

The Investigation Mechanism of Torture Claims in Israel: An Analysis of the 2012 GSS Investigation Decision and the Türkel Report

By Sharon Weill and Irit Ballas¹

“If we want things to stay as they are, things will have to change”²

Introduction

In its landmark 1999 ruling on torture, the Israeli Supreme Court outlawed certain inhumane and degrading methods of interrogations of Palestinian security suspects.³ Yet, 14 years later, the practice of torture continues unabated. Since the ruling, over 700 complaints of torture have been submitted by human rights organizations, but none have been criminally investigated or prosecuted. The authorities closed all of these complaints at the *examination* stage due to a purported lack of evidence or based on the ‘necessity defence’.

In the wake of the November 2012 General Assembly resolution recognizing Palestine as a non-member observer state at the UN⁴ and its potential capacity to ratify the Rome Statute of the International Criminal Court, the question of domestic investigations of war crimes is relevant in light of the complementarity principle.

In August 2012, the Supreme Court delivered a decision on a petition arguing that the internal examination mechanism for investigating torture complaints provided *de facto* immunity for the General Security Services (GSS) interrogation personnel. A few months later, in February 2013, the Türkel Commission rendered its long awaited report on whether Israeli domestic investigation mechanisms conform to international law;⁵ the report also specifically addressed the issue of investigations of torture allegations. Within the broader context of Israeli unwillingness to investigate and prosecute international crimes, this article examines domestic Israeli investigations (or their absence) following torture allegations in light of these recent legal developments.

1. Torture allegations in Israel

Allegations of torture by Palestinians held in Israeli detention centres and prisons include being denied the right to contact the outside world, particularly attorneys and family members often

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² Giuseppe Tomasi di Lampedusa. *The Leopard*, Feltrinelli, 1958, p. 40.

³ HCJ 5100/94, *The Public Committee Against Torture in Israel v. Government of Israel* (decision delivered 6 September 1999) (hereafter, the ‘Torture Case (1999)’).

⁴ On 29 November 2012, by 138 votes to 9 (Canada, the Czech Republic, Israel, the Marshall Islands, Micronesia, Nauru, Panama, Palau, and the United States), with 41 abstentions, the UN General Assembly accorded Palestine the status of non-member observer state in the United Nations. See General Assembly Resolution 67/19, 29 November 2012.

⁵ The Public Commission to Examine the Maritime Incident of 31 May 2010, ‘Second Report: Israeli’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law’, February 2013 (hereafter, the Türkel Report), available at: <http://www.turkelcommittee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>.

for extended periods of time.⁶ Sleep deprivation and prolonged interrogation hours are also commonplace, as are binding to a chair in painful positions, beatings, slapping, kicking, threats, verbal abuse and degradation. Special methods include bending the body into painful positions, manacled from behind for long periods of time, intentional tightening of handcuffs, exposure to extreme heat and cold, permanent exposure to artificial light, and detention in sub-standard conditions. Various forms of psychological torture, such as threats and exploitation of family members, are also commonly used.⁷ These allegations have not gone unnoticed by the UN Committee in charge of the implementation of the Convention Against Torture (CAT).⁸

2. Immunity as a result of the investigation mechanism

Israel established the examination procedure of complaints of torture or ill-treatment by the GSS in 1992 in the form of ministerial guidelines.⁹ Since then, practice has shown that a mechanism is in place that grants full impunity to GSS interrogators.

How does it work?

A GSS agent with a rank equivalent to that of Brigadier-General (the 'Interrogatee Complaints Comptroller' known in Hebrew as the 'Mavtan', whose identity is secret) first conducts a preliminary examination. While the preliminary inquiry includes a meeting with the GSS official and the complainant, it is often far more akin to an interrogation than to a proceeding intended to give the victim the feeling that justice is being done. The interview is conducted in prison, by a person whose identity is concealed, and without the victim enjoying legal representation. The findings of the preliminary inquiry are not transparent and almost impossible to challenge.¹⁰ When the preliminary examination is completed, the GSS transfers its findings to a senior prosecutor in the State Attorney's Office ('the Mavtan superior'). While the State Attorney has the authority to adopt the GSS's recommendation and close the file, only the Attorney General (AG) is able to order the opening of a criminal investigation.¹¹ The AG's decision can be appealed to the Supreme Court.

Thus, the mere decision to open a criminal investigation is a daunting process. The complaint must pass through a GSS internal examination, then it must receive a recommendation by a Ministry of Justice (MOJ) attorney, then the AG must make a decision, and then, if it is not favourable, an appeal can be brought before the Supreme Court (as a judicial review procedure of any administrative decision). Moreover, in practice, torture complaints are

⁶ Under Israeli military law in the West Bank, a suspect can be detained for up to 8 days before being brought before a judge, and prevented from meeting a lawyer for up to 90 days.

⁷ See Irit Ballas, "Family Matters", The Public Committee Against Torture in Israel, 2012; Maya Rosenfeld, "When the Exception becomes the Rule", The Public Committee Against Torture in Israel, 2012; Samakh El-Khatib, "Shackling as a Form of Torture and Ill-Treatment", The Public Committee Against Torture in Israel, 2009.

⁸ In its 2009 Concluding Observations, the UN Committee Against Torture expressed its concern about the continuing use of such methods: "The Committee is concerned that there are numerous, ongoing and consistent allegations of the use of methods by Israeli security officials that were prohibited by the September 1999 ruling of the Israeli Supreme Court." Committee Against Torture, 'Concluding Observations: Israel', UN doc. CAT/C/ISR/CO/4, 14 May 2009, §19.

⁹ Decision No. IS/16 of the Ministerial Committee for Israel Security Agency Matters of the 24th Government, "Procedure for Examining Interrogatees' Complaints", 20 May 1992. The procedure currently applicable was last revised on 1 February 2006 [quoted in the Türkkel Report, p. 305, at fn. 150].

¹⁰ See also the Türkkel Report, p. 415. "The Mavtan 'is very limited in his skills as an investigator' and his questions are 'laconic' ... The conclusions of the State Attorney's examination also found that the investigation process of the Mavtan takes too much time. An additional flaw that the examination identified was that ISA interrogations are not sufficiently documented, and that this lack of documentation creates a difficulty for the Mavtan's investigations."

¹¹ See also The Türkkel Report, p. 305-306.

met with foot-dragging and bureaucratic doublespeak, and they often remain unanswered for months or even years. As the data shows, none of the preliminary examinations have ever recommended the initiation of a criminal investigation on the basis of a complaint, and the AG has never ordered such an investigation to be opened.¹²

3. The Torture Investigation Case (2011)

In order to address the flawed investigatory mechanism, which effectively grants impunity to GSS interrogators, the Public Committee Against Torture in Israel, Adalah, and other NGOs submitted a petition to the Supreme Court in February 2011. The petitioners argued that the whole complaint-examination mechanism is tainted by “extreme unreasonableness”: the comprehensive policy of closing hundreds of complaints cannot be deemed reasonable by any means. The petitioners asked the Court to order the AG to initiate criminal investigations into all torture complaints filed by Palestinian security detainees interrogated by the GSS.¹³

In August 2012, the Supreme Court delivered its decision. Justice Rubinstein wrote the decision, although he was the AG in 1999 and in charge of the implementation of the Torture Case ruling, which included the drafting of the immunity guidelines.¹⁴ Justice Rubinstein ruled that a preliminary inquiry, and not a criminal investigation, is not only permissible but also necessary. According to international law, regardless of whether complaints are investigated in the framework of a preliminary examination or by way of criminal investigation, they must be independent, impartial, effective, prompt and transparent, principles fundamental for the conduct of any effective inquiry.¹⁵ Nonetheless, the Court was prepared to balance them against the GSS’s special needs. Accordingly, a preliminary internal investigation provides the right balance between the need to scrutinize GSS actions and the need to avoid disrupting its routines. According to Justice Rubinstein, the GSS Interrogatee Complaints Comptroller continues to be: “The person with the relevant expertise to examine the complaints, who can both guarantee an overall preliminary examination while keeping the secrecy required to protect the work of the GSS and to prevent an interruption of its routine work which may occur in case of the opening of an inquiry by a body external to the ‘Service’ [GSS] for each complaint.”¹⁶

After legitimizing the GSS’s secret examination practice, the Court further ruled that there was no obligation to automatically open a criminal investigation for each complaint; it was only necessary in cases in which the examination phase led to the disclosure of sufficient evidence.¹⁷ In so ruling, the Court let the narrative of lack of evidence prevail, a lack which it identified as being the result of false complaints, and not as a result of a structure that precluded the possession of such evidence. With this portrayal of the *facts* (or absence of facts), the Court showed more concern with false complaints, mentioned a few times in the ruling,¹⁸ than with the possibility of the non-investigation and non-prosecution of true torture allegations, which were never mentioned.

¹² The Türkel Report, p. 414. According to Israel's representations to various international bodies, in the past decade four disciplinary actions were imposed following complaints of torture and ill-treatment. See also H CJ 2150/96, *Harizat, et al. v Attorney-General, et al.* (State's response to petition on file with the authors).

¹³ H CJ 1265/11, *The Public Committee Against Torture in Israel, et al v. the Attorney General* (2012) (hereinafter: The Torture Investigation Case (2012)).

¹⁴ Justice Rubinstein mentions his prior post in the ruling itself, but does not see it as a conflict of interest, which should lead to his recusal. The Torture Investigation Case (2012), paragraph 17.

¹⁵ The Türkel Report, p. 413, and the sources mentioned there.

¹⁶ The Torture Investigation Case (2012), paragraph 21.

¹⁷ “The obligation to open a criminal investigation depends on the existence of evidence that would justify it. Allegations raised by a complaint, if it is not supplemented by such evidence, may not be enough to open such an investigation.” The Torture Investigation Case (2012), paragraph 31.

¹⁸ See for examples at the Torture Investigation Case (2012), paragraphs 19, 21, 34.

Having legitimized the internal examination procedure, yet uncomfortable with the fact that none of the complaints had ever triggered a criminal investigation, the Supreme Court *proposed* that the State implement the AG's guidelines for structural change. In 2007, the State Attorney's Office conducted an examination of this investigation mechanism, and in 2010 the AG decided that the process should not be conducted by a GSS agent but by an employee of the Ministry of Justice. Three years later, in June 2013, the MOJ announced the appointment of Colonel (Res.) Jana Modzagavrishvili as the New Inspector of Interogee Complaints, removing the decision from the GSS to the MOJ.¹⁹ The Court (in 2012) also ruled that measures be taken to increase the transparency of the procedure.²⁰ The Court concluded that:

“It seems that it can be assumed that the GSS have learned the lessons from their problematic ‘organizational culture’ that was practiced in the past. Indeed, nobody is immune from mistakes and slips.”²¹

The Court thus portrayed 12 years of torture allegations without criminal investigation or prosecution of hundreds of complaints as the result of a “culture of organization”, a bureaucratic problem that can be solved by transferring the Complaints Comptroller from the GSS to the MOJ. At several junctures, Justice Rubinstein mentions the “maturing” of the “security and human rights” issue in Israeli jurisprudence, interpreting the current situation as only a stage in a series of “evolutionary steps”.²² The “maturing” narrative enables Justice Rubinstein to avoid demanding that the State comply with its international obligations in relation to past allegations. Instead, the State receives a license to be tolerant of human rights abuses that are related to security issues, in the hope that in the future the system will improve. Yet the importance attached to this structural change puts the spotlight on procedure rather than substance; the state's unwillingness to prosecute torture allegations is not examined. Further, the fact that the Complaints Comptroller will still be a former GSS agent does not appear to pose a problem of impartiality:

“The decision to transfer the GSS Interrogatee Complaints Comptroller to the Ministry of Justice is significant both on a substantive level – for even if the Comptroller is going to be a former GSS agent, he will know his task and the framework in which it is situated – and also in terms of appearance – to the extent that the review is not performed by a party who owes an “institutional duty of loyalty” to the GSS.”²³

4. The Türkel Commission Report

On the surface, the Türkel Report provided a shield for past events, finding that “on the whole” the investigation policy of war crimes allegations is consistent with Israel's international legal obligations.²⁴ At the same time, the report presented 18 recommendations to the State for improving the examination and investigation mechanisms and for changing the accepted policy

¹⁹ PCATI released a public statement on 11 June 2013 stating that it “cautiously welcomes” the decision. See : <http://www.stoptorture.org.il/en/node/1876>.

²⁰ The Torture Investigation Case (2012), paragraph 21. Yet, while it mentioned the need for more transparency, it does not provide any instruction on how to do so.

²¹ The Torture Investigation Case (2012), paragraph 35.

²² See the Torture Investigation Case (2012), paragraph 21.

²³ Ibid.

²⁴ The Türkel Report, p. 377.

of impunity, some of them challenging their basic structure and function. As noted by one of the jurists who worked with the Commission:

“The more open-eyed approach would interpret the general conclusion that Israel complies with international law as no more than politics at work and an attempt to soften and make more palatable critical recommendations.”²⁵

Torture legislation

The first recommendation made by the Commission is to incorporate international norms into Israeli domestic law, while emphasizing the normative and educational values of this move.²⁶ In addition, the Commission recommended legislating “provisions that impose direct criminal liability on commanders and civilian superiors for offenses committed by their subordinates.”²⁷

Despite ratifying the CAT and the four Geneva Conventions, Israel has never incorporated the absolute prohibition on torture in its domestic law. Moreover, torture legislation within Israeli legal and political discourse has usually been understood as referring to the need for laws that authorize the use of certain interrogation methods,²⁸ rather than prohibiting them. Thus, the Commission’s recommendation in this regard is particularly significant.²⁹

From the obligation to investigate and prosecute to the obligation to examine and investigate

Generally, the Türkel Report distinguishes between the duty to examine and the duty to investigate. It states that there is a general duty to broadly *examine* all suspected violations of IHL, and an additional duty to *investigate* certain ‘war crimes’.³⁰ The Commission defines the scope of the term ‘war crimes’ in broader terms than the ‘grave breaches’ of the Geneva Conventions – it encompasses ‘serious violations’ of IHL as well as the acts listed in the Rome Statute and Additional Protocol I, to which Israel is not a party.³¹ The Commission also takes the view that not every war crime allegation merits a criminal investigation, but only those for which there is sufficient evidence.³²

Had the Commission ended here, it would be merely a reiteration of the Supreme Court’s ruling as far as it concerns torture examinations and investigations. Yet the Commission’s recommendation was far more comprehensive. It recommended full visual documentation of

²⁵ Michelle Lesh, “The Nature of Investigations under International Law: Reflection on the Türkel Report and Beyond,” Draft paper presented at the International Law Forum of the Faculty of Law, Hebrew University, Jerusalem (March 2013) at p. 3 (on file with the authors).

²⁶ The Türkel Report, p. 365-366.

²⁷ The Türkel Report, p. 369.

²⁸ See the Torture Case (1999) at paragraphs 23 and 39, and the Torture Investigation Mechanism Case (2012) at paragraph 19.

²⁹ The Türkel Report, p. 365: ““The Ministry [of Justice] should ensure that there is legislation to transpose clearly into law and practice the absolute prohibition in international law of torture and inhuman and degrading treatment. This is in order to enable ‘effective penal sanction’ for those committing war crimes, as required by international law”.

³⁰ The Türkel Report, p. 73-74.

³¹ The Türkel Report, p. 94-99. Particularly interesting is the fact that the Commission recognized the criminality of “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies” provided by Article 85(4)(a) of the 1977 Additional Protocol I and Art. 8 (2) (b) (viii) of the Rome Statute.

³² The Türkel Report, p. 99-100: “The Commission’s approach is that the threshold required for an investigation is where a credible accusation is made or a reasonable suspicion arises that a war crime has been committed... Whether a reasonable suspicion of a war crime exists depends on the facts of the concrete event and its particular context... therefore *credible information* suggesting their occurrence in itself gives rise to a reasonable suspicion that a war crime has been committed”.

interrogations,³³ in contradiction to Israeli law and the Supreme Court's ruling delivered just a few days after the Türkel Report was issued.³⁴

Moreover, unlike the Court, the Commission explicitly found that the GSS Interrogatee Complaints Comptroller does not comply with the requirement of an effective investigation:

*“The first reason concerns a problem of performance, i.e., the inherent difficulty of the Mavtan to fulfill his role, by virtue of the fact that he is a worker of the Israel Security Agency who is inspecting the activity of his colleagues. The second reason primarily concerns the problem of perception, i.e., the difficulty to justify a situation where an individual who is perceived to be internal to the Israel Security Agency examines complaints – ostensibly criminal – against his colleagues in the service.”*³⁵

Having found that the current mechanism does not comply with the requirement of an effective investigation, and criticizing the fact that to date the AG's decision to transfer the investigation body to the MOJ had not been implemented,³⁶ the Commission adopted a position that departs from that of the Court in the 2012 Torture Investigation Mechanism Case. As noted above, the Court described the function and structure of the Interrogatee Complaints Comptroller as a necessary balance, and it looked forward to the maturing of the system. Thus, the Commission now points out much more explicitly than the Court that the Complaints Comptroller does not have the impartiality and independence required, and that “there are serious failures in the effectiveness and thoroughness and also in the promptness of the investigation process.”³⁷

Conclusion

Human rights organizations submitted hundreds of torture complaints over the last decade. The question as to whether these complaints were effectively investigated by Israeli authorities, and in appropriate cases, prosecuted, should be examined in light of the complementarity principle, given that the possibility of the International Criminal Court (ICC) exercising jurisdiction over Israel's acts is no longer purely an academic matter. As shown above, the Türkel Report provided recommendations for more effective methods of investigating torture complaints, which, in certain aspects, go further than the methods proposed by the Supreme Court. Whether the State intends to fully implement the Türkel Commission's recommendations is unclear. Yet, in dealing with command responsibility, including the political echelon, the possibility of accountability seems remote due to political unwillingness, irrespective of any other structural improvements that may be introduced.

³³ The Türkel Report, p. 417.

³⁴ HCJ 9416/2010, *Adalah et al. v. Ministry of Public Security*, 2013. An unofficial English translation is available at: http://adalah.org/Public/files/English/Legal_Advocacy/Petitions/2010/HCI-9416-10-Judgement-English.pdf. For more background on the case see, e.g.: <http://www.adalah.org/eng/Articles/704/Cancel-Exemption-for-Israeli-Police-and-GSS-from-of>.

³⁵ The Türkel Report, p. 415-416, citing the AG.

³⁶ The Türkel Report, p. 416: “The said 2010 decision of the AG emphasized the lack of independence in the Mavtan's investigation process, as well as a perception of a lack of independence, because ‘he is a worker of the Israel Security Agency who is inspecting the activity of his colleagues’. The fact that no criminal investigations were ever opened only exacerbates these concerns.” Footnote 176 to this quotation states that, “It should be noted that meanwhile the Supreme Court handed down a decision on the legality of the special investigative mechanism to examine complaints by ISA interrogatees against their interrogators.”

³⁷ The Türkel Report, p. 416.