

The translation attempts to remain true to the original legal terminology though in some cases this was not wholly feasible.

In the Supreme Court of Israel  
Sitting as the High Court  
The Public Committee Against Torture in Israel

HCJ 5100/94

Against

- 1 . The State of Israel
2. The General Security Service

Motion for an Order Nisi

Directed Towards Respondent No. 1:

Why it does not order, as it is authorized according to Section 26(b) of the Investigatory Commissions Law, 1968, the publication of the interrogation measures described in the "Compilation of Guidelines to Interrogators of the Service", included in the classified part of the Landau Report, and affirmed from time to time by the Ministers Committee.

Grounds for the Petition:

The Importance of the Petition

1. A. The Shabak operates in the domain of the State of Israel and in the Occupied Territories without having been established by any law and without it having been granted secondary authority regarding searches, detention and interrogation.
- b. The Shabak has operated in this way since the day the State of Israel declared its independence, when it was tolerated as an extra-legal body, by all the authorities of the State of Israel. This includes the Courts, which accepted without question the interrogation authority of the Shabak and its presentation of evidence in the form of confessions, testimony and its own written record of events as admissible evidence.
- c. The legal justification for Shabak activities is claimed to be found prima facie in the general residual authority of the Israeli government. Using these authorities, the Shabak acts as the executory arm of the government in defending the security of the state.
- d. This Petition requests to put to the test the Shabak's authority as a body which operates outside the womb of the legal system, without the express authorization to undertake interrogation activities, and which employs through itself or through others, significant powers accompanying interrogations, such as detention, holding persons in detention and searches.

e. The Petition will emphasize the aberrant nature of Shabak activities. It will focus on the special and exceptional authorities granted to the Shabak interrogators, under the heading of the authority to employ "non-violent psychological pressures and "moderate physical pressure" against suspects during interrogations. These methods are phrased in a wording coined by the Landau Commission and adopted by the State of Israel in its interrogation guidelines to the Shabak. Underneath them lay hidden measures of physical and mental torture and degradation of interogatees for the purpose of extracting from them confessions of their offenses.

f. We have raised to the top of our legal ladder the Basic Law: Human Dignity and Liberty, and declare that its application is not limited only from the date of passage. In addition we claim that the Shabak cannot hide behind the small umbrella of the residual jurisdiction of the Israeli government.

The Authority of the Shabak and the Residual Authority of the Government of Israel

2a. In a traditional manner, the Shabak operates under the Israeli government and the Prime Minister. Its operation is based on the assumption that it is an executing arm of the government, carrying out the residual jurisdiction of the Israeli government to defend the security of the state, as is stated in Basic Law: Government in Section 29:

"The government is authorized to carry out in the name of the state, and in accordance with all laws, any activity whose execution is not provided for by law to another authority."

b. As is explained in this law, there are two conditions for the activation of the residual authority by the government (1) in accordance with all laws (2) any activity whose execution is not provided for by law to another authority.

c. The residual authorities are not above the law, rather the opposite. These authorities are subject to the law and for our purpose first and foremost to Basic Law: Human Dignity and Liberty, which is central to the legal foundation of the legal system and is part of the internal constitution of the State of Israel. The executory authority must observe these fundamental principles, since these principles are designed to restrict the activities of the executory body and to define explicitly its power to impair basic rights.

d. Despite the existence of these fundamental principles, the fact that the government authorizes the Shabak interrogators to harm the bodies and dignity of persons, is a constitutional disgrace which undermines the integrity of the legal system and challenges its right to exist.

e. The government through the Shabak is not entitled to activate interrogation authorities, even if these authorities were granted by various legislation to other bodies.

f. It will be stated at this point, that the residual jurisdiction of the government of Israel, does not allow the Shabak to carry out detention, interrogation and search activities promulgated by law to other bodies, such as the Israeli police, the Israel

Defense Force, the Israel Prison Service and others who are listed explicitly in the law.

3 a. The fundamental principle of the Israeli legal system establishes that the interrogation authority and the powers accompanying it, were granted to designated authorities through law and explicit regulations. The execution of this authority and power is subject to judicial oversight, in a manner that is defined by the law which grants these authorities.

b. An interrogation in its essence requires entering the privacy of a person, injury to his freedom and his dignity, limitation of his personal autonomy and the use of other invasive measures, like detention, search and the like. Therefore, the legislature made sure, that these authorities would be delegated by law to specific and designated authorities and carried out through a broad range of laws which provide to various government bodies interrogation authorities and entry into the sphere of the individual and the like.

c. One who reads the laws which deal with interrogation authorities, is convinced that the Israeli legislature's intention was to provide interrogation authorities in an explicitly and precise manner and not in a residual, general and wholesale manner.

d. The Criminal Procedure Law (1982) provides a clear-cut expression to this, as it is a primary law and not the only one, which explicitly orders invasive interrogation authorities. In addition:

(1) The Wiretapping Law (1979), under the definition of "Security Authority" the law allocates to primary bodies including the Shabak the authority to request a wiretap from the Prime Minister or the Minister of Defense, or to execute a wiretap in an urgent situation.

(2) The Protection of Privacy Law (1981), includes also the Shabak below the heading of "Security Authority" and releases its members from liability under this law in cases where the harm to the privacy was reasonably caused by an investigator in the framework of fulfilling his obligation.

(3) In accordance with the Regulations of the Criminal Procedure Law (Detainee Meeting With Attorney), the head of the interrogation team who was authorized by the head of the Shabak may prevent a meeting between a detainee and his attorney for up to 15 days.

To the best of the undersigned's knowledge, these are the only laws that refer to the Shabak regarding harming individual rights.

The fragmentary recognition of the Shabak in several laws and its providing secondary authorities to the Shabak to invade privacy, wiretap, and prevent a meeting with an attorney, without the Shabak being grounded in law and without it being provided in the law explicit interrogation authority, constitutes a legal mutation which creating a monster, whose image conjures up the hell Heronimus Bosh, with a giant ear that eavesdrops on private conversations and a big open eye which spies and interferes with privacy, but lacks a body, a head, and especially intelligence - the three being critical for judicial oversight and legal sanctioning.

## Shabak Interrogation and Detention Activities in the Real World

5a. The Shabak operates to protect the security of the state and to gather information, activate intelligence and analyze information. It has been functioning for many years in practice. The central tenant of its missions is enforcing the law through interrogating suspects of hostile terrorist activities (HTA), collecting testimony and confessions of suspects and witness, in order to be used as admissible evidence in Court.

b. In the work of enforcing the law, the Shabak acts in consort with other interrogation and judicial authorities like the Israeli police, the military police of the IDF, the General Prosecutor and the Courts.

c. Within these activities, the Shabak is an integral part of the interrogation, prosecutorial and judicial complex allied to bring to trial suspects of HTA. But there is no legal basis regarding the dimension of its activities. Its powers and interrogation authorities were not explicitly provided to it under the law.

6a. In the real world, the Shabak has not been provided with interrogation, detention, and search authorities even in the laws of the State of Israel, which grants the Israeli Police and the Prison Service these authorities. Nevertheless, the Shabak operates and executes detentions, searches, interrogations and holds detainees in interrogation facilities.

b. The interrogation facilities of the Shabak are found generally in detention centers, prisons or police stations. In these facilities, the Shabak interrogation branch is autonomous and totally controlled by the Shabak. The Shabak uses the authorities of the facility in which the interrogation center [i.e. the police] as a sort of sub-contractor to provide detention rooms, services to interrogators and detainees, protection services against the detainees, and all that is necessary to run a detention center and interrogation facility.

c. The authorities in the larger facility in which the Shabak interrogation wing operates autonomously, have no authority to intervene in the internal workings of the interrogation facility or any opportunity to oversee what occurs in them.

d. Routinely, the Shabak conducts searches, detentions and intensive questioning of suspects of HTA. Without independent detention and search authorities, the Shabak conducts these activities through the police of the Israeli police, or military police, whom the law authorizes to conduct searches and detentions.

e. Also in these circumstances, the police function as a sub-contractor for the Shabak for detention and searches, without being able to utilize their own independent discretion.

7a. The Shabak maintains a parasitical relationship with authorized authorities like the police or the prison service. The Shabak establishes itself in the viscera of an authorized body and hides from all judicial and public oversight. From its hiding place it activates the authority, milks from it invasive powers and measures, but prevents these authorities from employing their own discretionary powers.

- b. The members of the Shabak carry out interrogations of persons in detention, its members take statements from witnesses and suspects, written in the form of recollection of events/memoranda ("Zachad"). All this without the Shabak and its members having any explicit authority in the law to carry out the questioning of persons and demand answers to their questioning.
  - c. The law does not permit the Shabak agent any access to persons held in detention.
  - d. The Shabak carries out the questioning of detainees without a "sub-contractor", and the police enter the picture at a later stage of the interrogation. At this later stage, the detainee is brought in front of the police who take a statement under warning from him, which is submitted to the Court as a confession or as a witness statement.
  - e. In most of the cases, the police are not at all familiar with the interrogation or the suspicions against the detainee. They obtain from the Shabak a summary of the issues that the detainee confessed to during his interrogation by the Shabak, and the police are requested to take a similar confession from the detainee.
- 8a. A proper legal system cannot carry a body like the Shabak (which does fulfill an intensive and critical role in the work of bringing to trial and judgment suspects of HTA), without its power and authority being ordered by law. This is so especially when the Shabak is forced to derive these powers from other bodies through parasitic relationships which have no place in a legal system true to the principles of transparency and the limiting of its activities under the law.
- b. While the Shabak not authorized to carry out any interrogations, during the last seven years special authorizations have been issued to the Shabak to employ during the interrogation, non-violent psychological pressure and moderate physical pressure, as described in the rest of this Petition.

#### Landau Report

- 9a. On May 31, 1987, Respondent No.1 - the State of Israel established the Investigatory Commission in accordance with Section 1 of the Investigatory Commission Law 1968, regarding interrogation methods and operations of the Shabak regarding HTA. The head of the commission was Supreme Court Justice Moshe Landau, and comprised Reserve-Brigadier Yitzchak Chofe and the State Comptroller Yaakov Meltz.
- b. In the document establishing the Commission, it was requested among other things, to recommend and suggest "as much as it is called for, appropriate methods and operations regarding these interrogations and future ones, taking into account the special needs in the struggle against HTA."
  - c. Respondent No. 1 also decided to apply Section 23 to the Investigatory Commission Law which states that the Commission is the one who will decide if the report will be publicized in accordance with Section 20 of the Investigatory Commission Law.

d. On October 30, 1987 the Investigatory Commission submitted its report to the government. Among other things, the Commission suggested the application of certain interrogation methods of suspects of HTA in the following language:

"4.6 ...The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information...

4.7 The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided. GSS interrogators should be guided by setting clear boundaries in this matter, in order to prevent the use of inordinate physical pressure...

4.8...In a Chapter of this Report, which for understandable reasons will be included in the second, secret Part, we have therefore formulated a code of guidelines for GSS interrogators which define, on the basis of past experience, and with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him. We are convinced that if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity...

...The code of detailed guidelines which we recommend in the Report's secret part shall be brought annually for reappraisal before a small Ministerial Committee whose creation has already been recommended in the Report. This Committee can make whatever changes it deems fit, according to changing circumstances. Afterwards the guidelines will be made known to the Services Subcommittee of the Knesset's Defense and Foreign Affairs Committee."

e. Accordingly the Commission recommended that:

"The interrogation facilities should be expanded to create reasonable lighting conditions, proper ventilation in the cells and if possible allow for the penetration of daylight. Electric lighting in a detention cell at night should not exceed more than what is necessary in order to observe externally the internal cell activities, and there should be proper sanitation and facilities."

f. The Government decided to accept the recommendations of the Commission and to implement them, including the recommendation of the Commission regarding the above-mentioned interrogation methods. Accordingly, the government decided not to publicize the sections from the report that the Commission recommended to remain classified.

g. From the time the government decided to adopt the guidelines of the Landau Report, they were amended by the Restricted Ministerial Committee, which is referred to in the Landau Report.

It should be pointed out that the methods that the Shabak interrogator is entitled to employ today are forbidden for all other interrogation authorities, and in reality for all and any authorities in the State of Israel. These are methods designed to intentionally and actually harm the body and dignity of a person.

#### The Activities of the Shabak and Basic Law: Human Dignity and Liberty

10a. The activities of the Shabak describe above, such as searches, detentions and interrogations, including employing authorized government bodies as sub-contractors for these activities and the employment of moderate physical pressure measures and non-violent psychological pressure, violate emphatically the guidelines of Basic Law: Human Dignity and Liberty.

b. According to paragraph 2 to the law:

"There shall be no violation of the life, body or dignity of any person as such."

Section 4 of the law states that:

"All persons are entitled to protection of their life, body and dignity."

Section 8 of the law prohibits in its words:

"There shall be no violation of rights under this Basic Law except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required."

According to Section 11 of the law:

All governmental authorities are bound to respect the rights under this Basic Law."

Each and every one of the methods that the Shabak employs without explicit legal authorization violates the body and dignity of a person as a human being.

c. This is true regarding non-violent interrogations conducted on an interrogatee under detention conditions, where he doesn't control his surroundings, he is not free to stop the interrogation according to his will, and he is in all actuality subject to the mercy of the interrogator.

d. How much more so regarding interrogation means which the Landau Commission recommended, and issued to the Shabak interrogators by the Restricted Ministerial Committee, which includes non-violent psychological pressure and the "employment of moderate physical pressure".

e. Only the legislature is provided with the authority to grant the powers and authority to carry acts against the body of a person, his dignity and his mind, the type

that the Landau Commission recommended. Even these measures however, would be restricted by Basic Law: Human Dignity and Liberty for specific purposes, and to the extent they aren't excessive and do not contradict the fundamental values of the State of Israel.

#### Psychological and Physical Pressure Is Prohibited Even According to General Law

11a. Acts such as permitted by the government of Israel, following the Landau Report, are prohibited even according to the general law of the State of Israel, as existed before the legislation of the Basic Law and afterwards.

b. See in this matter, *Katalan v. Israel Prison Service* HCJ 355/79, Psak Din 34 (3) 294.

In this matter, the issue at hand was the legality of an administrative directive of the Prison Service which allowed the administering of an enema on a prisoner in order to reveal and prevent smuggling of drugs into the prison.

All the judges who deliberated on this Petition, voided this directive since it violated the dignity of person and his body. Justice Landau (and he was the one who headed the Investigatory Commission on the Shabak) stated:

The rule is, and to me it appears, that this subject should not be proceduralized through administrative guidelines and even through secondary legislation but rather through primary legislation, because of the harm to the right to privacy of the body.

c. And see the statement by Justice Barak on the same matter:

Every person in Israel enjoys a fundamental right to physical integrity and to the safeguarding of his honor as a person. These rights are included in the Judicial Bill of Rights... the right to integrity of the body and dignity of a person, his rights of a detainee and a prisoner. The walls of the prison do not distinguish between a detainee and the physical integrity of the person. The regime which exists inside prison demands from its very nature, many violations of liberty which a free person enjoys, but this regime does not necessitate the denial of the detainee's right to integrity of his person and to protection from harm to his dignity. Liberty is denied from the detainee: the form of personhood will not be taken from him... Therefore, in order for the prison authorities to administer an enema without the prisoner's consent and justify a criminal offence and a tort of assault, they must point to a statutory provision which allows them to do so. (page 298, emphasis added).

And see the words of the Honorable Justice Chaim Cohen:

The reasonableness of a regulation -and administrative guidelines - is best measured by the yardstick of the majority of the people in a democratic society and country of law. There is no better and acceptable criterion than the fundamental measuring rod of human dignity: A free and enlightened society distinguishes itself from a barbaric or oppressive governments in the level of dignity which it provides to a person as a human being. (p.305).

## The Landau Commission Relied on the Necessity Defense

12 a. The Landau Commission based its recommendations on the necessity defense, which justifies in the opinion of the Commission, the use of measures invalid on their own, in order to prevent an evil which cannot be prevented in any other way.

b. In the application of the necessity defense, the Commission does not distinguish between torture of the body and mind whose purpose is to obtain a confession from the interrogatee or other evidence for Court, and between the use of these methods in order to prevent a perceptible, true approaching danger which cannot be prevented in any other way.

c. The Commission's recommendations are sweeping, lack proper legal analysis, ignore relevant legal categories in the matters which the Commission deals with, and are based on an erroneous understanding of the Criminal Law regarding the necessity defense.

d. In the recommendations of the Commission there is a permit for violence during the interrogation; mental violence and physical violence. The classification of the violence permitted as "moderate physical pressure" in the opinion of the Commission, does not salvage these recommendations from its illegal fate and its harsh violation of the fundamental principles of safeguarding human dignity and protection of the body, especially from interrogators and persons from other parts of the government.

e. The Commission's conclusion that non-stop psychological pressure and moderate physical pressure do not constitute torture of the body or mind, abuse of the interrogatee nor degrade his dignity, is based on the far-reaching assumption as to what is permitted and prohibited in the violation of body and mind of interrogatees. This is an assumption that has been totally rejected in our law as in the laws of countries of other enlightened regimes.

## Accumulated Experience Illuminates the Details of the Landau Report Guidelines

13 a. The accumulated experience of interrogatees and defense attorneys in the trials of those who were interrogated by the Shabak, demonstrates that the employment of non-violent psychological pressure and moderate physical pressure is the norm in interrogation, and it is executed in almost every interrogation of a suspect of HTA. It is not specialized to instances where the necessity defense stands out, or where "necessity" finds any expression.

b. The experience of detainees and lawyers demonstrates that the means included under pressuring psychologically and the moderate extent of physical pressure include: sleep deprivation for periods more than 24 hours, painful shackling in all types of positions, seating on a low chair (20 cm from the floor) causing non-stop discomfort reaching the point of torture of the body, seating on a chair with three legs causing the interrogatee to undergo for a continuous period tension of the body which after a number of hours becomes torture of the body and mind. Other measures include the use of an opaque putrid sack that is placed as a hood on the head of the interrogatee for long hours, harming his sense of time and torturing his body and mind.

c. Likewise, the Shabak interrogators degrade the interrogatee, insult him, violate his dignity and the dignity of his family and the values closest to his heart, religious or ideological.

d. As a general rule, the Shabak interrogators employ activities constituting torture of the body and mind and degradation, according to the license granted to them by the Israeli government. These activities are forbidden for all other authorities in the State of Israel, and surely cannot be permitted to the Shabak without being prescribed by law.

e. The Petitioner of course does not know what is the full content of the classified interrogation guidelines which permit psychological pressure and moderate physical pressure. But knowledge has it that these are methods that use physical force against the body of the interrogatee designed to crush his opposition to confess and this rings true also regarding the psychological measures. The Petitioner presumes that the above-mentioned methods which violate the person of the interrogatee contain humiliating and offensive elements creating for the interrogatee mental anguish until his will is broken.

f. As stated above, the accumulated experience since the Landau recommendations were submitted, shows an implementation of interrogation measures that cause severe injury to his physical integrity and his body. The means are invalid on their own and null from the fact that within the isolated and continuous environment of the interrogation, a place which the interrogator faces-off with the interrogatee without witnesses, the interrogator has a permit to use moderate pressure. This pressure could deteriorate to harsh pressure, to the dangerous point of causing the death of the interrogatee. This has happened in the past and there is the fear that these incidents have multiplied after the Landau Report.

g. The total prohibition against physical harm is the only guarantee of defense for the interrogatee. At the time of the interrogation he is exposed and vulnerable to the interrogator. At this point, there is nothing to save him except for the total prohibition - the social and legal taboo against violating his body and mind.

h. The Commission issued a moral permit for the Shabak to use violence. This permit violates the physical integrity of his person and his body and creates conditions and circumstances for extreme and dangerous uses of violence during interrogation.

i. The implementation of the recommendations permitting the interrogator to violate the body of the interrogatee or his person, contradicts the principles of the rule of law and the defense of the individual against the authorities. It also surrenders the interrogatee to the arbitrariness of a violent interrogation.

j. Within the Commission's recommendation, there exists an institutionalization of illicit interrogation measures and a legitimization of these means without a proper legal analysis and therefore the danger of implementing these recommendations to the rule of law is severe and immediate.

The Criticism Leveled Against the Interrogation Measures Granted to the Shabak

14a. Since the issuance of the Commission's report to the public, the legal community has leveled extremely harsh criticisms. It pointed to the outright illegal basis of the recommendation to employ moderate physical pressure. Illegal on three levels - the Criminal Law, general norms of human rights and norms regarding the evidentiary acceptability of suspects confessions.

b. See especially "Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity 23 Is. L. Rev (1989).

c. Regarding the error of the Commission in describing the necessity defense and its sweeping decision of the range of types of interrogations, suspects and suspicions see the article of Professor Feller: "Not Actual 'Necessity' but Possible 'Justification; Not Moderate Pressure, but either Unlimited or 'None at All' at page 212.

d. And see the article of Professor Kremintzer: "The Landau Commission Report: Was the Security Service Subordinated to the Law or the Law to the "Needs" of the Security Service", Israel Law Review, Vol.23, Nos. 2-3, 1989 (at 254);

In the language of its author:

In a situation of necessity, a real (not imagined), concrete danger threatens an individual protected interest (life, limb, freedom, honor or property) which can be saved only by infringing upon another legitimate interest. It is doubtful whether such a situation exists in the course of the interrogation of an HTA suspect in order to extract information from him about terrorist organizations. The interrogation of an HTA suspect is not a pinpoint struggle with a concrete threat deriving from a particular incident or defined circumstances. It is rather a struggle with a general phenomenon and the general danger it poses. (See page 243).

The Recommendations of the Commission Constitute a Permit to Torture and Violate International Customary Law

15a. The prohibition of torture is universal. It is included in all the conventions that strive to protect human rights. Here we will only refer to the principal documents in which there is no disagreement as to the application and position as customary international law or general norms in which the State of Israel is obligated to act in accordance.

b. The accepted and obligatory definition of the interrogation procedure known as torture is stated in the UN Declaration Against Torture from 1975 which determines that for purposes of the declaration, torture is "any act that cause great pain or suffering, bodily or mental, which is done to a person intentionally by a person of an official role in order to obtain from him or from a third party information or confession, or to punish him for an act that he did or to intimidate him or to intimate others..."

c. The Petition points out that the definition embraces mental anguish with bodily anguish. The Petitioner claims that moderate physical pressure which causes bodily

pain and is designed to extract a confession from a suspect, falls within the parameters of the definition of torture, or in the alternative, is sufficient to advance and encourage use of outright torture measures.

d. The prohibition against inhuman or degrading physical harm was legislated also in Section 5 of the Universal Declaration of Human Rights adopted in the UN General Assembly on December 10, 1948. Section 5 states that no one will be subjected to torture or cruel, inhuman or degrading treatment or punishment.

e. Section 3 of the Geneva Convention of 1949 prohibits the employment of measures which cause pain to a person in order to obtain from him or from another person a confession or information.

f. The UN Declaration Against Torture which was accepted unanimously in the UN General Assembly of December 9, 1975, prohibits every country from permitting or agreeing to torture (according to the above definition) or any other inhuman or degrading treatment. Exceptional circumstances like a state of war, the threat of war, internal political instability, or any public state of emergency or the like, cannot be used to justify torture or other cruel, inhuman or degrading treatment.

g. The Petitioner requests to emphasize that the prohibition of torture is absolute. It is prohibited from deviating from the absolute prohibition even in a state of a real perceptible danger to the existence of the state. The Investigatory Commission found it correct to justify the use of the said interrogation means by abstract reasons of necessity.

h. The prohibition of torture is accepted by all the cultured nations of the world and it constitutes as such today, a rule of customary international law. Among others from the power of its inclusion as quoted above in the Universal Declaration of Human Rights. See Dinstein, International Law at p,123:

There is no doubt that the declaration was not declarative in its nature on the date of its acceptance, that it did not reflect the laws of customary international law that existed in 1948. The greater significance of the Declaration can be expressed by the fact that in many cases ...it fulfilled successfully the role that it was designed to do to direct the countries in their behavior. Over the years, the practice of states turned the sections of the Declaration into declarative, such that today it clearly reflects obligatory legal norms..."

The Universal Declaration...clearly reflects customary international law."

i. And see Nigel Rodley, "The Treatment of Prisoners Under International Law," at 63.

j. It is doubtful if there is anyone who will disagree that the prohibition against torture is included in international customary law. See in this matter *Filartiga v. Pena Irala* 630 F.2d 876. On page 882, the Court established explicitly:

For although there is no universal agreement as to the precise extent of "human rights and fundamental freedoms" guaranteed to all by the Charter (U.N. Charter), there is at present no dissent from the view that the guarantees included, as a bare minimum, the

right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights.

#### The Recommendations of the Commission Contradict Israeli Criminal Law

16. a. Section 277 of the Penal Law states:

"A public servant who commits one of these is subject to three years imprisonment:  
(1) Uses or orders the use of force or violence against a person in order to extract from him, or from another person who he is connected to, a confession to an offense or information regarding an offense."

b. The Commission's recommendations as they were accepted by the Respondent and included in the secret annex of the report, constitute a permit to commit the offense of Section 277 of the above Penal Law. Force or violence as defined by the law and its meaning according to the courts includes as a requisite moderate physical pressure as well.

c. Paragraph 2 of the above-mentioned Section 277, prohibits a public servant to threaten a person with injury to his body, or property or other things in order to extract from the person a confession to an offense or information regarding an offense.

d. Without knowing the text of the classified section, the Petitioner fears that the permitted mental pressure in the secret annex includes threatening behavior of the type that this prohibited by the above Section 277 (2).

e. The Commission's recommendations also violate the legal rules regarding admissibility of confessions in Court. The rule in Section 12 of the Evidence Ordinance is that a confession not provided freely is not admissible as evidence against the confessor. It is not known to the Petitioner one case where a confession was admitted where it was taken under moderate physical pressure employed for the explicit purpose of taking a confession from him. It is highly doubtful also the admissibility of a confession taken as a result of psychological pressure during a continuous and intensive interrogation.

f. The Commission's analysis regarding Supreme Court holdings and the precedent regarding the admissibility of confessions cannot lead to any other conclusion other than that the Court should accept into evidence a confession given after the use of the means recommended by the Commission, but actually the opposite is correct.

g. The recommendations of the Commission regarding the use of psychological pressure and moderate physical pressure is based on a serious misunderstanding of the law and precedent regarding admissibility of confessions. Accordingly the recommendations of the Commission are unreasonable. The Commission's purpose - instructing the interrogators with interrogation measures in order to obtain a confession admissible as criminal legal evidence - is not accomplished and the interrogation measures are employed in vain.

## Publicizing the Compilation of Guidelines to Shabak Interrogators

17a. The Investigatory Commission decided that the chapter of the report comprising the compilation of guidelines for the interrogators of the Shabak will remain classified and not made public. According to Section 26(b) of the Investigatory Commission Law, "the government is entitled, by order and by permission of the Knesset committee ...to permit an examination of the report of the Investigatory Commission...if it wasn't published or if it was published."

b. The "Compilation of Interrogation Guidelines", is a normative guideline which is directed to the interrogator but they affect the public entirely. The public may one day be the object of this instruction manual. In addition, the public is composed of lawyers and others who have an interest that Shabak interrogators will act in accordance with the law.

c. As is detailed in this Petition, the compilation of guidelines for the interrogator is a genuine deviation from the legal norms in effect in the State of Israel. We are not talking about the implementation of existing guidelines, but rather the creating of a new normative framework. Therefore, the compilation of guidelines to the interrogator is not of the status of internal guidelines (and therefore does not have to be published) but is a primary normative source or at least exists at the level of secondary legislation. As such, it cannot remain classified since the rule is that in our law there is not secret legislation.

d. The permit to use violence secretly in interrogations requires public review and oversight more than what the Commission determined - beyond the sub-ministerial committee of the Knesset.

## The Recommendations to Improve the Conditions in the Interrogation Center Have Not Been Implemented

18. The Investigatory Commission recommended: improving the conditions of the interrogation facilities; creating reasonable ventilation in the cells and if possible allowing the flow of daylight; limiting the use of electric lighting during night hours to the level necessary to observe externally the activities inside the cell; and also improving the sanitary conditions and facilities. To the best of the Petitioner's knowledge, these recommendations were not implemented and the conditions in the interrogation facilities have not been improved regarding the Commission's recommendations.

## The Petitioner

19. a. The Petitioner is a non-profit organization which was established to act to prevent torture in Israel, to deter against the use of torture, to be an address for people exposed to torture, and to conduct education activities and information activities to prevent torture.

b. The Petitioner acts essentially through volunteers. In the framework of its activities, the members of the Petitioner interview persons who were under Shabak

interrogation and lawyers who represented these persons. Accordingly, the Petitioner has collected a large amount of material regarding Shabak interrogation methods and their effect on interogatees.

c. More than once, the Petitioner's volunteers heard from those who were interrogated by the Shabak, claims regarding Shabak interrogation methods reaching moderate physical pressure and psychological pressure. At times the detainees complained of interrogation measures reaching the level of extremely severe torture, which cannot be defined as moderate employment of physical pressure.

d. In the instances in which there were moderate measures, relatively, the persons who were exposed to these methods wrote that they were extremely difficult. They stated that these moderate methods created a feeling of helplessness, deep frustration, and rage toward the interrogators and the Israeli government and a mental trauma which does not subside quickly.

e. The Petitioner's volunteers received the impression that the violent interrogation methods on the moderate level were employed in every HTA interrogation in a routine manner.

f. The Petitioner's volunteers received the impression that in many cases where these interrogation methods were employed, the persons were not brought to trial.

g. The Petitioner's standing in this Petition stems from its status as a public Petitioner appealing and pointing out to this Honorable Court, illegal behavior by an authority in the government and requesting the Court to correct this disgrace of first and foremost illegality which harms many and violates the basic principle of human dignity and integrity of the person.

#### Origins of this Petition

20a. A similar petition to this Petition, in everything connected to the recommendations of the Landau Report was submitted to this Honorable Court in 1991 (HCJ 2581/91) by the Petitioner and another person through the undersigned attorney. On August 12, 1993, Justices M. Elon, S. Levin and D. Levine rejected this petition.

b. It was held that the petition should be rejected not on its substance but because of the absence of a concrete dispute which would justify the intervention of this Honorable Court.

A copy of the decision of the Court is attached.

c. On August 18, 1993, a petition for an additional hearing (HCJ 4486/93) for this petition was submitted. It included the claim that the decision of this Honorable Court in HCJ 2581/91, totally contradicted the central stream of Court precedent. This precedent maintains that the High Court will intervene even in circumstances where there is no concrete dispute, where the Petitioner points to an illegal activity of an authorized body of the state that violates general principles and law and cannot be prevented except through a public petition to the High Court of Justice.

d. The Court was requested to deliberate this petition in an additional hearing, together with another petition H CJ 4110/92 Yoav Hess v. Minister of Defense. This matter regarded a judgment of this Honorable Court which rejected a petition that questioned the legality of the open-fire guidelines to IDF soldiers in Occupied Territories.

e. This petition was also rejected because of the absence of a concrete dispute and the Honorable Chief Justice of this Court was also petitioned to set an additional hearing on this issue.

f. On December 2, 1993, Chief Justice Shamgar decided that he would issue a decision in 4478/93 after issuing a decision in the extended hearing regarding open-fire regulations 4110/92.

g. On April 11, 1994, the Honorable Court decided in front of a panel of five justices by majority vote to accept the request for an extended hearing. It also decided in the same vote to annul the decision of the Court which held that it is prohibited to deliberate the legality of open-fire regulations absent a concrete dispute. The hearing was then returned to the lower panel in order to deliberate on the substantive issue of the legality of the open-fire regulations.

h. A copy from this decision is attached.

i. The Chief Justice's position in this decision regarding the legality of open-fire regulations is clear. A hearing on the regulations can not be conditioned on the existence of a concrete dispute, and that it is possible to deal with these regulations on the normative level which observes and moves forward regardless of whatever occurs in concrete circumstances. Accordingly, the Court accepted the Petitioner's claim (who was represented also by the undersigned) that the meaning "dispute" should be expanded "from its traditional meaning to a broader meaning of dealing with issues questioning the law and principles of the Rule of Law."

j. On April 12, 1994, the Chief Justice held in 4478/93 that in light of the decision of 4410/92, there is no reason to duplicate the hearing and rejected the request for an extended hearing.

This decision is attached.

k. It is clear that the Chief Justice's reasoning as to why open-fire regulations are justiciable, is applicable to the petition regarding the legality of the Shabak interrogation guidelines and there was no place to reject this petition outright on the "absence of a concrete dispute."

l. The legal situation has changed. The basis of the rejection of H CJ 873/91 (open-fire regulations) which is referred to in the decision in H CJ 2581/91 (legality of the guidelines to Shabak interrogators) has changed. Basic Law: Human Dignity and Liberty was legislated after the submission of the petition H CJ 2581/91, and therefore one cannot rule that the rejection of the first petition blocks the Petitioner from submitting this petition.

This petition is broader than the petition in HCJ 2581/91. After the legislation of Basic Law: Human Dignity and Liberty, and relying on it, this petition requests the Court to prohibit the Shabak and its interrogators from detaining, searching, interrogating, questioning, and holding in interrogation centers, detainees - without explicit authorization in the law.

#### The Timing of the Petition and the Potential Delay Claim

21.a. The Landau Report recommendations were submitted to the Government in 1987 and confirmed by it a short time after. Since that time it can be assumed that the interrogators of the service have put into effect the guidelines which are included in the classified section of the report. The employment of these guidelines is daily and the injury to the body and honor of interogatees continues.

b. Since the report was submitted, the issue has not declined from the public's agenda. The criticism from all sectors of the public and the academic world is almost non-stop and they all emphasize the illegal aspects of the permit to employ physical and psychological pressure as it violates the fundamental principles of a democratic regime.

c. There may have been a place to submit this petition when these recommendations were affirmed. However the law states that a delay in the submission of a petition is not a legal obstacle to challenge a continuous illegal practice, continuing at the time of submission of the petition, and set to continue in the future if the Honorable Court does not intervene.

d. By delaying the submission of the petition, the Respondent's situation will not change for the worse if the Petitioner's claims are true that the employment of the measures included in the report is illegal. As such the Respondents have no right to continue to employ these illicit measures without suitable judicial interference.

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