

OPINION
CONCERNING THE LEGALITY OF THE PARTICIPATION BY THE
ISRAELI MINISTRY OF PUBLIC SECURITY IN A RESEARCH
PROJECT FINANCED BY THE EUROPEAN UNION

I. Introduction.

I have been asked to give my opinion concerning the legality of the participation by the Israeli Ministry of Public Security (“IMPS”) in “Law Train” (“LT”), a research project financed by the European Union under the Horizon 2020 Research and Innovation Programme.

From the information given to me, it appears that LT started in May 2015. It is aimed at “harmonizing and sharing interrogation techniques between the countries involved in order to face the new challenges in transnational criminality”. The project is coordinated by the Bar Ilan University of Israel and includes IMPS, the Belgian Federal Public Service Justice, the Spanish Civil Guard and some private actors including the Catholic University of Leuven (Belgium). The Portuguese Ministry of Justice was initially involved but pulled out of the project in August 2016. The project will run until 30th April 2018 and has a budget of 5,095,687.50 Euros, half of which will be transferred to the Israeli institutions involved.

I understand that the compatibility of LT with applicable EU, national and international rules and legislation, including the European Convention on Human Rights, has been evaluated by an independent expert panel put in place by the Commission, and that the result had been “Good to excellent compliance”. The Commission also recently conducted a technical review of LT consisting of an in-depth examination of the project implementation ; this confirmed compliance with the work plan. ¹

However it does not appear that this review included an evaluation of the project in the light of the provisions of the EU Financial Regulation. ² The purpose of the present opinion is to remedy that omission.

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Answer given by Commissioner Moedas on behalf of the Commission to Parliamentary question n° E-008769/2016 of Ms Ana Gomes.

² Regulation (EU, Euratom) n° 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, O.J. L 298/1 of 26.10.2012, as amended by Regulation (EU, Euratom) n° 2015/1929 of the European Parliament and of the Council of 28 October 2015, O.J. L 286/1.

2. Relevant legal provisions.

1° Article 106(1)(c) of the **Financial Regulation** provides that an economic operator shall be excluded from participating in procurement procedures where :
“it has been established by a final judgment or a final administrative decision that the economic operator is guilty of grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession to which the economic operator belongs...”

This exclusion has been extended to applicants and beneficiaries of grants³, to participants in and winners of prizes⁴ and to final recipients of financial instruments.⁵ It is therefore relevant to the question examined in this opinion.

2° Article 1 of the **International Convention against Torture and Other Cruel, Inhuman or Degrading Punishment** (“ICT”), adopted by the United Nations General Assembly on 10 December 1984 and ratified by Israel in 1991 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 information or a confession, punishing him for an act which he or another person has committed or is suspected of having committed, of intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

According to Article 4 ICT:

“ Each State is obliged to ensure that all acts of torture are offenses under criminal law, as well as attempts to commit torture or complicity or participation in torture.”

3° Article 7(1) of the **Rome Statute of the International Criminal Court** lists, among the crimes against humanity :
“(f) Torture”.

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Article 131(4) FR.

⁴ Article 138(2) FR.

⁵ Article 139(5) FR.

According to Article 8(2)(a) of the Rome Statute, “war crimes” means :

“Grave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention :

...

(ii) Torture or inhuman treatment

...

(vii) Unlawful deportation or transfer or unlawful confinement”.

4° Article 4 of the **Charter of Fundamental Rights of the European Union** reads as follows :

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

5° Article 4(1) of the **Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War** (“FGC”) signed on 12 August 1949, defines “protected persons “ as follows :

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or the Occupying Power of which they are not nationals.”

Article 76, paragraph 1 FGC specifies that :

“Protected persons accused of offenses shall be detained in the occupied territory, and if convicted they shall serve their sentences therein.

Article 147 FGC provides that :

“Grave breaches to which the preceding article relates shall be those involving any of the following acts if committed against persons or property protected by the present Convention : (...) torture or inhuman treatment, (...) unlawful deportation or transfer or unlawful confinement of a protected person(...).”

3. Summary of opinion.

This opinion will show that the IMPS is guilty of grave and continuing breaches of the provisions cited in paragraph 2 above.

Since these breaches constitute grave professional misconduct within the meaning of Article 101(6) of the Financial Regulation, IMPS should be excluded from LT.

4. Torture.

Israel has not to this day adopted an express prohibition of torture and other cruel, inhuman, degrading punishment. In recommendations issued on 17 May 2016, the UN Committee Against Torture (“UNCAT”) requested that Israel adopt such a provision.⁶ Although it was reported in the press that such a law was under preparation,⁷ no law has yet been adopted. This is a continuing violation of Article 4 ICT.

Moreover, it is well-known that, since at least the start of the occupation of the West Bank and Gaza in 1967 until 1999, torture was routinely practised by Israeli Security Agency (ISA) (formerly titled “General Security Services” or GSS)⁸ when interrogating suspected terrorists.

This has been acknowledged by the Israeli authorities.

In a report prepared in 1987 after public enquiry, a commission headed by former Supreme Court Justice Moshe Landau confirmed that torture had routinely been used by the GSS against Palestinian detainees.⁹ This was condemned by the commission, who nevertheless accepted that “a moderate measure of physical pressure” could be exercised in certain cases. Such pressure, however, could not “reach the level of physical torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity”. The possible use of less serious measures had to be considered and the permitted means of pressure had to “be defined and limited in advance by binding directives”. The practical implementation of these guidelines had to be “strictly supervised” and disciplinary punishment or, in serious cases, criminal proceedings needed to be instituted against offending interrogators. The report laid down guidelines for the use of such “moderate physical pressure” in a classified annex.

The Landau report did not significantly alter the police’s interrogation methods. Complaints continued to be made to the courts. In its 1994 review of the steps taken by Israel to prevent torture, UNCAT considered that the use of “moderate physical pressure” was “completely unacceptable”.

⁶ <http://www.phr.org.il/en/un-committee-torture-recommends-50-measures-israel/>

⁷ See Haaretz, Israel’s Justice Ministry Drawing up Law Against Torture, Yaniv Kubovich, 4 May 2016.

⁸ This is commonly known as the “Shin Bet” or “Shabak”.

⁹ To the best of my knowledge, there does not exist an official English translation the Landau Report. I have based myself on the unofficial translation by the Israeli Government Press Office titled “Report of the Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activities (The Landau Commission)” : http://www.hamoked.org/files/2012/115020_eng.pdf. See also

A further report was prepared by the State controller Miriam Ben Porat who concluded that the limits set by the Landau commission were being systematically overstepped. The report was initially kept secret. It was only made public in 2000 upon recommendation of the Israeli Supreme Court.¹⁰

The matter had indeed been brought before the Supreme Court by the Israeli Public Committee Against Torture. The Court issued its ruling on 6 September 1999.¹¹

The following “special interrogation techniques” were examined by the Court and declared unacceptable :

Shaking : this consists in the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly.

Waiting in the "Shabach" Position : the suspect has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room. Suspects are detained in this position for a prolonged period of time, awaiting interrogation at consecutive intervals.

The "Frog Crouch" : the suspect being interrogated is forced into a "frog crouch" position. This refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals.

Sleep Deprivation : this is a result of being tied in the "Shabach" position, being subjected to the playing of powerfully loud music, or intense non-stop interrogations without sufficient rest breaks. The purpose is to cause the suspect to break from exhaustion.

This judgment, in so far as it condemned the methods described above, was hailed as an important victory in the combat against the use of torture by human rights defenders in Israel and abroad. Unfortunately, it contained a gap which the Israeli prosecutorial authorities did not fail to exploit fully after the judgment was rendered.

¹⁰ http://news.bbc.co.uk/2/hi/middle_east/637293.stm

¹¹ The Supreme Court Judgment of 1999 was translated by the Israel Ministry of Foreign Affairs and reproduced in “International Legal Materials” : 38 I.L.M. 1471 (1999).

Indeed, the Court was prepared to assume that the “necessity” defence could be invoked by investigators prosecuted for having used illegal physical pressure. According to Article 34(1) of the Israeli Penal Code :

“A person will not bear criminal liability for committing an act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things , at the requisite timing, and absent alternative means for avoiding the harm”.

The Court assumed that this defence would be open to an interrogator if he could show that the resort to physical means of pressure was absolutely necessary to prevent serious harm to human life or body ¹². The typical example given was the situation in which a suspect holds information respecting the location of a bomb that was set and will imminently explode. Unless information about its location is obtained and the bomb can be defused, immense harm will be inflicted on a large number of persons. The Court accepted that if, in such a situation, an interrogator was later prosecuted for having applied illegal methods, he could invoke the “necessity” defence and escape punishment.

Nevertheless, the Court made clear that a general authority to establish directives concerning the use of physical means could not be implied from the “necessity” defence since that defence involves a judgment on a individual’s reaction to a given set of facts in the presence of an emergency situation of which the circumstances can be varied and unexpected ¹³. It concluded that neither the government nor the heads of the security services possess the authority to establish directives and bestow authorizations regarding the use of liberty infringing physical means during the interrogation of suspects ¹⁴.

Shortly after the ruling, then Attorney General Eliakim Rubinstein established a “protocol” for the use of torture during interrogation. He thereby ignored the Court’s refusal to condone advance directives or authorizations on the use of torture. The protocol established a procedure allowing the prosecuting authority to “indicate” in advance to investigators whether he will prosecute them in incidents where torture is applied.

Thus, without explicitly legalizing torture, the attorney general may give an advance reassurance to an investigator that he will not prosecute him if the

¹² Paragraphs 33 and 34 of the judgment.

¹³ Paragraphs 35-37 of the judgment.

¹⁴ Paragraph 38 of the judgment.

resort to torture appears “necessary” to avert public harm. This effectively reversed the Supreme Court’s requirement of “no ex-ante authorization”.¹⁵

Under those circumstances, it is not surprising that torture continues to be used by Israeli interrogators. This occurs even in cases where the existence of a “necessity situation” is seriously questionable.

A good example is the Duma Arson case, since the suspects, contrary to the usual situation, were not Palestinian but Israeli nationals and the recourse to torture was extensively reported in the media. Two Israeli youths from a settlement in the West Bank were arrested for having firebombed a Palestinian family’s home during the night in late July 2015, resulting in the death of the parents and a four-month old baby. During the investigation, the main suspects remained silent. As the investigation “remained stuck in mud”, it was reported in December 2015 – and never officially denied - that Attorney General Weinstein had approved the use of torture in the interrogations. This clearly was not a “ticking bomb” situation ; the only pressure came from some parts of public opinion, which complained that the investigation was not proceeding sufficiently swiftly.

This shows that, to be effective, the prohibition of torture must be absolute. As soon as an exception, however carefully circumscribed, is introduced, the prosecuting authorities and the police interrogators are bound to avail themselves of it and to transform what was meant to be an exception into a routine practice. This is the reason why, in its recommendations concerning Israel, UNCAT urged Israel “to completely remove necessity as a possible justification for torture.”¹⁶ This is also why, in its conclusions of 11 December 2006, the EU Council stated that it “remains firmly committed to the absolute”¹⁷ prohibition against torture, cruel, inhuman or degrading treatment or punishment”.

The Israeli Supreme Court’s effort to both authorize and, simultaneously, limit as far as possible the use of torture was bound to fail, and did actually fail.

It can therefore be asserted by way of conclusion that the ISA today regularly infringes Article 1 UCT with total impunity. This constitutes not only a grave breach of the 4th Geneva Convention¹⁸ but also a crime against humanity.¹⁹

¹⁵ Itamar Mann, The Law Behind Torture, <http://bostonreview.net/blog/itamar-mann-torture-necessity-legal-israel-united-states>.

¹⁶ See above, footnote 6.

¹⁷ Emphasis added.

¹⁸ Article 147 FGC.

¹⁹ Article 7(1)(f) Rome Statute of the International Criminal Court..

5. Unlawful transfer or confinement.

Several thousands of Palestinian security detainees and prisoners have been held in prisons situated in Israel - and not in the Occupied Palestinian Territory.²⁰ This makes it in practice very difficult, if not impossible, for their families to exercise their right to visit.

These prisons are operated by the Israel Prison Services (“IPS”), which are part of the IMPS.

This is a clear violation of Article 76(1) FGC.

Moreover, the unlawful transfer or confinement of a protected person (such as a Palestinian prisoner or detainee) constitutes a grave breach of the FGC. It is also a war crime.²¹

6. Attribution of liability.

The IPS are part of the IMPS.²² Liability for the violation of Article 76(1) FGC is therefore attributable to that Ministry.

The situation is at first sight different as regards the ISA, since it answers directly to the Prime Minister. However it works in close cooperation both with the Israel Police and with the IPS which are both part of the IMPS. Arrests of terror suspects are often carried out jointly by the Israeli Police and the ISA. Interrogations by the ISA are carried out within precincts operated by the IPS.²³ The Israel Police and the IPS are at least complicit in the violations of Article 1 ICT committed by the ISA.

Moreover in its judgment of 1999 the Supreme Court of Justice stated that the ISA²⁴ and the Israel Police have the same powers of interrogation and are subject to the same restrictions as regards interrogation methods. Thus, when allowing the use of “moderate physical pressure” in case of “necessity”, the Supreme Court allowed not only the ISA but also the Israel Police to use these methods.

²⁰ Except for the prison in Ofer.

²¹ Article 147 FGC, in conjunction with Article 8(2)(a)(vii) of the Rome Statute of the International Criminal Court.

²² <http://mops.gov.il/English/Pages/HomePage.aspx>.

²²

²³ Thus it was reported that Palestinian security detainees undergo interrogations by the ISA in the Shikma prison facility, which is one of the prisons operated by the IMPS : <http://www.independent.co.uk/news/world/middle-east/palestinian-detainees-incarcerated-by-israel-at-shikma-prison-held-in-hellish-circumstances-a6892406.htm>

²⁴ Then called « General Security Services ».

It must therefore be concluded that the Israel Police's and the IPS's complicity, if not direct participation in, the violations of Article 1 ICT committed by the ISA, are attributable to the IMPS.

7. Grave professional misconduct.

It has been demonstrated that the IMPS :

- through its control over the Israel Police and the Israeli Prison Services,**
- through the close cooperation of the Israel Police and the Israeli Prison Services with the ISA during the arrest and interrogation of detainees and in their detention,**
- and (in the case of the Israeli Prison Services) through their operation of detention facilities for Palestinian suspects outside the Occupied Palestinian Territory,**

has engaged and continues to engage, either as author or accomplice, in crimes against humanity and in war crimes.

Since it cannot be denied that the prohibition of crimes against humanity and war crimes such as torture and the unlawful transfer or confinement of persons protected under the FGC are part of the “applicable laws” of the EU and of its Member States,²⁵ it follows that the IMPS has violated “applicable laws”, thereby making itself guilty of “grave professional misconduct” within the meaning of Article 106(1)(c) FR.

It could be objected that Article 106(1)(c) FR requires that the “grave professional misconduct” should be established by a final judgment or administrative decision. This requirement is normal in the usual case, where there is room for argument as to whether the existence of alleged misconduct is sufficiently serious and well-established as to be ground for exclusion under the regulation.

In the situation we are examining, the only question as to which some doubt could have arisen concerns the interrogation methods used by the ISA. However, in that case, the existence of a “violation of applicable laws” has been finally established by the Israeli Supreme Court in its 1999 judgment. It has never been alleged that the situation had materially changed since then. Thus the applicability of Article 106(1)(c) FR is beyond any doubt.

²⁵ As confirmed by Article 4 of the EU Charter of Fundamental Rights, cited *supra* in paragraph 2, and by the EU Council conclusions of 11 December 2006, cited *supra* in paragraph 4.

As regards the unlawful detention of prisoners (violation of Article 76(1) FGC), no doubt can arise. There is therefore no need for a judgment or administrative decision to establish it.

8. Conclusion.

The IMPS should be excluded from participating in LT.

Brussels, 10 April 2017.

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