At the Supreme Court Sitting as the High Court of Justice

HCJ 1265/11

Before:	**Honorable President A. Grunis** **Honorable Justice E. Rubinstein** **Honorable Justice U. Vogelman**
The Petitioners in HCJ 1265/11:	1. **The Public Committee Against Torture in Israel** 2. **The Association for Civil Rights in Israel** 3. **Yesh Din** 4. **HaMoked - Center for the Defence of the Individual** 5. **Adalah - The Legal Center for Arab Minority Rights in Israel** 6. **Physicians for Human Rights - Israel** 7. **N. _____ Halal** 8. **A. _____ 'Abed** 9. **A. _____ al-Ju'aba** 10. **F. _____ al-'Eish** 11. **A. _____ Mabid** 12. **A. _____ Halef** 13. **A. _____ Hamed** 14. **M. _____ Mu'amar** 15. **A. _____ al-Khaldi** 16. **J. _____ Khabish**
The Petitioners in HCJ 9061/11	1. **Imad Hutari et 11 al.** 2. **The Public Committee Against Torture in Israel**
	v.
The Respondent in HCJ 1265/11 and HCJ 9061/11:	**The Attorney General**
Petition for *Order Nisi*	
Session date:	21 Tevet 5772 (16 January, 2012)
Representing the Petitioners in HCJ 1265/11:	Adv. Smadar Ben Natan; Adv. Irit Blass
Representing the Petitioners in HCJ 9061/11:	Adv. Nabil Daqwar
Representing the Respondent in HCJ 1265/11 and HCJ 9061/11:	Adv. Aner Helman

Partial Judgment

Justice E. Rubinstein

1. The petitions before us address the Respondent's policy with respect to launching criminal investigations following complaints filed by interrogatees against their interrogators who are members of the Israel Security Agency (formerly the General Security Service or Shin Beit, hereinafter the **ISA**). The two petitions were heard jointly at the request of the Petitioners, as both relate to a single issue of principle and are distinct only with respect to the specific complaints of the various petitioners.

General Background - the Petitioners and the Complaints

2. The petitioners named in HCJ 1265/11 (February 15, 2011) and HCJ 9061/11 (December 7, 2011) are human rights organizations, headed by the Public Committee Against Torture in Israel (Petitioner 1 in HCJ 1265/11 and Petitioner 13 in HCJ 9061/11) (hereinafter: **Petitioner 1**), as well as individuals, most of whom are Palestinian residents of the Judea and Samaria Area (with the exception of Petitioner 6 in HCJ 9061/11, who has Israeli citizenship). They had filed complaints to the Respondent, via Petitioner 1, with respect to torture or ill-treatment that they allegedly suffered during their interrogation. The Petitioners' complaints were examined by the Inspector of Interrogatee Complaints (hereinafter: **the Inspector**) and, following this examination, the Inspector's Supervisor (hereinafter: **the Supervisor**) - a senior attorney at the State Attorney's Office, decided not to order a criminal investigation.

3. In light of the manner in which the petitions were heard, and given our decision, which is presented below, we shall not go into the complaints raised in the petitions in detail. However, we do note that some of the allegations made in the complaints concern the holding of interrogatees in harsh conditions in various facilities in the country over long periods of time, the use of binding in painful positions, sleep deprivation and physical and mental abuse during interrogation - matters that, in some cases, the Petitioners allege, amounted to "torture" of the interrogatees (in the meaning of the term under international and Israeli law).

4. Additionally, it is alleged that the petitioners named in the two petitions represent "the tip of the iceberg"; that hundreds of complaints had been brought to the attention of the Respondent and that in not a single one of them, did the State Attorney's Office order a criminal investigation. As stated, in view of the progression of the hearing, we shall not address every single individual complaint, but the aforesaid suffices to clarify the nature of the allegations made by the Petitioners.

General Background - the Process of Reviewing Complaints against Members of the ISA

5. A special arrangement for reviewing complaints against ISA personnel was first enshrined in law in 1994 (Sec. 49(9)1 of the Police Ordinance (New Version) 5731-1971). The law refers to offenses suspected to have been committed by an ISA staff member "during an interrogation, or in connection thereto or in connection to an individual who had been stopped or detained for interrogation…" (see Sec. 2 of the Law Amending the Police Ordinance (No. 12) 5754-1994 (hereinafter: **the 1994 amendment**)). The special arrangement was applied only to ISA **interrogators**. This section was amended in 2004 (see Law Amending the Police Ordinance (No. 18) 5764-2004 (hereinafter: **the 2004 amendment**)) to apply to any case in which an ISA employee is **involved** as part of his duties or in connection thereto. The current version of the section provides as follows:

> An offense suspected to have been committed by an employee of the Israel Security Agency in the performance of his duties or in connection with his

> duties shall be investigated by the Department [for the Investigation of Police, E.R.], **if the Attorney General so ordered**; the provisions contained in Sec. 49(2)(b) and (c) shall apply to this matter, *mutatis mutandis*; in this subsection, an "offense" shall mean any offense with the exception of a traffic offense in the meaning of the term under Sec. 1 of the Traffic Ordinance and an offense which an authority that is not the police or the Israel Security Agency is competent to investigate under any law. (Emphasis added, E.R.)

The power of the Attorney General was delegated to the State Attorney and the Deputy State Attorneys under Sec. 49(9)1(b) (**Official Gazette**, 5770, No. 6013, dated October 29, 2009, p. 264). The Respondent did not include a written protocol regarding the process for reviewing the complaints in question in his response (dated January 2, 2012). However, the contents of the response reveal that when ISA personnel **who are not interrogators** are the subject of complaints or suspicions - the materials are transferred to the Attorney General and his subordinates (specifically, to the official to whom the Attorney General delegated powers) and they decide whether a criminal investigation is warranted. According to the law, the investigation is carried out by the Department for the Investigation of Police (DIP). In cases that concern ISA **interrogators**, the Inspector of Interrogatee Complaints holds a **preliminary inquiry** prior to deciding whether or not to launch a criminal investigation. In the relevant period and until the hearing before us, the Inspector was an ISA employee who was professionally subordinate to the Inspector's Supervisor, who, as stated, is a senior attorney with the State Attorney's Office. According to the Respondent:

> The authority that lies exclusively with the Attorney General (and has been delegated also to the State Attorney and to his deputies) is the authority to order the **launching** of a DIP investigation against ISA personnel. Sec. 49(9)1 of the Police Ordinance does not prescribe that the Attorney General has exclusive authority to decide **not to launch an investigation**. Hence, this matter is subject to the law at large, according to which, the State Attorney's Office has the power to order the closing of a complaint file. (Respondent's Response, §7).

As indicated by the response of the Respondent, after receiving the results of the Inspector's inquiry, the Supervisor has the power to order the file **closed** or to transfer it to one of the competent officials (pursuant to the aforesaid delegation of the Respondent's power) for the purpose of **launching** an investigation. According to the Respondent, an official who is not vested with the power to launch an investigation - such as the Supervisor - , may, nevertheless, order a file be closed.

6. After receiving information, or a complaint (whether directly from the complainant or indirectly, for instance, through a rights group representative), the Inspector conducts a preliminary inquiry. According to the Respondent, this inquiry usually includes meeting with the complainant, reviewing the interrogation materials and questioning the ISA officials involved. Once the inquiry is completed, according to the protocol in place, the Inspector presents the inquiry file including all the materials collected as part of the inquiry, along with his opinion and a summary of his findings to the Supervisor. The Supervisor then reviews the file and the recommendations and decides how to proceed. The options are as follows: **A**. The file may be transferred to the competent authority for the purpose of launching a criminal investigation (unless the Supervisor is a deputy state attorney and is competent to make the decision himself); **B**. Disciplinary proceedings may be launched or working protocols may be amended; **C**. The file (and the complaint) may be closed.

7. This legal arrangement has been in operation since the early 1990s. It originated from increased public attention to the issue of oversight of ISA interrogations (see, *inter alia*, HCJ 2150/96 **Harizat v. Attorney General** (unreported)) and the recommendations made by the **Commission of Supreme Court President (emeritus) Landau** in 1987 (Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service regarding Hostile Terrorist Activity). This Court has been made aware of the work of the Inspector, and of allegations concerning ISA interrogations and the means used therein a number of times in the years that followed HCJ 5100/94 **Public Committee Against Torture in Israel v. Government of Israel**, IsrSC 53(4) 817 (1999) (hereinafter: **PCATI**). In **PCATI**, the powers of ISA interrogators were reviewed and clarified and certain practices that had been in use were adjudicated upon. However, and despite the fact that the very existence of the aforesaid oversight mechanism was mentioned in a number of cases heard by this Court (see, *e.g.* HCJ 11447/04 **HaMoked: Center for the Defence of the Individual v. Attorney General** (unreported) (hereinafter: **HCJ 11447/04**); HCJ 3533/08 **Sweiti v. Minister of Defense** (unreported); HCJ 6138/10 **HaMoked: Center for the Defence of the Individual v. Attorney General** (unreported)), the existing arrangement has yet to be challenged directly as it is in the petition at bar. Prior to considering parties' arguments, it is noted that the Respondent stated in his response to the petition in January 2012 as follows:

> In 2010, following many discussions in which various aspects of the Inspector's activities were examined, the Attorney General, in consultation with the State Attorney, the head of the ISA and the executive director of the Ministry of Justice, decided that the Inspector shall no longer be an ISA employee, but rather an employee of the Ministry of Justice…. Staff work for the purpose of implementing the Attorney General's decision… is in an advanced stage… It is expected that the Inspector's position within the Ministry of Justice will be posted in the coming weeks (Response on behalf of the Respondent, §19).

Parties' Arguments in the Petitions

8. Two remedies were sought in each of the two petitions - one was **specific** - launching a criminal investigation into the cases of the complaining petitioners. The second was **general** - ordering the Respondent to launch a criminal investigation in every case in which a complaint is filed with regards to torture or ill-treatment of individuals interrogated by ISA personnel, inasmuch as the complaint is not unfounded *prima facie*. As stated, the arguments presented by the Petitioners may be classified as relating to two levels: **First, the substantive, level**, relating to the complaint review mechanism. At this level, the Petitioners challenge the **power** itself, as well as **the manner in which it is exercised**. **Second, the concrete level**, relating to the processing of the Petitioners' complaints. This judgment will conclude the matter of the petitions with respect to the general-substantive issues. As for the individual level - we shall make a suggestion to the Respondent as detailed below.

9. With respect to the first level and the issue of **power**, the Petitioners argue that the amendment to the Police Ordinance does not detract from the general duty incumbent on the Respondent and the police (or another competent investigative agency such as the DIP) to launch a criminal investigation into **every case** in which a serious offense amounting to a crime, as prescribed in the law at large, is suspected, regardless of the identity of the subjects of the complaint or the substance thereof and barring clearly unsubstantiated suspicions, i.e. obviously false complaints. In other words, according to the Petitioners, the mechanism stipulated in the amendment to the Police Ordinance **augments** the broad rule prescribed in Sec. 59 of the Criminal Procedure Rules [Incorporated Version] 5742-1982, as follows:

> Should the police become aware of the commission of an offense, whether as a result of a complaint or by any other means, it shall launch an investigation. However, a police officer holding the rank of chief inspector or higher may issue an order not to investigate an offense that does not amount to a crime if he believes that there is no public interest in doing so or if another authority is legally competent to investigate the offense.

According to the Petitioners, Sec. 49(9)1 does not detract from the general obligation to launch a criminal investigation and the issue herein is **the identity of the agency** that conducts the investigation: whether it is the police (as in any ordinary complaint) or the DIP. The Petitioners claim that, whatever the case may be, one of these two agencies must investigate the complaint. They claim that in the absence of a positive decision on the part of the Respondent, the police should continue to investigate the complaint, as it would any other complaint alleging an offense classified as a crime. As such, the Petitioners maintain that in choosing to transfer all complaints to a preliminary inquiry by the Inspector and in closing complaint files without an investigation having been conducted either by the Respondent or the police, the Respondent exceeds his authority and breaches the aforesaid obligation to launch an investigation. According to the Petitioners, this interpretation of the amendment can be deduced both from the legislative history of the amendments made to the Ordinance and from their purpose (see below for more on the arguments regarding the interpretation of the section).

10. It is further argued, that with respect to complaints such as those discussed herein (complaints by detainees who are interrogated in secrecy), without a real inquiry by a professional investigative agency, it is very difficult to establish a preliminary factual foundation that could support a conclusion that no investigation is warranted. It is also argued that the complaint processing mechanism that has been put in place constitutes a "preliminary arrangement" which falls short of meeting the general obligation to investigate offenses classified as crimes (whatever the identity of the investigative authority). Therefore, for this reason too, the Respondent lacks the power to institute this mechanism. Finally, it is argued that the transfer of the power to instruct that an investigation not be launched from the Respondent to the Inspector, who is not necessarily one of the individuals to whom such power was delegated under Sec. 49(9)1, is not permitted under the law and is therefore, *ultra vires* from the outset, for this reason as well, (the Petitioners did not address the difference between the question of the power to open an investigation and the power to instruct an investigation not be opened, which the Respondent addressed).

11. With regards to the **exercise of power** - Petitioners argue that the mechanism effectively grants **full immunity** to ISA interrogators. According to a report written by Petitioner 1 and attached to the petition, of 598 complaints submitted to the Respondent between 2001 and 2008 regarding ill-treatment of interrogatees by ISA interrogators, the State Attorney's Office did not refer a single case to criminal investigation (the Respondent did not present contradicting figures on this issue, although, it was mentioned that in some cases, disciplinary proceedings had been opened and work protocols had been amended). According to the Petitioners, this is a situation of selective enforcement, compared to any other situation in which similar suspicions arise against police interrogators, and compared to other special statutory arrangements that vest the Respondent with unique powers to order investigations be launched (such as Sec. 17 of Basic Law: The Government; Sec. 12(a) of Basic Law: The Judiciary, and others). In these cases - even if there is a screening mechanism, there is no effective immunity. It is also argued that the processing mechanism is extremely unreasonable, in that even if each concrete decision is reasonable on its own right, the overall outcome points to an untenable reality. In the current situation, the victims are deprived of their due process rights and the absolute prohibition on torture is rendered meaningless. Note, the

grievance herein is not that no cause to indict was found in any of the cases, but that none of the cases were deemed worthy of investigation.

12. With respect to the **concrete aspect**, it is argued that the responses provided by the Supervisor are often delayed, brief and lack the required specifics (in addition to the fact that the right to review the inquiry findings was not upheld in any of the cases). Moreover, it is argued that the responses often fail to indicate the cause for closing the complaint file and that the factual foundation for this decision and how this foundation was put together remain unclear. It is argued that the interview the Inspector (himself an ISA employee) conducts with the interrogatee - the complainant - does not allow the complainant to develop trust in the Inspector, which is required for breaking the cycle of suspect/interrogatee and helping the complainant transition into the position of a victim who is seeking redress from a state official. In addition, it is argued that the described legal mechanism contradicts the obligation imposed by international law to investigate acts of torture and the prohibition on committing such acts.

13. In the response submitted by Respondent to the petition, it is argued that with respect to the **substantive aspect**, the last amendment to the Ordinance **empowers** the Respondent to decide whether or not to instruct the DIP to launch an investigation, and in any event, there is no room to launch investigations automatically. It is argued that substantively, whether decisions are made by the Inspector or by the Respondent, personally or through a delegated official, every decision is made according to the **ordinary standards and criteria** set forth in the Criminal Procedure Rules; namely, Sec. 59 thereof, as interpreted in case law (see e.g.: HCJ 3993/01 **The Movement for Quality Government in Israel v. Attorney General** (unreported)). It is further claimed that the second remedy sought (launching an investigation in all cases) must be denied since it is too broad and contradicts the language and purpose of the 2004 amendment to the Police Ordinance. It is argued that the correct interpretation of the language of the amendment, ("shall be investigated by the Department [for the Investigation of Police], if the Attorney General so **ordered** "), according to its subjective and objective purposes as well, is that the power in question is a "discretionary power" with respect to **launching an investigation *per se***. The Respondent explains that a special arrangement has been put in place to **balance** concerns regarding **frivolous complaints** and the obstruction of the ISA's work against the need to **examine complaints** and suspicions in cases that justify doing so. Automatically launching an investigation in every single case in which allegations are made is inconsistent with the aforesaid, with case law on matters concerning the wide scope of the Respondent's powers and with the Respondent's discretion (see also below).

14. With respect to the identity of the investigating agency, it is argued that according to the 2004 amendment, in cases in which the Respondent decides to order an investigation into a member of the ISA, only the DIP has the power to investigate. Therefore, any argument that the Israel Police has a simultaneous or residual power must be rejected. It is also argued, as stated above, that the power vested in the Respondent to order an investigation must be distinguished from the power vested in the State Attorney's Office, in this case the Supervisor, to close a complaint file without launching a criminal investigation (see Response on behalf of the Respondent, §77). The Respondent recalls that the Supervisor's decision may be appealed, as is the case with any decision to close a file (under Sec. 64 of the Criminal Procedure Rules). With respect to **the manner in which the power is exercised**, it was argued that the argument was too general and that inasmuch as the Petitioners believed that a specific decision was flawed, they must follow the appeal route open to them. On the **concrete level**, it is argued that the petition must be dismissed *in limine* for non-exhaustion of remedies since no individual appeals have been filed. Other grounds offered for dismissal are the fact that the matters of some of the named petitioners are being pursued in a separate petition and the fact that relevant respondents have not been named, i.e. the ISA interrogators involved in the specific cases, as per Petitioners' complaints.

15. With respect to other arguments, Respondent submits that the mechanism established in the Police Ordinance is consistent with international law, which does not preclude holding a preliminary inquiry prior to making a decision to launch a criminal investigation and that even if said mechanism did contradict the norms of international law - **which is not the case according to the Respondent** - such contradiction would be insufficient to justify the Court's intervention.

The Hearing before Us

16. During the hearing before us (January 16, 2012), the Petitioners repeated their main arguments. It was emphasized that the Respondent had not fulfilled his duty to notify the complainants of their right to appeal the decision of the Supervisor, and that at the time of the hearing, after the deadline prescribed by law had passed - this remedy was irrelevant. On this issue, the Petitioners argued that the letter of the senior aid to the Attorney General dated January 20, 2011, stated that the file [*sic*] did not define a process for appealing the decisions of the Supervisor. However, such appeals "are generally considered by the State Attorney and the Attorney General, to whom the Supervisor is subordinate". It was only later, in December 2011, that the letters sent by the (new) Supervisor stated that an appeal could be filed. It was further argued that the petition sought to establish what the correct interpretation of the Ordinance was rather than to intervene in the Respondent's policy on indicting and that even if the policy were to change in the future, the past must be addressed. Counsel for the Respondent repeated his response, arguing that Petitioners had, in effect, been aware of their right to appeal, and that this was made clear to them on a number of occasions. It was further argued that the petition was filed too late, given that the decision to change the legal apparatus (in connection to moving the Inspector's position within the establishment) had already been made and was in its final implementation stages. It was stated that for some time, there was no acting Inspector, but it was hoped that the situation would rectified from that point onwards. It was further stated that the establishment was undergoing a process of "maturation" through experience and that there had been cases of disciplinary action. I shall add here, that the letters sent by the Inspector of Interrogatee Complaints, Adv. Dan Eldad, dated December 25, 2011 and January 1, 2012 and appended by the Respondents (exhibits R/5 and R/7) to the response in HCJ 9061/11, all state: "This decision [to close a file, E.R.] may be appealed to the Attorney General through my office".

Decision

Introduction - Trends and Guiding Considerations

17. I shall open by recalling, though this is public knowledge, that I served as the Attorney General from February 1997 to December 31, 2003, including at the time the judgment in **PCATI** was handed down. The specific cases addressed herein all date to a later period (the complaints addressed in the petition were filed between 2005 and 2010). Indeed, to my best recollection, in my final years in office as the Attorney General, a number of complaints on this issue were filed and reviewed by the Inspector at that time and by the person who was Director of the State Attorney's Office Special Functions Department and the Supervisor at the time. These complaints were presented to me as well, and I believe that not all of them were closed, though I am not in possession of any figures. I do not regard this as an impediment to my presiding over petitions that refer to events that occurred after my term as Attorney General both on the normative level (the interpretation of the 2004 amendment) and on the individual level. I shall recall here that shortly after the **PCATI** judgment was delivered in September 1999, I put out a memorandum (in October 1999) entitled "ISA Interrogations and the Necessity Defense - A Framework for Discretion", which was, as articulated by the court, an effort at "self-guidance" on the issue of post factum review of interrogations and of the use of interrogation methods that are necessary in cases in which human life is at risk. This, while seeking a "balance between security needs and human rights and dignity, and taking into account public and human sensitivities". See document in the addendum to

my article *Security and Law: Trends*, **HaPraklit**, 44 (Cheshvan, 5760 - October 1999) 409; also published in my book **Law and Administration Pathways** (5763-2003, 263, 274). The memorandum originally included a paper about the necessity defense prepared by Miss Nava Ben-Or, then director of the State Attorney's Office Criminal Department (now a District Court judge).

18. I now turn to the issue itself. From a broad perspective, the issue herein is still in development. Perhaps the appropriate term for describing it is the one used by the Respondent - "maturation" -, like many other matters related to security and law, questions of security versus the world of rights and specifically the ISA. As Justice (emeritus) Zamir wrote:

> Forty years ago, the State of Israel was established. The declaration of the establishment of the state proclaimed that the state shall "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex". At the same time, Israel was fighting for its freedom. This war has not yet ended. The threat to national security persists, internally, as well as externally. The battle for security has been raging, without reprieve, for forty years. This battle has a price and it collects payment in human rights among other things… War, as an English justice once said, is not fought according to the Magna Carta" (Yitzhak Zamir, *Human rights and National Security*, **Mishpatim** 18, (5749) 17).

And as I have had occasion to write:

> The relationship between human rights issues and the needs and challenges of national security will remain on the agendas of Israeli society and the Israeli courts for years to come… The inherent tension between security and human rights issues will, therefore, persist. The courts will seek a balance between security and rights such that security is neither falsely used, nor abandoned" (*On Basic Law: Human Dignity and Liberty and the Security Establishment*, **Iyunei Mishpat** 21 (5758) 21, 22: see also **Netivey Mimshal U'Mishpat** (5763) 226; CrimApp 8823/07 **A. v. State of Israel** (unreported) §§5-8).

19. Thus, there is a constant struggle for security and for rights, rights of different types and from different aspects, rights to security, interrogatee rights and the likes of both. Until the mid 1980s, the ISA was almost "under the radar" of the judiciary, in a "twilight zone". It cannot be denied that the organizational culture that was exposed in the Bus 300 affair and the Landau Commission was inappropriate. Since the late 1980s, following the Bus 300 affair, the publication of the Landau Commission findings and, with more force after the enactment of Basic Law: Human Dignity and Liberty and the rulings of this Court, such as **PCATI** and others later, as well as the enactment of the Israel Security Agency Law 5762-2002, the security establishment has been carrying out its missions in broad daylight, and under the scrutiny of the court, in a new era of transparency. In the period that followed the **PCATI** judgment, handed down after ISA deviations from the Landau Commission's directions, the ISA was forced to adapt to the new situation. I have written on this:

> After the judgment, the establishment found itself in a dilemma: on one hand, the ISA believed that the judgment severely impaired the effectiveness of its interrogations at a time when its capacity to interrogate had been restricted, given the agreements signed with the Palestinians and the withdrawals taking place on the ground. It, therefore, believed that statutory regulation was in place. This position is worth considering. Many thought

> otherwise, believing it impossible to achieve effective legislation that would meet the terms of the limitation clause. One of the dilemmas we face relates to defending interrogators who do their work honestly, given that according to the judgment, the necessity defense is not a 'sword' but rather a 'retrospective shield'. As for myself, I believe it is very important for any solution to this issue to be accepted in as wide a consensus as possible, as I believe that morally speaking, no one among us is more concerned for security than another, nor is anyone more concerned for rights than another… These are very difficult questions, akin to an attempt to square the circle... Ultimately, after all this, the October 2000 incidents that broke out and the violence that followed made all these questions about the interplay between security and rights, as well as many others, all the more acute (*Trends in Security and Administration*, in **Netivey Mimshal U'Mishpat**, 273-274).

Ultimately, the road of legislation was not taken (the Israel Security Agency Law 5762-2002 was enacted, as stated, but it did not contain a specific reference to the permitted rules of interrogation) and the security establishment found interrogation methods and routes that fell within the terms of the judgment, despite the concerns that were raised initially (see HCJ 466/07 **MK Zahava Gal-On, Meretz Yahad v. Attorney General** (unreported), §49, where I addressed this issue). One need not elaborate on how essential the interrogation work of the ISA is for the country and for all of its residents and citizens. Nevertheless, I am of the opinion that in the matter herein, as in others, despite concerns that the work of the ISA, whose motto is "Defend Unseen" (although it is more seen nowadays) and of its interrogators may be somewhat disrupted as a result of false and frivolous complaints, there is no choice but to move the judicial review mechanism forward in the spirit of the times.

20. Professor Menachem Hofnung has written, in his book **Israel - National Security versus the Rule of Law** (5761):

> The curtain that concealed the operation of the secret services for close to four decades has been partially lifted following the ISA affair and its aftermath. This affair, which shined the spotlight of public debate and scrutiny on the activities of the ISA, has brought the moral question of national security considerations versus rule of law considerations to the forefront in full thrust.
>
> Even before the ripple effect of the 'ISA affair' had subsided, it was reported that torture had been used in the interrogation of IDF officer Izzat Nafsu, who was suspected of espionage during his service in Lebanon. The two affairs, which shocked the Israeli public in 1986 and 1987 led to the appointment of the Landau Commission to investigate the ISA's interrogation methods. The extensive media coverage of the affairs and the Commission's report resulted in tighter monitoring of the security services. The Landau Commission provided the public with official information that torture was being used during ISA interrogations and that false testimonies given by ISA interrogators had been used court. In its report, the commission noted that the use of false testimonies had been discontinued and that an ISA comptroller was appointed in February 1987. The commission recommended the state comptroller's purview be extended to include the ISA interrogation unit and that reports would be submitted to a

> special sub-committee of the Knesset State Control Committee. The ISA affair and its aftermath rocked Israel's political and judicial establishments and posed a severe threat to the rule of law, particularly in the area of security. The shockwaves did not spare the ISA… Civilian oversight, which had lapsed, and the harm to orderly government caused in the ISA affair were somewhat restored following the appointment of the Landau Commission… Civilian oversight of the military and the secret services is still quite lax and it is mostly concentrated in the hands of the executive branch, but it seems that the incidents of recent years contributed to tightening this oversight more than in any other time in the past". (*Ibid*., pp. 270, 276).

This process has progressed, with respect to the ISA, since the enactment of the Israel Security Agency Law which includes, *inter alia*, control mechanisms and statutory transparency with respect to the operation of the ISA in general (see Secs. 12 and 13 of the law, which institutionalize oversight by a ministerial committee, a parliamentary committee and an internal comptroller). As we can see, the light of day has slowly penetrated ISA facilities and what was inconceivable in past generations, is now legitimate and recognized; see HCJ 8102/03 **MK Gal-On v. Defense Minister** (unreported)

21. Before I proceed to address the arguments put forward by the parties, I shall emphasize that, in my view, the central question here is how to correctly handle complaints, both procedurally and substantively. The door must be open, as appropriate, to careful review of complaints: the ISA is not above the law and is not immune to scrutiny. However, due to the nature of the ISA's work, and, let us not feign innocence, concerns regarding politically and ideologically motivated false complaints given the nature of the subject at hand, there is clearly room for relevant screening. The road to correct review of complaints begins with ISA personnel taking notes in real time and an organizational culture of documentation. To this end, there is a real, substantive benefit to the post of the Inspector as a professional oversight body. This post is integrated with the statutory provisions that grant the Attorney General discretion. On the one hand, the Inspector is a person who possesses the appropriate expertise for reviewing complaints; a fact that may guarantee a thorough and exhaustive preliminary inquiry without compromising the secrecy required to protect the ISA's work and prevent disruptions that might be caused if investigations by an external investigative agency were automatically launched **for every complaint lodged**. On the other hand, the Inspector is not an all-important factor, as we shall see below, and it is not only essential to monitor him, but also that such monitoring be as transparent as possible, providing complainants with responses that are as detailed as possible. I shall say at this early point, that the decision to move the post of the Inspector to the Ministry of Justice is appropriate and important: materially, since even if the Inspector is a former ISA employee, he will be aware of his task and of his institutional position. It is also important for the sake of appearances - having monitoring conducted by an individual who does not owe "institutional allegiance" to the ISA. I myself, am of the opinion that it is worth considering to enshrine the post of the Inspector and oversight thereof in the Israel Security Agency Law. Thus, the Inspector - yes; but in a new institutional position and with more transparency. I shall add that the "severing" the Inspector from the ISA as the fruit of the process of "maturation" and insight, is morally akin to the establishment of the DIP inside the Ministry of Justice pursuant to the 1992 amendment to the Police Ordinance, the assumption being that an agency should not investigate itself regarding allegations of criminal offenses.

The Interpretation of Section 49(9)1 of the Police Ordinance

22. We now turn to reviewing the **normative framework** and the **substantive** dimension of the arguments presented by the parties, particularly the question of whether, as the Respondent

maintains, Sec. 49(9)1 prescribes that **only** the DIP is empowered to investigate ISA personnel and only following **a positive decision by the Respondent**, or rather, as the Petitioners have it, complaints against ISA personnel are subject to the law at large and the section simply prescribes that the Respondent has the power to order the **transfer of an investigation** from the police to the DIP. In other words, the parties are in dispute as to whether the section aims to create **a separate,** unique track for reviewing complaints against ISA personnel, or rather, to create a **sorting function**, presided over by the Respondent, the State Attorney. To facilitate the discussion we shall recall that the phrase regarding which the parties are in dispute is:

> An offense suspected to have been committed by an employee of the Israel Security Agency in the performance of his duties or in connection with his duties shall be investigated by the Department, **if the Attorney General so ordered.**
> (Sec. 49(9)1 of the Ordinance, emphasis added).

The final clause, "**if the Attorney General so ordered**", appeared unchanged in the two aforementioned amendments from 1994 and 2004. I shall first note that it seems that the language of the law could tolerate both suggested interpretations and that neither can be conclusively excluded based on language alone. Following one interpretation, one could say that an investigation **will take place** once a complaint is lodged, but that the State Attorney will be able to decide who investigates. Following the other, one could say that an investigation will take place **if** the Attorney General decides on one. Both parties look to the legislative history of the amendments in order to glean information about the correct interpretation of the ordinance today. The Petitioners quoted statements made by Knesset Constitution Law and Justice Committee Chair, MK Dedi Tzuker at the time the 1994 amendment was brought for second and third reading:

> I would like to make one thing that the Committee pledged not to enshrine in the law clear, make it expressly, perfectly, crystal clear. What happens when a complaint is filed and the Attorney General, or the State Attorney… and does not get transferred to the DIP? … **I want to clarify, the obligation the police has to investigate under Sec. 59 of the Criminal Procedure Rules will remain as it is. This law does not aim to grant the Attorney General… the power to prevent an investigation** of a complaint that raises allegations against an ISA employee. **The purpose of the current amendment is not to change the existing situation for the worse**. That is, there will not be a situation in which the Attorney General decides that the complaint should not be referred to the State Attorney's Office and the action is not investigated. If he decides… that the complaint is not to be investigated by the DIP, the ordinary procedural provisions will apply and a police investigation will be carried out, as is the norm". (Discussion of the Bill to Amend the Police Ordinance (No. 12), **Knesset Protocols**, 39, p. 7249 (February 1, 1994), emphasis added - ER).

On the face of it, these statements lend support to the Petitioners' position: Just as the police was competent to investigate complaints against ISA interrogators before the 1994 amendment, so it continues to have the power to do so thereafter, and ,inasmuch as the Respondent decides that a complaint shall not be investigated by the DIP, it shall be investigated by the police. These statements join the explanatory notes for the bill: "The Attorney General, or the State Attorney, will order the **transfer of appropriate cases** for investigation by the Department" (Amendment Bill, **Bills**, 5753, 304; emphasis added - ER). In other words, this seems to indicate that the power the section grants the Respondent is a power to **transfer** cases from the police to the DIP. On the other

hand, other statements made in the legislature support the other possibility. See for example the statements of MK Elie Goldschmidt during a discussion about the bill:

> This bill expresses maintaining the line, which is sometimes a fine line, between the requirements of the rule of law, and borderline cases in which certain actions are required, when one is working for security. This is the true, and right, reason that **the discretion to decide when to investigate one incident or another must be granted to the highest authority, which is the Attorney General**…"
> (Discussion of the Bill to Amend the Police Ordinance (No. 18), **Knesset Protocols**, 39, p. 7249 (February 1, 1994), emphasis added - ER)

23. The Respondent argued that the aforesaid was relevant only for the 1994 amendment, and hence, quoted statements made by MK Michael Eitan in a discussion that was held when the 2004 amendment was presented to the Knesset:

> What is happening in the current bill is that there is a feeling, not just among the public, but also among government officials, that the police and the ISA collaborate very closely in their day to day operations. In order for the investigations to be even more objective, we say: let's do the same for ISA personnel. Let's not have them investigated by the police but by the same DIP. It happens now, but only for offenses ISA personnel commit during interrogation or against a person who is under detention.. the purpose of our bill is to expand, to bring complaints… in every case in which the suspect, who is an ISA employee, committed the offense in the line of duty…"
> (Discussion of the Bill to Amend the Police Ordinance (No. 14), 5764-2004, **Knesset Protocols**, B, p. 5468 (June 28, 2004)

I personally do not identify in these statements a substantive departure from the approach taken in the 1994 amendment. All the 2004 amendment does, according to MK Eitan as well, is to expand the arrangement prescribed in the 1994 amendment so that it applies to all ISA personnel such that is not limited to suspicions of offenses committed by ISA personnel during interrogation. As stated, the final clause of Sec. 49(9)1, whose interpretation is at the core of the proceeding herein, was not altered ("if the Attorney General so ordered").

24. And yet, I shall note that some support for the Respondent's position may, perhaps, be found in the explanatory notes for the 2004 amendment:

> … Due to the close collaboration between police personnel and ISA personnel … a need has arisen **to remove the power to investigate offenses** suspected to have been committed by ISA personnel **from the police to another agency**, including with respect to offenses that were not committed during interrogation…. and expand the powers of the DIP to investigate any offense suspected to have been committed by an ISA employee….**It is clarified that the proposed amendments do not prevent the police from investigating an offense prior to becoming aware that an ISA agent is implicated in its commission**.
> (Explanatory notes for the Bill Amending the Police Ordinance (No. 18) (Investigation of Members of the Israel Security Agency by the Department for the Investigation of Police) 5763-2003, **Bills**, 5763, 42 (emphasis added - ER).

First, here, in contrast to the aforementioned explanatory notes for the 1994 amendment, the issue is the "transfer of power", rather than the "transfer of files". **Second**, the final clause ("prior to becoming aware that an ISA agent is implicated") might lead to the conclusion that once the police finds out that the complaint concerns an ISA employee, it must withdraw and hand over the investigation to the DIP, and of course, when it comes to complaints lodged by interrogatees, this is a foregone conclusion. However, even if it is possible to locate wihin the explanatory notes to the 2004 amendment an interpretive indication that supports the Respondent's approach on these two points, one must recall that the language of the law, as it was in 1994, was not altered in 2004 and the purpose of the 1994 amendment was clear.

25. It seems then, that when it comes to legislative history, the arguments made by the Petitioners are not unfounded, even if arguments "against" do exist. However, legislative history is not the only tool in the interpretive toolbox. It is an important aid in the task of interpretation, and I am one of its staunchest supporters. Yet, as articulated by Justice (as was his title then) Barak in **Laor**:

> One of the sources to which it is permissible to turn in order to search for and find legislative intent, is legislative history in general and parliamentary history in particular. However, legislative history is not everything…The information gleaned from it on legislative intent must be combined with the language of the law and other reliable sources, such as the structure of the law, the array of legislation and the various presumptions with respect to the purpose of the law and the logic of the matter (HCJ 142/89 **Laor Movement v. Speaker of the Knesset**, IsrSC 44(3) 529, 544).

The **purpose** of the arrangement, which emerges, inter alia, from the aforesaid and from the explanatory notes for the 2004 amendment, is juxtaposed against what emerges from the legislative history. The main purpose of the two amendments has been and remains the integrity of the investigative process. In an **ideal** situation, there is no reason that investigations into ISA personnel should be conducted by police personnel, with whom they maintain working relationships. In this sense, the Respondent's interpretation seems to optimally fulfil the purpose of the arrangement, preventing possible conflicts of interest, appearances and rumours which may arise should ISA personnel be investigated by the police. As is known, ISA interrogations that materialize into criminal cases against the interrogatees are transferred to the police for completion. Although the police is a large agency with many investigators and it is always possible to find ones that have no contact with the ISA, there are potential difficulties, as indicated also in the explanatory notes for the 2003 amending bill (Bills, 5764, 42) which speak of "close collaboration between police and ISA personnel in their daily operations". In addition, appearances also play a significant part in creating the necessary trust among various publics. I shall add that in comparison to other arrangements in which the Respondent was given responsibilities (see, as stated, Sec. 17 of Basic Law: The Government and Sec. 12(a) of Basic Law: The Judiciary), the simple fact that the legislator chose to involve the Respondent, the Attorney General, himself in decisions regarding complaints against ISA personnel, could indicate that his involvement in decisions of this kind includes material discretion, and it is quite doubtful that his power can be interpreted as nothing more than a sorting function. In these circumstances, it appears to us that the correct purposive interpretation is that in view of the sensitivity of the issue, the power to launch an investigation has been, in essence, transferred by the legislator to the Respondent (and to those to whom he delegated his power). It is, therefore, difficult to fathom a situation in which the police would carry out this function.

26. We add, beyond requirement, that the dispute with respect to interpretation is entirely theoretical, and has no real practical significance. This approach flows from the premise used in the interpretive

discussion. **First**, with respect to substantive law on the decision as to whether or not to launch a criminal investigation into complaints against ISA members, Sec. 59 of the Criminal Procedure Rules, and the relevant case law, (see §§9, 13 above) apply, even if we presume, as argued by the Petitioners, that both agencies are authorized to investigate. In other words, whatever agency makes the decision; the same statutes and the same case law apply in terms of substantive law, the cause for launching an investigation or for closing a file, etc. **Second,** there is no dispute that the Petitioners also agree that the State Attorney's Office has the power to **make** a decision to close an investigation file and the Attorney General has the power to **transfer** files to the DIP for investigation. In the current state of affairs, the decision as to whether or not to launch an investigation is made by a senior official in the State Attorney's Office, to whom the power has been delegated, according to accepted criteria. If the Supervisor reaches the conclusion that an investigation **should not be** opened, the identity of the investigating agency is of no consequence. By contrast, if the Supervisor reaches the conclusion that an investigation **should be** opened, and the competent official decides the same (inasmuch as the Supervisor is not the competent official), then, according to the Respondent's position, all cases would be transferred for investigation by the DIP. It is difficult to fathom a situation in which it is decided that a criminal investigation **is warranted**, and the Respondent **does not exercise his power** and does not instruct the DIP to launch an investigation. Therefore, there is no need to address such a possibility. At the same time, by the same token, it should be interpreted that even when the competent official decides not to launch a criminal investigation, there is no reason to create a "bypass" track, by turning to the police.

27. It shall hereinafter be said that the substantive and operative power in the matter at hand lies with the Respondent whatever the case may be. We were compelled to state this as it is difficult to dispute that the language produced by the legislature was insufficiently clear and required judicial interpretation.

28. The question still remains whether a decision by the Supervisor is sufficient for closing a file while launching an investigation requires the decision of an official to whom the State Attorney's power has been delegated. I myself am of the opinion that in order to best express the legislature's intent, each complaint file the Supervisor had recommended be closed shall be brought to the Respondent, or an official acting on his behalf and to whom the power to launch an investigation has been delegated, such that a decision to close a case shall have the approval of the official who is competent to launch an investigation. It may also be determined, and this would be appropriate in my view, that the Supervisor (the official who issues the instruction not to launch a criminal investigation) would also have the power to issue the instruction to launch an investigation (a power that, as aforesaid, has been delegated by the Respondent to the State Attorney and his deputies). This is a sensitive topic, and it is more fitting to allow the Supervisor himself to instruct to launch an investigation. This is so, as stated, in view of the sensitivity of the subject and as a result of the wish to ensure, even if only for the sake of appearances, that when the Supervisor reviews the complaint and the Inspector's findings, his powers cover the entire gamut of relevant decisions (closing the file, launching an investigation, conducting further inquiries, etc.). This is not an impossible task, although we are aware that it requires an amendment to Sec. 49(9)1(b) that would add the Supervisor to the delegated officials. In our opinion, this had best be done soon. With respect to the right to appeal, inasmuch as the decision to close a file, pending legislative amendment, is made with the approval of the official who is competent to launch an investigation, the appeal shall be filed to the next in rank.

The Legitimacy of Preliminary Inquiry by the Inspector

29. This Court has previously addressed the **general** fundamental questions related to the very legitimacy of a mechanism such as the Inspector, that is, the question of whether the State

Attorney's Office is competent to hold a preliminary inquiry and whether, despite the clear language of Sec. 59 of the Criminal Procedure Rules, it has discretion to instruct **when a criminal investigation should not be launched.** This Court has answered both these questions affirmatively, as detailed.

30. We have already mentioned that the authority to conduct a **preliminary inquiry** in order to determine whether a criminal investigation should be opened forms part of the decision-making process within the State Attorney's Office and that there was no flaw in conducting a preliminary inquiry. As reasoned by Honorable Justice (as then titled) Strasberg-Cohen:

> One of the Attorney General's areas of work is overseeing the enforcement of criminal law, and he is vested with the power to order the police to launch a criminal investigation… Once the Attorney General, the Government or the State Attorney's Office receive a communication that suggests a suspicion that someone has committed a criminal offense, they have several courses of action from which they may choose. **One of these, which is relevant to our matter, is to conduct an inquiry in order to determine whether or not to order a criminal investigation.** Issuing such an order, similarly to issuing an order to serve an indictment, is a matter of discretion… This discretion is extremely broad, and judicial intervention therein is limited and made only in rare cases… such an inquiry forms part of the process that leads to making a decision the State Attorney's Office is competent to make… the State Attorney's Office is involved in criminal investigations conducted by the police. It sometimes follows them and it has the responsibility to decide whether a suspicion that an offense had been committed has been established and who the suspect is. It also has the responsibility to order an investigation accordingly. As stated, it is not possible to determine criteria for the scope, nature and quality of the inquiry and this matter is best left at the discretion of the State Attorney's Office with every case examined individually, according to its particular circumstances" (HCJ 3993/01 **Movement for Quality Government v. Attorney General** (*ibid.*, §§3-4) (Emphases added - ER).

This ruling did not make new law beyond the pre-existing situation, as emerges from the decision on the Motion for Further Hearing that was filed after it was given (see HCJFH 1396/02 **Movement for Quality Government v. Attorney General** (unreported), §6 of the decision of Justice Mazza).

31. Thus too, with respect to the authority to instruct no criminal investigation be launched, it has been ruled that the authorities should not be compelled to "automatically" launch an investigation into complaints that allege criminal activity (see also, HCJ 1113/07 **Tsadok v. Head of the Police Investigation and Intelligence Department** (unreported), §§24-25, opinion of Justice Joubran and references therein; HCJ 3292/07 **Adalah v. Attorney General** (unreported) §12 of the opinion of Justice Beinisch). As Justice (as then titled) Mazza reasoned in HCJFH 7516/03 regarding the non-investigation of a senior police officer:

> The first clause of Sec. 59 prescribes "Should the police [and, in our case - the State Attorney's Office] become aware of the commission of an offense, whether as a result of a complaint or by any other means, it shall launch an investigation". However, the main question regarding this issue is whether the police had, indeed, become aware of the **commission** of an offense. An affirmative response to this question requires there be evidentiary

> infrastructure at a level that justifies launching an investigation… In our case, the Attorney General's decision does not mean that an investigation will not be launched, **despite**, the fact that the State Attorney's Office is aware that an offense has been committed, but that the available evidentiary infrastructure **does not create** such awareness, hence Sec. 59 does not apply in any event" (HCJFH 7516/03 **Nimrodi v. Attorney General** (unreported, emphases in original - ER).

In other words, the duty to launch an investigation is subject to the existence of evidentiary infrastructure justifying doing so. "Clearly, the complainants' arguments, if not supported by such infrastructure, **may** not be sufficient for doing so" (*ibid.* emphasis added - ER). It has been found that the duty to order an investigation is, indeed, not automatic and that the authority to hold a preliminary inquiry does exist. It is in the context of this legal infrastructure that we examine the mechanism employed in the matter at hand.

32. And still, the mechanism of preliminary inquiry by the Inspector must be examined both on its own right, and in light of the outcome, given it has never led to a criminal investigation. This court has previously addressed the aforesaid mechanism and examined the administrative validity of the Inspector's inquiry preliminary, albeit it did not refer specifically to the Inspector, but rather held that the inquiry preliminary that had been held (in that case, by the Inspector) was not unreasonable given the circumstances of the matter (in complaints similar to the case discussed herein). As Supreme Court President (as titled then) Barak reasoned in the aforementioned **HCJ 11447/04**:

> Indeed, the Respondents cannot completely ignore the petitioners' complaints. The Respondents must examine complaints that they receive and explain their decision in the matter after they exercise their discretion (cf.: CA 1678/01, **State of Israel et al. v. Weiss et al.** (unreported),§13 of the judgment). The Respondents' decision must be made in accordance with the principles of administrative law and in good faith, honestly, without discrimination, and it must be reasonable (HCJ 935/89, **Ganor et al. v. Attorney General**, IsrSC 44 (2) 485, 507-508). However, the discretion granted to the Respondents in the matter of opening a criminal investigation is broad … In our case, we did not find reason to interfere in this discretion of the Respondents. The process used by the Respondents in deciding not to open a criminal investigation was proper… They reached their decision after conducting an inquiry into the matter, the principal findings of which are delineated above. Their decision has a factual foundation. In the circumstances, the Respondents' decision is not unreasonable. The Petitioners also attack the **scope of the preliminary inquiry** that the Respondents conducted in order to establish the basis for their decision. Indeed, it is hard to set criteria as to the scope and nature of the inquiry. How through the inquiry will be is determined by considerations that vary according to the circumstances of each case. Clearly, the credibility of the complainant is a relevant consideration in this regard…"
> (**HCJ 11447/04**, §§9-10).

The Petitioners argued that this ruling, which effectively approved preliminary inquiries by the Inspector, did not render the petitions herein moot, as at the time, the particulars presented above were not available for the court to consider and the weighty questions of law and principle raised in this deliberation were not reviewed. I am of the opinion, as laid out in detail above, that even if there is merit to this, it does not undermine the fundamental existence of a power to hold a

preliminary inquiry in order to decide whether or not to launch a criminal investigation, nor does it undermine the legitimacy of this power. I shall further note in this context, that in HCJ 6138/10 (mentioned above, in which Petitioner 4 in HCJ 1265/11 was named), Justice Vogelman noted that it would be necessary to wait until the structural changes to the Inspector's position were completed before filing petitions against existing protocols, or seeking a remedy in the form of establishing a new general protocol (*ibid.*, §5).

The Considerations underlying the Inspector's Inquiry

33. In view of the fact that the power to conduct a preliminary inquiry does exist, and in view of the need for an appropriate evidentiary infrastructure to justify launching a criminal investigation, it appears that at the end of the day, **at the fundamental level**, the mechanism of the Inspector and his supervisor (and I have already noted that it is appropriate that this should be an official vested with powers pursuant to Sec. 49(9)6 and therefore, that it is appropriate to delegate to this official the power to launch an investigation as well) strikes an appropriate balance between the relevant interests; all, of course, **subject** to the completion of the process of severing the Inspector from the ISA and making him an employee of the Ministry of Justice (his status as such will be made clear to complainants), and, naturally, the door to judicial review shall remain open in future. On the one hand, some may argue that a complaint of torture made by an ISA interrogatee should be examined in the same manner as that of any other complainant regarding violence inflicted on him by another – be it by an official of the DIP – that is the case with respect to having such complaints initially reviewed by the criminal department of the State Attorney's office; this, given that this so-called examination, away from the "disinfecting sunlight", [is performed] by a person (the Inspector) whose identity is kept from the public, and in the current situation, is also classified under the Israel Security Agency Law , the Inspector being part of the ISA, whose inquiry findings are confidential?

34. However, there are, on the other hand, weighty considerations that support having the preliminary inquiry held by a designated official (such as the Inspector), once he is not an ISA employee - primarily, the public interest in safeguarding the ISA's interrogation methods. This is not, God forbid, in order to allow ISA interrogators to break the law, but rather to guarantee that they have, at their disposal, effective investigative tools that rely on deception and vagueness - within the limits of the law - particularly following **PCATI**. The ISA's interrogation methods, which are based, among other things, as stated, on deception, require confidentiality and are classified by law (see, Sec. 19 of the Israel Security Agency Law; CrimApp 8950/09 **Atar v. State of Israel** (unreported); CrimApp 9718/09 **Cabha v. State of Israel** (unreported)). In this sense, consolidating the processing of the complaints into the hands of one competent official, helps **protect the confidential material**, quite aside from providing the required specialization in and familiarity with the ISA's investigative apparatuses, which enable said official to draw a direct impression of the **credibility of the complaint** even at the preliminary inquiry stage. This would also prevent opening and closing investigations following frivolous complaints. It appears to me, therefore, that the balance of interests justifies the continued existence of the Inspector position, but, as an employee of the Ministry of Justice, without ties to the ISA.

35. In general, it appears, as has emerged in the review at hand, that the State is aware of the need to re-examine monitoring mechanisms in this case and in others, indicating that the process of change and "maturation" is in progress (see, for instance, the government resolution on the establishment of the Turkel Commission for reviewing the flotilla incident of May 31, 2010, Sec. 5: "The Commission shall also review the question of whether the mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law in use in Israel in general, and as applied to the current incident, are compatible

with Israel's obligations under the norms of international law"). I have recently had occasion to state, in a petition that concerned adapting the country's emergency legislation to the current times:

> Israel is an abnormal normal country; it is normal, because it is a vibrant democracy in which fundamental rights, including free choice, freedom of expression, and the independence of the judiciary and the Attorney General, are upheld. It fulfills the essence of its designation as a Jewish and democratic state. It is abnormal, because the threats to its existence have yet to be removed; it is the only democracy to be under such a threat and its relations with its neighbors have not yet been properly resolved, despite the peace agreements with Egypt and Jordan and some agreements with the Palestinians. The battle against terrorism continues and will likely continue in the foreseeable future. We are not yet living in peace…
>
> The challenge is to shape a legal system, on this subject as well, which faces both the normal and the abnormal at the same time. This goal is achievable. It is not out of reach.
> (HCJ 3091/99 **Association for Civil Rights in Israel v. Knesset** (unreported), §18).

In these circumstances, with the structural change in the Inspector's institutional identity, I am of the opinion that the mechanism for reviewing complaints filed by ISA interrogatees meets legal standards and that it is reasonable on its merits. However, with the same breath, we recall that appeals against the Inspector's Supervisor's decisions may submitted to the Respondent. The official who makes the decision to close a file must formally and clearly inform the complainant of this right. This did not occur until late 2011, likely due to lack of clarity among officials. The decisions are subject to judicial review which allows this court, in cases brought before it, to observe the review mechanism, as it develops, directly. The facts that have emerged naturally call for further investigation, and the current "evolutionary" phase does show more transparency. It appears to me that it is safe to assume that the ISA has internalized the lessons learned from the inappropriate institutional culture of yesteryear. However, no agency is immune to mistakes and aberrations and concerns regarding the danger of a "slippery slope" do exist; see, within Hebrew law, my essay *On the Danger of the 'Slippery Slope'*, **The Weekly Torah Portion** (Aviad HaCoehen and Michael Vigoda, editors), Exodus 282, 286-288, **Netivey Mimshal U'Mishpat**, 160. The Respondent, who, among other things, considers the appeals filed against decisions not to launch criminal investigations in complaints of this sort, must examine matters thoroughly, leaving no stone unturned, particularly in this sensitive issue. Additionally, for the sake of transparency, there is room to consider legislating the position of the Inspector. Naturally, all these are augmented by judicial review, which provides oversight, as is the norm in petitions by administrative detainees as an example, and, in a different context, in petitions concerning the security fence.

36. In a lecture given some time ago, entitled "Israel - Security and Law: A Personal Perspective" (Bar Ilan University, 9 Kislev, 5772, December 5, 2011), I have had occasion to say, on the issue of petitions by administrative detainees:

> Administrative detainees often file petitions with the High Court of Justice, after having gone through two court martial instances. The petitions are heard within days or weeks by a panel of three justices. I believe this is unparalleled anywhere in the world. We examine the intelligence information *ex parte*, including by reviewing primary materials if need be and conversing with security officials. Indeed, in most of these cases we do

> not intervene and no scholarly judgments are written. However, in more than a few cases, the position we express in the classified hearing is presented to security officials in order to mitigate [the outcome] and this has results later on… It is precisely in a country where, times being difficult, the 1945 Mandatory emergency regulations have not been cancelled, particularly during our struggle for independence and despite their impure source, that judicial intervention in such matters is justified.

See recently, also HCJ 3267/12 **Halahla v. Judea and Samaria Area Military Commander** (unreported) and the authorities therein. I believe that these matters are close to the issue herein. Maintaining the rule of law is a mission, a task, that is shared by all state authorities, even in the context of the delicate balance between security and rights. We, as a state, as enforcement, prosecution and judicial agencies, must constantly examine our actions and our commitment to defending fundamental democratic values using keen and sober self-criticism.

37. In conclusion, therefore: There is no flaw in the existence of the Inspector mechanism - inside the Ministry of Justice; the Inspector's supervisor should review each and every complaint and should be legally vested with the power not only to close an investigation, but also to open one (through delegated officials); the decision to close a file should be approved by the competent official; notification of the right to appeal should be given in every case, and, naturally, the door to judicial review shall remain open.

The Specific Complaints

38. With respect to the Petitioners' allegations regarding the specific investigations: Given the Respondent's position that the available remedies had not been exhausted (as appeals had not been filed), the **individual factual inquiries** that are required and the Petitioners' allegations that they had not been clearly and officially informed of their right to appeal, I believe that the appropriate solution is to extend the deadline for submitting appeals.

39. According to Sec. 65 of the Criminal Procedure Rules, an appeal "shall be submitted within 30 days of the notification given to the complainant pursuant to Section 63. However, the competent official may decide in an appeal as stated in Section 64, to extend the deadline for submission of an appeal". As such, the Respondent shall notify the Court within 30 days (court recess included) if he is prepared to allow an appeal against the Supervisor's decision, with respect to the decisions made by the Supervisor in Petitioners' matters, inasmuch as such did not include notification of the right to appeal. In the response, the Respondents shall provide an update on the transfer of the Inspector's position to the Ministry of Justice. We note that we consider the regulation of this matter to be essential and that failure to do so or to complete the process in the near future may justify legal action. Inasmuch as the Respondent agrees to these propositions, and the Petitioners file appeals, it is presumed that these shall be considered in the spirit detailed above.

Conclusion

40. This partial judgment concludes our handling of the general head of the petition. The individual matters shall be handled according to the outline specified in paragraphs 38 and 39.

Justice

President A. Grunis

I concur

President

Justice U. Vogelman

1. I concur with the conclusions in the partial judgment of my colleague Justice **E. Rubinstein** and I concur with the outline suggested therein for reviewing the individual allegations made by the Petitioners. I also join my colleague's comments on the institutional aspect, with respect to the need to enshrine the powers of the Inspector and of his supervisor in primary legislation and with respect to the importance of transferring the position of the Inspector to the Ministry of Justice. I shall emphasize that this institutional change is decisive as far as I am concerned. Should it become clear that this change has not materialized, it shall constitute cause to renew this review, as noted by my colleague as well.

2. I should like to address, in brief, the dispute between the Petitioners and the Respondent with respect to the interpretation of Sec. 49(9)1 of the Police Ordinance (New Version) 5731-1971 (hereinafter: **the Police Ordinance**), and in particular, to the question of whether the power vested in the Department for the Investigation of Police (DIP) to launch an investigation into an offense suspected to have been committed by an ISA staff member in the line of duty or in connection thereto is an exclusive power (the exercise of which is subject to approval by the Attorney General), which overrides the duty of the police to investigate upon becoming aware of the commission of an offense pursuant to Sec. 59 of the Criminal Procedure Rules [Incorporated Version] 5742-1982, (hereinafter: **the Criminal Procedure Rules**). I believe that the section should be interpreted in a manner that grants the DIP **exclusive authority** to investigate an offense suspected to have been committed by an ISA member. This conclusion is supported by the legislative structure of Chapter D2 of the Police Ordinance, regarding "The Investigation of Offenses Committed by Police Officers and Members of the Israel Security Agency". Sec. 49(9) of the Police Ordinance, under the subheading "The Authority to Investigate", stipulates that the DIP has exclusive authority to investigate offenses (listed in the schedule) suspected to have been committed by a police officer. Sec. 49(9)1, which constitutes a specific provision relating, as the subheading states, to "the investigation of members of the Israel Security Agency" and applies some of the provisions of Sec. 49(9), *mutatis mutandis* to the arrangement relating to members of the ISA, must be interpreted along the same lines. Indeed, some statements made as part of the legislative history of the section do support the Petitioners' interpretation (see, §22 of the opinion of my colleague). However, the latter is only one component of the interpretive process. When formulating the final purpose of this piece of legislation (as detailed in §25 of my colleague's opinion), we must make a positive finding that the exclusive power to investigate an offense "suspected to have been committed by an employee of the Israel Security Agency in the performance of his duties or in connection with his duties" is vested in the DIP and is subject to the decision of the Attorney General (or anyone to whom this power has been delegated by law). It is emphasized, as my colleague also stated, that the substantive criteria for deciding whether or not to launch an investigation pursuant to Sec. 49(9)1 of the Police Ordinance are identical to the criteria on the basis of which the police decides whether or not to launch an investigation pursuant to Sec. 59 of the Criminal Procedure Rules (see HCJFH 7516/03 **Nimrodi v. Attorney General** (unreported, February 12, 2004); HCJ 1113/07 **Tsadok v. Head of Police the Investigation and Intelligence Department,** §§24-25 (unreported, September 1, 2008)). The only difference is the institutional identity of the investigating agency (the DIP) and the official who makes the decision to launch an investigation (the Attorney General). On this last issue, I second the remark made by my colleague, that it is appropriate that a decision not to launch an investigation be made by the

official who is vested with the power to launch such (§27 of his opinion). Subject to our comments, and subject to the completion of the process of transferring the Inspector to the Ministry of Justice, I have found that the mechanism instituted by the Attorney General with respect to the exercise of powers vested pursuant to Sec. 49(9)1 of the Police Ordinance is not a breach statutory provisions.

3. In addition to the aforesaid, I shall add that I have not lost sight of the Petitioners' - uncontested - argument that, in general, the mechanism of preliminary inquiry by the Inspector does not, in practice, result in criminal investigations, despite the large number of complaints submitted. This information justifies a review of the decision-making process specifically. Such review should be conducted based on a concrete factual infrastructure, following exhaustion of remedies according to the outline provided by my colleague in paragraphs 38 and 39 of his judgment.

Justice

Decided as stated in the opinion of Justice E. Rubinstein

Rendered today, 18 Av, 5772 (August 6, 2012)

President Justice Justice