ In order to change the norms in the field, the military must first and foremost stop pretending that the phenomenon does not exist.

¹²³ From **Commander of Checkpoint Who Abused Palestinians Arrested**, Walla website, 4 July 2004: <http://walla.co.il/?w=//565498>.

¹²⁴ In response to the questions forwarded by PCATI; see note 96 above; and in response to questions submitted by Yesh Din, see: Yossi Yehosha, **IDF: Sharp Rise in Investigations into Abuse of Palestinians**, Yediot Acharonot, 11 May 2008.

¹²⁵ The quotes are taken from the grounds for sentencing in cases involving soldiers convicted of abusing Palestinian detainees discussed by the Central District Military Court in the period 2003-2007: District MR/526A/04; District MR/454/03; District MR/387/03; District MR/386/03; District MR/376/03.

¹²⁶ For example, see the decision in AA/28/04 **Staff Sgt. B.S. v Chief Military Prosecutor**, and para. 16 in particular.

¹²⁷ We found an interesting exception to the tendency of official sources to deny the phenomenon. During a discussion in the Knesset Constitution, Law, and Justice Committee on 22 June 2003, the MAG at the time, Maj. Gen. Finkelstein, commented on the handling of various types of defects in the behavior of soldiers in the Territories by his office: “The example of violence during the transporting [of detainees by] soldiers... Recently we have received a large number of complaints on this subject,” he noted. [P. 31 of the minutes of the meeting]. Five years have passed since this

As shown by the quotes above relating to the operational debriefings, the refusal to acknowledge the phenomenon sometimes leads to the whitewashing of incidents by soldiers performing arrests and by their commanders. This was the case, for example, following an incident in which soldiers placed a heater on the face of a detainee aged sixteen and a half. The soldiers agreed on a false version of events regarding the ill treatment of minors, and attempted to coerce additional women soldiers into agreeing with this version.¹²⁸ The same behavior was seen in a case reported by Carmella Menashe in which, she claimed, the commanders on the brigade, regiment, and company levels all whitewashed an incident in the “890 paratroopers regiment, which has a prestigious image, in which soldiers beat and kicked a Palestinian detainee, poured Coca Cola on a fourteen-year old youth, forced him to dance, and filmed the incident.” When one of the soldiers complained about the incident to his immediate superiors, and subsequently to more senior commanders, they forced him to leave the company he was serving in, not before the company commander “almost hit him, insulted him and offended him.”¹²⁹ In an interview to mark his retirement, the commander of the military’s Command and Headquarters College, Brig. Gen. Yaacov Zigdon, claimed that the repeated whitewashing of cases “reflects basic human nature. If a soldier did something wrong, then the brigade commander who interrogates him is also seen to have failed. Accordingly, it is very difficult to expect that commanders who are effectively investigating themselves will expose all the defects.”¹³⁰

The problems that exacerbated the situation regarding abuse at checkpoints also apply in the case of the ill treatment of detainees by soldiers. The reluctance to acknowledge the phenomenon is perceived as tacit support and encouragement; the concealing of the problem enables unacceptable norms to take root and grow, heightening their destructive consequences. Relative to the scale of the phenomenon, prosecutions of individual soldiers are localized and evasive actions that fail to ensure deterrence. Defective enforcement strengthens the message of legitimization that is conveyed to the abusers.

The IDF Spokesperson reports that the School of Military Law and its representatives run training workshops and command courses in the various military units. However, when the basic approach to a phenomenon is to deny its very existence, such workshops cannot in themselves alleviate the problem of the ill treatment of detainees. This is particularly true given that “the subject of the rules of behavior mandated in the encounter with the Palestinian population, including Palestinian detainees, is taught mainly as part of the international law track.”¹³¹ The study of international law is an important field. However, given the absence of precise guidelines and procedures, and in view of the sweeping denials by senior commanders, it may be anticipated that the provisions of international law will be perceived as divorced from the reality on the ground and irrelevant to routine operations, with the result that the study of these aspects will not be effective.

Support for this assumption may be found in an article by Lt. Col. (reserves) Amos Giora, former commander of the military’s School of Military Law, who was already mentioned

comment, but the MAG has not addressed the matter further:
<http://www.knesset.gov.il/protocols/data/html/huka/2003-06-22.html>.

¹²⁸ See note 46 above.

¹²⁹ Report on 29 January 2008, see note 55 above.

¹³⁰ Amir Rappoport, “**Military Debriefings Can No Longer Be Trusted,**” note 86 above.

¹³¹ Reply of the IDF Spokesperson to the questions forwarded by PCATI on 19 December 2007, para. 2.

above. Giora comments that it is “unclear” whether the lectures given to soldiers on the subject of international law were effective. The role playing exercises were perceived by the soldiers as “unnatural.”¹³² The article focuses on methods developed in place of the lecturers and role playing exercises: a computer program based on excerpts from Hollywood movies, and the presentation of dilemmas and questions relating to hypothetical cases. The details of the themes raised in the new training courses shows that they make no reference to arrests in general or to the treatment of detainees following arrest in particular.¹³³

The military claims that, as part of the themes taught in the School of Law, “the main emphases presented to soldiers and commanders at all ranks are identical, including the central theme that the civilian and non-combative population is to be treated with dignity and politely.”¹³⁴ The reality of frequent abuse at the checkpoints, which is acknowledged even by official military spokespeople, reinforces still further the impression that legal training is not sufficient to uproot abusive norms that have taken hold at the grassroots level.

The years that have passed are a lost period of extensive ill treatment, violence, humiliation, frustration, and physical and emotional damage. It is unreasonable, illegal, immoral, and undesirable that yet more years be wasted due to the refusal to recognize the phenomenon of the ill treatment of detainees. We have seen above that despite the clear and absolute prohibition against ill treatment, the military does not make proper preparations for arrest operations; refrains from imposing responsibility on commanders for the ill treatment of detainees; and is extremely disinclined to launch investigations and indict soldiers suspected of abusing Palestinian detainees. As will become apparent below, the governmental echelons are also part of the policy of denial that enables detainees to continue to be harmed.

B. Israeli Authorities: Silence

The Defense Ministry

The Defense Ministry and its senior officials are directly responsible for military operations. Despite this, they completely ignore the abuse of Palestinian detainees by soldiers.

By way of example, the goals of the Defense Ministry for 2006 make absolutely no mention of the grave problems raised during the constant friction between soldiers and the Palestinian population. This evasion is not due to a general lack of interest on the part of the ministry in moral or educational issues relating to the military. Goal no. 7, for example, directly relates to educational aspects: “To intensify educational actions in order to ensure that service in the IDF is meaningful; to realize national tasks; and to raise public awareness of security-related issues.” The ministry’s list of objectives also makes no mention of the need to address the questions or problems raised by the occupation, and in particular violence and abuse. The impression is that the heads of the Defense Ministry do not consider these subjects to be attractive or important enough to warrant educational action.¹³⁵ The only systemic reference to these issues comes in what the Defense Ministry calls the “Fabric of Life” project, which addresses the serious problems the Separation Barrier creates for the Palestinian residents of

¹³² Pp. 10-11 of his article, see note 100 above.

¹³³ Ibid., pp. 11-15.

¹³⁴ Reply of the IDF Spokesperson dated 19 December 2007, see note 131 above, para. 6.

¹³⁵ See the Report of the Defense Ministry for 2006. Goals – p. 9; objectives – p. 13. See: http://www.mod.gov.il/pages/about_office/pdfs/200601.pdf.

the West Bank. The phenomenon of abuse is not the product of the Separation Barrier, and accordingly it is not addressed in the framework of this project.¹³⁶

In terms of the administrative structure of the ministry – the areas of expertise of the defense minister’s advisors and assistants and the bodies and units of the headquarters accountable to the minister – it emerges that no specific individual or body is responsible for examining the problematic moral or professional ramifications of military operations in the Occupied Territories.¹³⁷

Our examination of institutional attention to the problem also included a review of the proposed defense budget for 2008 (the unclassified section).¹³⁸ The proposal relates to a total budget of approximately NIS 11 billion, and does not include the budget of the Coordinator of Government Activities in the Territories. The 300-page proposal includes an elaborate macro-economic analysis, dozens of diagrams and tables, and hundreds of budget items, but there is no mention whatsoever of the need to address the phenomenon of violence against Palestinians by soldiers: no educational program, no investigation, no research, and no monitoring. Again, the reason is not that these aspects are not relevant to the examined material. The proposed budget details payments for enrichment courses (NIS 1.1 million) and for psychological counseling and diagnosis for demobilized soldiers (approximately NIS 0.5 million);¹³⁹ addresses at length what it terms “the evasion of service in the IDF” and suggests diverse budgetary means for encouraging enlistment;¹⁴⁰ and even includes an allocation “of up to NIS 10,000” to be provided for each reserve regiment in order to raise the soldiers’ morale – “for the acquisition of shirts, hats, and so forth.”¹⁴¹

The above-mentioned budget items show that the Defense Ministry addresses issues relating directly to soldiers in the army as it sees fit, initiating large-scale projects in areas it considers deserve encouragement or in order to solve problems it considered urgent. The budgetary priorities presented by the defense minister for 2008 reveal that crimes committed against Palestinians by the military on a regular basis are not considered worthy of such attention.

In order to complete our examination, we also reviewed the press releases issued by the Defense Ministry and by Defense Minister Ehud Barak, who served in this position at the time of writing and during the period when most of the incidents discussed in this report occurred. We also examined Barak’s speeches from his appointment in mid-2006 through April 2008.¹⁴² Our review also included the remarks made in the Knesset by Defense Minister Barak, and by his predecessor Amir Peretz, during their time in the position from the beginning of 2006 through April 2008, as well as the comments of their deputies – Matan Vilnai and Ephraim Sneh, respectively.

¹³⁶ See the project site: <http://www.securityfence.mod.gov.il/Pages/Heb/mirkam.htm>.

¹³⁷ Pp. 14-16 in the report (see note 135 above).

¹³⁸ See: http://www.mod.gov.il/Pages/general/pdfs/takziv_2008.pdf (hereinafter: “the proposed budget for 2008.”)

¹³⁹ Proposed Budget for 2008, p. 74, item 1705/5, sub-section 1404.

¹⁴⁰ Proposed Budget for 2008, p. 227, section 5E.

¹⁴¹ Proposed Budget for 2008, p. 223, section 5B.

¹⁴² As available on the Defense Ministry website. For the press releases of the Defense Ministry Spokesperson, For the media releases and speeches of the defense ministry: http://www.mod.gov.il/pages/about_office/ministerMsg.asp.

The examination of the press releases shows that while these addressed important and interesting aspects,¹⁴³ the ministry and the minister did not choose to devote even a single press release (out of over 150) to the phenomenon of the abuse of Palestinians. The only release that relates to the subject was issued on 5 October 2006. Under the heading “Ensuring Quality Service at the Crossings,” the release notes that an employee at “Sha’ar Ephraim Crossing” who stole money from a Palestinian was located and dismissed. During this period, it should be noted, a large number of serious cases of ill treatment were revealed.

An examination of the 40 speeches by Ehud Barak included on the Defense Ministry website reveals two references to relevant issues. The first appears in a speech made on 26 July 2007 to new recruits to the Kfir Brigade. In his speech, Barak made a distinction between the determined and victory-oriented behavior that is required “against anyone who wishes to harm the State of Israel and Israelis” and “the woman crossing the checkpoint on her way to give birth, the child and the old man in the car,” regarding whom the soldiers should be “humans.” The second reference appears in a speech made at the ceremony marking the appointment of the president of the Military Court of Appeals on 14 August 2007. Commenting on the military operations in the Territories, Barak noted:

“... Regrettably, in the course of such intensive and protracted operations mishaps also occur, errors are made, and there are sometimes exceptional incidents. The function of the judicial system in the IDF, and of the Military Court of Appeals in particular, is not to protect the army from the law – but to protect the law from deviations [...] The IDF is a moral army. But in order to maintain its morality, we must pay the strictest attention to ensuring that the law is observed and to command – and if necessary legal – action in the case of any manifestation of arbitrary or inhuman behavior or injury to human rights that are not essential for security reasons and which are contrary to the law, the order, and the values of the IDF.”

Both these references are consonant with the systemic denial of the phenomenon of detainee ill treatment and the support for this abuse. This is true, firstly, in the distinction made between “women, old people, and children” and “those who wish to harm Israel.” This distinction leaves the detainees in the latter group, which is not considered worthy of the soldiers’ humanity.¹⁴⁴ Secondly, Barak’s comments adopt the “exceptions” theory, denying that ill treatment is a phenomenon, and thus supporting it and preventing attention to the issue. In this situation of denial and evasion, it is hardly surprising that a vast gulf has emerged between the norm to which the defense minister is committed – the norm of responding to any violation of the law – and the harsh reality in the field.

¹⁴³ By way of example, see the press release dated 5 February 2006: “Israeli Stand at the Defexpo Wins First Prize for Most Impressive Stand Design;” or the release dated 16 June 2006 announcing that the Defense Ministry would be cooperating with a participant in the television reality program “The Ambassador” in another exhibition.

¹⁴⁴ Barak made a similarly simplistic distinction on 25 March 2008 during a visit to the Judah district brigade. Meeting with soldiers from the Kfir brigade, in which numerous cases of ill treatment have been revealed recently, he noted: “I have come here today to say thank you to you fighters. This type of task [takes place with] a civilian population that does not exactly like us. We must treat the population with a combination of firmness and operational decisiveness whenever there is an operational problem, but a human approach in any other case,” Barak told the soldiers. Barak refrained from commenting on the instances of ill treatment. Here, too, his position is that human behavior is confined to cases that do not raise an “operational problem.” See the website of Arutz Sheva: <http://www.inn.co.il/News/News.aspx/173232>.

Further evidence of denial may be found from as early as 2004, when the Defense Ministry asked the Knesset Education and Culture Committee to refrain from discussing the testimonies of soldiers regarding the widespread violation of human rights in the Territories. The soldiers themselves were due to attend the discussion.¹⁴⁵

In the Knesset, the defense ministers and their deputies have made almost no reference to the ill treatment of Palestinians, despite the large number of cases. Ehud Barak has spoken only very rarely in the Knesset in his capacity as Defense Minister;¹⁴⁶ most of the parliamentary questions directed to Barak were answered by Deputy Minister Matan Vilnai. Only in one question was the defense minister asked to comment on the ill treatment of a Palestinian by soldiers. The question concerned the ill treatment of an Israeli citizens at the Taisir checkpoint, and to the growing number of complaints about the behavior of the soldiers at this checkpoint. The deputy minister's reply was an example of our arguments above concerning the handling of such cases. Vilnai noted that the MIU investigation was "in its final stages;" thus far, a debriefing had been undertaken, in light of which it had been decided that the soldiers who were involved in the incident will not serve in the future at this checkpoint. "We attach great importance to this issue," the deputy minister added.¹⁴⁷

Although he appeared before the Knesset much more frequently than Barak, Amir Peretz did not address questions relating to the ill treatment of Palestinians by soldiers. The same is true of his deputy, Ephraim Sneh.

Accordingly, an examination of the diverse areas of activity of the Defense Ministry and of its heads shows that they refuse to recognize the phenomenon of the ill treatment of Palestinian detainees by soldiers. The natural consequence is that they fail to address the issue or to introduce significant steps in this regard. As we saw in the previous chapters, one of the ramifications of this situation is that the Defense Ministry bears responsibility for the absence of operational procedures in the military defining the handling of detainees until their transfer to the detention facilities; for the removal of responsibility for the ill treatment of detainees from the command echelons; and for the failure to take into account the special circumstances that arise in the arrest of minors.

The Knesset

Though our examination has examined in depth the military and the Defense Ministry, this must not obscure the ongoing responsibility of elected public representatives, who are supposed to supervise the behavior of the executive arm of government and its agents. A review of the Knesset Protocols for the period January 2006 through April 2008 reveals that no discussions took place in the plenum of the Knesset regarding the ill treatment by soldiers of Palestinians in general, or Palestinian detainees in particular; needless to say, there was also no legislative activity on this subject. In order to extend our examination further, we focused on the activities of the Knesset Foreign Affairs and Defense Committee (hereinafter: "the Committee") – the Knesset body responsible for supervising the activities of the defense system, as well as the discussions of the Knesset Constitution, Law, and Justice Committee,

¹⁴⁵ See the comments of MK Etti Livni at the session of the Knesset Constitution, Law, and Justice Committee on 18 August 2004, p. 51: <http://www.knesset.gov.il/protocols/data/html/huka/2004-08-18.html>.

¹⁴⁶ A search of the Knesset Protocols revealed two speeches (one his inauguration speech) and a reply to one parliamentary question, though the latter was made in writing rather than in person.

¹⁴⁷ In the response to a parliamentary question to the defense minister, 12 November 2007.

which has undertaken periodic examinations of issues relating to human rights and combat in the Territories.

A review of the unclassified materials relating to the agenda of the Knesset Foreign Affairs and Defense Committee shows that during the period 2003-2008, out of the total of over 400 sessions and tours, the Committee did not devote even a single discussion to the ill treatment of Palestinian detainees by soldiers – this despite the presence of countless reports of abuse in the media, numerous testimonies by soldiers, and requests from various organizations. A subsidiary team of the Committee called the “Team for Civilian-Defense Operations in the Judea and Samaria Area,” which does not have any statutory status, held several sessions over the years, but there is no documentation of any attention to the subject of abuse. Of the proposed laws raised by the Committee over this period, not one relates to the behavior of the military in the Territories. Of 167 points of order that are not on the Committee’s website, not one relates to the ill treatment of Palestinians by soldiers. The document “Foundations and Requests for Planning the Summer Session, 2005”¹⁴⁸ also makes no mention of any issue relating to the behavior of the military in the Territories.

This it can be seen that the Knesset Foreign Affairs and Defense Committee, which is charged by the public, through the Knesset, with supervising the defense system, has failed abysmally to protect the public interest when it comes to ensuring the rule of law in the actions of the executive branch in the Territories. It is important to emphasize that the problem is not that the Committee has attempted to fill this role but has failed. Rather, it has deliberately ignored the issue. Even during the height of the intifada, when a flood of news and other reports revealed cases of looting, ill treatment, and unjustified shooting, the Foreign Affairs and Defense Committee preferred to neglect the subject completely.¹⁴⁹

The Committee itself has declared on several occasions that the Knesset’s supervision of the defense establishment is insufficient. On 22 September 2003, the Committee, which was headed at the time by MK Yuval Steinitz, appointed a public committee to examine the parliamentary supervision of the defense system. The committee was headed by former Justice Minister Prof. Amnon Rubinstein (hereinafter: “the Rubinstein Committee.”)¹⁵⁰

The Rubinstein Committee found that proper parliamentary supervision requires, among other aspects, “...a joint committee of the Foreign Affairs and Security Committee and the Constitution, Law, and Justice Committee to attend to issues of law, justice, and human rights in the Administered Territories [...] We feel that there is a need for such a committee, since the laws of the Knesset do not apply thereto [i.e. to the Territories],” the members of the Rubinstein Committee wrote. They continued:

“It hardly needs to be noted how important such parliamentary supervision is in an area in which Israeli law does not apply, nor how important it is for the

¹⁴⁸ The documents appear on the Knesset website: <http://www.knesset.gov.il/committees/heb/docs/confidence.htm>.

¹⁴⁹ A request from the editor of this report dated 21 January 2008 to Avriel Bar-Yosef, the director of the Committee, and Etti Cohen-Nohan, the Committee’s secretary, to receive **information regarding the activities of the Foreign Affairs and Defense Committee** on the above-mentioned issues received a similar response and was completely ignored.

¹⁵⁰ **Letter of Appointment of the Rubinstein Committee**, 22 September 2003. The letter of appointment and the other documents of the committee may be viewed at: <http://www.knesset.gov.il/committees/heb/docs/defense16-1.htm>.

purpose of maintaining Israel's character, both internally and externally, as a law-abiding country [...] The members of the Committee noted [...] the absence of due parliamentary supervision of events in the Territories [...]"¹⁵¹

However, the proposed sub-committee for the Territories was never established. In a document summarizing the activities of the Foreign Affairs and Defense Committee during the period 2003-2005, approximately one year after the submission of the recommendations, MK Steinitz writes:

"[...] Many of the issues addressed by the Committee [...] are not subject to the scrutiny of any other bodies outside the defense system, due to the absence of minimum information enabling informed scrutiny. The citizens of Israel, the media, academia, and members of the Knesset plenum are, if at all, exposed only to the tip of the iceberg of certain issues or certain systems."¹⁵²

The situation today is no different than when MK Steinitz wrote his comments.

The recommendation to establish a subcommittee to supervise the operations of the defense system in the Territories, and indeed the failure to implement this recommendation, are both part of an ongoing thread of lack of responsibility. The creation of a secretive framework for discussing such phenomena as the extensive ill treatment of persons following their arrest forms part of the effort to keep improper norms and actions as far from the public eye as possible, under the cloak of self-scrutiny. These are not classified subjects. On the contrary: they are well known to every Palestinian and to every soldier and commander in the military. It is the legislature that is unfamiliar with these phenomena and which has failed to fulfill its function and its obligation to supervise them and to identify solutions.

In this instance, a confidential committee is a framework that grants excessive power to the representatives of the defense system, and insufficient power to the desirable public debate on such matters. The fact that even the attempt to establish such a subcommittee proved unsuccessful is further evidence of this: Figures from the security establishment, together with public representatives who have an interest in maintaining the status quo, refuse to abandon their total control of information in order to provide an account to the public. It may be assumed that similar considerations led the Foreign Affairs and Defense Committee – both before and after the Rubinstein Committee – to refrain from discussing the serious phenomena of violence that have become endemic in the treatment of Palestinians by the military.

MK Michael Eitan from the Likud seems to have reached a similar understanding when he initiated a series of twice-yearly discussions under the heading "Protecting Human Rights during the War against Terror." The discussions formed part of the routine activities of the Constitution, Law, and Justice Committee, which Eitan headed. During one session of the committee, Eitan noted:

"I have found that the Constitution Committee is the proper place to serve as the parliamentary tool scrutinizing the IDF in terms of the protection of

¹⁵¹ From the **Report of the Rubinstein Committee**, 28 December 2004, **ibid.**

¹⁵² From the introduction to the summary document:
<http://www.knesset.gov.il/heb/docs/confidence2.pdf>.

human rights. The regular and central body regarding the IDF is the Foreign Affairs and Defense Committee, but on aspects relating to the protection of human rights I felt that the responsibility and scrutiny should be transferred to the Constitution Committee, since our perspective is different, due to our different emphases.”¹⁵³

At another session, Eitan responded to the proposal to establish a joint subcommittee for both committees: “[...] I attach great importance to army generals and even the Chief-of-Staff coming specifically to the Constitution Committee. They already know the Foreign Affairs and Defense Committee, they know how to get by there.”¹⁵⁴

Between May 2003 and December 2007, at least fourteen sessions of the Knesset Constitution, Law, and Justice Committee were devoted to human rights issues. The majority of these focused mainly on human rights issues in the Territories, and particularly on the rights of Palestinians against the background of military operations, security needs, questions of legality and policy, maintaining the “purity of arms” during combat, and so forth. The behavior of soldiers at the checkpoints, administrative detention, the “neighbor procedure,” the policy of house demolition, and problems resulting from the construction of the Separation Barrier all received specific attention. Human rights representatives were present at most of these discussions and were given considerable time to raise questions, positions, and recommendations. The military representatives, including the MAG, were present at the discussions on a regular basis, answered questions, and routinely presented various data and explained the legal position of the military on diverse issues. The frequency of such sessions has fallen sharply since 2006, once MK Eitan was no longer chairperson of the committee, but several sessions were also held in 2006 and 2007. The impression is that that the broad issues of interest to the committee are highly pertinent to this report. “Our problem,” MK Eitan clarified in one of the earlier sessions, “is whether the IDF inspects itself. Is this policy implemented in the field? And is there enough control over what happens in the field?”¹⁵⁵

The thematic and conceptual framework of the discussions in the committee is appropriate for considering the phenomenon of the ill treatment of Palestinian detainees by soldiers. In practice, however, no such discussion has taken place. The committee has occasionally heard from the MAG that a particular punishment has been imposed in an instance of ill treatment, and the problem of the conditions of detention of Palestinians has been raised, but there has been no discussion of the phenomenon per se. As a result, the committee has not addressed the issue on a systemic, consistent, and effective basis – something that could have helped raise the issue on the public agenda, secured a response from military sources, or even led to change.¹⁵⁶ We hope that this report will encourage the Knesset Constitution, Law, and Justice Committee to address the phenomenon of the ill treatment of Palestinian detainees by soldiers as part of the responsibility the committee has accepted for scrutinizing, inspecting, and

¹⁵³ Session of the Knesset Constitution, Law, and Justice Committee, 6 December 2007, p. 3 of the protocols.

¹⁵⁴ Session of the Knesset Constitution, Law, and Justice Committee, 18 August 2004, p. 25 of the protocols of the session: <http://www.knesset.gov.il/protocols/data/html/huka/2004-08-18.html>.

¹⁵⁵ Session of the Knesset Constitution, Law, and Justice Committee, 22 June 2003, p. 10 of the protocols of the session: <http://www.knesset.gov.il/protocols/data/html/huka/2003-06-22.html>.

¹⁵⁶ The most comprehensive discussion held by the committee on the subject of detainees focused on the difficulties faced by Noam Federman [a Jewish Settler suspected of extremist activities] during his detention; see the session of the Knesset Constitution, Justice, and Law Committee, 10 December 2003: <http://www.knesset.gov.il/protocols/data/html/huka/2003-12-10.html>.

encouraging change on behalf of the public in matters relating to human rights violations in the Occupied Territories.

6. Recommendations for Change

The State of Israel and the citizens of Israel have an obligation, and indeed an interest, to expose and stop the phenomenon of the ill treatment of detainees. The broad picture is one of failures on all levels, despite isolated efforts in various places to expose the phenomenon, mainly on the part of legal and educational functions within the military. The impact of such localized efforts is limited. It is vital to overcome the disconnection between the moral legal and professional approach and the operational echelons, from the soldier in the field to every last member of the general staff. In view of the profile of this phenomenon and the functioning of the different systems as examined above, we recommend the following detailed courses of action.

A. The Army

(1) Recognition

The political and military echelons must recognize that the widespread ill treatment of shackled detainees is a real problem that exists in the field. They must also acknowledge that the various supervisory mechanisms for reporting, inspection, and enforcement have refrained from addressing this phenomenon.

Under the supervision and responsibility of the political echelon, the military must undertake an urgent, honest, and profound examination of the situation on the ground. The results of this examination should inform urgent and systemic discussion producing immediate recommendations for action, under the responsibility of the defense minister and under the supervision of the chief-of-staff. Such recommendations must include tangible objectives for securing a drastic reduction in as short a period of time as possible, with the ultimate goal of completely eradicating this phenomenon.

The required recognition is not confined to the senior echelons. The process of normative change must also include discussions between commanders and soldiers of different ranks. These discussions should expose dilemmas, difficulties, and cases of ill treatment. Such a process of clarification may play a vital role in redefining what is “normal” and what is “desirable” and in clarifying new boundaries, in order to draw the reality on the ground closer to the legal and moral approach.

(2) Exposure

Together with the decision to embark on a course of remedial action, and as part of this process, the defense minister and the military should publicize the principal findings of the internal examination. This information should be shared with forums of commanders and in lessons and discussions within the military, as well as in the media and in the Knesset plenum. Such public exposure is vital in order to convey a determined and unequivocal message against the phenomenon of ill treatment of shackled detainees. Public statements embody a two-way commitment, both internally within the military and externally, to the citizens of Israel as the source of sovereignty. Such statements also bind those who make them on a personal level. The general public should also be included in actions adopted to stop the phenomenon, and should be kept informed of progress and difficulties on an occasional basis. These efforts might focus on legislation, such as on Amendment No. 44 to the Military Justice

Code as proposed by the Foreign Affairs and Defense Committee (Restriction of the Confidentiality of the Military Debriefing).¹⁵⁷

(3) Amending procedures

The security system must introduce orders and procedures preventing, as far as possible, the ill treatment of detainees. The Defense Ministry and the military should make clear and detailed guidelines available to commanders and soldiers. The task of arrest should be defined as a distinct action, and planned on the basis of general principles and detailed procedures that view the rights of detainees and responsibility for their wellbeing as an integral part of the operational process of arrest.¹⁵⁸

The following aspects should be among those addressed by the procedures: A clarification of permitted and prohibited actions regarding detainees; the regulation of the responsibility for detainees as part of the operational task – who is responsible, what is the range of responsibility, and how is responsibility transferred from one detail to another; and, in particular, an emphasis on the command and residual responsibility for abusers, in view of the frequent argument that it is difficult to locate those who commit ill treatment, and hence difficult to combat the phenomenon; the identification of the weak points at which detainees are subject to arbitrary treatment, and the neutralization of these points (for example, by means of command presence or through a controlled physical space); the prevention of contacts between dogs and detainees; and special sensitivity during the arrest of minors.

The application of these procedures should begin on the completion of the arrest task. The completion of an arrest will be defined as occurring only when the detainees are transferred to a proper imprisonment facility or to another body. This will prevent, at least in procedural terms, the creation of periods of time during which it is unclear who bears responsibility for the detainees' wellbeing. Accordingly, the procedures should also define the manner in which detainees are to be transferred, the maximum period of time from the commencement of the arrest task through to transfer, the nature of an "imprisonment facility," and so forth.

¹⁵⁷ See the debate in the Knesset, 13 January 2003: <http://www.knesset.gov.il/TqI/mark01/h0010847.html#TQL>.

¹⁵⁸ The absence of orders and procedures on this subject in the military may be contrasted, for example, with the booklets of principles and practical procedures that have been produced by both the British and the American militaries. These documents relate to such aspects as planning, command responsibility, exercises and training, supervision, infrastructures, medical treatment, hygienic conditions, arrest procedures, and release, as well as the manner of transfer of detainees. Some of these procedures were introduced after instances of ill treatment of Iraqi detainees by soldiers from both militaries. We readily acknowledge that guidelines and procedures cannot, in themselves, prevent cases of ill treatment; they must be accompanied by intention, practice, and due monitoring and enforcement. Even if this is ensured, it may be assumed that as long as force is used, it may also be used outside the combat context. Nevertheless, the mere presence of an official and public approach to the issue is a vital condition for serious attention and a foundation for action and examination. In terms of comparative aspects, it is worth noting that the files of procedures relating to the handling of detainees by the military are available to the public and are not classified. Regarding the British military, see: **Prisoners of War, Internees and Detainees – Joint Doctrine Publication 1-10 & Joint Doctrine Publications 1-10.1 to 1-10.3**, available at: <http://www.mod.uk/DefenceInternet/MicroSite/DCDC/OurPublications/JDWP>. Regarding the US military, see: **Detainee Operations – Joint Publication 3-63**, 06 February 2008, available at: http://www.fas.org/irp/doddir/dod/jp3_63.pdf.

The entire arrest task must be accompanied by a monitoring form or similar means of documentation noting the identity of those responsible for the detainee at every stage and detailing his condition – on arrest, after transportation, on transfer between military details, and so on. This documentation will be used for monitoring purposes during the course of arrest and thereafter. According to the reply of the IDF Spokesperson dated 3 February 2008 to PCATI's questions, the military already maintains such a procedure on a partial basis, and the MIU officer ensures that all detainees taken to a detention facility "[...] undergo a comprehensive and thorough medical inspection before entering the detention facility." In addition, "The arrival of the detainee at the detention facility requires the full registration of the identity of the detail that executed the arrest as a condition for transfer to the facility. In any case in which the medical examination reveals signs of injury or violence, the military police officer must forward the matter to the MIU for examination."¹⁵⁹ All that remains, then, is to extend this procedure to all stages of arrest, and to ensure that violence against a detainee results in an **investigation** by the MIU, rather than an "examination" that may end in a decision not to investigate the incident.

In order to facilitate the implementation of the procedures, the following conditions must be ensured:

- (1) The procedures must be available in writing and must be forwarded in a written format to every soldier liable to execute arrests as part of his military duties;
- (2) The procedures must be presented as part of the briefing before every arrest operation;
- (3) The procedures will not be superseded by other procedures influencing the tasks, whether as part of an unacceptable "tradition" in the military or as the result of the different operational theories applied by GSS personnel who accompany many of the arrests;
- (4) Maintaining the wellbeing of detainees will also mandate the allocation of the necessary resources for arrests, for the purpose of handcuffing, transportation, holding, and so on.
- (5) In order to enable the effective allocation of responsibility and awareness of responsibility on a real-time basis (and, in particular, the responsibility of commanders), the arrest process must be documented in an orderly manner, including details of the details participating in the arrest; the time the arrest began and ended; injuries or other unusual incidents; etc.¹⁶⁰

As noted, the IDF Spokesperson claims that "the IDF acts to inculcate the value of human dignity in its units" and employs various study means and in-service training courses in order to inculcate "the values of justice."¹⁶¹ However, recognition that ill treatment is a phenomenon may be expected to change the manner in which the authorities cope with the problem, including the ways in which these study means are used and, potentially, the development of new means. Since these are practical and complex matters, the inculcation and formulation of areas of content should begin and be founded on the highest echelons.

¹⁵⁹ Item 2 of the reply.

¹⁶⁰ See similar comments on the difficulty in attributing responsibility in the position paper of the Redress organization, in response to a report by the British Ministry of Defence regarding cases of ill treatment and the killing of prisoners in Iraq (The Aitken Report): *Memorandum to the UK Ministry of Defence on the Aitken Report*, 31 January 2008: [http://www.redress.org/publications/Memo%on%Aitken%Rep\[ort%2031%20Jan%2008.pdf](http://www.redress.org/publications/Memo%on%Aitken%Rep[ort%2031%20Jan%2008.pdf).

¹⁶¹ Reply of the IDF Spokesperson to the questions forwarded by PCATI on 19 December 2007, paras. 1-6.

Inculcation efforts should not stop the moment a soldier leaves the gates of the IDF School of International Law. The approach should be reversed – junior commanders and soldiers should be trained in the field, with the participation of senior commanders, and on the basis of the examination of real-life cases. Training in preparation for operations in the Territories should include a special section devoted to arrests and the handling of detainees. This section must emphasize the absolute prohibition against harming detainees; the responsibility of soldiers and commanders for their wellbeing; the obligation to prevent and report cases of ill treatment; and the relevant orders and procedures, once these have been introduced.

Training programs for soldiers and officers serving in the field should include a practical dimension relating to detainees, as well as the theoretical section. A review of the educational program currently employed by the military (see Chapter E above) shows that the division of the treatment of moral questions and operational practice mirrors the disconnection found in the field during the execution of arrests, whereby there is a wide gulf between theory and practice. Accordingly, all aspects and stages of the arrest mission should be practiced in light of the procedures and orders as introduced, and this mission should be properly debriefed as a full-fledged operational task.

(4) Enforcement

As we have shown, the military system does not ensure adequate investigation of cases of ill treatment of detainees, and is reluctant to prosecute or punish offenders. Meaningful enforcement is vital in order to uproot unacceptable phenomena and is no less important than the educational aspects. In particular, acceptance of criminal responsibility for ill treatment at the command level must become the norm. The legal authorities in the State of Israel should supervise these activities and ensure the presence of mechanisms for investigation, prosecution, and penalization in order to ensure effective deterrence of those inclined to abuse detainees.

As long as the military continues to hold the authority for investigating instances of ill treatment of detainees by soldiers, the military enforcement system must present clear and realistic objectives relating to the exposure and investigation of offenses of ill treatment against detainees. The MIU should make immediate and substantial improvements to the investigation of such complaints. The investigations must be rapid and proactive, and must include the work of investigators with training in forensic medicine and of Arabic-speaking investigators. It must also be ensured that complainants enjoy full access to all relevant information. In order to enable an analysis of the reality in the field as reflected in complaints and investigation files, the system of information classification in the MIU should be made sufficiently sensitive to assist in diagnosing specific phenomena, and certainly more so than is presently the case.¹⁶²

¹⁶² According to the IDF Spokesperson, the Military Investigations Unit classifies complaints relating to offenses against Palestinians into offenses of violence / death / property / others (reply of the IDF Spokesperson to PCATI's questions, 1 May 2008). This classification is crude and inadequate.

(5) Monitoring

In order to ascertain whether the efforts to reduce the scale of the phenomenon have been effective, the military must evaluate its educational and command actions. The evaluation should examine whether changes occurred in the behavior of soldiers, commanders, and units before and after the introduction of these means and, if so, should specify the nature of these changes. The feedback will be used to improve the techniques employed to tackle the problem and to enhance their effectiveness. Similarly, the effectiveness of all steps taken to uproot the phenomenon of ill treatment of detainees must be monitored.

B. The Ministry of Defense

In view of its direct responsibility for the military and the gravity of this Righteous Gentile, PCATI urges the minister of defense to instruct the chief-of-staff to undertake examinations and introduce changes as detailed above.

PCATI recommends the establishment within the Defense Ministry of a special team to supervise the processes of clarification, learning, enforcement, and monitoring within the military with the goal of ill treatment of detainees. The outcomes should be brought before the Knesset on a periodic basis, or as required, in light of developments and findings.

Once the defense minister has been made aware of the phenomenon of the ill treatment of detainees – including by means of this report – he bears the responsibility for its continued existence unless and until he does everything possible to prevent it.

C. The State Comptroller

A division within the Office of the State Comptroller is responsible for scrutinizing the defense system. In response to a request from PCATI, Mr. Yehoshua Roth from the Office of the State Comptroller stated that he has never examined the phenomenon of the ill treatment of Palestinian detainees by soldiers.¹⁶³ Such an examination should be undertaken, and its findings should be accompanied by vigorous action by the State Comptroller Committee in accordance with its authorities under the State Comptroller Law, 5718-1958.

D. The Knesset

PCATI urges the Knesset to establish a special committee to examine the phenomenon of ill treatment of Palestinian detainees and to report on its findings to the Knesset and to the general public.

Pending the establishment of such a committee, PCATI urges the Knesset Constitution, Law, and Justice Committee to hold a series of discussions on the phenomenon in open hearings, exercising its extensive powers of summon in order to clarify thoroughly the questions of responsibility and authority, orders, procedures, and practical norms, and to examine the situation in the field relating to this phenomenon.

PCATI demands that the Knesset ensure that the Defense Ministry and the military maintain processes of evaluation, correction, and monitoring as required in this chapter. By way of an

¹⁶³ In telephone conversations on 25-26 December 2007.

initial step, PCATI urges the Knesset to ensure that the MIU launch investigations immediately into the 90 cases on which this report is based.

PCATI further appraises the Knesset as to the urgent need to transfer the responsibility for investigating criminal conduct by soldiers during operational activities. Investigations should be transferred from the army to a professional, public, external, and impartial body not restricted by military thought patterns and basic assumptions, free of conflicts of interest, and concerned above all with the rule of law, rather than with military tasks. This body must be provided with all the necessary resources, including access and authority, in order to enable it to undertake professional and rapid investigations.

7. Conclusion

Palestinian detainees held by the Israeli military are not safe. Their dignity and physical integrity are in grave and concrete danger. Throughout the Occupied Territories, Palestinians who are arrested are subject to the power and whims of Israeli soldiers from all units, and are often the victims of severe ill treatment and humiliation while they are shackled and blindfolded.

The military and the authorities responsible for its operations have refused to recognize the phenomenon of the ill treatment of detainees and insist on regarding such cases as exceptional. In its responses to the questions presented by PCATI, the IDF Spokesperson emphasizes the “values of the IDF” and the extensive educational activities that it claims are implemented in order to inculcate these values. However, the military has declined to formulate instructions relating to the treatment of detainees from the moment of their arrest, preferring to quote the “spirit of the IDF” as a justification for this ongoing failing. The self-perception reflected in the military’s responses to incidents of ill treatment of detainees by soldiers and to PCATI’s questions is far from encouraging. The military seems to base itself on a hollow and rhetorical normative framework that cloaks a system that, for the most part, chooses not to tackle the moral distortions that result from the protracted oppression of a civilian population. By so doing, it exacerbates these distortions. Those within the military who have attempted to combat the phenomenon are marginal relative to the central command core and their influence is negligible. Senior command echelons and the political echelon relieve themselves of responsibility, while soldiers in the field act in accordance with unacceptable norms supported by silence, obscurity, and a reluctance to ensure enforcement.

Despite the special gravity of this phenomenon in moral and legal terms, the Military Investigative Unit and the military prosecution have refrained from taking meaningful action to eradicate it. The number of investigations is small; the vast majority are closed at an early stage; and the number of soldiers prosecuted for abusing or injuring Palestinians is ludicrously small relative to the scale of the phenomenon. Commanders are almost never prosecuted for their command responsibility for the ill treatment of detainees, and in the two cases in which commanders have been convicted; they were not sentenced to imprisonment. With the exception of the Military Court of Appeals, the message conveyed by the military investigative and legal establishment, and indeed by the military system as a whole, is one of a silence that is tantamount to encouragement. Thus, through their inaction, the MIU and the military prosecution reinforce the military policy of denying the very existence of the phenomenon. The cases described in this report could provide sufficient motivation for changing the way in which the military tackles the phenomenon – from denial and evasion to recognition and vigorous action to uproot ill treatment completely.

Outside the military establishment, State authorities– the Defense Ministry, the Knesset plenum and committees, and the State Ombudsman’s Office – do not seem to regard the ill treatment of Palestinian detainees as a phenomenon. As emerges clearly from the report, such abuse is widespread and long-standing. It is difficult to believe that the refusal to accept the existence of this phenomenon is due solely to ignorance. Whatever the case may be, the collection of testimonies and the analysis of the situation in the field and of policy as presented here impose an urgent obligation on the State of Israel to clarify the phenomenon of the ill treatment of detainees thoroughly and to take strong steps to eliminate it.

The recommendations we presented above for confronting the phenomenon are based on our familiarity with the phenomenon itself and with Israeli reality in all its diversity, based on a willingness to confront it and to demand that the authorities show a similar level of integrity and engage in vigorous action. We demand that the military recognize the phenomenon of the ill treatment of detainees; study its characteristics; and prepare seriously for arrests. The process of preparation should be manifested in orders, procedures, and activities ensuring inculcation, enforcement, and monitoring. The bodies responsible for the military – i.e. the Defense Ministry and the Knesset – must intervene urgently to ensure the immediate implementation of the necessary changes, and must monitor their impact.

A key tool in enhancing the capability of the Knesset to supervise the process of eliminating the phenomenon must be the public and extra-military investigation of ill treatment of Palestinian detainees. This will also serve as a preliminary means of deterrence and may have a positive impact in terms of reducing the scale of ill treatment of detainees in the field. The Knesset should immediately appoint a committee to study this matter. The institution of the State Comptroller should also be involved in ensuring that the legislature, for its part, does not evade its obligations toward Palestinian detainees as has been the case to date.

In the context of the interplay between society, elected public officials, and those who implement policy, this report serves not only as a means of documentation but also as a clarion call, a warning, and a demand for action. Uprooting the unacceptable phenomenon of ill treatment of detainees is not only an unequivocal legal requirement; it is also – and perhaps primarily – a moral and social imperative of the first degree. These acts of ill treatment are committed in the name of the citizens of Israel. **The Public Committee Against Torture in Israel** and other civil society organizations devoted to the protection of human rights will continue, together with their supporters, to expose and highlight this phenomenon until it is completely eliminated.

Appendix

Application of International Law

1. The legal framework

The Public Committee Against Torture in Israel (PCATI) emphasizes that the military and other forces undertaking arrests must act and must examine their operations not only on the basis of the military orders and the provisions of Israeli law, but also with regard to the provisions of international law. Relevant provisions are included in agreements and other international documents relating both to international humanitarian law (the rules of war) and to human rights.¹⁶⁴ These documents delineate the standards established by the international community (including Israel) with regard to the treatment of detainees. The State of Israel in general, and the military and other security services in particular, are obliged to observe these provisions for the following legal and public reasons:

- The Fourth Geneva Convention, which addresses the treatment of civilians (including in an occupied territory) in time of war, still applies in the Territories and is binding on Israel (which chose to join the Convention);
- Israel has also joined the principal conventions relating to human rights (as detailed below) and, by so doing, undertook to observe their provisions;
- Some of the provisions included in these conventions and in other international documents (such as announcements and declarations regarding the principles of behavior toward imprisoned persons) as mentioned below reflect provisions of international customary law and, accordingly, are also valid in Israeli law;¹⁶⁵
- The partial or defective implementation of international standards, as well as total disregard therefore, are the main reasons for continued abuse and the longstanding pattern of partial and defective attention to this phenomenon;
- Strict attention to these standards in practice and their inculcation in the military and in other forces undertaking arrests, on the basis of the expertise, experience, and humanity embodied in these standards, will contribute to ending ill treatment and preventing its recurrence in the future.

The following list details the conventions and other international documents that are relevant in the context of the treatment of detainees (some of the documents relate exclusively to minors), and which relate directly to the behavior of security force personnel toward Palestinians during and after arrest:

¹⁶⁴ International human rights law continues to apply even during times of war, albeit with certain modifications in some cases (though not for our purposes, i.e. regarding the prohibition against the torture and ill treatment of detainees). See, for example: *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 (I), opinion of 8 July 1996, para. 25; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2005 at 201, Judgment of 19 December 2005, para. 216.

¹⁶⁵ See, for example, H CJ 610/78, 606 **Suleiman Tawfiq Ayoub and 11 others v Defense Minister and 2 others**, *Piskei Din* 33(2); H CJ 390/79 **Izat Mohammed Mustafa Dweikat et al. v Government of Israel**, *Piskei Din* 34(1) 1; cf. CA 7029/94 **Her Majesty The Queen in Right of Canada v Edelson et al.**, *Piskei Din* 51(1) 625, 639-641 and the references therein.

- The Universal Declaration of Human Rights,¹⁶⁶ and in particular the articles relating to the prohibition against torture and ill treatment (Article 5) and the prohibition against arbitrary arrest (Article 9);
- The International Covenant on Civil and Political Rights:¹⁶⁷ In particular, the articles relating to the prohibition against torture and ill treatment (Article 7) and regarding detainees' rights (Articles 9 and 10);
- The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment;¹⁶⁸
- The Convention on the Rights of the Child:¹⁶⁹ particularly the articles relating to the prohibition against torture and ill treatment (Articles 19 and 37) and regarding the rights of minor detainees and prisoners (Article 40);
- The (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949:¹⁷⁰ Particularly the articles relating to the absolute obligation to treat detainees humanely and the prohibition against torture and ill treatment (Articles 3, 5, 27, 32, 37, 127, 147);
- Body of Principles for the Treatment of All Persons under Any Form of Detention or Imprisonment;¹⁷¹
- Standard Minimum Rules for the Treatment of Prisoners;¹⁷²
- Basic Principles for the Treatment of Prisoners;¹⁷³
- Rules for the Protection of Juveniles Deprived of Their Liberty.¹⁷⁴

¹⁶⁶ See: Universal Declaration of Human Rights, UNGA res. 217 A(III), adopted 10 December 1948. The full text of all the international documents mentioned here may be found on the website of the United Nations High Commissioner for Human Rights: <http://ohchr.org>. See also: Office of the United Nations High Commissioner for Human Rights, *Human Rights: A Compilation of International Instruments*, Vol. 1 (First Part) (New York: UN, 2002).

¹⁶⁷ See: International Covenant on Civil and Political Rights, UNGA res. 2200 A (XXI) adopted 16 December 1966, entered into force 23 March 1976. The covenant was ratified by Israel in 1991. See **Convention Documents** 1040, Vol. 31, p. 269.

¹⁶⁸ See: Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UNGA res. 39/46 adopted 10 December 1984, entered into force 26 June 1987. The convention was ratified by Israel in 1991. See **Convention Documents** 1039, Vol. 31, p. 249.

¹⁶⁹ See: Convention on the Rights of the Child, UNGA res. 44/25 adopted 20 November 1989, entered into force 2 September 1990. The convention was ratified by Israel in 1991. See **Convention Documents** 1038, Vol. 31, p. 221.

¹⁷⁰ See: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949. For the text of international human law conventions, see, for example, the website of the International Red Cross: <http://www.ohchr.org>. The convention was ratified by Israel in 1951. See **Convention Documents**, Vol. 1, p. 559.

¹⁷¹ See: Body of Principles for the Treatment of All Persons under Any Form of Detention or Imprisonment, UNGA res. 43/173 adopted 9 December 1988.

¹⁷² See: Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹⁷³ See: Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

¹⁷⁴ See: United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

2. Permitted and prohibited behavior during and after arrest

The provisions of international law regarding permitted and prohibited behavior during arrest are based on the principle of the use of the minimum force required. If a person resists lawful arrest, the security force personnel of the state are entitled to use reasonable force, that is to say: the minimum force required in order to overcome this resistance in order to enforce the arrest. If the arresting forces face lethal danger, whether from the arrested person or others, the force exercises may, if there is no alternative, include lethal force.

In other words, this report addresses the treatment of detainees only after all resistance on their part (if any) has ceased. From this point, at which the individual is subject to the control of the arresting forces and is not physically resisting arrest, any use of violence against the individual is absolutely prohibited, and any violence exercised against him constitutes excessive force amounting to ill treatment or torture.¹⁷⁵ A similar prohibition applies to any behavior toward a detainee liable to humiliate him or injure his human dignity.

The legal provisions do not permit Israeli soldiers to employ violence after executing the arrest or to humiliate detainees. In this respect there are no substantive discrepancies between the principled approaches of international and Israeli law. The problem lies in the implementation – or, more accurately, the non-implementation – of the law, and in the lack of action against those who violate the law.

3. The absolute prohibition against torture and other forms of inhuman, cruel or humiliating treatment or punishment

The origins of the prohibition in international law against torture and other forms of inhuman, cruel or humiliating treatment or punishment (hereinafter: “ill treatment”) lie in the rules of war as these developed during the nineteenth and early twentieth centuries, and which prohibited injury to prisoners of war and civilians. The traumas of the Second World War reinforced international agreement that torture and ill treatment must be absolutely prohibited.

In 1984, the United Nations formulated a special convention to combat torture.¹⁷⁶ Article 2(2) of the convention prohibits the use of torture or the justification of torture in any situation. This convention was preceded by a long series of conventions, such as the Covenant on Civil and Political Rights¹⁷⁷ (Article 7), as well as conventions relating to the rules of war,¹⁷⁸ all of which prohibit torture and all other forms of ill treatment in any circumstances. International law recognizes that, in times of emergency, there may sometimes be no alternative but to impose restrictions on certain human rights. However, the prohibition against torture and ill treatment is absolute, without exceptions.¹⁷⁹ This absolute prohibition is a provision of international customary law.

¹⁷⁵ See, for example, Manfred Nowak, “What Practices Constitute Torture?: US and UN Standards,” 28 (4) *Human Rights Quarterly* 809 (2006), at 837.

¹⁷⁶ See note 168 above.

¹⁷⁷ See note 167 above.

¹⁷⁸ For example: The Regulations Annexed to the Hague Convention, 1907 (Regulation 4 regarding prisoners of war and Regulation 44 regarding civilians); Article 3(1), which is common to all four Geneva Conventions, 1949 regarding a non-international dispute; the Third Geneva Convention, Articles 13-17 and elsewhere regarding prisoners of war; the Fourth Geneva Convention, Articles 27, 31, and 31 regarding civilians held by an occupier or a party to a dispute.

¹⁷⁹ See, for example, Article 4 of the Covenant on Civil and Political Rights.

As noted, Israel is a party to all the above-mentioned conventions and has never expressed reservations regarding the provisions that absolutely prohibit torture and ill treatment.

All the international and regional bodies involved in human rights and international human law unequivocally emphasize the absolute prohibition against torture and ill treatment. The rulings of the European Court of Human Rights are particularly prominent in this respect; this court has considered numerous cases involving the torture or ill treatment of terrorists (real or imagined): In all the cases, the court has established that there are no exceptions to this rule.¹⁸⁰

4. The provisions of international criminal law regarding command responsibility

As noted above, a Palestinian detainee held in Israeli custody is protected by two international legal systems: the first relates to human rights and, by its nature, applies to any human being; the second relates to the rules of war, insofar as Palestinian residents are still considered the residents of an occupied territory, and Israel is considered an occupying power. A third legal system is international criminal law, which relates to the prosecution of suspects and the penalization of offenders relating to acts defined as crimes in international conventions or in accordance with international customary law.

International criminal law imposes criminal responsibility not only on soldiers who commit acts it defines as crimes, but also on commanders¹⁸¹ whose subordinates commit such acts. This criminal responsibility applies primarily in the following cases:

- When the commanders ordered their subordinates to commit crimes;
- When commanders knew that their subordinates were committing crimes but deliberately refrained from exercising their authority in order to stop the actions or punish their perpetrators.

The criminal responsibility of the commanders in both these cases is obvious and we will not dwell on these categories here. However, many commanders charged with command responsibility argue that they were unaware of the actions of their subordinates. Is an Israeli commander who sits in the front of the vehicle while his soldiers abuse a Palestinian detainee exempt from responsibility in view of his claim that he was unaware of what was happening behind his back?

The laws and rulings of international criminal law and military legislation in many countries all unequivocally respond that even if this argument cannot be refuted, it cannot release a defendant of command responsibility for crimes.

¹⁸⁰ By way of example, see: *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25; *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336; *Chahal v. the United Kingdom*, judgment of 15 November 1996, **Reports** 1996-V; *Aksoy v. Turkey*, judgment of 18 December 1996, **Reports** 1996-VI; *Aydin v. Turkey*, judgment of 25 September 1997, **Reports** 1997-VI; *Selmouni v. France*, judgment of 28 July 1999, **Reports** 1999-V; *Öcalan v Turkey* (Application no 46221/99), Judgment of 13 March 2003, para 194.

¹⁸¹ In addition to commanders and the military echelon in general, criminal responsibility may also apply to senior civilians responsible for the military in general, or to civilians to whose authority those committing criminal acts were accountable. This aspect will not be considered here, however.

The extreme opposite of this claim is equally untrue. Thus, for example, a famous ruling of the American Military Committee (and, subsequently, of the US Supreme Court) relate to the case of Yamashita, the Japanese general convicted of crimes committed in the Philippines by his subordinates during the Second World War.¹⁸² In this ruling, the committee and the Supreme Court came close to ruling that commanders bear strict responsibility for crimes on a large scale committed by their subordinates, that is to say – command responsibility is always present, by virtue of the mere status of the commander, and regardless of his actions, failings, knowledge, and so forth.¹⁸³ Since this ruling, the legal approach has moderated slightly; today, the approach rejects the concept of strict responsibility. It remains evident, however, that the mere claim “I did not know” is not sufficient to acquit a commander accused of crimes committed by his subordinates.

Professor Jenny Martinez concluded that in accordance with international customary law as this has evolved through the rulings of the international criminal courts, three components are required in order to establish criminal guilt on the basis of command responsibility:

- The presence of relations of authority including effective control, whether in legal or practical terms (by the holder of authority over those subject thereto);
- The holder of authority was aware or had cause to be aware that a criminal act was about to be committed or had been committed;
- The holder of authority failed to take the necessary steps to prevent the offense or to punish its perpetrators.¹⁸⁴

These principles are formalized in the constitutions of the special criminal courts established in the 1990s and during the present decade, including international courts (in the former Yugoslavia and in Rwanda) and mixed courts (such as those in Sierra Leone and Cambodia). The formula employed in these constitutions is that the commander will be found to bear criminal responsibility if he “knew or had reason to know”¹⁸⁵ about the crimes committed by

¹⁸² See: IV Law Reports of Trials of War Criminals, at 35 (United Nations War Crimes Commission, 1947); *Yamashita v. Styer*, 327 US 1(1946).

¹⁸³ Yamashita argued that his ability to control and communicate with his subordinates had been totally neutralized due to the Allied attacks, thus rendering him unable to know about or prevent the crimes. The committee and the Supreme Court did not address this argument directly.

¹⁸⁴ See: Jenny S. Martinez, “Understanding Mens Rea in Command Responsibility: From Yamashita to *Blasskic* and Beyond,” 5 *Journal of International Criminal Justice* 638 (2007), at 64.

¹⁸⁵ This is the format employed in the constitutions of the international courts in Yugoslavia and Rwanda. Both these courts were established in accordance with resolutions of the United Nations Security Council: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, UN Doc. S/RES 955, adopted by Security Council on 8 November 1994, Art. 7(3); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), Art. (3). The same is true of the constitutions of the mixed courts; for example, see: Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000 Art. 6(3). For text see e.g. the Court’s website, <http://www.sc-sl.org>; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Crimes Committed during the Period of Democratic

his subordinates. These provisions also mirror similar ones in the military legislation of many countries.¹⁸⁶

The international courts have interpreted these provisions at length and explained various aspects. Thus, for example, the court for Yugoslavia explained that when the subordinates committed a crime and their commander did not order them to do so, but refrained from acting to prevent the crime, stop it, or punish the perpetrators therefore, the commander is not to be seen as bearing “the same responsibility as his subordinate who committed the crimes, but, on the basis of the fact that those subject to his command committed crimes, the commander must bear responsibility for failing to act.”¹⁸⁷

In another case, this court (in the appeals instance) explained the requirement that the commander had “cause to know” of crimes committed by his subordinates, when “he [the commander] was in possession of information that would have brought to his attention the fact that his subordinates were committing crimes.”¹⁸⁸

The Rome Constitution of the International Criminal Court, which was adopted in 1998 and entered into force in 2001, details these principles in greater detail than in the constitutions of the earlier international courts and the principles formulated by Professor Martinez. The constitution establishes that criminal responsibility will be borne by commanders who were in “effective control and command” of their subordinates at the time these committed crimes, when –

“That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces [under his command] were committing or about to commit ... crimes [contrary to the constitution] and [...] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”¹⁸⁹

Similar provisions are stipulated regarding responsible persons who are not security force personnel.¹⁹⁰

Kampuchea, as amended on 27 October 2004 (NS/RKM/1004/006), Art. 29. For text see e.g. the Court’s website, <http://www.eccc.gov.kh>.

¹⁸⁶ For a comprehensive review of this legislation, see: The International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds.), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), pp. 3745-3751.

¹⁸⁷ See *Prosecutor v. Sefer Halilović*, ICTY Case no. IT-01-48-T, Trial Chamber, Judgment of 16 November 2005, para. 54.

¹⁸⁸ See: *Prosecutor v. Zejnir Delalic and others*, Case No. IT-96-21-A, ICTY Appeals Chamber Judgment of 20 February 2001, para. 241.

¹⁸⁹ See: Rome Statue of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2002, Arts. 28(a) 28(a)(i) and 28(a)(ii), respectively. For text see the Court’s website, <http://www.icc-cpi.int>.

¹⁹⁰ *Ibid.*, Art. 28(b).

The International Criminal Court has not yet issued a ruling on this matter; it is currently taking its first steps toward the prosecution of persons suspected of war crimes and crimes against humanity in Uganda, the Democratic Republic of Congo, the Central African Republic, and Sudan (Darfur). Not all of the theoretical questions relating to command responsibility in international criminal law have been resolved, and naturally each specific case brought before the criminal courts raises new questions of fact and, in some cases, principle. However, the international constitutions and case law have created a sufficiently uniform and clear picture in terms of the validity of the criminal liability borne by commanders for the actions of their subordinates.

Israel has not joined the constitution of the International Criminal Court and is not bound by its provisions, except insofar as these reflect the provisions of customary international law. However, the United Nations Security Council may refer matters for the attention of this court even if the relevant country is not a party to the constitution; this has already occurred in the case of Darfur.

Unlike the constitution of the International Criminal Court, the four Geneva Conventions also apply to Israel. In accordance with Article 146 of the Fourth Geneva Convention, Israel – just like other states that are party to the Convention (i.e. all the nations of the world) – is obliged to prosecute, or to extradite to another country or to an international court for the purpose of prosecution, any persons suspected of “grave breaches” of the provisions of the Convention, which relate, inter alia, to persons arrested in an occupied territory. Article 147 of the Convention establishes that “torture and inhuman treatment” constitute such a “grave breach.”

5. From the general principle to the specific instance: The criminal responsibility of the commanders of the Israeli military and other arresting forces for the ill treatment of Palestinian detainees by their subordinates

We will focus here on the principled question regarding the responsibility of commanders from the Israeli military and other arresting forces for the actions of their subordinates involving the ill treatment of Palestinian detainees. It is not, of course, PCATI’s job to determine the presence of criminal liability in specific cases. In view of the above discussion, the question raised by the international law that is binding on Israel is whether the commanders know – or whether, in the prevailing circumstances, they should know – that their soldiers are abusing Palestinian detainees, or that there is a danger that they will abuse them, and are failing to take all reasonable steps within their authority to prevent the ill treatment or to forward the matter to the attention of the relevant authorities for the purpose of investigation and prosecution.

In Israel in early 2008, it will be very difficult for a commander in the military or in the other security services to claim that he has not heard of cases in which security force personnel in the Occupied Territories have abused detained Palestinians. Even if we accept the highly improbable possibility that the commander did not happen to hear even fragments of information from their own knowledge of events in the field, the reports of human rights organizations detailing such cases have appeared since as early as the 1990s.¹⁹¹ Since the

¹⁹¹ See, for example, the reports published by B’Tselem: **Maltreatment and Degradation of Palestinians by Israeli Authorities During June-July 1996; Sheer Brutality - The Beatings Continue: Beatings and Maltreatment of Palestinians by Border Police and Police Officers during May-August 1997.**

beginning of the Al-Aqsa Intifada, numerous reports and cases have been published both in the media and by PCATI and other human rights organizations.¹⁹²

On the basis of the general knowledge of the risk, any commander of an arresting force in the field bears the following obligations:

- To expressly forbid the soldiers to use violence or humiliation of any kind against Palestinians who have been arrested and who are not resisting arrest or have ceased to resist arrest, and to clarify that he will respond harshly to such actions;
- To supervise the behavior of the soldiers during and after arrests;
- To halt any attempt or act of ill treatment against detainees;
- To ensure that any person who abuses detainees is prosecuted in a fair trial.

More senior commanders bear the following obligations:

- To ensure that the provisions of international law are observed fully and in practice;
- To issue unequivocal orders to forces involved in arrested prohibiting the use of any form of violence or humiliation against Palestinians who have been arrested and who are not resisting arrest, or have ceased to resist arrest;
- To ensure that these orders are clearly conveyed both to commanders and to rank-and-file soldiers and constitute part of the exercises of the forces and of their briefings ahead of arrest operations;
- To require frequent reports from commanders in the field on the execution of the orders;
- To maintain ongoing monitoring of the execution of the orders, including through independent means of supervision, surprise visits, and so forth.

This report shows that commanders of all ranks in the military and in the other forces involved in executing arrests in the Territories have failed to meet these obligations. Our conclusion is that there are reasonable grounds to assume that, in accordance with those provisions of international criminal law that bind Israel, some of these commanders bear criminal liability for the ill treatment of Palestinians following their arrest.

¹⁹² For example, see: PCATI, **Back to a Routine of Torture: The Torture and Ill treatment of Palestinian Detainees during Arrest and Interrogation, September 2001 – April 2003; Ticking Bombs: Testimonies of Victims of Torture in Israel**, 2007. See also, for example, B'Tselem: **Death in Custody: The Killing of Murad 'Awaisa, 17, in Ramallah, 31 March 2002**; B'Tselem and HaMoked, **Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees**, May 2007.