HCJ 1265/11

Petition for granting of *order nisi*

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Executive Summary

This petition requests that the High Court of Justice grant an *order nisi* which would oblige the Attorney General to open criminal investigations in response to complaints of torture filed by Palestinian security detainees interrogated by the General Security Services, in particular with regard to Petitioners No. 7-16, and in general regarding all cases in which such a complaint is filed. The petition, filed 14 February 2011, was brought by the Public Committee Against Torture along with The Association for Civil Rights in Israel, Yesh Din, HaMoked, Adalah, Physicians for Human Rights-Israel (Petitioners No. 1-6), and ten out of the hundreds of Palestinian security detainees whose complaints were closed by the complaint-examination mechanism implemented by the Attorney General, in the absence of any criminal investigation whatsoever. The Attorney General's policy amounts to a **complete abstention** from ordering the opening of criminal investigations against GSS interrogators suspected of torture and/or cruel, inhuman or degrading treatment (hereinafter, ill-treatment) of interrogees.

The petition begins by presenting the existing legal arrangement under which complaints of torture and ill-treatment are examined and pursued. Under both Article 59 of the Criminal Procedure Law and Article 49.I.1 (A) of the Police Ordinance, the Attorney General is responsible for the law enforcement system of the State of Israel. Among his authorities under the Police Ordinance, the Attorney General is authorized to decide whether suspected violations committed by GSS employees in the context of their duties will be investigated by the Israel Police or by the Police Investigations Department at the Ministry of Justice (PID). A perusal of the legislative history of the §amendments to the Police Ordinance which grant the Attorney General this choice quickly shows that the intent of the amendment **was in no way to allow the comprehensive transfer of complaints to a non-investigative preliminary examination by the Officer in Charge of GSS Interrogee Complaints (OCGIC) – an obscure figure who is himself a GSS employee.** As a matter of routine, complaints are filed with the Attorney General, and just as **routinely they are examined by the OCGIC, approved unconditionally in the name of the Attorney General by the OCGIC's Supervisor at the Ministry of Justice, and**

closed in direct contravention of the provisions of the law and without any criminal investigation having been carried out.

Petitioners No. 7-16 are Nadal Yussuf Younes Abu Hallal, Ali Yussuf Ali Abed, Anas Tzidki Abed el-Rahman el-Juabeh, Futhna Mustafa Khakil Abu el-Aish, Abed el-Karim Younes Khasseen Mabeyd, Ahmed Lutfi Ahmed Kh'alef, A'amad Yussuf Abed el-Karim Khamed, Mustafa Abu Muammar, Amjad Abu el-Karim el-Kh'aladi and Jamal Nasser Khabeesh, respectively. Between March 2005 and September 2009, these Palestinians residing in the Occupied Territories filed complaints with the Attorney General regarding torture and ill-treatment they were subjected to during their interrogations at the hands of the General Security Services. Their complaints reported a wide range of violations: painful cuffing and shackling to interrogation chairs affixed to the floor (see PCATI report, Shackling as Torture and Abuse); deprivation of sleep by means of constant light and uncomfortable holding conditions; curses and threats including the use of family members as means of pressure during interrogation (see PCATI report, Family Matters), threats to demolish the homes of interrogees, to arrest their family members, and in one case, extortion under threat of rape of a female interrogee; isolation from the outside world by means of incommunicado detention in solitary confinement and the prevention of meetings between detainees and their attorneys (see PCATI report, When the Exception Becomes the Rule); degrading conditions such as insufficient and low-quality food, inferior sanitary conditions, foul smelling cells containing cockroaches and mosquitoes and refusal of medical treatment; the conditioning of better treatment upon provision of information; blows, kicks and strikes to the face and other parts of the body; the use of the "kambaz" (kneeling) position, the "banana" position, and the "hanging to the wall" position.

The complaints were met with foot-dragging and bureaucratic doublespeak. Rarely was any substantive response received earlier than **one year** after the filing of the complaint, and in some cases **three or four years passed** before a response was received. The OCGIC's Supervisor most often responded by noting that the OCGIC's examination had found no corroboration for the complainant's version of events, and invariably decided to shelve the complaints. The rationale given is often baseless and peculiar, the examination's findings are not available for perusal, and based on complainants' descriptions of the OCGIC's visit, these decisions are based on a completely insufficient basis of information: detainees remain in prison for the interview, they are denied the right to consult or be accompanied by an attorney, they are often shackled, and, generally, the OCGIC's visit re-enacts the experience of the interrogation far more than it allows the complainant to feel like the victim of a crime for whom justice is being done.

The human rights organizations who are parties to the petition, led by PCATI (see PCATI's Report, Accountability Denied, sent to the Attorney General for his response, but ignored), harshly protested this policy, and demanded that all suspicions of torture or ill-treatment perpetrated by GSS interrogators be referred to a criminal investigation, or alternatively that transparent criteria be defined to designate the exceptional cases in which a

preliminary examination would be permitted. These protests and principle petitions were met by further foot-dragging and secrecy: though these requests by the human rights organizations to change the policy or to clarify the relevant legal procedures received no response, the Israeli press reported in November 2010 that the OCGIC would be transferred to the employ of the Ministry of Justice, thus ostensibly rendering it a more independent examining body. The nature of this change has not been clarified, despite repeated requests.

Israeli Law

The petition's legal argument addresses the duty to investigate in both Israeli and international law. While acknowledging the existence of frivolous complaints – which indeed implies that not all complaints must be investigated by the police – the Petitioners argue that in no way can over 600 such complaints of torture or ill-treatment have been ignored for this reason without **a single one leading to a criminal investigation**. Furthermore, the Attorney General's policy is unauthorized: it is in clear contravention of the stated intent of the legislature in passing the amendments to Article 49 of the Police Ordinance, and case law states that residual powers may not be used to grant authorities to an official when the circumstances include human rights violations. Also, the referral of every single complaint of torture or ill-treatment to the OCGIC entails the creation of an a priori arrangement, which the Attorney General is unauthorized to do under the law. Moreover, these complaints deal with the 'holy of holies', the individual's right to physical and emotional integrity and to be free from harm; nevertheless, the Attorney General and those delegated with his authorities routinely shelve complaints of this most basic and fundamental right, without even blinking an eye. This is especially troubling in the case of complaints regarding torture and/or ill-treatment for several reasons.

First of all, these are grave violations entailing serious damage by state authorities to the human rights of the victims. Also, state officials must be held to an especially high standard with regards to violations of this gravity. Further, the detainees are filing complaints of torture while **still in the custody of the alleged perpetrators of the crimes**, and may fear harassment or worse. Finally, the Attorney General's policies are only part of a whole series of legal obstacles standing before the collection of corroborating evidence for the victim's complaint: they are cut off from the outside world; they are categorized as security detainees, which **exempts the GSS** from requirements of audio-visual recording of interrogations; and the identities of GSS interrogees are concealed by the system of nicknames they use. Thus, **a legal absurdity** is created: in the absence of a criminal investigation which can corroborate a complaint of torture, the complainant's version of events will inevitably be the only evidence available, but he is unable to meet the evidentiary requirements demanded by the Attorney General to justify the opening of a criminal investigation. The refusal to open a criminal investigation further amounts to denying victims the evidence necessary to form the basis of a potential civil lawsuit for damages. All of this becomes even more urgent in light of the GSS organizational history, one including a long list of lies and cover-ups, including the concealment of information from the justice system.

The petition further argues that the Attorney General exercises his authority in a selective manner: GSS employees are not held to the same rules which govern the conduct of their colleagues in the Police and other investigative bodies. Such discriminatory use of the prosecutorial power is crucially dangerous to the public's faith in the government and harms the deterrent power of the criminal justice system. Incidentally, other investigatory bodies (the Investigative Military Police, the PID (the Police)) require the opening of a criminal investigation whenever a violation is suspected of having been perpetrated, without a preliminary investigation.

The Basic Law: Human Dignity and Liberty anchors the right not to be subjected to torture, as reinforced by case law; yet when violations of this right lead to no sanction whatsoever, it is emptied of all value. The Attorney General's policy of examining complaints of torture also violates the due process rights of complainants, because it prevents the detainee from accumulating evidence for a *voir dire*[1] hearing which could invalidate the testimony taken from him under interrogation – one of a security detainee's few possible defenses. Further, the petition argues that the limitations clause is not the appropriate criterion for judging the complaint examination mechanism; the prohibition against torture is absolute and makes up an inseparable part of customary international law, which is directly integrated into Israeli law.

Furthermore, the complaint examination mechanism is tainted by extreme unreasonableness. Even if a decision to close a single complaint of torture was deemed reasonable, the comprehensive policy of closing all of the hundreds of such complaints clearly shows that no consideration of the matter is carried out. Thus, though case law establishes the precedent of the court not intervening in a decision that is within the range of reasonableness, the unreasonableness of the closure of each complaint aggregates to a level of extreme unreasonableness which justifies the intervention of the High Court.

Additionally, the complaint examination mechanism is unauthorized. Although the Attorney General is authorized under the Police Ordinance to delegate his authority to order the opening of a PID investigation, the OCGIC's Supervisor is not among the deputies designated this authority, and the comprehensive transfer of complaints to her care is unauthorized. Thus the decisions reached under the complaint examination mechanism as it exists today must be annulled.

Again, the petition does not deny that frivolous complaints are filed with the Police. Nevertheless, *prima facie* frivolous complaints must be sent to a preliminary examination to be conducted by an impartial, independent and professional authority with investigatory powers. The mechanism of the OCGIC is clearly not such an authority, and his decisions must be annulled and re-evaluated. Here the Petitioners note that they reserve the right to petition the

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[1] This is also refered to as a "trial within a trial" which is an intermediary proceeding challenging evidence such as a confession alleged to have been obtained illegally.

High Court regarding the characteristics of the heretofore unclear changes made to the complaint examination mechanism.

International Law

Under international law as well, the complaint examination mechanism violates the obligations of the State of Israel under international law. The right to be free from torture is among the rare legal principles granted the status of customary international law, obligatory upon all the states of the world. The prohibition against torture is anchored in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention Against Torture), which obliges states to take effective measures to prevent torture within territories under its jurisdiction and clarifies that no circumstances can justify torture. The UN Covenant on Civil and Political Rights, ratified by Israeli in 1991, emphasizes the duty to treat interrogees humanely and with dignity. International Humanitarian Law also anchors the prohibition against torture and ill-treatment, most explicitly in Article 3 common to all four Geneva Conventions. Articles 27, 31 and 32 of the Fourth Geneva Convention and Article 46 of the Hague Convention further enforce this prohibition. Various international criminal tribunals have also defined torture and ill-treatment as crimes in and of themselves – and under certain circumstances as war crimes and even crimes against humanity – which can entail international criminal responsibility.

Alongside the prohibition against torture, international law imposes the duty to investigate violations of this prohibition. Human rights law sets requirements for appropriate investigation and punishment mechanisms; these must be efficacious, completely independent, effective and credible. As detailed in The Convention Against Torture and the communications of the UN Committee Against Torture which monitors its implementation, the appropriate authorities must initiate a prompt and impartial investigation **every time** the suspicion arises that torture has been perpetrated. This should be followed up, when appropriate, by prosecution and penalization, including with respect to senior military and civilian officials. Thus only a criminal investigation may even begin to uphold the requirements of international law, and the preliminary examination enacted by the Attorney General and conducted by the OCGIC does not fulfill the requirements of independence, thoroughness and effectiveness demanded for the upholding of the Convention Against Torture. The Human Rights Committee, which implements the International Covenant on Civil and Political Rights, has similarly and consistently pleaded with states to initiate a **criminal** investigation when grave human rights violations are suspected. It unequivocally emphasizes that criminal investigations and the placing on trial of perpetrators are **necessary remedies**, and that the decision not to initiate a specifically criminal investigation amounts to a denial of justice and a violation of the Covenant.

International humanitarian law also anchors the duty to investigate suspicions that torture and ill-treatment have been perpetrated. First, the Fourth Geneva Convention obliges State parties to enact legislation and to otherwise pursue the violators of the convention. The Red Cross' Study on Customary International Law further imposes an obligation upon states to

investigate and punish war crimes allegedly committed by their nationals. Furthermore, it has been determined that grave breaches of international humanitarian law and human rights law can impose individual responsibility in addition to State responsibility; the failure to investigate may lead to the exercise of the full rigor of the law in international courts and in state courts implementing universal jurisdiction, including the responsibility of those who instigated, planned, ordered or otherwise aided in the execution of the crime.

International Criteria for Investigations

International law goes beyond the prohibition against torture and surpasses also the requirement that violations of that prohibition be investigated. It proceeds to set criteria which such an investigation must meet. The **Istanbul Protocol**, a UN-sponsored guide for preventing torture, lays out as a minimum that investigations of torture and ill-treatment be investigated promptly, accurately and effectively; that they be independent, competent and impartial; that the investigators be ensured full freedom of action and access to information; that they be allocated necessary budgetary and technical resources; and that the victims and their representatives be allowed access to and be informed of developments in the investigation. Other international documents set the following fundamental elements which an investigation must uphold:

- Independence and impartiality – The investigation must be independent in two senses. First, the investigative body must independently initiate the investigation; second, the investigators must be personally and institutionally independent and separate from those suspected of perpetrating the violation. The investigation must be impartial in that it bear no prejudicial views of the victim, the alleged crime or the expected result of the investigation.

- Thoroughness and effectiveness – The investigation must be complete and coherent. That is, it must include the consultation of medical records, the collection of evidence, the conduction of field visits, the taking of testimony from victims and witnesses, and the coherent arrival at conclusions based on all relevant materials.

- Tools placed at the disposal of the investigative authority – The investigative bodies must be authorized to collect and analyze evidence, to receive medical records, summon and protect witnesses including the victim and the victim's family, and must be allocated the necessary budgetary and technical resources to fulfill their task.

- Suspension of those involved – All international bodies agree that those suspected of involvement in torture and/or ill-treatment must be suspended from their duties until the conclusion of the investigation.

It has further been noted by the UN Special Rapporteur on torture that placing the burden of proof on the victim while he lacks any means to collect evidence to corroborate his complaint – and hence remains unable to meet the required evidentiary threshold for taking criminal steps against the perpetrators – foils any effective investigation. All of this clarifies that the Attorney

General's complete abstention from ordering criminal investigations of torture or ill-treatment by GSS interrogators amounts to a clear violation of the State of Israel's obligations under international law and of Israeli law, because it is a policy which does not uphold the duty to investigate complaints of torture. The Attorney General's policy in practice grants *a priori* amnesty to those suspected of torture, and serves as a sanctuary for the perpetuation of grave breaches of Israel's obligations.

The court is thus requested to grant an *order nisi*, and to make it absolute, ordering the re-opening of the complaints of Petitioners No. 7-16 and the opening of criminal investigations as described above.

The Supreme Court
Sitting as the High Court of Justice **HCJ 1265/11**

In the Matter of:

1. **The Public Committee Against Torture in Israel**
2. **The Association for Civil Rights in Israel**
3. **Yesh Din**
4. **HaMoked: Center for the Defense of the Individual**
5. **Adalah - The Legal Center for Arab Minority Rights in Israel**
6. **Physicians for Human Rights – Israel**
7. **Nadal Yussuf Younes Abu Hallal**
8. **Ali Yussuf Ali Abed**
9. **Anas Tzidki Abed el-Rahman el-Juabeh**
10. **Futhna Mustafa Khakil Abu el-Aish**
11. **Abed el-Karim Younes Khasseen Mabeyd**
12. **Ahmed Lutfi Ahmed Kh'alef**
13. **A'amad Yussuf Abed el-Karim Khamed**
14. **Mustafa Abu Muammar**
15. **Amjad Abu el-Karim el-Kh'aladi**
16. **Jamal Nasser Khabeesh**

Represented by the Attorneys Samah Elkhatib Ayoub and/or Irit Ballas and/or Bana Shoughry-Badarne and/or Nabeel Dakwar and/or Meissa Irshaid and/or orther attorneys from the Public Committee Against Torture in Israel, P.O. Box 4634, Jerusalem 91406; Tel. 02 6249825, Fax 02 6432847

The Petitioners
V E R S U S

The Attorney General

By means of the State Attorney
29 Salah e-Din Street, Jerusalem
Tel. 02 6466590, Fax 02 6466655
The Respondent

Petition for Granting of *order nisi*

The Honorable Court is requested to grant an *order nisi* against the Respondent, ordering him to show cause for the following:

A. Why the Respondent does not order the opening of a criminal investigation in response to the complaints of the Petitioners No. 7-16.

B. Why the Respondent does not order the opening of a criminal investigation whenever his office receives a complaint of the use of torture and/or ill-treatment of interrogees by members of the General Security Service (hereinafter: GSS), whether by means of his authority under Article 49.I.1(A) of the Police Ordinance (Law Version) 5731-1971, or by passing the complaint on to the Israel Police, in accordance with the criteria determined in Article 59 of the Criminal Procedure Law (Consolidated Version) 5742-1982.

Introduction

1. This petition deals with the Attorney General's **complete abstention** from ordering the opening of criminal investigations against GSS interrogators suspected of torture and/or cruel, inhuman or degrading treatment (hereinafter: **"ill-treatment"**) of interrogees. The complaint examination mechanism initiated by the Respondent, and for which he is responsible, has brought about the comprehensive closing of **hundreds of complaints**, with no criminal investigation, indictment or standing trial. The Respondent's conduct, his manner of checking the complaints, and the absolute impunity which he grants GSS interrogators from criminal investigation or from standing trial – together with a series of other legal means – enable the absolute lack of oversight of the happenings within GSS interrogation rooms. All of this creates an unconditional legal defense for GSS interrogators.

2. Over 650 complaints of torture or ill-treatment reached the Respondent in the past decade, **and not a single one of them led to a criminal investigation**. The vast majority of these complaints were rejected by the Respondent without the initiation of any investigative or criminal steps whatsoever. More than anything else, this statistic suggests the failure of the complaint examination mechanism enacted by the Respondent. It also corresponds to the regrettable fact that these complaints – every single one – are automatically and comprehensively referred to an examination by the Examiner of GSS Interrogee Complaints (hereinafter: OCGIC), an authority whose identity is shrouded in obscurity, whose independence is dubitable, and whose recommendations are one alone: the closing of the complaint without an investigation being opened, a recommendation accepted unchallenged by the OCGIC's Supervisor at the Ministry of Justice (also known as the Director of the Department of Special Tasks at the State Attorney's Office; hereinafter: the OCGIC's Supervisor) .

3. The Petitioners will claim that the existing arrangement, which leads to the comprehensive closing of hundreds of complaints, is in opposition to the language and the provisions of the law, that it is fundamentally defective, and that it is enough to undermine basic precepts of justice. The existing arrangement was made in an unauthorized manner; it harms fundamental rights; brings about extreme unreasonableness and is in contradiction of international law and the international obligations of the State of Israel. The arrangement should be ordered annulled and complaints of torture and ill-treatment be investigated in the framework of an independent, impartial, effective and thorough criminal investigation.

4. The Petitioners will also claim that the change reported upon in the press at the end of last year and in the State's response to the petition of Petitioner No. 4 (see the State's response in **HCJ 6138/10 HaMoked: Center for the Defense of the Individual v. Attorney General**, § 10), according to which the institutional link between the OCGIC and the GSS has been severed, does not diminish the essential and necessary nature of this petition. The aforementioned change does not provide the remedy requested in this petition: the conduction of a criminal investigation by an investigative body.

The Grounds for the Petition are as Follows:

The Parties to the Petition:

5. Petitioner No. 1, the Public Committee Against Torture in Israel, is a civil society organization dealing primarily with the public and legal struggle against torture and ill-treatment and with defending the rights of detainees and interrogees. This Petitioner has set itself the goal of struggling against the use of interrogation methods causing pain, suffering and/or degradation to interrogees.

6. Petitioner No. 2, the Association for Civil Rights in Israel, is a human rights organization acting to protect human rights in Israel and in the Occupied Territories.

7. Petitioner No. 3, "Yesh Din", is an Israeli human rights organization which acts to strengthen and to support human rights in the West Bank and among other actions, provides legal aid to civilians harmed by violations of the Israeli security forces.

8. Petitioner No. 4, HaMoked: Center for the Defense of the Individual, is an Israeli human rights organization. Among its activities it represents a large number of prisoners and

former prisoners who complain of the treatment received while under the custody of the Israeli security authorities, including GSS interrogators.

9. Petitioner No. 5, Adalah – The Legal Center for Arab Minority Rights in Israel, is an independent human rights organization and legal center acting to advance human rights in general and the rights of the Arab minority in Israel specifically.

10. Petitioner No. 6, Physicians for Human Rights-Israel, is a non-profit, non-governmental organization acting to advance human rights in general and the right to health in specific, in Israel and in the Occupied Territories.

11. Petitioners No. 7-16 are all Palestinians residing in the Occupied Territories who have filed complaints with the Respondent through Petitioner No. 1 regarding torture or ill-treatment they were subjected to during their interrogations, and whose complaints were shelved by the OCGIC's Supervisor, the Director of the Department of Special Tasks at the State Attorney's Office, on behalf of the Respondent's office.

12. The Respondent is responsible for the criminal law enforcement system. Among other things the Respondent is authorized, according to Article 49.I.1(A) of the Police Ordinance (Law Version) 5731-1971 (hereinafter: the Ordinance), to order that the Police Investigation Department at the Ministry of Justice (hereinafter: PID) – instead of the Israel Police – open criminal investigations against GSS interrogators suspected of committing violations in the framework of fulfilling their duties.

The Factual Background:

The Respondent's Duty to Refer Complaints to the Care of PID or the Police

13. In this section we describe the existing legal arrangement. The Petitioners claim that in accordance with the existing provisions of the law, the law enforcement system is obliged to open a criminal investigation whenever it is informed of torture or ill-treatment violations perpetrated by state officials during interrogations, and that the Respondent is not authorized to order the comprehensive shelving of all complaints of torture and ill-treatment presented to him without a criminal investigation having been conducted in accordance with the law.

14. In general, when an individual complains of a criminal violation carried out against them, they must file a complaint to the Israel Police. When a complaint is filed on suspicion of the perpetration of a felony, the Police is obliged to open an investigation. This arrangement is anchored in Article 59 of the Criminal Procedure Law (Combined Version) 5742-1982 (hereinafter: Criminal Procedure Law), which states:

> "If the police, whether by a complaint or in any other manner, learns that an offence has been committed, **it will open an investigation**. However, in the case of an offence **other than a felony**, a police officer with the rank of captain or higher is entitled to direct that no investigation will be held if he is of the opinion that no public interest is involved or if another authority is legally competent to investigate the offence".
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> **[Emphases added, S.E.A. and I.B.]**

15. Without diminishing from the duty to open a criminal investigation whenever the Police learns of the perpetration of a felony, when the complaint regards a violation whose suspected perpetrators are GSS interrogators, the legislature has established a specific arrangement which leaves the decision regarding **the nature of the body investigating the violation** to the Respondent. This arrangement is anchored in Article 49.I.1(A) of the Police Ordinance, which states the following:

> "(A) An offense which an employee of the General Security Services is suspected of committing in the framework of the carrying out of his duties or in connection with his duties, will be investigated by the [Police Investigations – **our addition, S.E.A. and I.B.**] Department, if the Attorney General decides as such".

16. The meaning of this clause, as detailed below, is that the Respondent must decide whether the complaint on torture and ill-treatment will be investigated by the **Police** or by the **PID** at the Ministry of Justice. The clause is the result of two amendments, Amendments No. 12 and 18 to the Police Ordinance, legislated in 1994 and 2004, respectively. The amendments add to the authorities of the PID the additional authorities to investigate violations perpetrated by GSS employees. The first amendment granted PID the authority to investigate violations which GSS employees are suspected of perpetrating in the course of an interrogation they carried out, or with regard to this interrogation, or in relation to persons restrained or subjected to detention for interrogation purposes. The second amendment expanded the authorities of PID to include **all** the violations GSS interrogators are suspected of perpetrating in the

framework of the fulfilling of their duty or in connection with this duty, and not only in the course of interrogation and in connection with the interrogation.

17. Behind these amendments stands the desire of the legislature to increase oversight of GSS activities; thus the first amendment deals with expanding the authorities of PID as an external body, and the second amendment expands the types of violations which PID is authorized to investigate.

18. Note that the aforementioned Article does not diminish the duty to open a criminal investigation as long as the perpetration of a felony is known. The entire purpose of the Article is to enable the Respondent to order that the criminal investigation be carried out by PID instead of the Israel Police.

19. **An appropriate interpretation of the language and purpose of the law is thus the Respondent's referral of all complaints to a criminal investigation by PID or the Police.** Any other interpretation exacerbates the situation which preceded these amendments, when complainants were able to turn to the Police for the opening of a criminal investigation.

20. One way to understand the purpose of the law is by examining the objective of the legislature as reflected in the debates which accompanied the law's legislation. The Attorney General's duty to order the opening of a criminal investigation by an investigative body – whether it be PID or the Police, according to his decision – was explicitly clarified by the Chairman of the Constitution, Law and Justice Committee at the time, former MK Dedi Zucker, in a discussion of the Proposed Law to Amend the Police Ordinance (No. 12), 5744-1994 (Second and Third Readings):

> "I would like to clarify something here that the Committee promised not to establish in law, but rather to clarify here in the plenum in an explicit, lucid, and clear manner. **What happens in a case in which a complaint is submitted and the Attorney General or the state prosecutor, or the person empowered thereby, decide that it is not to be forwarded to the Police Investigation Department? [...] I wish to clarify that the duty to investigate imposed on the Police in accordance with Article 59 of the Criminal Procedure Law shall remain intact**. This law is not intended to grant authority to the Attorney

> General or the State Attorney to prevent the investigation of a complaint raising suspicion against a GSS employee, and **the purpose of the amendment is not to worsen the existing situation**.
>
> "In other words, a situation shall not arise where the Attorney General decides not to refer the complaint to the State Attorney's Office and accordingly the action shall not be investigated. **If he has decided – the Attorney General or the State Attorney – that the complaint is not to be investigated by the Police Investigation Department, the provisions of the legal procedures shall apply and a police investigation shall be conducted as usual.**
>
> "It should also be clarified that the police cannot infer from the proposed amendment that if another authority engages in investigations or is empowered to do so, it does not bear an obligation to investigate if the investigative authority or the State Attorney's Office decides not to investigate. This clarification is crucial in order to appreciate that the purpose of the amendment is not to worsen the existing situation". *Knesset Protocols, Second Session, Bk. 39, p.* 7429 (1 February 1994).
>
> **[Emphases added, S.E.A. and I.B.]**

21. It is thus clear from the wording of the law, the law's purpose and its legislative history, that the aforementioned **clause is not meant to diminish from the duty to order the opening of a criminal investigation, but rather leaves in the hands of the Respondent the decision of which investigative unit will be chosen – the PID or the Israel Police.** Thus, it is the authority of the Respondent to refer complaints filed with him to PID, and if he chooses not to do so, he must order the Israel Police to open a criminal investigation, in accordance with the provisions of the law.

22. And yet, an examination of the Respondent's conduct shows that in practice he behaves in a completely different manner, standing in absolute contradiction to the provisions of the law and its purposes. Complaints of torture and ill-treatment in GSS interrogations are filed with the Respondent's office by Respondent No. 1 and others. **As a matter of routine complaints are filed with the office of the Attorney General, and as a matter of routine they are shelved – in contradiction of the provisions of the law and without criminal investigations of the complaints having been carried out.**

23. As a "substitute" for an independent, comprehensive and thorough criminal investigation, the Respondent chose to refer **all** complaints of torture and ill-treatment filed with him –

by means of the OCGIC's Supervisor at the Ministry of Justice – to an examination by the **OCGIC**: himself a GSS employee.

24. Note that even in cases where a complaint was filed directly to the Israel Police, and not to the office of the Respondent, the Police proceed to refer the complaint to the Respondent's office, at which point it is treated in the same manner as the rest of the complaints.

    - A copy of the Police's 31.4.09 response to a complaint filed by Petitioner No. 1 is attached and marked as **Appendix A/1**.

25. We should note, by the way, an item published in the media on 17.11.10, according to which the OCGIC would be moved to the employ of the Ministry of Justice, thus, it was claimed, increasing his independence (see also Article 10 of the State's response in **HCJ 6138/10 HaMoked: Center for the Defense of the Individual v. Attorney General**). On 21.12.10, the Petitioners wrote the Respondent requesting an explanation of the nature of the aforementioned change, yet to date no substantive response has been received. As far as we understand it, the proposed change has yet to be enacted. In light of the publication of these expected changes to the mechanism of the OCGIC, whether they are meaningful or solely for the sake of appearance, **this petition is not directed against problems in the functioning of the OCGIC or its lack of independence, but rather against the comprehensive referral of complaints to the OCGIC in place of the opening of criminal investigations**.

    - A copy of the Petitioners' correspondence is attached and marked as **Appendix A/2**.

26. The predictable result of the Respondent's conduct is the **closing of hundreds of complaints of torture and ill-treatment; not even in a single case did the Respondent find it appropriate to order the opening of a criminal investigation, let alone subject the suspects to a criminal trial.** To emphasize: out of all the hundreds of complaints filed from 2001 to this day, not only have the suspects not been placed on criminal trial, but furthermore the OCGIC's examinations and the behavior of the interrogators have not aroused even the shadow of a doubt in the Respondent's conscience; such doubt may have justified the opening of a criminal investigation which would enable the investigation of the truth. **Yet not in a single case did this come to pass.**

The Complaints of Petitioners No. 7-16 to the Respondent

27. The Respondent enacted the unacceptable policy described above in the cases of Petitioners No. 7-16, whose cases will be described in this section. It should be noted that these Petitioners are no more than the tip of the iceberg in relation to the hundreds of complaints shelved by the Respondent.

28. Petitioner No. 7, **Nadal Yussuf Younes Abu Hallal** of the Nur Shams Refugee Camp in Tulkarem, was arrested on 8.5.07, interrogated at the Kishon ("Jalame") Detention Center and on **3.1.08** filed a complaint of torture and/or ill-treatment to which he was subjected over the course of his interrogation by the GSS at Kishon. In his complaint he describes how he was interrogated with his hands shackled in a painful position behind the interrogation chair; he was held in this position for 35 hours save two hours rest. His complaint was corroborated by protocols from these interrogations. In practice, the Petitioner was deprived of sleep for a period of 60 hours from the time of his detention until the conclusion of his interrogation. His interrogation further included the cursing of his wife and parents, threats to strike him, and his holding in an isolation cell for an extended period. His interrogator crudely told him: "You'll fart and eat your own shit until you talk". Abu Hallal was held in isolation for a period of 35 days.

- A copy of the complaint is attached and marked as **Appendix 3/A**.

29. On 18.9.08, over eight months after the filing of the complaint, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint under the justification that "the OCGIC's examination showed that there is no basis or corroboration for the complainant's claims ... under the aforementioned circumstances I have decided to close the examination file".

- A copy of the response is attached and marked as **Appendix 4/A**.

30. Petitioner No. 8, **Ali Yussuf Ali Abed**, from Qalqilya, was arrested on 28.3.07, interrogated at Kishon ("Jalame") Detention Center and on **26.11.07** filed a complaint through Petitioner No. 1 regarding torture and/or ill-treatment he was subjected to over the course of his interrogation by the GSS at Kishon. In his complaint, he describes how for 75 days he was held in detention at "Jalame", his interrogation itself continuing intensively for a period of three weeks. For a period of one week he was transferred to a cell of prison informants (fellow detainees who deceive interrogees in order to elicit confessions for the GSS) at Be'er Sheva Prison. The complaint details a ruthless series of physical harm and mental pressure implemented against him over the course of his

interrogation by GSS interrogators, including sleep deprivation; violence; painful shackling; violent shaking; and the use of his mother as a means of psychological pressure during interrogation.

- A copy of the complaint is attached and marked as **Appendix 5/A**.

31. A response was received from the OCGIC's Superior, Atty. Rahel Mattar, on **18.9.09**, nearly ten months after the filing of the complaint, shelving the complaint under the justification that "the complaint detailed in your correspondence, as well as the complainant's version as given before the OCGIC, were examined by the OCGIC, and no corroboration was found for the various versions".

    - A copy of the response is attached and marked as **Appendix 6/A**.

32. Petitioner No. 9, **Anas Tzidki Abed el-Rahman el-Juabeh**, from Hebron, was arrested on 30.9.03, interrogated at the "Russian Compound" Detention Center in Jerusalem and on **31.3.05** filed a complaint regarding torture and/or ill-treatment suffered during his interrogation. In the complaint he describes being interrogated for a period of two days, during which he was not allowed any time to sleep and was seated with his hands and legs shackled behind him in a painful position. Mr. el-Juabeh's interrogators threatened to demolish his house and to subject members of his family to a "military interrogation" unless he confessed. Later, the Petitioner was held in an isolation cell for three days. Suffering from asthma, he asked to be examined by a doctor, but was not referred to the [detention center] clinic. The complainant further described the harsh holding conditions, which ranged from curses hurled at him by the police officers to insufficient quantities of revolting, low-quality food, and inferior sanitary conditions. His cell had cockroaches and mosquitoes, a foul smell, humidity, and high temperatures.

    - A copy of the complaint is attached and marked as **Appendix 7/A**.

33. On **18.9.08, three and a half years after the filing of the complaint**, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint under the justification that "the complainant's complaints were examined by the OCGIC and no corroboration was found for them".

    - A copy of the response is attached and marked as **Appendix 8/A**.

34. Petitioner No. 10, **Futhna Mustafa Khalil Abu el-Aish**, from Askar Alkadim Refugee Camp in Nablus, was arrested on 21.7.06 and interrogated at the "Shomron" Detention Center in Petah Tikva. She filed a complaint through Petitioner No. 1 on **13.11.06** regarding sexual abuse and torture to which she was subjected over the course of her interrogation at the hands of the GSS at Petah Tikva. The complaint details sexual assault, strikes and blows, and how she was "hung on the wall": her hands raised, separated and shackled to loops in the wall, her legs spread apart, making an "X" shape in which she was forced to stand for two straight nights, isolated, without access to a toilet, food or drink. She was also forced to do her bodily functions in this position. Another interrogation method implemented against her was extortion upon threat of rape. The complainant also laid out her story before Judge Lieutenant Colonel Erez Hasson at her remand of detention hearing in the Shomron Military Court on 24.8.06.

    - A copy of the complaint is attached and marked as **Appendix 9/A**.

35. On **26.10.08**, some two years after the filing of the complaint, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint under the justification that "the OCGIC's examination shows that there is no basis for the complainant's various complaints... under the aforementioned circumstances I decided to close the examination file".

    - A copy of the response is attached and marked as **Appendix 10/A**.

36. Petitioner No. 11, **Abed el-Karim Younes Khasseen Mabeyd**, from Tulkarem, was arrested on 26.6.08 and interrogated at Kishon ("Jalame") Detention Center. He filed a complaint through Petitioner No. 1 on **28.10.08** regarding torture and/or ill-treatment to which he was subjected during his interrogation at the hands of the GSS at "Jalame". In his complaint, he describes being seated during his interrogation on a chair affixed to the floor with his hands shackled with metal handcuffs which had been attached from behind his back to the backrest of the chair. Save Fridays and Saturdays, Mr. Mabeyd's interrogation proceeded on a daily basis, during which he was held in the described position. Mr. Mabeyd noted that his interrogator removed the handcuffs when he cooperated, even giving him coffee and a cigarette during the interrogation. At times his interrogator left him alone, shackled in the room. As a result of the painful shackling, the complainant suffered from physical pains in his body, which he noted when meeting Atty. Talhami on behalf of Petitioner No. 1 on 20.7.08, approximately one month after the conclusion of his interrogation.

    - A copy of the complaint is attached and marked as **Appendix 11/A**.

37. On **14.1.09**, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint. According to her, "the OCGIC's examination shows that there is no basis or corroboration for the complainant's various complaints... The complainant's different versions, the complainant's confession that he intended to present a frivolous complaint against his interrogators and the examination documents show that the complainant's various complaints are not credible". It should be noted that in a telephone conversation on 9.2.11 meant to clarify the situation, Mr. Mabeyd denied that he at any time intended to or said he intended to present a frivolous complaint against his interrogators.

    - A copy of the response is attached and marked as **Appendix 12/A**.

38. Petitioner No. 12, **Ahmad Lutfi Ahmad Kh'alef**, from Barkin in the Jenin District, was arrested on 1.7.04 and interrogated at Kishon ("Jalame") Detention Center. He filed a complaint on **7.4.08** through Petitioner No. 1 regarding torture and/or ill-treatment he was subjected to during his interrogation. The complaint details his interrogation for thirteen straight days, which lasted for thirteen hours each day while his legs were shackled, his hands cuffed to the back of his chair and his eyes covered for several hours. Mr. Kh'alef's interrogators violently shook him and threatened him with a "military interrogation" (a euphemism for the worsening of interrogation conditions). On the third day of the interrogation, his interrogators stripped him of his clothes and dressed him in what they told him were special clothes meant for a "military interrogation". This interrogation lasted for two days, over the course of which they yelled extensively at him. He describes the way his interrogators violently shook him while he was shackled to the chair and his hands were cuffed behind his back. Mr. Kh'alef was held in drastic conditions: he was not given a change of clothes; for several days he received small amounts of rotten food. Later he was transferred to a cell of informants. He further complained that he was suffering from headaches and tooth pain and that he felt strong pains in his left leg which made him worry that he was in need of surgery, but that his requests to receive medical treatment and pain relievers did not draw any response at all.

    - A copy of the complaint is attached and marked as **Appendix 13/A**.

39. On 25.3.09, **some four years after the filing of the complaint**, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint under the justification that "the complainant's various complaints against General Security Services interrogators were examined by the OCGIC and no corroboration was found for them".

- A copy of the response is attached and marked as **Appendix/14A**.

40. Petitioner No. 13, **A'amad Yussuf Abed el-Karim Khamed**, from Beit Hanoun in Gaza, was arrested on 5.1.09 during Operation "Cast Lead" and interrogated at "Shikma" Detention Center in Ashkelon. On **23.4.09** Respondent No. 1 filed a complaint in his name regarding torture and/or ill-treatment he was subjected to over the course of his interrogation by the GSS at Ashkelon. In the complaint he describes being held with his hands cuffed behind the chair and his legs shackled to the chair itself. Mr. Khamed was interrogated in this position for eight days; the first five days his interrogation proceeded day and night while the interrogators took shifts. Mr. Khamed was allowed to rest and eat for only an hour and a half after 18 hours of interrogation. His interrogators threatened to leave him shackled to the chair until he developed hemorrhoids, they cursed him and yelled in his ear and in his face. During his period of detention, Mr. Khamed was transferred between three different isolation cells, in all of which there was a weak yellow-colored light which caused him eye pain. Within the cell there was a squat toilet and a shower which for the most part did not have hot water despite the bitter cold of January.

    - A copy of the complaint is attached and marked as **Appendix 15/A**.

41. On **20.7.09**, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint under the justification that "the complainant's complaints were examined by the OCGIC and no basis or corroboration was found for them".

    - A copy of the response is attached and marked as **Appendix 16/A**.

42. Petitioner No. 14, **Mustafa Abu Muammar**, from the Alshuka region of Rafah, was arrested on 22.6.06 and interrogated at two locations: in a caravan at a military base, and at "Shikma" Detention Center in Ashkelon. He filed a complaint on **31.8.06** regarding torture and/or ill-treatment he was subjected to during his interrogation. With regards to the interrogation conducted at the military base, the complainant noted that his hands and legs were shackled painfully backwards, that his head and face were covered by a piece of cloth, and that he received strong blows to the face. At one point the interrogators forced him to fasten his legs to the legs of the chair with the backrest to the right of his body and pushed his back down towards the floor, ordering him to remain in this position (the "banana position") for an hour. Every time he attempted to rise, they struck him. As a result the complainant suffered from strong pains in the stomach muscles. His interrogators further used the high cuffing method – they pulled his arms behind him,

cuffed his arms instead of his wrists and applied pressure to the handcuffs. This caused both hands to swell and blocked the blood flow in his blood vessels to the point that the interrogators were later able to remove the cuffs from his arms only with difficulty. His interrogation also included blows and strikes. Later on, he was transferred to "Shikma" Detention Center in Ashkelon, where he was subjected to the same interrogation methods he had encountered at the military base. He describes how three interrogators attacked him in his cell and struck him harshly. He also complained of curses, threats to demolish his house and the use of his family members as means of torture – he was informed that his brother would be arrested and subjected to torture. His interrogators further used the "kambaz" (kneeling) method, which caused severe pains in his leg muscles. This interrogation continued for seven days, during which he fainted and lost all contact with reality. Only then did his interrogators end the interrogation and pour water on him, at which point he was returned to interrogation once more.

- A copy of the complaint is attached and marked as **Appendix 17/A**.

43. On **10.12.07**, a year and four months after the filing of the complaint, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint after, according to her, the Petitioner refused to convey his version of events to the OCGIC, requesting to consult his attorney beforehand. The response noted that "the OCGIC explained to the complainant that he was free to do this, and that if he was interested in the continuation of his complaint's examination, he must inform the State Attorney's Office through his attorney. No such message was received from the complainant or his representative", hence the decision to shelve the complaint.

    - A copy of the response is attached and marked as **Appendix 18/A**.

44. On 23.12.08, the Petitioner wrote to the Respondent requesting once more that he carry out his authorities as required in accordance with the law, and stop the referral of complaints to the OCGIC for a preliminary examination. The delay in the sending of this request was due to difficulties posed by the authorities in arranging for the attorneys of Petitioner No. 1 to visit the Respondent.

    - A copy of the response is attached and marked as **Appendix 19/A**.

45. A response was received on 19.8.09 from Atty. Rahel Mattar, the OCGIC's Supervisor, shelving this renewed request as well, under the justification that "this complaint of the complainant's was examined and no basis or corroboration was found for it. As for the

claim that the OCGIC is situated in an inherent conflict of interest, I would like to inform you that the OCGIC is subjected to the professional supervision of the State Attorney, and that no employee of the GSS is authorized to order him how to examine complaints or to intervene on this matter. These guidelines were meant to prevent any conflict of interest on his part. Nevertheless, it should be noted that discussions have been held recently on the matter of improving and making more efficient the functioning of the OCGIC and his manner of conducting investigations. In the framework of these discussions your claims regarding the lack of professionalism and lack of objectivity of the OCGIC were raised, as was your claim regarding the conflict of interest in which he finds himself as part of a 'non-independent system'. The discussions on the topic are still in progress... In light of the aforementioned, I do not see it fit to carry out an additional examination of the issue".

- A copy of the response is attached and marked as **Appendix 20/A**.

46. Petitioner No. 15, **Amjad Abed el-Karim el-Kh'aladi**, from Beitunya in Ramallah, was arrested on 18.2.09 and interrogated at the "Russian Compound" Detention Center in Jerusalem. He filed a complaint through Petitioner No. 1 on **26.9.09** regarding torture and/or ill-treatment he was subjected to during his interrogation at the hands of the GSS. In his complaint he describes being seated on a metal chair affixed to the floor with his hands cuffed behind his back, shackled to the chair with his legs cuffed by means of metal chains, also shackled to the chair. He complained of being held in an isolation cell for a period of five days without the conduction of any interrogation at all. This cell contained a hole in the floor to be used as a toilet ("jora"), separated from the cell by means of concrete blocks. The cell was lit by two yellow bulbs which were kept on continually, causing the complainant pain in the eyes and depriving him of sleep. In the isolation cell there was an air-conditioner controlled by the prison guards, who arbitrarily decided when and at what temperature to activate it. Afterwards, he was transferred to interrogation and was once again cuffed in a painful manner. The Petitioner was held handcuffed behind his back by means of a metal chain and was forced to sleep while cuffed in this position. He was held in this manner for three days with no break except for showering.

- A copy of the complaint is attached and marked as **Appendix 21/A**.

47. On **21.10.10, approximately one year and four months after the filing of the complaint**, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint under the justification "that no basis was found for the complainant's complaints of improper behavior on the behalf of General Security

Services interrogators". On 7.11.10, a response was sent to the Respondent on behalf of Petitioner No. 1, confirming receipt of the aforementioned decision to shelve the complaint and requesting an explanation of the Respondent's abstention from referring the complaint to a criminal investigation by the PID. The correspondence further requested information on the decision-making process which led to the aforementioned shelving and inquired as to the relevant legal procedures for the shelving process. To date, no substantive response to this request has been received.

- A copy of the response is attached and marked as **Appendix 22/A**.
- A copy of the responding letter is attached to this petition and marked as **Appendix 23/A**.

48. Petitioner No. 16, **Jamal Nasser Khabeesh**, from Dir Abu Masha'al in Ramallah, was arrested on 26.10.08 and interrogated at the "Russian Compound" Detention Center in Jerusalem. On **20.8.09**, he filed a complaint through Petitioner No. 1 regarding torture and/or ill-treatment to which he was subjected in interrogation. In his complaint the Petitioner describes being seated in a chair affixed to the floor with his hands shackled behind him. He further testified that his interrogator kicked him and struck him in the face. He was held in complete isolation in an extremely small cell for a period of two months. Throughout this period he met only his interrogators, who yelled at, cursed and threatened him.

    - A copy of the complaint is attached and marked as **Appendix 24/A**.

49. On **21.10.10**, over a year after the filing of the complaint, a response was received from the OCGIC's Supervisor, Atty. Rahel Mattar, shelving the complaint. Atty. Mattar's response briefly listed the following justifications for the case's closing: according to her, the OCGIC's examination showed that the interrogation had lasted for a shorter period of time than that noted in the complaint; that for most of the interrogation period the Petitioner was held with other prisoners and not in isolation; that he had been examined by one interrogator and not three, as had been claimed; that he had cooperated with his interrogators from the first moment and thus it was unreasonable that any violence would have been used against him (!); that the Petitioner did not convey his claims to the judge at the time of his remand of detention hearing; and that in his meeting with the OCGIC, his complaint of violence on the part of his interrogators was "unconvincing". On **7.11.10** a letter of response was sent to the Respondent, requesting an explanation of his abstention from referring the complaint to a criminal investigation by the PID. Information was further requested as to the decision-making process which led to the

aforementioned shelving, and regarding the relevant legal procedure. To date, no substantive response to this request has been received.

- A copy of the responding letter is attached to this petition and marked as **Appendix 25/A**.
- A copy of the response is attached and marked as **Appendix 26/A**.

50. The above cases illustrate many of the failures and oversights which characterize the complaint-examination mechanism: there is oftentimes a delay before the receipt of any answer causing significant damage to the Petitioners' right to have justice done; many of the responses of the OCGIC's Supervisor are short and laconic, and they hastily disregard the details of the complaint; they do not detail the data upon which the OCGIC's examination is based; the rationales for the closing of the complaints are often baseless and peculiar; and permission is not granted to browse the findings of the examination.

51. It should be further noted that most of the Petitioners described to their attorneys the visit of the OCGIC who, following up on the complaint, came to take their testimony. From their descriptions it is clear that such a visit cannot in any way make up a sufficient evidentiary basis for the closing of a complaint. The visits take place without any prior warning and in the absence of the complainant's attorney, even when the complainant explicitly asks to be accompanied by their attorney. The visits last between a quarter of an hour and an hour and a half. They take place in prison, often when the complainant is shackled. These conditions do not allow complainants to gain any trust for the mechanism examining their complaint – in fact, the process in large part recreates the complainants' interrogations by the GSS. The "interview" conducted by the OCGIC thus reflects the Respondent's policy, according to which the complainants – victims of a crime – remain themselves in the status of suspect, and in which there is no desire to confirm their complaints or to punish those who harmed them.

The Appeals of Petitioners No. 1-6 to the Respondent

52. The defective conduct of the Respondent in investigating the complaints of victims of torture and ill-treatment at the hands of GSS interrogators was described in-depth in a report published by Petitioner No. 1 in December 2009 and entitled "**Periodic Report: December 2009 – Accountability Denied**".

- A copy of "**Periodic Report: December 2009 – Accountability Denied**", published by Petitioner No. 1 in December 2009 is attached to this petition and marked as **Appendix 27/A**.

53. **Prior to the publication of the report**, on 1.12.09, Petitioner No. 1 wrote to the Respondent requesting his response to a draft of the report and its claims, with the intention of publishing his response. The Respondent did not respond to this request.

    - A copy of the correspondence from Petitioner No. 1 is attached to this petition and marked as **Appendix 28/A**.

54. On 30.12.09, after the publication of the report, Petitioner No.1 again wrote to the Respondent, this time requesting **his response** to the official report and the arguments included in it. The Respondent did not respond to this request either.

    - A copy of the correspondence from Dr. Ishai Menuchin, Executive Director of Petitioner No. 1, is attached to this petition and marked as **Appendix 29/A**.

55. On 9.3.10, Petitioner No. 1, in the name of Petitioners No. 2-6, approached the Respondent by means of an additional letter, this one regarding his policy on the treatment of interrogee complaints of torture and other cruel, inhuman or degrading treatment by GSS interrogators. The Petitioners requested that the Respondent order that **any suspicion of the use of torture or ill-treatment in GSS interrogations be referred to a criminal investigation**, or alternatively, he was asked to **set transparent criteria for the exceptional and rare cases in which the complaint would be referred to a preliminary examination** before its referral to a criminal investigation; in this context he was requested to order that these examinations be carried out by a **professional and independent authority not from the ranks of the GSS**, and to forbid the referral of complaints to examination by the OCGIC. Secondly, the Respondent was requested **to refer to criminal investigation all complaints filed by the Public Committee Against Torture in Israel since 2003**; or, alternatively, to order the examination of every single one of the these complaints according to the clear and transparent criteria which would be set. The request was accompanied by a detailed list of the approximately 170 complaints filed between March 2003 and December 2009, including those of Petitioners No. 7-16. In the framework of the re-examination the Respondent was requested **to allow the victims of torture and ill-treatment the right to an effective appeal of the conclusions of the examination, which would include the right to access its findings**, according to the same criteria employed in PID investigations.

- A copy of the correspondence from Atty. Samah Elkhatib Ayoub and Atty. Irit Ballas is attached to this petition and marked as **Appendix 30/A**.

56. On 11.3.10 the Respondent's Office Director wrote confirming receipt of the Petitioners' letter and passed on the standard message received in response to every individual complaint of torture and ill-treatment by GSS interrogators: that "after examining your request, it was referred to the care of Atty. Rahel Mattar, the OCGIC's Supervisor at the State Attorney's Office".

    - A copy of the response of the Respondent's Office Director is attached to this petition and marked as **Appendix 31/A**.

57. On 11.4.10 the Petitioners approached the Respondent to protest the referral of their previous request to the care of the OCGIC's Supervisor as someone involved in the process about which they were complaining. In light of this, the Respondent was requested again to examine the letter himself and to respond to it with haste.

    - A copy of the correspondence, dated 11.4.10 is attached to this petition and marked as **Appendix 32/A**.

58. Since no substantive response to the Petitioners' principle petition was received, a reminder was sent to the Respondent on 30.5.2010.

    - A copy of the reminder is attached to this petition and marked as **Appendix 33/A**.

59. On 6.7.10 a response dated 9.6.10 was received from Atty. Raz Nazri, a senior aide to the Respondent, stating that, "your petition on the matter at hand from 9.3.10 was referred to, among others, Atty. Rahel Mattar, the OCGIC's Supervisor at the State Attorney's Office, so that she may respond to the claims of principle, as is usual. After the requested responses have been received and the entirety of the circumstances of the matter examined in conjunction with all the relevant authorities, a response from the Attorney General will be provided".

    - A copy of the response from Atty. Ran Nazri, senior aide to the Respondent, is attached to this petition and marked as **Appendix 34/A**.

60. On 27.7.10 the representatives of the Petitioners sent the Respondent an additional reminder regarding their principle petition, in which they demanded a meaningful response from the Respondent as soon as possible.

    - A copy of the Petitioners' correspondence is attached to this petition and marked as **Appendix 35/A**.

61. Since no substantive response to the aforementioned reminder was received, the Petitioners' representatives sent another reminder on 21.9.10, emphasizing that, "more than six months have passed since our initial appeal, and almost a full year since we approached you with the report dealing with the subject in order to receive your response. We see your failure to respond in the most severe terms, and are considering petitioning the courts unless your substantive response is received as soon as possible".

    - A copy of the Petitioner's correspondence is attached and marked as **Appendix 36/A**.

62. Nevertheless, to this day no substantive response has been received from the Respondent to the Petitioners' principle petition. This in spite of the fact that more than fifteen months have passed since the draft of the report was sent for his response, **and in spite of the fact that almost a year has passed since our additional request on 9.3.2010**. Since no substantive response to the Petitioners' requests has been received and since the Respondent and the OCGIC's Supervisor continue to shelve complaints without ordering the opening of a criminal investigation by the PID against GSS interrogators – because of this we have filed the current petition. **Needless to say, the failure to answer for such a long period of time represents a grave failure in and of itself.**

63. On 17.11.10, as noted, the media published a news item according to which the OCGIC would be transferred to the employ of the Justice Department and thus, it was claimed, his independence would be increased. Though this was one of the central subjects of the Petitioners' appeals, **the Respondent did not bother to update the Petitioners about this change**. Thus on 21.12.10 the Petitioners sent the Respondent an additional letter, asking him to specify the nature of this change. To date no substantive response to this letter has been received.

The Legal Argument

64. The basic and fundamental argument of the Petitioners is that, in accordance with the provisions of existing law, there is a duty to open a criminal investigation when a complaint of torture and ill-treatment is received, this in accordance with the criteria determined by Article 59 of the Criminal Procedure Law. The Petitioners claim that the policy of the Respondent with which this petition deals stands in contradiction to his duty under the law and should thus be annulled.

Part A – The Duty to Investigate in Israeli Law

1. On the Duty to Launch a Criminal Investigation

65. "All are subject to the law, both the citizen and all the governing authorities: executive, legislative and judicial, and no authority is above the law" (Eliad Shraga and Roe'e Shakhar, **Administrative Law: The Justifications for Intervention**, Vol. 3 Tel Aviv 2008, p.123 [in Hebrew]). The principle of legality states that the administrative authority has the power to act in accordance with what it has been authorized to do by law.

66. The Respondent's aforementioned policy of ordering the comprehensive referral of all complaints to a preliminary examination stands in contradiction to the provisions of existing law. When a complaint of ill-treatment and/or torture which is not *prima facie* a frivolous complaint is filed with the Respondent, **the only option before the Respondent is to determine whether the PID or the Israel Police will carry out to the criminal investigation. That and no more**. In choosing to refer all the complaints to a preliminary examination by the OCGIC through the OCGIC's Supervisor, without implementing a criminal investigation, the Respondent is taking an unauthorized action, because his actions are taken in contradiction to the provisions of the law. Under these circumstances, the Respondent's policy should be struck down.

67. The Respondent will argue that his authority is to be interpreted in a broad manner, and/or that he is authorized under the principle of residual powers to order a preliminary examination. These claims must be rejected outright. The legislature has clearly and unequivocally determined that criminal investigations must be opened in these types of cases. So long as the Respondent decided not to order the PID to open a criminal investigation, he is obliged to order the Israel Police to open a criminal investigation regarding complaints of GSS interrogees, in accordance with the criteria fixed in Article 59 of the Criminal Procedure Law.

68. In accordance with case law well-rooted in the rulings of this Honorable Court, authority may not be granted to an official by force of residual powers in circumstances which entail the violation of human rights (see: HCJ 3267/97 **Amnon Rubenstein v. Minister of Defense** Piskei Din 52(5) 481, p. 515 (1998); HCJ 5100/94 **Public Committee Against Torture in Israel** Piskei Din 53(4) 817, p. 833 (1999); HCJ 8600/04 **Avner Shimoni v. Prime Minister** Piskei Din 59(5) 673, p. 687 (2005); HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel** (not published, 27.2.06), §20, English translation available at High Court website). As we will detail below, the Respondent's policy of ordering the comprehensive shelving of interrogee complaints without a criminal investigation, brings about a grave and fundamental violation of their rights; thus the Respondent's authority should be interpreted minimally, and the principle of residual powers should not be relied upon in this context.

69. In addition, the Respondent's policy of the wholesale referral of every complaint of torture or ill-treatment in interrogation to a preliminary examination by the OCGIC is within the realm of a primary arrangement, which the Respondent is not authorized to set. Thus the Respondent's policy violates the principle of separation of powers and backhandedly creates, *ex nihilo*, an examining body which is not provided for in the law and which, in any case, lacks authorization under the law. On this matter it has been ruled that the government does not have the authority to set up primary arrangements, because this is the role of the legislative authority. The decision of what is a primary arrangement is to be made *ad hoc*, "by addressing the nature and substance of this issue under discussion, the background of the basic principles upon which the legal system is based, and by using common sense and our logical faculties... The substance of the arrangement, its social ramifications and the degree to which it violates the liberty of the individual all affect the determination whether we are dealing with a primary arrangement or a secondary arrangement... Thus, *inter alia*, we should examine the degree to which the arrangement affects the public in Israel... Let us therefore examine the purpose of the act and the degree of public agreement which it enjoys...; the cost of the act...; the extent of the legislature's involvement in an act and its effect on it...; the stage at which the matter is brought before the court...; how urgent an activity is...; the degree of public reliance on a government promise, etc. The list of considerations, it need not be said, is not a closed list" (HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel**, (not published, 27.2.06), §§37-39 of Justice Cheshin's opinion).

70. This Honorable Court has ruled that under certain circumstances a preliminary examination may be carried out prior to the opening of an investigation (AddDiscHCJ

1396/02 **The Movement for Quality Government in Israel v. Attorney General et al** (not published, 24.4.03), §6). Similarly, the court has ruled that a complaint filed with regards to a felony must provide a basis for the Police's "learning" of the perpetration of a crime, so that that the latter may initiate an investigation (HCJ 1113/07 **Nissim Tzadok v. Head of Interrogations and Intelligence Department et al** (not published, 1.9.08), §§24-26). The Petitioners argue that these rulings do not detract from the duty to open a criminal investigation, in circumstances where a complaint has been filed regarding torture or ill-treatment in interrogations carried out by state officials.

71. The logic standing at the foundation of the aforementioned ruling of the Honorable Court is to not force the police to open a criminal investigation in every single case in which a complaint is filed, for instance when the complaint at hand is a frivolous complaint or a *prima facie* baseless complaint. It was in this light that Justice Joubran stated in the Tzadok case:

> "The claim raised by the Petitioner, according to which every complaint filed with regards to a felony must be investigated by the Police, is a problematic one to say the least. Such a situation is improper, as a great many frivolous complaints are filed regularly with the Police, and it is inconceivable that in every case wherein an individual appeals to the Police claiming that someone has committed a felony, despite the claim being *prima facie* objectively unreasonable, the Police will initiate an investigatory process of the complaint" (HCJ 1113/07 **Nissim Tzadok v. Head of Interrogations and Intelligence Department et al** (not published, 1.9.08), §24 of Justice Joubran's opinion).

72. Indeed, the Petitioners do not contest that when the complaint at hand is "*prima facie* objectively unreasonable", along the lines of a "frivolous complaint", the Police is not obliged to order the initiation of a criminal investigation. Except that the policy of the Respondent, that which is the object of this petition, is not directed at complaints foreseen to be frivolous, or against those for which an additional examination is required in order to check whether they match the criteria of Article 59 of the Criminal Procedure Law.

73. First of all, these are detailed complaints of torture and ill-treatment which do not include grave inherent contradictions. It can certainly not be claimed that all these hundreds of complaints, closed by the Respondent without any investigation, were along the lines of "frivolous complaints" not necessitating criminal investigations. In addition, these complaints deal with the "holy of holies" – the individual's right to the integrity of body and spirit and the freedom from physical or emotional harm – which becomes even more crucial when the crimes are perpetrated by state officials. With complaints of this kind,

the Respondent's hand should quiver before signing a decision to shelve the complaint without any serious or effective criminal investigation having been conducted.

74. In practice, not only does the Respondent's hand remain steady, as described above; he in fact implements an unique arrangement, the essence of which is a **complete** abstention from criminal investigations of these complaints, and their comprehensive referral to preliminary examinations leading – always – to the closing of the complaints. Thus, the Respondent's conduct under the circumstances entails a significant deviation from the provisions of the law, enough so as to both gravely damage interrogee rights and to prevent any chance of deterring future GSS violations of interrogees' integrity of body and spirit.

75. The obligation to act in a uniquely cautious manner in order to ensure that a criminal investigation be opened regarding every complaint which is not *prima facie* a frivolous complaint, becomes even further valid when the complaints at hand involve torture and/or ill-treatment of detainees.

76. **First**, the public interest in the opening of an investigation increases with complaints testifying to alleged **grave violations** such as ill-treatment and torture, which entail **serious damage by the authorities to the human rights of the victims**.

77. **Second**, the public interest in the opening of an investigation also increases in light of the suspicion that a violation has been carried out by a **state official**. In the investigation of public position holders in general, and those responsible for the enforcement and application of the law in particular, there is an obligation to abstain from shelving complaints which are liable to be truthful. Such an obligation has been noted by this court in AddDiscHCJ 7516/03 **Ya'akov Nimrod v. Attorney General et al** (not published, 12.2.04), in which it ruled:

> "The ruling does indeed attribute importance, for the purposes of making a decision regarding the opening of an investigation, to the fact that the defendant is a Police employee. This is because the very investigation of a Police employee – and particularly in he holds a senior position – entails unique ramifications, among other things on public faith in the law enforcement system and on the system's ability to continue to function independently while very powerful pressures are enacted upon it from different directions at all times. **Needless to say, the role of Police employees does not make them immune to**

investigation, but rather places especially high standards before them with regard to obligations of trust, fairness and safekeeping of the law".

[Emphases added – S.E.A. and I.B.]

78. The corollary to this principle, the necessity of a preliminary examination to prevent false investigations which may fetter the state official's functioning, takes on a different meaning when we are dealing with complaints of torture and ill-treatment in interrogation: these crimes are **always** carried out by a state official. A comprehensive conclusion by which preliminary examinations may be justified by the suspect's being a state official, leads to a comprehensive policy of preliminary examinations replacing criminal investigations; this in the absence of any substantive justification, in contradiction of the provisions of the law, and in violation of Israel's international obligations.

79. **Third**, a detainee in custody who is the victim of a violation suffered at the hands of a state official against whom he would like to complain is confronted by various systematic difficulties. For a Palestinian victim from the Occupied Territories, classified as a detainee suspected of security violations (hereinafter: security detainee), the situation is exponentially worse. First of all, he files the complaint at a moment when he is still under the custody of the very same organization which he claims carried out the violation; he understandably fears harassment. Secondly, he does not speak the language of the system, which he sees in many ways as hostile to him. To this we must add the meager resources at the disposal of many Palestinian detainees suspected of security violations, placing a further obstacle before the filing of complaints.

80. **Fourth**, and most importantly: a series of legal and circumstantial obstacles stands before complainants, which prevents them from establishing an evidentiary basis which can provide that same "corroboration", in the absence of which the Respondent refuses to open a criminal investigation. Among these obstacles we may list are: the existence under Israeli administrative case-law of a presumption of propriety in favor of the authorities that the relevant administrative agency made a reasonable decision; the fact of the complainants' detention, subjected to the authority of the same interrogators suspected of perpetrating the violations; their isolation from the outside world, including their prevention from meeting an attorney, which prevents them from describing their ordeal to potential witnesses in real time and from receiving legal advice; their being categorized as suspected of security violations, which exempts the authorities from obligatory visual and audio documentation of their interrogation under the Criminal Procedure Law

(Interrogation of Suspects) 5762-2002; the problem of deficient medical documentation from the period of the interrogation; and the system of nicknames customary among GSS interrogators, obscuring the identity of the complainants' attackers.

81. The existing **circumstances** dictate that the complaint of a security detainee will inevitably rely on the complainant's version as the sole evidence; only very rarely will this be corroborated by other incriminating evidence such as medical records, physical signs of injury, wounds, other witnesses, etc. Thus, the Petitioners claim that **conditioning the opening of a criminal investigation into ill-treatment or torture carried out by GSS interrogators upon the existence of "additional corroboration" creates a legal absurdity in which the victim of torture or ill-treatment will find it extremely difficult to reach the evidentiary threshold, forever remaining denied a criminal investigation of his attackers. The very goal of a criminal investigation is to allow the thorough and exhaustive examination of the complaint in order to decide whether it is justified or not; as long as the complaint is not a *prima facie* frivolous one, the fact that no additional evidence is available cannot in any way entail a justification for its shelving before investigation.**

82. We further note that the Respondent's duty to investigate entails his obligation to form a minimal evidentiary basis which can eventually lead to the exposure of the truth and to the launching of criminal judicial proceedings against the suspects involved. The court noted this in CrimApp 721/80 **Turjeman v. State of Israel**, Piskei Din 35(2) 466, pp. 474-475, (1981):

> "The purpose of a Police investigation is not the discovery of evidence for the conviction of a suspect, but rather the discovery of evidence for the exposure of the truth, whether this truth is liable to lead to the suspect's acquittal or to his conviction".

83. Again, the situation is exponentially more severe when the violations at hand are torture and ill-treatment during interrogation, which present the complainant with particular evidentiary difficulties. Furthermore, the Criminal Procedure Law (Interrogation of Suspects) 5762-2002, which requires the video recording of interrogations in the framework of investigations of crimes for which the punishment is 10 or more years in prison, does not apply to the GSS. This exemption further increases the need to open a criminal investigation regarding these complaints, seeing as the complainant is denied even the minimal right of documenting his interrogation in order to allow the retrospective establishment of the legality of the interrogation methods and the examining

of his complaint. In this context, the absence of proper treatment of interrogee complaints entails an additional method, joining a series of other means preventing any effective supervision of GSS interrogation rooms.

84. The Petitioners further claim that the Respondent's abstention from ordering the PID to open investigations against GSS interrogators is tantamount to denying from complainants the evidence which could potentially form the basis of a **civil lawsuit** for damages. Case law states that such behavior on behalf of the investigative authorities entails evidentiary damage; in a civil lawsuit, such behavior in and of itself transfers the evidentiary burden of proof to the state (CivApp 361/00 **A'azam D'ahar v. State of Israel** 59(4) 310, §19 (2005)).

85. Moreover, the Respondent's duty to investigate also increases when the violations supposedly committed are those of GSS interrogators – this in light of **the GSS organizational history**, full as it is of troubling episodes entailing lies and cover-ups, which include the concealment of information from the justice system. The GSS, which in many ways enjoys a near-complete exemption from the requirements of transparency and reporting to the public, must operate under the watchful eye of law enforcement officials. In this sense as well, the precedents set down by this court are not relevant in the matter at hand.

86. The Petitioners are also aware of this Honorable Court's ruling in HCJ 11447/04 **HaMoked: Center for the Defense of the Individual v. Attorney General** (not published, 21.4.05), §9 (2005), in which the court decided not to intervene in the Respondent's decision to carry out a preliminary examination regarding a complaint of torture and ill-treatment. In our opinion, this ruling cannot be shown to render the current petition redundant, seeing as the gravity and breadth of the Respondent's conduct did not stand before the court, and seeing as it did not discuss the weighty judicial questions and questions of principle which are raised by this petition.

2. The Respondent's Conduct Grants Full Immunity to GSS Employees

87. The Petitioners claim that the manner in which the Respondent enacts his authority under Article 49.I.1(A)of the Ordinance has created a situation of selective enforcement, in the sense that GSS employees are not placed on trial for the same violations that, insofar as they are suspected of perpetrating them, their colleagues in the Police and the other investigative bodies, are brought to justice for. The result of this selective enforcement is

absolute impunity for GSS interrogators with regards to torture and ill-treatment in interrogations.

88. The obstruction of an interrogee's complaint against their interrogator regarding the perpetration of violations over the course of the interrogation due only to a distinction in the character of the interrogation or the interrogator's position, in and of itself entails discrimination in the use of the criminal procedure, and may damage the public's faith in the prosecutorial authorities:

> "Proper implementation of the criminal procedure is based on public faith in the prosecutorial authorities that its decisions are reached out of a sense of equality. The filing of convictions in a discriminatory manner harms the public faith in the prosecutorial authorities. This harm is grave for a democratic regime. This harm is treble: first, **discriminatory use of the prosecutorial power harms the fundamental assumptions behind granting judgment to the prosecutor**; second, discrimination in the filing of convictions harms the faith of the public in the prosecutorial authorities in specific and in the governing authorities in general, thus eroding the bonds linking the members of society; third, **unequal implementation of the prosecutorial power harms the deterrent strength of criminal justice**". **(**HCJ 935/89 **Atty. Uri Ganor v. Prime Minister of Israel et al**, Piskei Din 44 (2) 485 (1990), 511-512).
>
> **[Emphases added, S.E.A. and I.B.]**

89. The Petitioners emphasize that one must not rely solely upon the fact that the legislature has designated a special arrangement for complaints against GSS interrogators. Similar arrangements exist with regards to the opening of criminal investigations against the Prime Minister (Article 17 of Basic Law: The Government), judges (Article 12(a) of Basic Law: The Judiciary), Qadis (Article 23 of the Qadi Law, Article 28 of the Druze Religious Courts Law) which have been further anchored in the Attorney General's Guidelines No. 4.2200 (90.004) on the subject of "Investigating Public Servants", but these have not been interpreted as entailing an obstruction to their investigation in a criminal investigation. (See for example – S.Cr.C. (T.A.) 1015/09 **State of Israel v. Moshe Katsav** (not published, 30.12.10); S.Cr.C. (T.A.) 40138/08 **State of Israel v. Avraham Hirschson** (not published, 8.6.09); S.Cr.C. (Jer.) 2062/06 **State of Israel v. Shlomo Benizri** (not published, 1.4.08); S.Cr.C. (Jer.) 305/93 **State of Israel v. Arieh Deri et al** (not published, 19.3.99)).

90. We should also note that (notwithstanding the criticism of their conduct reserved by the Petitioners) a perusal of the policy practiced by other interrogatory bodies such as the Police, PID and Investigative Military Police (hereinafter: IMP), reveals the immediate requirement to open a criminal investigation whenever a suspicion of the carrying out of a violation in the matter arises, without the launching of a preliminary examination.

- National Police Headquarters Order 4.04.03 "Examining Officers and Examining Committees", Article 6.

- National Police Headquarters Order 09.04.01 "Examining Officers and Examining Committees", Article 14.

- Article 62.A(16) of General Staff Directive 33.0304 for IMP Examination and Investigation.

- Military Prosecution's "Gaza Operation Investigations: Update Report" regarding the conclusions of the Goldstone Committee from January 2010, § 50. (http://www.mag.idf.il/SIP_STORAGE/files/3/713.pdf)

- Military Prosecution's "Gaza Operation Investigations: Second Update" from July 2010, Article 6, p. 2; Article 37, p. 9. (http://www.mag.idf.il/SIP_STORAGE/files/3/883.pdf)

91. Thus, it is only appropriate that the fate of GSS employees be no different than that of their colleagues, and that they too be subjected to the authority of the law. The Respondent's policy, bringing about the comprehensive closing of all complaints, stands in contradiction to this demand, and for this reason too, it must be struck down.

3. Constitutional Violation of Fundamental Rights

A. Violation of the Right not to be Subjected to Torture

92. The right not to be subjected to torture has already been recognized as part of the right to dignity, and as such it is anchored in the Basic Law: Human Dignity and Liberty. This recognition grants it a special status among the human rights protected under Israeli law. On more than one occasion the Justices of the High Court have ruled that the right to dignity is not denied an individual even when his freedom is taken away. "Prison walls do not come between the detainee and his human dignity"; that even if the detainee has been denied freedom, "his humanity has not been stripped away".

- HCJ 355/79 **Katlan et al v. Prisons Service**, IsrSC 34(3) 294 (1980), § 34.

93. And yet this right is emptied of all value when its violation does not lead to any sanction, or even to a criminal investigation which may form the preliminary evidentiary basis for exercising the full rigor of the law against the right's violators. In this sense, the Respondent's abstention from ordering criminal investigations in response to the complaints of Petitioners No. 7-16 and 650 such complaints overall, entails a grave violation of the individual's right to human dignity anchored in the Basic Law: Human Dignity and Liberty.

B. Violation of the Right to Due Process

94. The Petitioners claim the abstention from criminal investigation generally violates their due process rights, specifically their ability to conduct an effective *voir dire* hearing in the course of the criminal trial; this due to the absence of evidence which the authorities are obligated to provide by means of a criminal investigation of their complaint.

95. The right to due process has already been recognized in case law as part of the right to dignity. As such, it is anchored in the Basic Law: Human Dignity and Liberty. The words of Honorable Justice Dorner are especially appropriate here:

> "Basic Law: Human Dignity and Freedom (hereinafter – the Basic Law), passed in 1992, granted the status of constitutional basic right to a person's right to criminal due process, especially pursuant to Article 5 of the Basic Law, which determines the right to freedom, and pursuant to Articles 2 and 4, which determine the right to human dignity. Article 11 of the Basic Law obliges all the ruling authorities – the legislative, the executive and the judiciary – to respect the rights determined in it". (CrimRetrial 3032/99 **Baranes v. State of Israel**, Piskei Din 56 (3) 354, 375 (2002)).

96. For a security detainee the conduction of a ***voir dire*** **hearing** over the manner by which testimony was taken from him is a crucial way in which he realizes his right to due process. However, the mechanism by which complaints of ill-treatment and torture are checked, in its existing form which never even leads to a criminal investigation – empties this right to conduct a *voir dire* hearing of all value, so long as the complaints are shelved from the outset and do not yield criminal investigations.

97. Under these circumstances, the security detainee's right to conduct a *voir dire* hearing becomes a dead letter, fatally damaging his fundamental and constitutional right to due process. The existing complaint checking mechanism obstructs the confirmation of a *voir dire* claim for the invalidation of evidence, so long as the complaints are routinely shelved before having been examined by means of a criminal investigation.

98. As for the limitations clause: seeing as the prohibition against torture and inhuman or degrading treatment is absolute and may not be diminished even in the most extreme crises, and seeing as the unlimited nature of the prohibition entails an inseparable part of customary international law – the integration of which into Israeli law is direct (see HCJ 7195/08 **Ashraf Abu Rahma v. Brigadier General Avichai Mandelblit**, § 42 (2009)) – the Petitioners claim that it would be unsuitable to check whether the Respondent's abstention from ordering criminal investigations is in contradiction of the limitations clause. To this we add that an individual's right not to be subjected to torture and/or ill-treatment is a violation which is always unlawful, which lacks proper purpose and which does not meet the remaining requirements of the limitations clause.

On the status of the rules of customary international law in Israeli law see:

- Eyal Benvenisti, "Influence of International Human Rights Law on the Israeli Legal System: Present and Future" 28 **Israel Law Review** 136, 138 (1994).

4. The Complaint Checking Mechanism Is Extremely Unreasonable

99. The Petitioners further claim that the Respondent's conduct is extremely unreasonable. This with regards both the closing of the complaints of Petitioners No. 7-16 and the general policy which led to the shelving of all the hundreds of complaints without any criminal investigation.

100. The Petitioners claim that the comprehensive referral of all complaints to a preliminary examination and their closing without any criminal investigation, are tainted by extreme unreasonableness. Note well: **even were the decision to close a single complaint reasonable, the fact that hundreds were closed without even a single one leading to a criminal investigation, is a clearer testament than any other to the extreme unreasonableness of the Respondent's conduct**. Surely, this comprehensive closing of complaints is testament to the fact that not all the relevant considerations were weighed and that no proper balance between them was reached in a manner which "descends to the root of the issue". (HCJ 935/89 **Atty. Uri Ganor v. Prime Minister of Israel et al**, Piskei Din 44 (2) 485 (1990)).

101. What are these considerations which the Respondent must weigh in approaching the creation of an appropriate policy for examining complaints of torture or ill-treatment which GSS interrogators are suspected of perpetrating? We may learn about these from the content of the law, from the legislative history of the order granting authorization to the Respondent, as well as from "the values and principles of the entire legal method" (Eliad Shraga and Roe'e Shakhar, **Administrative Law: The Justifications for Intervention**, Vol. 3 Tel Aviv 2008, p. 229 [in Hebrew]); which latter, for the matter at hand, include the magnification of public oversight of the GSS' activities; the exercise of the full rigor of the law against interrogators employing violence in interrogations; and the increase of public faith in the law enforcement system.

102. Clearly, the reality is that the Respondent has done away with some of the considerations we have listed here, or has given these considerations too insignificant a weight. Otherwise, the patently unreasonable result, by which the Respondent did not refer even a single complaint for criminal investigation, would have been avoided.

103. Indeed, case law dictates that the court will not intervene in a decision when it is within the range of reasonableness (HCJ 6406/00 **Bezek Israeli Communications Company Ltd. v. Communications Minister**, Piskei Din 58 (1) 433 (2001), p. 434); and yet for the hundreds of complaints which have been closed, the unreasonableness of closing one joins the unreasonableness of closing the next, and these together reach an extreme level of unreasonableness which justifies the intervention of this Honorable Court.

5. The Complaint-Examination Lacks Proper Authority

104. As noted, the authority under Article 49.I.1(A) of the Ordinance is granted to the Respondent. The Petitioners claim that insofar as the decision to close a complaint is reached by the OCGIC's Supervisor, as was done in the cases of Respondents No. 7-16, and not by the Attorney General or the State Attorney or the deputies to which his authority has been delegated, then this decision has been reached in an unauthorized manner and is thus void.

105. In 2005, the Respondent delegated to the State Attorney his authority to order the opening by PID of a criminal investigation, under power of an option vested in him by the law (in the Publications Notebook No. 5441 from 27.9.2005, p. 4288). In 2009, the

Respondent expanded the delegation of his authority to the State Attorney's deputies (in Publications Notebook No. 6013 from 29.10.09, p. 264).

106. The Petitioners should hasten to state that the fact of this delegation of authority to the State Attorney and his deputies does not free the Respondent from this authority and that he retains the choice to use it at all times and to provide guidance to the State Attorney and his deputies on how to enact it, and even to cancel the delegation of the authority. **Nevertheless, the referral of all complaints against GSS interrogators to the treatment of the OCGIC's Supervisor is not within the realm of what is permitted under the law**; the OCGIC's Supervisor (the Deputy State Attorney for Special Tasks) does not count herself among these authorized officials, and is not authorized to determine the fate of the complaints.

- Ra'anan Har Zahav, **Israeli Administrative Law** (Tel Aviv, 1997), p. 71.
- Yitzhak Zamir, **The Administrative Authority** (Jerusalem, 1996), vol. 2, p. 551.

107. Thus, the complaint checking mechanism as it exists today, in which the actual decision is made by the OCGIC's Supervisor – who adopts the OCGIC's recommendations fully and unquestioningly – is unauthorized, and the decisions reached by means of this mechanism must be annulled (HCJ 2918/93 **Kiryat Gat Municipality v. State of Israel**, IsrSC 47 (5) 832, p. 845 (1993).

6. Preliminary Examination of Frivolous Complaints

108. As detailed above, the Petitioners recognize that, in accordance with Article 59 of the Criminal Procedure Law quoted above, in order to filter out frivolous complaints and to implement the basis of the term "the Police... learns that an offence has been committed" in the Article, under certain circumstances a preliminary examination may be conducted in order to evaluate a complaint which seems, *prima facie*, to be baseless.

109. In those exceptional and unique cases when a complaint foreseen to be a frivolous complaint is referred to a preliminary examination, such examinations must be conducted by an impartial, independent and professional authority possessing investigatory powers. As such, the complaints examined prior to the policy change discussed in Articles 4 and 25 of this petition, including the complaints of Petitioners No. 7-16, were closed in an unauthorized manner; the decisions regarding these cases must therefore be annulled and

re-evaluated. In light of the claims raised in this petition it is clear that, at least prior to this policy change, it was impossible to claim that the mechanism of the OCGIC was independent, either in terms of its organizational location or in terms of results – its comprehensive decision to close the complaints.

110. In this context it is noted that, because the wording of the Respondent's press release raises doubts regarding the essential character of the change to the complaint-examination mechanism, and since a response has yet to be received from the Respondent regarding the nature of the suggested change of the mechanism – and that hence the independence of the new examination mechanism remains shrouded in obscurity – the Petitioners reserve the right to petition this Honorable Court once again regarding the independence of the mechanism, insofar as this may be necessary once the issue is clarified.

Part B – The Duty to Investigate in International Law

111. The Petitioners claim that the comprehensive decision closing all complaints of torture or ill-treatment reaching the desk of the Respondent, like those of Respondents No. 7-16, must be annulled, because they contradict explicit provisions of international law to which the State of Israel is obligated, which require the referral of all complaints to a criminal investigation, save completely baseless or extremely unreasonable complaints.

1. The Prohibition Against Torture and Ill-Treatment

112. The right to be free from torture and other forms of cruel, inhuman or degrading treatment or punishment is among the central and fundamental rights of the law of nations, and one of those rare legal principles granted the status of customary law and thus obligatory upon all the states of the world. On the matter of the customary nature of the prohibition see also:

- *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. G.A. Res. 62/148, prmbl. (18 Dec. 2007), U.N. Doc. A/RES/62/148 (4 Mar. 2008).

- Nowak Manfred & McArthur Elizabeth, **The United Nations Convention Against Torture – A Commentary**, Oxford University Press (2008), pp. 117-118.

113. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: "The Convention Against Torture") came into force in 1987. Under it, the nations of the world, including Israel, agreed upon rules which would assist in the realization of the customary, absolute prohibition against torture and against all cruel, inhuman and/or degrading treatment. The Convention Against Torture is thus intended to enforce the existing defenses within international law. Article 2 of the Convention obliges every member state to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". The Article further emphasizes the absolute nature of the prohibition in stating that no exceptional circumstances, be they a state of war or the threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.

114. The prohibition against torture and against cruel, inhuman and/or degrading treatment, is further anchored in the **UN Covenant on Civil and Political Rights**, which came into force in 1976 and was ratified by Israel in 1991. The Covenant states that this prohibition must not be diminished from, even in a public emergency which threatens the life of the nation (combination of Articles 7 and 4.2 of the Covenant). Article 10 of the Covenant further emphasizes the Respondent's duty to treat interrogees humanely and with consideration for their dignity in light of the denial of their liberty.

115. The relevant provisions of International Humanitarian Law – that part of international law (along with human rights law) which governs the treatment of Palestinians under Israeli occupation, including the treatment of detainees and interrogees – also anchor the prohibition against torture and all degrading and ill-treatment. Article 3, common to all four Geneva Conventions (1949), anchors the prohibition against torture and against cruel treatment and mutilation. This Article applies explicitly to people being held in detention. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, from 1949, fixes an absolute prohibition against torture and against all cruel, inhuman and/or degrading treatment or punishment of protected persons – in our case, detainees from the Occupied Territories. Article 27 of the Convention anchors the right of protected persons to the protection of their persons and their dignity, their right to humane treatment and their right to be protected from any act of violence or the threat of violence. Article 31 of the Convention prohibits any physical or moral coercion with the intention of obtaining information. In addition, Article 32 sets down a broad prohibition against torture and all brutal measures. Finally, Article 46 of the Hague Convention also anchors the general prohibition against physically harming the residents of occupied territory.

116. The prohibition against torture and ill-treatment has also been defined as a violation of international criminal law. Torture and ill-treatment have been recognized as crimes in and of themselves, and under certain circumstances as war crimes or even as crimes against humanity (see Orna Ben-Naftali and Yuval Shany, **International Law Between War and Peace**, Tel Aviv 2006, p. 260). For example, in Article 7(1) of the Rome Statute, sub-Article 6 names the crime of torture among the crimes against humanity. In practice, various tribunals have already ruled that a single act of torture is sufficient in order to form international criminal responsibility (**Yuval Shani and Orna Ben-Naftali**, p. 283).

2. The Duty to Investigate Violations of the Prohibition Against Torture and Ill-Treatment

117. Alongside the absolute prohibition against torture, international law places the duty to investigate violations of this prohibition. International law often emphasizes that the realization of a state's obligations is conditional upon their enacting mechanisms for the punishment of violations of their obligations, as we shall show in what follows.

A. Human Rights Law

118. Human rights law does not suffice with the prohibition against torture, but goes further by arranging for appropriate investigation and punishment mechanisms. From a consideration of the founding documents of the UN Committee against Torture, those of the UN Human Rights Committee – which is entrusted with monitoring the implementation of the International Covenant on Civil and Political Rights – and the rulings of central international tribunals, one may learn about the demand for a system to deal with, investigate, and punish in response to complaints of torture and ill-treatment; such a system must be efficacious, completely independent, effective and credible. The authorities and capabilities of this system must be so as to set in motion an investigation **every time** a complaint of torture is received or whenever a suspicion of torture arises.

The Convention Against Torture

119. The Convention Against Torture addresses the duty to investigate in two Articles:

> "12. Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

> "13. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

And Article 16 of the Convention states:

> "1. Each State Party shall undertake to **prevent** in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment".
>
> **[Emphasis added, S.E.A. and I.B.]**

120. These articles have been interpreted by the UN Committee against Torture as creating the duty to carry out an **effective investigation**. In this context the Committee has ruled that law enforcement authorities must not be given discretion regarding the duty to investigate or placing the perpetrators on trial; such discretion would entail a direct contradiction of the wording and the spirit of Article 12 to the Convention. The Committee has dealt with the prosecutorial system in three different reports, those regarding Burundi, France and the USA, respectively, reaching the following conclusions:

> "[The State party] should take effective legislative, administrative and judicial measures to ensure that **all allegations** of torture and cruel, inhuman or degrading treatment will be the subject of prompt investigation, **followed as appropriate by prosecution and punishment**… The State party should consider introducing an exception to the current system of assessing the appropriateness of prosecution in order to conform with the letter and spirit of article 12 of the Convention and to remove all doubt regarding the obligation of the competent authorities to institute, systematically and on their own initiative, impartial inquiries in all cases where there are substantial grounds for believing that an act of torture has been committed".

- *Conclusions and recommendations of the Committee against Torture: Burundi*; UN Doc, CAT/C/BDI/CO/1 (2007), paras. 21-22.

> "The Committee recommends that the State party should take the necessary measures to ensure that every public official, or any other person acting in an official capacity or at the instigation of or with the consent or acquiescence of a public official, who is guilty of acts of torture should be **prosecuted and receive a penalty** commensurate with the seriousness of the acts committed".

- *Conclusions and recommendations of the Committee against Torture: France,* UN Doc, CAT/C/FRA/CO/3 (2006), § 21.

> "The State party should also ensure that perpetrators of acts of torture are prosecuted and punished appropriately… **The State party should promptly, thoroughly, and impartially investigate any responsibility** of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates".

- *Conclusions and recommendations of the Committee against Torture: United States of America,* UN Doc, CAT/C/USA/CO/2 (2006), §19.

[Emphases added, S.E.A. and I.B.]

121. In the UN Committee against Torture's most recent report on Israel, published in May 2009, **the Committee addresses Israel's violations of the Convention**, including among other issues the absence of an effective and independent investigative mechanism, stating:

> "… The State party should also ensure that **all allegations of torture and ill-treatment are promptly and effectively investigated and perpetrators prosecuted** and, if applicable, appropriate penalties are imposed".

- *Concluding observations of the Committee against Torture: Israel*, UN Doc, CAT/C/ISR/CO/4 (15.5.2009), § 19.

[Emphases added, S.E.A. and I.B.]

122. The Committee further expressed worry in light of the fact that of the 600 complaints of torture and ill-treatment committed by GSS interrogators, which were received by the Respondent between the years 2001 and 2008, not a single one proceeded to a criminal investigation, determining that:

"The State party should duly **investigate** all allegations of torture and ill-treatment by creating a **fully independent and impartial mechanism outside the ISA [Israel Security Agency – the GSS' new moniker]**".

[Emphases added, S.E.A. and I.B.]

123. The Petitioners therefore claim that international law establishes the duty to investigate complaints of torture in an effective and thorough manner, and in appropriate cases to place the suspects on trial. In the Israeli legal system, the bodies legally authorized to conduct criminal investigations are the PID and the Police; thus only criminal investigations **conducted by them** may even begin to uphold the effectiveness requirement fixed by international law, and it is solely through such investigations that the law enforcement system can exercise the full rigor of the law against the violators of the Convention. **The preliminary examination** – there is no dispute that it is not an investigation – to which the Respondent forwards complaints of torture (whether in the manner by which it is conducted today or if, in the future, it will carried out by an individual subject to the Ministry of Justice), does not fulfill the requirements for independence, thoroughness and effectiveness demanded by international law as a condition for upholding the Convention.

The International Covenant on Civil and Political Rights

124. The abstention from opening criminal investigations as the comprehensive policy of the Respondent, and in specific for the cases of Petitioners No. 7-16, entails a violation of the duty to investigate as obligated by the guidelines of the **International Covenant on Civil and Political Rights**. The Human Rights Committee, the body authorized to monitor the implementation of the Covenant, has persistently and consistently pleaded with State parties to proceed to **criminal** investigation in cases of grave violations of human rights, including placing those involved on trial.

1. *Umetaliev et al v. Kyrgyzstan*, Communication No. 1275/2004, views expressed at meeting on 30 October 2008, § 9.2.

2. *Amirov v. Russian Federation*, Communication No. 1447/2006, views expressed at meeting on 2 April 2009, paras. 11.2-11.4.

125. The Committee ruled that the abstention from conducting investigations regarding violations of human rights and to place those suspected of such violations on trial, especially for violations such as torture and ill-treatment, in and of itself entails a violation of the Covenant's provisions.

- ICCPR, General Comment No. 31 (2004) on the nature of the legal obligation on States parties to the Covenant, paras. 15, 18.

126. In the Committee's rulings with regards to individual cases, it clarified unequivocally that **criminal** investigations and the placing of perpetrators of grave violations of human rights (such as torture and ill-treatment) on trial, are **necessary** remedies. To quote:

> "6.4… the Committee recalls its constant jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant… In the absence of any explanation by the State party and in view of the detailed evidence placed before it, the Committee must conclude that the Attorney-General's decision not to initiate criminal proceedings in favour of **disciplinary proceedings** was clearly **arbitrary and amounted to a denial of justice**. The State party must accordingly be held to be in breach of its obligations under articles 6 and 7 to **properly investigate** the death and torture of the victim and take appropriate action against those found guilty. For the same reasons, the State party is in breach of its obligation under article 2, paragraph 3, to provide an **effective remedy** to the authors.
>
> **[Emphases added, S.E.A. and I.B.]**

- *Sathasivam v. Sri Lanka*, Communication No. 1436/2005, views adopted on 8 July 2008, § 6.4.

127. The Human Rights Committee emphasized that **the duty is to open a speficially criminal investigation, and criticized the use of other investigations of a non-criminal character**. The Committee ruled as such in addressing the failure of the Swedish prosecutorial authorities to conduct a criminal investigation regarding clear suspicions of torture/ill-treatment against an Egyptian asylum seeker passed on, without the proper proceedings, to American authorities who then transferred him to Egypt. These suspicions were reinforced by a limited investigation, of a purely administrative character, which was conducted by the Parliamentary Ombudsman. This investigation foiled the possibility of carrying out a criminal investigation in accordance with the law:

> "While the thoroughness of the investigation for that purpose is not in doubt, the systemic effect was to seriously prejudice the likelihood of undertaking effective criminal investigations at both command and operational levels of the Security Police. In the Committee's view, the State party is under an obligation **to ensure that its investigative apparatus is organised in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7**

committed within its jurisdiction and to bring the appropriate charges in consequence. The State party's **failure** to so ensure in this case **amounts** to a **violation** of the State party's obligations under **article 7**, read in conjunction with **article 2** of the Covenant".

[Empahses added, S.E.A. and I.B.]

- Human Rights Committee, *Mohammed Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, (HRC), View of 10 November 2006, § 11.7.

128. In Article 12 of the Human Rights Committee's conclusions regarding the third periodic report filed by Israel, published on 29.7.10, the Committee stated among other conclusions that Israel must investigate complaints of torture and/or ill-treatment:

> "The State party should ensure that **all alleged cases of torture, cruel, inhuman or degrading treatment and disproportionate use of force by law-enforcement officials**, including police, personnel of the security service and of the armed forces, **are thoroughly and promptly investigated by an authority independent of any of these organs, that those found guilty are punished with sentences that are commensurate with the gravity of the offence…**"
>
> **[Emphases added, S.E.A. and I.B.]**

- Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: Israel*, UN Doc. CCPR/C/ISR/CO/3, § 12.

B. International Humanitarian Law

129. International humanitarian law also anchors the duty to investigate suspicions that torture and ill-treatment have been perpetrated.

130. Articles 146-147 of the Fourth Geneva Convention state that:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts…
>
> "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by

> the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention…"

131. Rule 158 of the International Red Cross' Study on Customary International Humanitarian Law states:

> "States must **investigate** war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also **investigate** other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects".
>
> **[Emphases added, S.E.A. and I.B.]**

- Jean-Marie Henckaerts and Louise Doswald-Beck, **1 Customary International Humanitarian Law** 607-11 (2005).

132. It has also been determined that grave breaches of international humanitarian law and of human rights law can impose individual responsibility as a complement to State responsibility. In the matter at hand, the breach of the duty to investigate by the law enforcement authorities – the Respondent – may lead to the exercise of the full rigor of the law against the offenders in international courts and in state courts which will implement universal jurisdiction. Note that the responsibility of those who instigated, planned, ordered or otherwise aided in the execution of the crime is listed alongside direct responsibility in the constitutions of all international courts. Thus military or civilian leaders are liable to be held accountable through superior responsibility. (Orna Ben-Naftali and Yuval Shany, **International Law Between War and Peace**, p. 292).

3. Criteria of the Investigation

133. International law does not suffice with the imposition of the duty to investigate, but rather presents a long list of criteria which must be met by the investigation. A study of these characteristics, only some of which are discussed here, shows that the preliminary examination conducted by the Respondent can in no way fulfill them, and that **only a criminal investigation can bring about the fulfillment of Israel's obligations under international law**.

134. The relevant standards in this matter are the special standards required for the investigation of torture and/or cruel, degrading or inhuman treatment. These standards were agreed upon and fixed in the Istanbul Protocol (submitted to the UN High Commissioner for Human Rights on 9.8.99) and were aggregated into a comprehensive guide formed at the conclusion of three years' study by 75 well-known experts from the fields of law, medicine and human rights, including experts from Israel:

- **Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1999).**

135. The guide does not purport to determine the maximal but rather the minimal standards which must be met in the investigation and documentation of torture. According to the guide, the following obligations are imposed: the State must ensure that complaints of torture and/or cruel, inhuman or degrading treatment be investigated promptly, accurately and effectively, even in the absence of a formal complaint (Articles 14, 17); the investigators must be independent, competent, and impartial (Articles 14, 17); the State must ensure the freedom of action of the investigators during the time of the investigation and their full access to all sources of information (Article 78); the investigation must meet the highest professional standards and its findings must be made public (Article 79); the State must provide the investigators with all the necessary budgetary and technical resources required for the conduction of an effective investigation (Article 80); and the investigators must inform the alleged victims and their representatives of any developments in the investigation and be allowed access to any relevant hearings (Article 81).

136. In addition, various international documents dealing with the duty to investigate emphasize that the investigation must have the following fundamental elements:

- **Independence and Impartiality** – This requirement addresses two distinct types of independence: first, the independent initiation of investigations by the investigative body; and second, institutional and personal independence – that the investigators apply their own discretion such that there is an institutional separation between the investigators and those suspected of involvement in the violation. The requirement of an impartial investigation refers to an investigation with no prejudicial views regarding the victim, regarding what has occurred or the regarding the expected results.

- Manfred Nowak, **U.N. Covenant on Civil and Political Rights: CCPR Commentary**, 2nd rev. ed. (N.P. Engel, 2005), pp. 320-321.

- **The Right to Remedy and to Repatriation for Gross Human Rights Violations – a practitioners' guide**, International Commission of Jurists, Geneva, December 2006, p. 69.

- **Thoroughness and Effectiveness** – This requirement addresses the completeness of the investigation and the coherence of its conduct. A thorough and effective interrogation must include the consultation of medical records; the collection and noting of all relevant evidence; the conduction of field visits when necessary; the taking of testimony from the victim and all relevant witnesses; the coherent questioning of the witnesses such that the investigation may establish the circumstances of the alleged violation and those responsible for it; and the provision of conclusions based on a coherent analysis of all the relevant materials.

  - Human Rights Committee, *Stephens v. Jamaica*, Communication No. 373/1989, UN Doc. CCPR/C/55/D/373/1989 (1995), Views of 18 October 1995, § 9.2.

  - Human Rights Committee, *Arhuacos v. Colombia*, Communication No. 612/1995, UN Doc. CCPR/C/60/D/612/1995 (1997), Views of 19 August 1997, para 8.8.

  - European Court of Human Rights, *Nachova and Others v. Bulgaria*, application No. 43577/98 and 43579/98, Judgment, 6 July 2005, Reports 2005-VII, § 113.

  The requirement of effectiveness means that the remedy is not solely theoretical, but rather provides the victims with real and concrete justice.

  - **The Right to Remedy and to Reparation for Gross Human Rights Violations – a practitioners' guide**, International Commission of Jurists, Geneva, December 2006, p. 46.

  - European Court of Human Rights, *Case of Airey v. Ireland*, Judgment of 9 October 1979, Series A, No. 32, § 2.

- **Placement of Tools at the Disposal of the Investigative Authority** – The investigative bodies must hold the authorizations appropriate for the fulfillment of their duty, including the authority to collect and analyze evidence, to receive medical records and to summon and protect witnesses including victims and their family members; in addition they must

be allocated the necessary budgetary and technical resources and have the ability to form a commission of inquiry.

- *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Economic and Social Council resolution 1989/65, annex, principles 9-17);

- **Istanbul Protocol: Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (General Assembly resolution 55/89, annex).

- **The Right to Remedy and to Reparation for Gross Human Rights Violations – a practitioners' guide**, International Commission of Jurists, Geneva, December 2006, p. 70.

- **Suspension of those Involved in Ill-Treatment and Torture During the Conduction of the Investigation** – The Human Rights Committee, The UN Committee Against Torture, and the UN Special Rapporteur on Torture have repeatedly ruled that those involved must be suspended from their duties until the conclusion of the investigation.

  - **The Right to Remedy and to Reparation for Gross Human Rights Violations – a practitioners' guide**, International Commission of Jurists, Geneva, December 2006, p. 77.

  - Human Rights Committee, *Concluding Observations on Serbia and Montenegro*, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, § 9;

  - Human Rights Committee, *Concluding Observations on Brazil*, UN Doc. CCPR/C/79/Add. 66, 24 July 1996, § 20;

  - Human Rights Committee, *Concluding Observations on Colombia*, UN Doc. CCPR/C/79/Add. 76, 5 May 1997, § 32;

  - *Reccomendations of the Special Rapporteur on torture*, UN Doc. E/CN.4/2003/68, 17 December 2002, Recommendation 26 (k).

137. In addition, it has been determined that placing the burden of proof on the victim of torture and ill-treatment while he lacks any means to collect evidence to corroborate his complaint – such as forensic evidence, crucial medical evidence and additional evidence required to establish the high threshold necessary for taking criminal legal steps against the suspects involved – foils any effective investigation.

- Manfred Nowak (2010) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishnment. Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, p. 36.

138. The Respondent's failure to order the opening of a criminal investigation by an investigative body (PID or the Police) regarding suspicions that ill-treatment and torture have been carried out by GSS interrogators is thus in clear violation of the State of Israel's obligations under to international law: this policy does not fulfill the duty to investigate complaints of torture, part of the state's obligation to do the utmost in order to prevent instances of torture. In practice, the Respondent's conduct grants complete *a priori* amnesty to those suspected of involvement in torture. His policy serves as a sanctuary for the perpetuation of grave breaches of Israel's obligations under the conventions to which it is a party.

Conclusion

139. In light of the gravity of the violations with which we are dealing, and seeing as the process implemented by the Respondent for examining complaints does not meet the requirements of international or Israeli law, the Honorable Court is requested to order the re-opening of the complaints of Petitioners No. 7-16; and the opening of criminal investigations as described in detail above, according to the criteria set in Article 59.

140. Therefore, the Honorable Court is requested to grant an *order nisi* as appealed for at the beginning of this petition, and upon receiving the Respondent's reply, to make the *order nisi* absolute, and to charge the Respondent with the costs of this petition and attorney's fees.

14 February 2011

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Atty. Samah Elkhatib Ayoub Atty. Irit Ballas

Representatives of the Petitioners