Analysis: High Court on collision course with ICC over enhanced interrogation

December 15, 2017

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The Jerusalem Post

http://www.jpost.com/Israel-News/Israel-High-Court-on-collision-course-with-ICC-over-enhanced-interrogation-518153

Whatever one thinks about the Supreme Court’s landmark decision regarding Shin Bet (Israel Security Agency) interrogations that use extreme-pressure methods, it may put the court on a collision course with the International Criminal Court.

This is because much of the world and the human-rights community, which the ICC often agrees with, views any pressure interrogation methods as torture and potentially a war crime.

In fact, the ICC Prosecutor’s Office last month opened a full war-crimes criminal investigation against the US, alleging CIA and other operatives engaged in systematic torture of detainees.

Israel’s Supreme Court was always unique in that it had established a category of “moderate physical pressure” that could legally be used on terrorist detainees to help the Shin Bet get information to stop an imminent attack.

Moderate physical pressure in Israel might mean exposing a detainee to some amount of pain, such as sitting in a bent-over position or slapping, but banning more extreme and painful methods, such as beating or waterboarding.

After September 11, 2001, the US used even harsher “enhanced interrogation” methods than Israel uses, including waterboarding, against terrorists as part of the war on terrorism.

Some other democratic countries have used disputed interrogation methods on occasion, such as England in Northern Ireland and Iraq, and France in Algeria.

But the US outlawed virtually all of these methods in 2015, and no democratic country in the present era has defended the legality of such methods or established normative legal principles relating to them quite like Israel.

Israel has responded to its critics that no country faces the same amount of constant imminent terrorist threats, that the methods are rarely used and well-regulated, and that they save lives.

In a sense, none of that is new.

What is new as of Wednesday is that the Supreme Court refused to order a criminal investigation even in a rare case where the Shin Bet admitted on record to using extreme pressure, saying the preliminary review of the allegations, which closed the file, was sufficiently serious.

But in a preliminary review, the Shin Bet agents cannot be questioned under caution, only interviewed.

From the ICC Prosecutor’s recent explanation of its reason for criminally investigating US interrogations, it is highly unlikely that it will accept Israeli investigations as valid, which did not question the interrogators under caution.

Until now, many presumed that even though the Israeli legal system had not had a criminal investigation of any of 1,000 alleged torture complaints, a 1999 historic Supreme Court decision might require a criminal investigation in a case where the Shin Bet admitted it used moderate physical pressure. No longer.

A second aspect of the ruling is likely to seriously perturb the ICC Prosecutor.

The basis for using moderate physical pressure on detainees was the idea of legal necessity. If such methods were the only way to help save lives from a “ticking bomb” imminent terrorist attack, they were justified, the Supreme Court ruled in 1999.

Many presumed that the “ticking bomb” standard meant the Shin Bet could use moderate physical pressure on a terrorist to stop an attack that was likely to occur within a matter of hours or maybe a bit longer.

Honenu, which represents right-wing Jewish activists, had accused the Shin Bet of illegally using moderate physical pressure on some Jewish extremists in 2015, arguing that the “ticking bomb” the Shin Bet claimed was too vague or distant.

NGOs on the Left, such as the Public Committee Against Torture in Israel, had claimed the same and filed the case that the Supreme Court decided Wednesday.

The Supreme Court blew this conception out of the water. It explicitly said finding an explosive belt 17 days after using moderate physical pressure was included within the idea of a “ticking bomb.”

This not only gives the Shin Bet a much freer hand to use extreme pressure in the future (which the security establishment will praise and portions of the Right and the Left will decry), it likely eliminates the possibility of the ICC Prosecutor accepting Israel’s legal structure on the issue.

Crucially, the Supreme Court issued its decision knowing about the ICC’s recent decision to go after the US.

Maybe the ICC Prosecutor never would have accepted using pressure interrogation methods even to stop a terrorist attack that was only hours away. But there is very little likelihood it will accept the new broader definition that the Supreme Court has declared.

Maybe Israel’s only consolation on this issue is the potential relative positive of the ICC Prosecutor going after the US. Since the US will likely ignore the ICC, it may be easier for Israel to do so if the ICC comes after Israel.

But if Israel can use the Hebron shooter case as proof that it prosecutes its own soldiers, it will not be able to use Wednesday’s Abu Gosh ruling for the same purpose.