Human Rights Brief

Volume 4 | Issue 3 Article 1

1997

Israeli Interrogation Methods Legitimized by Court

Alexandra L. Wisotsky
American University Washington College of Law

HUMAN RIGHTS
Center for Human Rights and Humanitarian Law
BRIEF

Washington College of Law • American University Volume 4, Number 3 • Spring 1997

Israeli Interrogation Methods Legitimized by Court

by Alexandra L. Wisotsky

During 1996, the Israeli High Court of Justice (HCJ) heard several complaints by Palestinian detainees who alleged the use of physical and psychological torture during interrogations by Israel's General Security Service (GSS, also known as *Shin Bet* and *Shabak*). Three cases involving the GSS interrogation methods have been widely publicized and have caused international concern because the HCJ's decisions seem to be legitimizing the use of physical force during interrogations. The European Court of Human Rights has held in a similar case that the methods in question do not constitute torture, but a recent statement by the United Nations Committee Against Torture disagrees. This article will provide a legal analysis of the HCJ opinions and the conflicting international authorities.

The *Bilbeisi*, *Hamdan*, and *Mubarak* cases were all brought by individuals seeking interim injunctions to stop the use of the contested interrogation methods. The injunctions were granted by the Court, and the GSS then filed for annulment of these injunctions. In each case, the detainees were known by GSS intelligence to be active members of the terrorist groups Islamic Jihad or Hamas and were believed to have information about imminent terrorist attacks. The GSS argued that its interrogation methods were necessary to obtain the essential information that would prevent these attacks and spare many lives.

During a GSS interrogation, 'Abd al-Halim Bilbeisi admitted that in January 1996 he had planned a terrorist attack at a major intersection in which twenty-one Israelis were killed. He also disclosed that he had constructed the explosives at his home, transferred them to a hiding place, and recruited three suicide bombers to carry out the attack. Upon Bilbeisi's direction, the GSS located and neutralized a bomb that had not been used by the suicide bombers. Based on this and other information gathered during interrogation, the GSS concluded that there was a "very clear probability" that Bilbeisi had vital information regarding the planning of a serious terrorist attack in the near future.

Muhammad 'Abd al-'Aziz Hamdan was first arrested in 1992, and confessed his active membership in Islamic Jihad. He was detained by the Israelis in 1995, and by the Palestinian authority in March 1996, for terrorist activities associated with the organization. In October 1996, GSS intelligence determined that Hamdan was still active within Islamic Jihad, and he was detained again. The GSS stated that based on information

continued on page 10

See page 13 for an analysis of the ICTY's Judgment in the *Tadić* Case

China's Plans for Hong Kong Jeopardize Basic Civil Liberties

by Gillian A. Brady

At a time when the overwhelming trend among nations is toward democratization, Hong Kong's return to the People's Republic of China (PRC) is an anomaly. The transfer, scheduled for July 1, 1997 is possibly the first time in history that a non-democratic government will peacefully gain control of a democratic society. While the handover itself will almost certainly be peaceful, it is unclear how the people of Hong Kong will react to the new laws which will undoubtedly restrict many of the freedoms they currently enjoy.

continued on page 8

INSIDE:

Israel, continued from page 1

received during interrogation, it had a "well-founded suspicion" that Hamdan possessed "extremely vital information the immediate procurement of which would help save human lives and prevent serious terrorist attacks in Israel, which there is a real concern are to be carried out in the near future."

As in the *Bilbeisi* and *Hamdan* cases, the GSS knew that Khader Mubarak was an active member of Hamas and had participated in terrorist activity. After the GSS interrogated him, it determined that Mubarak possessed information that was "highly likely" to prevent future terrorist attacks.

Bilbeisi, Hamdan, and Mubarak complained of five types of GSS interrogation methods. The first, *tiltul* (shaking), consists of holding the detainee by the collar of his shirt and violently shaking him. In the second method, shackling, officials hand-cuff the detainee to a low

> Three cases involving the GSS interrogation methods have been widely publicized and have caused international concern because the HCJ's decisions seem to be legitimizing the use of physical force during interrogations.

stool with his arms stretched backwards in a painful position, and tighten the handcuffs until they press or rub against the skin, causing swelling and abrasions on the wrists. The third method, hooding, consists of placing a sack over the head of the detainee. In the fourth method, constant loud music is played in the room where detainees are held before interrogation. The fifth method is sleep deprivation, in which periods of interrogation are interspersed with a "waiting" period that may last for days, and during which detainees are not permitted to sleep.

The legality of shaking is being addressed in a pending case before the HCJ, and in the meantime, the Court has refused to grant interim injunctions against the use of that method. It did, however, grant the detainees interim injunctions to keep the GSS from using the other four procedures. Upon receiving information regarding future terrorist attacks, the GSS petitioned the HCJ to remove the injunctions so that they might obtain further information.

> The European Court of Human Rights has held in a similar case that the methods in question do not constitute torture, but a recent statement by the United Nations Committee Against Torture disagrees.

The GSS maintained that it did not over-extend the arms of the interrogees and did everything possible to ensure that the handcuffs did not rub or press against the skin. The GSS also claimed that it placed a sack over the head of the detainees as a security measure, to keep them from identifying one another, that it played loud music in order to keep interrogees from communicating with each other, and that everyone in the vicinity, including the guards, was subjected to the music. Furthermore, the GSS argued that it is not GSS policy to deprive detainees of sleep, although it admitted that when detainees were held prior to interrogation, they were not given breaks designed especially for sleep. After interrogation, detainees were sent as soon as possible back to their cell where they could sleep.

> The GSS argued that its interrogation methods were necessary to obtain the essential information that would prevent these attacks and spare many lives.

Counsel for the detainees accepted the GSS' assertion that the detainees had knowledge of future terrorist attacks in Israel. Based on these assertions, the detainees' acceptance of these facts, and a review of each interrogation method, the HCJ concluded that the shackling method of detention is illegal, but lifted the injunction against the other three methods. The Court was satisfied with the GSS' justifications for hooding, loud music, and lengthy detainment. The decision stated that placing a sack over the head of the interrogee, especially where it does not deprive the interrogee of ventilation or normal breathing, does not cause pain and as such does not constitute a method of torture. The Court further determined that playing loud music as a security measure, to which everyone present including the guards was subjected, is not a form of torture, and that lengthy periods of detention prior to interrogation, where detainees might be deprived of sleep, is justified by the pressing need to prevent future terrorist attacks and loss of life.

Under Section 277 of the Israeli Penal Code, a public servant can be sentenced to three years in prison for using or threatening violence against a person for the purpose of extorting a

> The HCJ concluded that the shackling method of detention is illegal, but lifted the injunction against the other three methods.

confession of, or information related to, an offense. There is, however, an exception set out in Article 34 that excludes criminal liability for acts that are "immediately necessary" to save the life, freedom, person, or property of oneself or another from a "concrete danger stemming from the conditions at the time of the act." This "ticking bomb" rule allows official use of force in situations where an impending attack threatens the general public. While this rule typically applies to an immediate, emergency situation, the current cases constitute the first time the "ticking bomb" theory has been used to justify official acts aimed at preventing future attacks.

In 1987 the Government of Israel established the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding

continued on next page

Israel, continued from previous page

Hostile Terrorist Activities, also known as the Landau Commission, headed by the former President of the Supreme Court of Israel, Moshe Landau. This Commission recommended that the GSS use "psychological and moderate physical pressure" as part of its interrogation procedures. The Commission stated that physical pressure should not

> This "ticking bomb" rule allows official use of force in situations where an impending attack threatens the general public.

reach the level of torture or ill-treatment such that the human dignity of the detainee is violated. *B'Tselem* and other human rights organizations, including Human Rights Watch and the UN Committee Against Torture have stated, however, that the Landau Commission report permitting "moderate physical pressure" violates the terms of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).

Article I of that convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . ." That Convention and every other international instrument addressing the question state that the right not to be subjected to any form of torture is non-derogable even in time of war, threat to national security, or exigency. That the rule is so widely accepted suggests that it has reached the level of *jus cogens*.

Cruel, inhuman, and degrading treatment and punishment has not been defined in any international instrument. The European Commission of Human Rights in 1969, however, defined degrading treatment or punishment as "conduct that grossly humiliates persons before others or drives them to act against their will or conscience," and inhuman treatment as "conduct that deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable." In 1993 the Judicial Committee of the Privy Council in England applied the same definition. Like torture, the non-derogability of cruel, inhuman or degrading treatment or punishment is widely accepted in the international community.

Do the interrogation methods used by the GSS constitute torture? It is generally accepted, even by the HCJ, that painful shackling violates Article 1 of the Convention Against Torture. International norms indicate that violent shaking, although not addressed by the Court in these cases, probably reaches the level of an Article 1 violation as well. The status of the other three alleged violations is not as clear.

The European Court, in the 1978 case of *Ireland v. United Kingdom*, held that ill-treatment must reach a minimum level of severity in order to be considered torture under Article 3 of

> *B'Tselem* and other human rights organizations have stated that the Landau Commission report permitting "moderate physical pressure" violates the terms of the Convention Against Torture.

the European Convention for the Protection of Human Rights and Fundamental Freedoms. At issue in that case was the United Kingdom's order allowing official use of certain interrogation procedures to combat IRA terrorist activities. These procedures included hooding, subjection to continuous loud noise, deprivation of sleep, deprivation of food and drink, and "wall standing," which refers to forcing detainees to stand spread-eagled with fingers high above the head pressed against the wall, and feet so far back that the detainees were forced to stand on their toes so that most of the weight was on the fingers. The Court held that each interrogation method standing alone did not constitute torture as defined by the law of nations, since the procedures did not "occasion suffering of the particular intensity and cruelty implied by the word torture." The Court nonetheless decided that official use of the five techniques in unison did constitute inhuman and degrading treatment, and therefore violates the European Convention and customary international law.

Under the European Court's analysis, the Israeli procedures, with the exception of shackling and shaking, would not constitute violations of Article 1 of the Torture Convention. If the judgment of the European Court were applied to the current cases, however, it is plausible that these three practices would constitute cruel, inhuman and degrading treatment.

In its recently held eighteenth session, the UN Committee Against Torture reviewed the interrogation methods in questions. The Committee assumed the accuracy of reports submitted by NGOs, which were neither confirmed nor denied by the Israeli delegation. Based on these reports, the Committee determined that the methods in question constituted torture in contravention of Article 1 of the Torture Convention. Acknowledging the "agonizing dilemma" faced by the Israelis of balancing between the need to seek information from terrorist suspects in order to save the lives of innocent civilians, while at the same time respecting human rights, the Committee nonetheless found the procedures individually, and particularly when used in combination, to constitute torture. The Committee found that by signing the Torture Convention, Israel is precluded from justifying its actions on the basis of necessity or exceptional circumstances.

Israel maintained that it does not engage in the use of torture, and that none of the methods in question reached the level of torture, or cruel, inhuman or degrading treatment, and were not designed to inflict severe pain and suffering. The Israeli government emphasized its strict guidelines on the use of limited forms of "moderate physical pressure" under very specific circumstances, and stated that anyone found to engage in illegal actions would face criminal prosecution. Furthermore, the Israelis stated that they must be free to fight terrorism in order to protect the civilian population, and indicated that

continued on page 24

Romania, continued from page 5

Premier Victor Ciorbea (CDR) and the ministers of foreign affairs and national defense (both of USD) each paid visits to Budapest, in order to improve bilateral relations and foster support for Romania joining NATO and EU. Also, as a sign of ethnic reconciliation, President Constantinescu pardoned an ethnic Hungarian who had been sentenced in March 1990 to a 10-year imprisonment, and in March 1997, Premier Ciorbea sent a message of unity to the participants on the Hungarian national holiday. Despite criticism by the nationalist-Communists, who predicted the "imminent disintegration of the country," the governments' actions gained popular support.

Some Rroma members of parliament have criticized recent legislative amendments that favor the Hungarian community, demanding similar treatment for their community.

Some Rroma members of parliament have criticized recent legislative amendments that favor the Hungarian community, demanding similar treatment for their community such as bilingual signs in villages where Gypsies live. The Gypsies, however, are not well organized politically, and in fact, many Rroma declare themselves as Romanians, in order to avoid the "pariah" label. Thus, the Gypsies are divided even among themselves in how to fight for minority rights.

Romania is trying to offer more effective protection to minorities by cooperating with and requesting assistance from Western monitoring bodies.

Ethnic détente after the November 1996 elections impacted considerably upon the ideology of some fervent nationalist parties, such as PUNR, which has experienced a visible decline in popularity and is now trying to redefine its image.

Practicing an open-door policy toward minorities, the Constantinescu administration addressed a call to German emigres to come back and invest in Romania, in exchange for returning their former assets and properties in Transylvania. Romania is also trying to offer more effective protection to minorities by cooperating with and requesting assistance from Western monitoring bodies, such as the OSCE. For example, in April 1997 talks were held between Romania's Foreign Minister Adrian Severin and the OSCE High Commissioner for National Minorities, Max van der Stoel.

Although the new administration has been in office for less than a year, it has already increased unity within Romania and improved the country's image internationally. A strong commitment to defending human and minority rights will be necessary to continue on this path. The current administration's dedication to this reform thus far has already helped Romania gain more credibility in the West and has increased its chances of being adopted into the large family of democratic nations. ⊕

Although the new administration has been in office for less than a year, it has already increased unity within Romania and improved the country's image internationally.

Israel, continued from page 11

use of the methods have prevented ninety large-scale terrorist attacks in the last two years, including helping the GSS find and defuse unexploded bombs.

The argument that some force should be allowed against one person to prevent the potential murder of hundreds is persuasive. There is a significant risk, however, that allowing force to be used to obtain information, even in the most extreme cases, could lead to the erosion of human rights standards.

Israel faces serious threats to its national security, and undoubtedly suffers at the hands of violent terrorist groups that advance their political agenda by engaging in indiscriminate killing of the civilian population. The argument that some force should be allowed against one person to prevent the potential murder of hundreds is persuasive. There is a significant risk, however, that allowing force to be used to obtain information, even in the most extreme cases, could lead to the erosion of human rights standards. Israel and the international community therefore must find a way to address the growing problem of terrorism in an effective manner without violating the human rights of those accused or suspected of such crimes. ⊕

This article does not address the case of *Association of Civil Rights in Israel v. The Prime Minister, et al.* (HCJ 4045/95) because a decision has not yet been issued by the HCJ. In that case, the detainee 'Abd Al-Samad Harizat died as a result of violent shaking during the interrogation process. The decision has been pending for more than a year, and in the meantime, the Court has refused to issue interim injunctions prohibiting the use of this method. For a detailed discussion of this ongoing case, see Amnesty International's October 1995 report "Death By Shaking: The Case of 'Abd Al-Samad Harizat."