

The lack of investigation and punishment of torture in Israel

by Irit Ballas

In the course of the past five years PCATI and a number of other human rights organizations In Israel have submitted over 600 complaints concerning the use of torture and ill treatment by Israel's General Security Service (Henceforth: The Shin Bet). At no point have the authorities seen fit to initiate a criminal investigation into the chargers much less to prosecute the accused torturers.

This paper is based on the findings of research conducted by PCATI. The paper will first survey the background on the use of torture and Ill treatment in the Israeli context, discussing, *inter alia*, the "Torture Ruling": a landmark ruling that was handed down by The Israeli High Court of Justice (HCJ) a decade ago. This will be followed by a short critique of the State's 'investigation' process of torture victim complaints and the manner in which it disregards victim's complaints of alleged torture and ill treatment. The process results in a state of affairs in which Shin Bet agents are immune from prosecution and receive full support from the legal system for their use of illegal methods of investigation, including methods of torture.

A. Background: From Scandals to Scrutiny

The use of torture and ill treatment by the Shin Bet came to the attention of the general public in Israel only in the mid eighties, mainly due to a series of publicized cases, which exposed the habitual use of torture and ill treatment in Shin Bet interrogations.

The infamous "Bus 300" scandal, in 1984, involved a hijacking of a bus by four Palestinian terrorists. During the Israeli rescue attempt two of the Palestinians were killed and two were taken into Shin Bet custody. While in custody they were beaten to death by Shin Bet officials, who followed the direct orders of the head of the organization. An unprecedented cover up followed, in which Shin Bet officials fabricated evidence and lied in court while giving sworn testimony. A few days later, a picture was published in one of the daily newspapers, revealing that at least one Palestinian was caught alive by the Shin Bet during the rescue mission. Following the publication of the photograph the newspaper was shut down for several days by the Israeli military censor.

Three years later another incident involving the Shin Bet was publicized in Israel. Izzat Nafsu, an officer in the IDF, who was from Israel's tiny Muslim Circassian minority, was accused of espionage. Based on his confession he was sentenced to an extensive prison sentence. While in prison Nafsu continued to assert his innocence, claiming that his confession was forcefully (tortured) extracted from him. In 1987 he was finally released from prison after Israel's Supreme Court confirmed his claims and ruled that his confession had been violently extracted and that Shin Bet agents had lied to the court when Nafsu argued against the validity of his confession.

Following these affairs, and the subsequent public outrage, a commission of inquiry was appointed in 1987, headed by former Supreme Court President Justice Moshe Landau. The "Landau Commission's" mandate was to examine Shin Bet's methods for interrogation Palestinian security suspects. A significant portion of the Commission's report was made public, but its most important findings and recommendations, such as the interrogation techniques the Shin Bet had used between 1967 and 1987, and which methods should henceforth be permissible, remain classified to this day. The report did state that many of the methods used by the Shin Bet were illegal, but nevertheless recommended that agents that used these methods **not be prosecuted**. The report and its recommendations was endorsed by the Israeli government.

The Landau report also revealed that since 1971, Shin Bet interrogators had systematically lied to the military courts. Whenever Palestinian defendants sought to repudiate their confessions on the

grounds that they had been coerced, Shin Bet agents consistently testified that the confessions had been obtained by non-coercive methods only. The Commission proposed abandoning the then current hypocrisy of an interrogation system which uses and systematically covers up illegal methods. Instead, the Commission suggested, Israel's government should acknowledge that some measures of coercion are permissible, and then codify and monitor them to prevent abuse.

Even though the commission's findings were grave, and included evidence of systematic and institutionalized perjury and sweeping use of torture, **no personal charges against any Shin Bet personnel were filed.** No one was held accountable for these crimes.

B. The High Court of Justice Ruling

Following the Landau Commission, torture continued to be a major subject of public debate in Israel. Several human rights organizations tried to challenge the methods used by Shin Bet by filing petitions to the High court of Justice. In 1999, after lengthy deliberations, 9 justices of the high court, an unusually large number, issued one of the Court's most important rulings.

Written by Supreme Court President Aharon Barak, the ruling is usually considered progressive and at the time was regarded as one of the Israeli human rights movement's most significant accomplishments. Indeed, it was and remains an important milestone in the struggle against torture insofar as it recognizes the absolute prohibition of torture in international law, and subsequently led to a significant reduction in the use of torture in Shin Bet interrogations.

The ruling stated that:

a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever...Human dignity also includes the dignity of the suspect being interrogated ...These prohibitions are "absolute".
There are no exceptions to them and there is no room for balancing.

But the court was ambivalent, and along with this absolute prohibition, the ruling created loopholes that effectively sanction the use of torture by law enforcement agencies. In essence, the court established that if **the detainee is abused in order to save a human life, the interrogator may assert the "necessity defense" if he is brought to trial.**

Thus, the court asserts that when torture is the only way to obtain the required information in time to save lives (what is also known in the literature as the "Ticking Bomb Scenario"), this can be justified, in hindsight, in a criminal trial.

All penal systems recognize the need for exceptions to the general standards set by the criminal code, and therefore establish a kind of "necessity defense", which provide for releasing the accused from criminal responsibility in extraordinary cases. However, the norm that forbids torture and ill treatment is unique and the international community is still debating if and in what form the necessity defense can serve as a legitimate defense in cases of torture. However, the Israeli High Court of Justice went well beyond the limits discussed in this debate when it not only recognized the applicability of the necessity defense to torture, but also permitted the Attorney General to write guidelines under which he could determine **in advance** which cases will fall under the "necessity defense". In these cases the Shin Bet agent involved will not be indicted.

In this way the High Court of Justice gave a priori approval for the use of violent interrogation methods, by no means an acceptable implementation of the necessity defense. Days after the ruling was issued such guidelines were published by the Attorney General. They established the principle that if an agent felt he was acting out of necessity, he would not be indicted.

This ruling provided the Israeli High Court of Justice with the best of both worlds: on the one hand, it stated torture and abuse are absolute prohibitions, thus strengthening the court's international reputation as the protector of human rights in Israel. But on the other hand, it mitigated this prohibition in several ways, mainly by using the ticking bomb scenario to give partial legal immunity to Shin Bet agents.

In its often understood as progressive judgment the court actually paved the way for the creation of a culture of impunity, which was the focus of PCATI's recent research.

C. Procedure for dealing with Torture Complaints

For 20 years, and especially in the decade following the court's ruling, PCATI and other human rights organizations have challenged the Israeli legal establishment, mainly the Attorney General, by submitting complaints on behalf of victims of torture and ill treatment. As mentioned above, none of these complaints have resulted in the launching of a criminal investigation.

Normally, the police is charged with investigating criminal complaints submitted by victims. But when a complaint concerns a police officer, the alleged misconduct is investigated by a special department in the Ministry of Justice – the police investigations division (PID). The reasoning behind this system lies in the inherent inappropriateness for the police to investigate itself, and therefore such investigations should be carried out by an independent body.

In the wake of the Shin Bet incidents discussed earlier the law was changed so that complaints concerning Shin Bet agents would also come under the authority of the same department. That meant that the proper PID would be charged with conducting investigations against Shin Bet. The legislature explained that this would ensure that investigations would be impartial.

However, the Knesset added one small distinction between police and Shin Bet complaints. Complaints against police officers were to be submitted directly to the PID complaints dealing with Shin Bet agents would first be submitted to the Attorney General, who would then decide whether to forward the complaint to the department, or to close it. One can think of several reasons why the legislature created this separate category and one can certainly criticize it. However, even the most ardent advocates of the conspiracy theory, couldn't have anticipated what the Attorney General actually did with his legally invested authority: before deciding whether to forward the complaint to PID, the Attorney General requires a preliminary inquiry into the complaint. This inquiry is **conducted by a Shin Bet agent** who, after

'investigating' the matter and sometimes even after *interrogating* the complainant submits his findings to the Attorney General.

The precise nature of the authority given to the Shin Bet agent in charge of the inquiry remain, as is the whole process, cloaked in a veil of secrecy. What is known, however, is that to this very day, not one of the complaints submitted were found by the Shin Bet agent to be worthy of criminal investigation, and therefore none of the complaints submitted to the Attorney General reached the PID, as required by law.

It is clearly evident that this entire procedure is profoundly defective, and is in no way compatible with the requirements of the UN Convention Against Torture nor is does it comport even with the standards laid out in Israeli law. First, the preliminary inquiry does not constitute a criminal investigation, with all its public and legal implications. The most important issue, however, is that complaints concerning the Shin Bet violations of the absolute prohibition against torture and ill treatment (a criminal offense in domestic and international law) are, examined by the Shin Bet itself. This not only contradicts the legislative intent of the law, to entrust an independent body with such authority, in order to ensure effective law enforcement, but also legally launders every violent method of investigation used by the Shin Bet.

D. Examples of Answers

As part of the research, all of the responses to the 169 complaints submitted by PCATI since January 2004 were analyzed. The findings reveal the serious flawed nature of this self investigatory mechanism. The research revealed in each of the complaints there has been either no serious investigation, or if an investigation has taken place its findings are being concealed. Furthermore, the written responses we do receive are terse, and they rarely relate in any substantive way to the claims raised in the complaints. The similarity of the responses are often marked by standard phrases that include:

“There is no basis for your complaint.” This sentence is not followed by any additional explanation or information connected to the method of investigation the authorities used

in making their determination. They do not inform us as to any interviews with the Shin Bet investigators Or even as to the extent of the inspector's access to all of the relevant information.

“The investigation was conducted according to the procedures.” This sentence begs the obvious questions: Which procedures and where are they published? Are such procedures in accordance with the law? More importantly, does such a response lead us to the obvious conclusion that the the Attorney General and his staff acknowledge that the facts in our complaint are correct, but the "procedures", permit the use of torture?

Sometimes, the reasons for dismissing the complaint *are* given, but very briefly. These reasons do not justify the State's ongoing and systematic failure to open criminal investigations. Some examples follow.

I. The investigator is always right:

A complaint filed on 13 March 2005 stated that during the interrogation the complainant was held in a painful position for hours and that the interrogators cursed him, spat at him, threatened him with rape while depriving him of sleep.

The response received by PCATI asserts that sleep deprivation never occurred, and that there is no basis for the complaint. However, there is an additional reference to the spitting:

"During the investigation, a drop of spit from one of the investigators unintentionally fell on the complainant's cheek. The investigator wiped the spit off and apologized. Apart from this incident, no one spat on the complainant."

This somewhat grotesque example clearly shows that the Attorney General unconditionally accepts the investigators' rendition of the facts. His version is presented uncritically and not as a suspect's version, but as if it was *the* complete and truthful reflection of the event.

Perhaps it is unnecessary to add, but in a proper criminal process contradictions between the complainant's version and that of a suspect are inherent. However they are not grounds for closing a file.

II.Shin Bet Constraints:

In some replies, the answer states that the complainant has been released from detention and has been returned to the Palestinian Authority areas. Therefore, the response asserts, a Shin Bet agent cannot meet with the complainant in the territories, due to security considerations.

"The fact that the complainant was already released made it extremely difficult to conduct a proper investigation, as the inspector could not meet with the complainant and take down his testimony"

The argument that the Shin Bet cannot meet someone in the Occupied Territories is puzzling. Other bodies, such as the Military Police criminal investigations unit, regularly meets with Palestinian witnesses in the Occupied Palestinian Territory. The fact that a meeting with a complainant in the Occupied Territory might require complex and expensive security arrangements cannot be considered valid grounds for failing to interview witnesses. In contrast, it is clear that if the suspect is a Palestinian and not his Shin Bet interrogators such a claim would not even arise.

III.Ticking Bombs

Another type of answer says, implicitly or explicitly, that this is a "ticking bomb" case, and therefore the methods used were justified. Such an answer looks like this:

"An examination of the matter has found that the complainant was detained for interrogation because of grave suspicions against him, which were based on reliable prima facie information suggesting that he was involved in or assisted in serious terror activities that were liable to occur within an immediate timeframe and which could injure or endanger human life"

In this type of answer, the Attorney General does not deny the facts we mentioned in the complaint, but rather justifies the methods used by the “necessity defense” model which was mentioned earlier. This is a legal construction which attempts to diminish the absolute nature of the prohibition against torture. These answers are, in this sense, more serious than the previous ones, as they admit, implicitly, the facts in the complaint.

In this "Ticking Bomb" answer, we are not given any information about who stands behind the decision to use these methods nor under what circumstances they are exercised. We do not know if permission was given in advance of the interrogation or ex post facto. This raises serious questions regarding the existence of guidelines for using violent methods which ought to be dealt with in a criminal investigation or trial.

One more problem with these answers is that there is a great difference between a criminal investigation and an indictment: The investigation is the first step, and its results are the basis for the decision whether or not to indict. The High Court of Justice ruling does give the Attorney General the discretion not to indict, but only after establishing the facts by means of a criminal investigation. It is clear that from the decision that the Attorney General may not refuse to open such an investigation. Giving an automatic exemption without even investigating whether an indictment is warranted widens the crack in the absolute prohibition against torture made by the High Court of Justice ruling and clearly facilitates the use of torture.

E. Conclusions

The unequivocal conclusion from our research is that in Israel there is no valid mechanism for investigating complaints of torture. The fact that not one of 600 complaints has led to the opening of a single criminal investigation clearly demonstrates that the existing mechanism is flawed and is not designed to uncover the truth. The High Court of Justice ruling which created the opening for exempting torturers from punishment has evolved into a state of affairs in which interrogators committing grave criminal offences enjoy absolute immunity from prosecution. The absence of such an effective mechanism implies the consent – if not the encouragement – of the law enforcement authorities for acts of torture that occur in Shin Bet interrogation rooms.

This flawed system exists within the framework of a cruel and ongoing Occupation in which thousands of Palestinians have been arrested, interrogated and detained in the midst of the Israeli legal system's silence, if not the actual support. Furthermore Israel's ongoing insistence to perform merely nominal internal examinations of complaints of torture cannot substitute for a serious criminal investigation and only reflects the dominant Israeli world view, that blanketly protect those who, while dealing with the "holy" matter of security commit grave violations of human rights.

This paper is based on a report published by PCATI at December 2009.

For further references please check:

Accountability Denied: The absence of Investigation and Punishment of Torture in Israel, Periodic Report, December 2009, Public Committee against Torture, Jerusalem.

http://www.stoptorture.org.il/files/Accountability_Denied_Eng.pdf