Regimes of Impunity

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In the past decade, 600 complaints to the Israeli Attorney General (AG) concerning the use of torture and ill-treatment by Israel's General Security Services (GSS, also known as the Shin Bet or Israel Security Agency – ISA) have been submitted. Regrettably, none of these complaints has led to a criminal investigation.

In my talk, I will explore the concept of impunity within this context. I will start with a description of the existing legal framework that allows for the systematic dismissal of complaints. Then I will outline some of PCATI's efforts in this respect. Finally, I will present some of our – I must admit – limited accomplishments and future prospects.

In an attempt to challenge the law enforcement system, human rights organizations have filed complaints on behalf of victims of torture and ill-treatment to the AG. Following the Israeli High Court of Justice's famous ruling of 1999,[1] which banned most of the then-commonplace methods of interrogation, this course of action has gathered force. Today, it is the main avenue for challenging the use of torture and ill-treatment during interrogations. It is interesting to note here that this course of action has two important strategic objectives. The first objective is to obtain a remedy for a specific victim, and the second is to expose major structural flaws by showing a systematic modus operandi.

[1] HCJ 5100/94, *The Public Committee Against Torture in Israel, et al. v. The State of Israel, et al.*

As a rule, victims wishing to complain about a crime committed against them lodge a complaint to the police. When the alleged crime is committed by a police officer, Israeli law stipulates that the complaint be handled by a special department within the Ministry of Justice, the Police Investigations Department (PID) [according to Article 59 of the Criminal Procedure Law (Combined Version) 5742-1982, and Article 49 I of the Police Ordinance, 5731-1971]. However, when the alleged offence is committed by a GSS agent, the law contains a special provision: the complaint is first to be submitted to the AG, who has the authority to decide whether or not to forward it to the PID for criminal investigation [according to Article 49 I 1(a) of the Police Ordinance].

One might expect the AG to treat all complaints of torture or ill-treatment by the GSS according to their gravity and thus forward them to the PID. However, what happens in reality is quite different: complaints are forwarded to none other than a GSS agent, who conducts "a preliminary inquiry". Predictably, of the hundreds of complaints that have been lodged in the past decade, not even one has been found worthy of a criminal investigation.

Despite banning the vast majority of the methods of torture and ill-treatment that were brought before it, the court left a number of loopholes that effectively permit the use of torture, primarily through the use of the necessity defense.

Complaints of torture and ill-treatment are dismissed using two types of answers. The first and most common response claims that the complaint has no basis in reality, i.e. the conduct alleged in the complaint never happened: "There is no basis for your complaint," or "The investigation was conducted according to the relevant procedures".

In approximately 20% of cases, we receive the second type of answer, which we call the "necessity defense" type. This answer acknowledges the facts but claims that the methods used were justified. Such answers read more or less as follows, "An examination of the matter found that the complainant was detained for interrogation because of grave suspicions against him [...] suggesting that he was involved in serious terror activities which could harm or endanger human life."

Occasionally, such answers are followed by a short explanation. One complaint, for instance, stated that during the interrogation the complainant had been held for hours in a painful stress position. His investigators had cursed him, spat at him, threatened to rape him and deprived him of sleep. The reply we received to our letter was that sleep deprivation never occurred and that there was no basis for the complaint. However, the answer also contained an additional reference to the spitting, stating that, "During the investigation, a drop of spit from one of the investigators accidentally fell on the complainant's cheek. The investigator wiped the spit off and apologized. Apart from this incident, no one spat at the complainant."

This "necessity defense" model was established by the High Court of Justice in the famous 1999 PCATI ruling. The ruling represents several achievements and has various flaws, but what is relevant here is that despite banning the vast majority of the methods of torture and ill-treatment that were brought before it, the court left a number of loopholes that effectively permit the use of torture, primarily through the use of the necessity defense. The court's interpretation of necessity is very broad, a fact that has permitted the Attorney General to write guidelines in which he determines in advance which cases will fall under the defense. In these cases, the GSS agent will not be indicted. The necessity defense type of answer is based on this doctrine.

The two types of answers presented above demonstrate the distinction between two regimes of impunity, as I call them, i.e. **the two ways in which impunity is granted to GSS agents**. Under the first regime, torture is not investigated because it has been denied; under the second, torture is not investigated because it was **permitted**.

Trying to challenge the regime under which the AG closes complaints because they "have no basis", Attorney Samah Elkhatib Ayoub from PCATI and I prepared a major petition that was submitted to the High Court of Justice on behalf of PCATI and five other Israeli human rights organizations in February 2011.

The petition rests on two main arguments. First of all, in complaints of torture and ill-treatment the law does not give the AG the authority to dismiss a complaint or to create a mechanism whereby a preliminary inquiry is an automatic stage of the procedure. Any other interpretation of the law would make GSS agents less accountable for an alleged crime than anyone else, rather than the other way round, as was the intention of the legislature.

Second, we try to show the absurdity of the AG's conduct, which creates an implicit requirement for additional evidence. Where there is no such additional evidence to support a complaint, the decision will be that there is no basis for investigating it. Naturally, torture is by its very nature an evidence-free crime, which creates a situation in which a complaint of torture can almost never be the subject of a criminal investigation.

Finally, the petition rests on international law, showing how the AG's conduct violates the obligation to investigate all complaints of torture, an obligation clearly established in various conventions to which the State of Israel is a signatory. This petition is now pending and a hearing has been scheduled for January 2012.

Another course of action in fighting the rejection of our complaints via the first regime is exhausting every individual case we handle, starting with a request for further information: What is the procedure for appeal? Can we see the file pertaining to the investigation? Several petitions concerning individual cases appealing this type

of answer have already been filed. Exhausting a mass of individual cases is based on the same strategy mentioned above, one that achieves the dual purpose of obtaining remedies for individual victims while at the same time revealing the structural flaws in the system.

As for the second regime, the "necessity defense" regime, we are currently working on an additional petition. As I mentioned earlier, in the 1999 "torture ruling", the High Court of Justice permitted the AG to write guidelines to govern when an indictment should be filed. The AG immediately did so. These guidelines further elaborate the broad interpretation of the necessity defense given by the court. However, the guidelines specifically exclude torture; that is, they will only apply to means of investigation that, though otherwise illegal, do not constitute torture. This gives us a small opening for action. We plan to go to court with cases in which the methods used are undoubtedly torture, as defined under international law. In such cases, we will claim, the guidelines do not apply and a criminal investigation must be launched. It is this argument that forms the basis of the petition.

We may ask: Did these efforts bring about any change? And what are the prospects for further change?

Though we have never received any substantive response by the state, there are indications that certain changes in the mechanism of investigation are, in fact, on their way. The first change, the significance of which is debatable, is the state's announcement in November 2010 that the GSS agent charged with inquiring into complaints of torture and ill-treatment would, from then on, be an employee of the Ministry of Justice. This announcement, however, leaves open a number of questions: Is the agent the same person, having merely changed his employer? Is he a former GSS agent? Will procedures no longer be secret? Was there a public tender for the position? PCATI submitted a request for answers to these questions to the Ministry of Justice under the Freedom of Information Act.

These requests have been met with unjustified delays and bureaucratic stonewalling, as a result of which PCATI filed a petition demanding that the Court order the release of the requested information.[2]

We have also seen a series of changes in the terminology used in the answers we receive, indicating that someone in the Ministry of Justice is putting some thought into

[2] AP 9289-09-11, *The Public Committee Against Torture in Israel v. The Supervisor of Freedom of Information Law, Ministry of Justice*. On 25 October 2011, PCATI finally received formal notification from the Ministry of Justice confirming that the announced plans had not been implemented and stating that, "A principled decision was taken regarding the transfer of the IIC [Inspector of Interrogee Complaints] from the ISA to the Ministry of Justice. Subsequently, several discussions have taken place between the [relevant] authorities relating to budgetary and procedural matters. This issue has been prolonged due to our demand that, once transferred, the IIC be in a better position to meet obligations optimally. Additional steps are currently being taken towards formulating decisions, as a result of which we will have answers to all your questions, such as the selection process to fill the position, working procedures and methods of referral to the IIC. Once decisions are made on this issue, we will share this information with you."

the matter. As far as we can tell, these changes are all cosmetic and do not indicate a real shift in the lack of will to press charges against any GSS agent responsible for torture or ill-treatment. Still, it seems that someone inside the system understands that the current situation is deeply flawed.

Finally, two points should be borne in mind. The first is that of the two regimes of impunity, the first – the one that denies that torture and ill-treatment took place – can possibly be combated. That is, because the conduct of the AG is illegal in these cases even under Israeli law, it can be challenged in court. However, the second regime – the one justifying torture – is much trickier. Even though we are currently writing a petition to challenge the necessity defense guidelines, we do not have the legal tools with which to challenge it under Israeli law. Instead, we are using the state's own legal doctrines to find cracks in the system of impunity. Our petition, however, cannot challenge the legality of the necessity defense. That is not a feasible endeavor in an Israeli court, which is a classic demonstration of the limits of a struggle for human rights using legal means.

The second point is a more general one, and has to do with the "ongoingness" of the struggle against torture: We see that every achievement brings about a refinement of the system and brings with it new struggles. The 1999 torture ruling was a major achievement, but torture did not end because of it. Its perpetrators are merely being protected in a more sophisticated way.

I would like to end on an optimistic note and express hope for success in ending impunity. However, one must take into account the fact that new obstacles inevitably await us down the line. What will these obstacles be? Can we prevent them? Is this an inherent trait of any struggle? These questions remain, as yet, unanswered.