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Public Committee against Torture in Israel v State of Israel Case (Isr)

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Yoram Rabin, Assaf Meydani

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A. Synopsis

1. *Public Committee against Torture in Israel et al v The State of Israel et al* is a decision handed down by the → *Supreme Court of Israel (Beit HaMishpat HaElyon)* sitting as the High Court of Justice (HCJ), led by President A Barak, on 6 September 1999. In its interrogations, the Israeli General Security Service (GSS) made use of methods that included subjecting suspects to 'moderate physical pressure' in accordance with the relevant directives, which allowed for such measures if necessary to immediately save human life. The petitioners challenged the legality of these methods. The HCJ held that the GSS did not have the requisite legal authority to employ the methods challenged by the petitioners. The Court also held that while the 'necessity defence' in Israeli penal law could exempt GSS investigators ex-ante from criminal liability for such interrogation practices, it could not in and of itself be considered sufficient authority in advance for their use.

B. Background

2. The Court's decision included an explicit recognition of the fact that ever since it was established, the State of Israel has been engaged in an unceasing struggle for its security. Terrorist organizations have set Israel's annihilation as their goal and do not distinguish between civilian and military targets, nor between men, women and children (→ *terrorism*). They have carried out terrorist attacks in which scores were murdered in public areas—in areas of public transportation, city squares and centres, theatres and coffee shops.

3. In 1987, the Israeli government appointed the Commission of Inquiry Regarding the Interrogation Practices of the GSS with Respect to Hostile Terrorist Activities (hereinafter the Commission). The Commission, headed by former Supreme Court President, Justice M Landau, was tasked with examining the GSS's methods of interrogating terrorist suspects. The Commission concluded that in cases where the saving of human lives requires obtaining certain information, the investigator is entitled to apply both psychological pressure and 'a moderate degree of physical pressure'. Therefore, when such danger exists, the 'necessity defence' would be applicable to an investigator who applied a degree of physical pressure proportionate to the danger to human life, as long as it did not constitute abuse or torture of the suspect. The Commission was convinced that its conclusions were not in conflict with international law but rather were consistent with both the → *rule of law* and the need to protect the security of Israel and its citizens effectively (→ *international human rights law and municipal law*). The Commission approved the use of a 'moderate degree of physical pressure', which could be applied under stringent conditions. Directives to this effect were set out in the second, secret part of the Commission's report. The Commission's recommendations were approved by the government, and the compliance of the GSS with the directives was made subject to the supervision of bodies both internal and external to the GSS.

4. The HCJ's decision dealt with a number of petitions, some brought by suspected terrorists and some by public organizations, about the application of physical and psychological pressure by the GSS for interrogation purposes. The specific means of pressure that the petitioners cited included the forceful and repeated shaking of the suspect's upper torso; seating a suspect with a sack over his head and his hands tied behind his back for long periods while loud music was blaring; use of excessively tight cuffs on the suspects' hands or legs; and extensive sleep deprivation.

5. It is also worth mentioning that the first petitions in this case were filed in 1994 but were left undecided for more than five years. Eventually, President Barak ruled that the HCJ would hear the petitions before an expanded panel of nine judges (instead of the ordinary panel of three judges), and the first meeting was scheduled for May 1998. The ruling was a year later in May 1999.

C. The Petitioners' Legal Arguments

6. The petitions raised three essential arguments. First, they maintained that the GSS is never authorized to conduct interrogations. Second, they argued that the physical means employed by the GSS investigators not only infringe the human dignity of the suspect undergoing interrogation but also constitute criminal offences (→ *dignity and autonomy of individuals*). Third, they claimed that these methods violate international law, because they constitute 'torture'. The petitioners claimed that since Israel is a party to both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the → *International Covenant on Civil and Political Rights (1966)* (ICCPR), it must prohibit torture (→ *prohibition of torture*) even during a → *state of war* or other public emergency.

D. The State's Legal Arguments

7. According to the State of Israel, the authority of the GSS investigators to interrogate those suspected of committing crimes against the security of Israel stems from the government's general and residual powers, as per Article 40 of the Basic Law: the Government. With respect to the physical means employed by the GSS, the State argued that these methods do not violate international law. Moreover, citing the 'necessity defence' of Art. 34(11) of the Penal Law of 1977, the State argued that these means are legal under domestic Israeli law (→ *history and concepts of emergency*; → *types and effects of emergency*).

E. The Ruling of the Court

8. The HCJ, led by President Barak, ruled unanimously against the State of Israel, finding that the GSS did not have the authority to use the various physical methods of interrogation on terrorist suspects. It reached this decision based on a number of important legal determinations.

1. The Government's General Residual Powers

9. Article 40 of the Basic Law: the Government, which authorizes the government to perform 'all actions which are not in the jurisdiction of another authority'—are limited to situations where an 'administrative vacuum' exists. As such, this residual power cannot serve, in and of itself, as the basis of the authority for the GSS, as an organ of the government, to conduct interrogations. In this area, there is no such 'administrative vacuum', because 'the field is entirely occupied by the principle of individual freedom'.

2. The Authority to Interrogate

10. The HCJ held that no Israeli legislation granted the GSS special powers of interrogation, and therefore the GSS had the same authority as regular police to conduct interrogations (→ *powers and functions of the police*):

> The power to interrogate granted to the GSS investigator is the same power the law bestows upon the ordinary police investigator. The restrictions upon the police investigations are equally applicable to GSS investigations. There is no statute that grants GSS investigators special interrogating powers that are different or more significant than those granted the police investigator. From this we conclude that a GSS investigator, whose duty it is to conduct the interrogation according to the law, is subject to the same restrictions applicable to police interrogators. (para. 32)

3. A 'Reasonable Investigation' and Human Rights

11. The HCJ ruled that:

> a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation … Human dignity also includes the dignity of the suspect being interrogated. (para. 23)

4. International Law

12. The conclusion that the GSS did not have the authority to use the various physical methods of interrogation accords with international treaties to which Israel is a signatory, which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment'. These prohibitions are 'absolute'. There are no exceptions to them, and there is no room for equivocation (para. 23).

5. Necessity Defence

13. The State's position was that by virtue of the necessity defence against criminal liability, as provided in s. 34(11) of the Israeli Penal Law, GSS investigators were authorized to apply physical means in the appropriate circumstances and in the absence of other alternatives, in order to prevent serious harm to human life or limb (the situation of a 'ticking bomb'). The Court rejected this claim, ruling that the authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be inferred from the 'necessity defence'. The 'necessity defence' does not constitute a source of authority, which would prospectively allow GSS investigators to make use of physical means during the course of interrogations. The Court noted that its decision did not negate the possibility that the 'necessity defence' would be available post factum to GSS investigators—either in the choice made by the Attorney General in deciding whether to prosecute or according to the discretion of the court if criminal charges were brought against them.

14. The HCJ also concluded that:

> According to the existing state of the law, neither the government nor the heads of the security services have the authority to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of an interrogation itself. Similarly, the individual GSS investigator—like any police officer—does not possess the authority to employ physical means that infringe on a suspect's liberty during the interrogation, unless these means are inherent to the very essence of an interrogation and are both fair and reasonable. (para. 38)

15. The HCJ also determined as follows:

> An investigator who employs these methods exceeds his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the 'necessity defence.' Provided the conditions of the defence are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the 'necessity defence' does not bestow authority, the lack of authority does not negate the applicability of the necessity defence or of other defences from criminal liability. The Attorney General can establish guidelines regarding the circumstances in which investigators shall not stand trial, if they claim to have acted from 'necessity.' A statutory provision is necessary to authorize the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary 'law of investigation' and in order to provide the individual GSS investigator with the authority to employ these methods. The 'necessity defence' cannot serve as a basis for such authority. (para. 38)

6. Importance of Legislation

16. The issues at stake necessitate that any decision whereby physical means would be sanctioned must be taken, after proper debate, by the legislative branch, which represents the people. Any such legislation would, of course, have to be in line with the relevant constitutional limitations, including Article 8 of the Basic Law: Human Dignity and Liberty, whereby any infringement of individual rights must be no greater than necessary and in accordance with legislation befitting the values of the State of Israel and enacted for a proper purpose.

F. Significance of the Case

17. Over the years the *Public Committee against Torture* ruling has been the subject of a debate in the study of security, democracy and human rights (see for example Nourafchan). Some criticized the ruling for allowing certain methods of interrogation (see Rubel 723–4), and others emphasized the fact that for the first time a Supreme Court interfered in the work of an intelligence security agency. It must be noted too that, in the wake of the HCJ decision, the Knesset did enact legislation, with the General Security Service Law passed in 2002. This law establishes a legal framework for the activity of the GSS. Section 7(a) of the Act stipulates that:

> The GSS is charged with maintaining the security of the state and the democratic regime and its institutions against the threat of terrorism, sabotage, subversion, espionage and the disclosure of state secrets. Furthermore, the GSS will safeguard and promote other vital national interests of the national security state, as determined by the government and subject to the law.

18. However, the law states, generally that: 'To fulfil its functions, the GSS […] will be granted official police powers … as may be prescribed by regulations or rules, in consultation with the Minister in charge of any enactment' (Art. 8(b)). The law does not grant the GSS special investigative authority and does not mention the interrogation methods that were discussed in the HCJ's decision (and rejected). In 2016, the Fight against Terrorism Law was passed, which provides a detailed set of specifications about issues related to the fight against terrorism. However, it also does not authorize the General Security Services to use special interrogation techniques that were rejected in the decision.

19. At any rate, the verdict must be seen as a courageous judicial decision. The HCJ could very well have used juridical or procedural tools (such as the doctrine of 'non-justiciability') and declined to make a substantive decision in the case, but instead delved into the issue, forthrightly, on its merits. Moreover, notwithstanding the Court's recognition of the immense difficulties facing a society dealing with ongoing terrorist attacks, the HCJ emphasized the importance of protecting human rights—including those of the suspected terrorists themselves—even to the point of placing concrete and substantial limitations on the methods that society and its security agencies may use as part of their defensive war against terror.

20. President Barak concludes the judgment by acknowledging this harsh reality:

> We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open to it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit, and this strength allows it to overcome its difficulties. (para. 38)

21. Three years after the ruling, and after the terrorist attack on the United States on 11 September 2001, the ruling of the Israeli High Court of Justice served as the foundation for several courts in other democratic countries, who, like Israel, were also forced to deal with terrorist threats

(including dealing with complaints regarding the illegality of the methods used to interrogate the terrorists). For example, the → *Supreme Court of Canada (Cour suprême du Canada)* relied on President Barak's decision in its ruling that discussed the constitutionality of various sections of the Criminal Code of Canada. The Canadian Code gave special powers to conduct investigations of terrorism that were added to the Canadian Code right after the terrorist attacks of 2001 (Application Section 83.28 of the Criminal Code, [2004] 2 SCR 248). Based on the judgment of President Barak, the Canadian Supreme Court ruled that:

> The challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy. (260–261)

22. The reliance on the judgment of the Israeli Supreme Court is evident in other Canadian legal decisions (*Canadian Security Intelligence Service Act (Re)* (2008 (Can); *Khadr v Canada (Prime Minister)* (2009) (Can); *United States of America v Khadr* (2011) (Can); *Presse ltée (La) c Service des poursuites pénales du Canada* (2016) (Can)). We can hear echoes of the High Court of Justice's decision in the rulings of the Federal Court in Australia (*Al-Kateb v Godwin* (2004) (Austl)) and in the judgments of the House of Lords in the United Kingdom (*A v Secretary of State for the Home Department* (2005) (UK); *A v Secretary of State for the Home Department* (2006) (UK)) as well as in the decision of the US Court of Appeals for the Ninth Circuit in the case of *Padilla v Yoo* (2012) (US).

Select Bibliography

Amand, M, 'Public Committee against Torture in Israel v The State of Israel et el: Landmark Human Rights Decision by the Israel High Court of Justice or Status Quo Maintained?' (2000) 25 North Carolina Journal of International Law and Commercial Regulation 655.

Bernsmann, K, 'Private Self-Defense and Necessity in German Penal Law and in the Penal Law Proposal—Some Remarks' (1989) 30 Israel Law Review 171.

Dershowitz, AM, 'Is it Necessary to Apply Physical Pressure to Terrorists—And to Lie about It?' (1989) 23 Israel Law Review 192.

Evans, MD, and Morgan, R, *Preventing Torture* (Oxford University Press 1999).

Feller, SZ, 'Not Actual Necessity but Possible Justification; Not Moderate Pressure, but Either Unlimited or None at All' (1989) 23 Israel Law Review 201.

Greenberg, SJ, 'Torture of Terrorists in Israel: The United Nation and the Supreme Court of Israel Pave the Way for Human Rights to Trump Communitarianism' (2000–2001) 7 ILSA Journal of International and Comparative Law 539.

Grosso, CM, 'International Law in Domestic Arena: The Case of Torture in Israel' (2000–2001) 86 Iowa Law Review 305.

Gunneflo, M, *Targeted Killing: A Legal and Political History* (Cambridge University Press 2016).

Kremnitzer, M, 'The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the 'Needs' of the Security Service?' (1989) 23 Israel Law Review 216.

Lyne, T, 'Lessons on Lesser Evils: Israel and the Prohibition against Torture' (2006) 14 Israel Law Review 207.

Moor, MS, 'Torture and the Balance of Evils' (1989) 23 Israel Law Review 280.

Nourafchan, N, 'Judging Torture: Lessons from Israel' (2011–2012) 43 Georgetown Journal of International Law 1259.

Rodley, NS, *The Treatment of Prisoners under International Law* (Clarendon Press 1987).

Rubel, JS, 'A Missed Opportunity: The Ramifications of the Committee against Torture's Failure

to Adequately Address Israel's Ill-Treatment of Palestinian Detainees' (2006) 20 Emory International Law Review 699.

Select Cases

A v Secretary of State for the Home Department [2005] 2 AC 68 (UK).
A v Secretary of State for the Home Department [2006] 2 AC 221 (UK).
Al-Kateb v Godwin [2004] HCA 37 (Austl).
Application under Section 8328 of the Criminal Code [2004] 2 SCR 248 (Can).
Canadian Security Intelligence Service Act (Re) (FC) (2008 FC 300) [2008] 3 FCR 477 (Can).
Hussein v Secretary of State for Defence 2013 WL 128618 (2013) (UK).
Khadr v Canada (Prime Minister) [2009] FCJ No 893 (Can).
Padilla v Yoo 678 F3d 748 [2012] US App LEXIS 8934 (US).
Presse ltée (La) c Service des poursuites pénales du Canada [2016] QCCS 2623 (Can).
Public Committee against Torture v Israel HCJ 5100/94 (6 September 1999) (Isr).
United States of America v Khadr [2011] OJ No 2060 (Can).