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ISRAEL

INTERROGATION TECHNIQUES ON BOTH SIDES OF THE GREEN LINE

This report gives an overview of Israeli policy regarding the use of torture or harsh treatment during interrogation. The use of violence against a suspect's body or spirit is illegal under Israeli law. This prohibition applies to all State officials wherever they operate within and outside of the Green Line.

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ISRAEL

INTERROGATION TECHNIQUES ON BOTH SIDES OF THE GREEN LINE

Executive Summary

The use of violence against a suspect's body or spirit is illegal under Israeli law. The prohibition applies to all State officials, including investigators of the Israel Security Agency (formerly the General Security Service, or GSS) and Israel Defense Forces wherever they operate, within or outside of the Green Line.

In its 1999 leading decision the Supreme Court outlawed the use of any "brutal or inhuman means" in the course of an investigation. The Court defined a reasonable investigation as "one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever." The Court further specifically clarified that these prohibitions are "absolute." Therefore no exceptions are recognized, including the "ticking bomb scenario," where there exists a concrete level of imminent danger of the explosion's occurrence.

Interrogators who violated the above prohibitions in cases involving the "ticking bomb scenario" may avail themselves to the defense of necessity if criminally indicted. The defense of necessity, however, is very narrow. The Court emphasized that the lifting of criminal liability in appropriate cases does not infer a pre-authorization to infringe upon a suspect's human rights.

Immediately following the September 6, 1999, decision a directive was issued by the Israel Security Agency (ISA) requiring all personnel to adhere to the Court's ruling. ISA employees are required to attend training programs on proper investigative techniques.

The complete prohibition on the use of physical pressure in the interrogation of suspected terrorists was expressly pronounced by Supreme Court in 1999. The Court's decision was preceded by an intense debate in the Israeli society over the appropriateness of using means that are unlawful in interrogations of "regular" criminal suspects in those interrogations of suspected terrorists. The debate was sparked by two scandals that occupied public attention in the 1980s. Strong condemnation by the Supreme Court in one case and political pressure in both led to the appointment of a Commission of Inquiry chaired by retired Justice Moshe Landau. The Landau Commission report expressed preference for "non-violent psychological pressure" as a tool of interrogation, but authorized the use of a "moderate degree of physical pressure" in cases where psychological pressure is not useful. The Commission's recommendations regarding the latter were clearly voided by the 1999 Supreme Court decision.

This report describes the events leading to the establishment of the Landau Commission, the Commission's report and its rejection by Israel's High Court in 1999. The report presents Israel's lessons in its struggle to balance the conflicting interests of protecting public and state security on the one hand and the democratic principles protecting human dignity and liberty on the other.

I. Introduction

The issue of the interrogation techniques of terrorist suspects has occupied the agenda of Israel's public, media, politicians and courts alike for many years. In accordance with Basic Law: Human Dignity and Liberty,¹ and with case law that had been developed by the Supreme Court even before the enactment of this Basic Law, “[f]undamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free.”²

The prohibition against torture and other cruel, inhuman or degrading treatment or punishment is anchored not just in Israel's constitutional law. Israel's Penal Law³ prohibits torture by prohibiting “oppression by a public servant,”⁴ as well as “blackmail with use of force”⁵ and “blackmail by means of threats.”⁶ In addition, Israel signed the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Convention) on October 22, 1986, and deposited its instrument of ratification with the Secretary-General of the United Nations on October 3, 1991. In accordance with Article 27.2 of the Convention, the Convention entered into force for Israel on November 2, 1991.⁷

The reality in which Israel has been struggling for its existence since its establishment has undoubtedly posed a challenge to Israel's democratic principles and its commitments under international law. Terrorist organizations have set Israel's annihilation as their goal. Terrorist methods, cruel and inhuman, were used against military as well as civilian targets, without distinction between men, women, children and the elderly. Israel's Security Agency (ISA), formerly named the General Security Service (GSS), being responsible for fighting terrorist activities, has been successful in preventing many attacks, including suicide bombings, attempts

¹ See Basic Law: Human Dignity and Liberty (5752 – 1992), as amended, Knesset (Israel's Parliament) website, available at www.knesset.gov.il (official source). The Basic Law is accorded with a higher normative status than regular laws, see CA 6821/93 Bank Hamizrahi Hameuchad Ltd. et al v. Migdal Kfar shitufi, 49(4) Piske Din [Decisions of the Supreme Court, hereinafter PD] 221 (5755/56-1995) (official source).

² *Id.*

³ Laws of the State of Israel (hereinafter LSI), Special Volume, Penal Law, 5737-1977, as amended.

⁴ *Id.* § 277.

⁵ *Id.* § 427.

⁶ *Id.* § 428.

⁷ *Committee Against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention, Israel, U.N. Doc. CAT/C/54/Add.1 (2001)*, UNIVERSITY OF MINNESOTA, HUMAN RIGHTS LIBRARY, available at <http://www1.umn.edu/humanrts/cat/israel2001.html>.

to detonate car bombs, kidnappings of citizens and soldiers, attempts to hijack buses, murders and the placing of explosives.⁸ Prevention of terrorist attacks from being carried out requires intelligence. Sometimes the only way to obtain crucial information to prevent attacks is by interrogating suspected terrorists.

This report explores Israel's response to the challenge of protecting public and state security while preserving its democratic character and its obligations under the convention. It describes the events and changes of approach to the legality of use of physical pressure in ISA's interrogations. The report details the background of the Landau Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity,⁹ and the report issued by the Commission (hereinafter the Landau report). An analysis of the legal developments following the issue of the Landau Commission report, culminating with the 1999 Supreme Court decision outlawing torture also is provided.¹⁰ This report further addresses the potential criminal liability of an investigator who violates the law and the possible use of the "necessity defense" in such circumstances.

II. Events Leading to the Landau Commission

1. *The No. 300 Bus Affair*

On April 12, 1984 four terrorists took control of a bus on the "300 route" and held its passengers hostage. During the hostage taking one passenger was injured. The next morning at dawn Israel Defense Forces (IDF) swarmed the bus and released its passengers. During the rescue operation one passenger and two of the four terrorists were killed. Photographs showing the remaining two terrorists being led, walking handcuffed by IDF soldiers, out of the bus were first published in foreign and then by Israeli media, contrary to Israeli censorship law at the time. In a statement made on April 13, however, an IDF spokesperson stated that all four terrorists were killed without providing any details regarding the circumstances of the death of the two terrorists who were seen and photographed as having survived the rescue operation. In a later announcement the IDF spokesperson stated that while the first two terrorists were killed during the rescue operation, the other two died later on the way to the hospital. The discrepancy between the media reports and the IDF official statements created a public and political scandal. Not only was the role of the military censorship questioned in this case, but also, considering the undisputable fact that two terrorists died in captivity, the character of the IDF, and its basic norms of ethics became a focus of scrutiny.

⁸ HJC 5100/94 Public Committee Against Torture in Israel v. The State of Israel et al. 53(4) P.D. 817 (5759/60-1999); *Judgments of the Israel Supreme Court: Fighting Terrorism Within the Law*, ISRAEL SUPREME COURT 27-28 (2004).

⁹ COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY, REPORT, Part One at 1, State of Israel (English translation provided by the Government Press Office, Jerusalem, October 1987) (hereinafter Commission of Inquiry).

¹⁰ *Id.* at 54.

Under mounting pressure, Moshe Arens, the Minister of Defense at the time, ordered the establishment of an investigative committee under the Military Justice Law, 5715-1955,¹¹ as amended. The committee, headed by Commander Zorea, operated from April 26 to May 18, 1984. In spite of the secrecy surrounding its proceedings, it became known that, during its twenty days of activity, the committee members heard dozens of witnesses, including military, police and members of the General Security Service, as well as reporters and media photographers.¹²

According to unclassified parts of the Zorea committee's report, the two surviving terrorists received severe blows to their heads and bodies during the rescue operation, in order to subdue them and to prevent the possible activation of explosives. The committee further found that the two were immediately taken off the bus and moved to an adjacent area for preliminary interrogation as well as to verify if there were any traps on the bus. During this time the terrorists were subjected to additional severe blows; the committee, however, could not specify the time of and the identity of those responsible for the death of the two.

The committee held that the security forces were not given any instructions to kill the surviving terrorists; at the same time, however, there were no instructions on how to treat captured terrorists. Moreover, there were no arrangements for prevention of access to unauthorized persons to the area. The report states suspicions that several members of the security force violated the law; it was further recommended that they be investigated in order to determine if further legal measures should be taken.¹³

An investigation headed by the State Attorney Yona Baltman recommended several indictments against high-ranking IDF and GSS officers. The interrogation of the GSS witnesses during the State Attorney's investigation, however, precipitated major concerns in regard to practices used by the GSS in providing evidence to the court.

Inside the GSS "those who share secrecy" reorganized Persons who appeared before the investigators were given relevant instructions, and were summonsed to preliminary conversation with the legal advisors of the GSS for guidance. At the day of testimony every witness was summonsed to the GSS offices and provided with guidance. At the end of testimony the witness would return to the office and report on his investigation.

The GSS legal advisors did not tend to leave any possibility for deviation from the line of testimony dictated by them, not only were the witnesses who participated in killing the terrorists guided and rehearsed, also witnesses who participated or were present during the beating before the killing were summonsed to the office and prepared for giving testimony, even if they had no connection to the killing act. As remembered, the GSS resorted to a line of total and complete rejection of both any responsibility for the terrorists' death but also for their beatings. ... The legal advisors explained to the persons who were guided that the purpose of the cover-up was to prevent the exposure of

¹¹ 9 LSI 184 (5715-1954/55).

¹² ILAN RACHUM, THE SHABAK (Hebrew abbreviation of the General Security Service) AFFAIR 67 (1990, in Hebrew).

¹³ *Id.* at 70.

one of the highest secrets of the GSS, and that there was a suspicion that if disclosed, it would cause severe harm to state security.¹⁴

The scandal led to a questionable clemency granted by the President to GSS officers for their involvement in any offenses related to the bus no. 300 affair.¹⁵

Revelations made regarding the bus no. 300 affair also led to a disclosure of the cover-up and false testimony by GSS investigators in another trial, referred to as the *Nafsu* case. It became known that in testimony given by a GSS officer, Yosi Genosar, regarding his share in the cover-up of false testimony before the Zorea committee, the officer argued that such objections and hiding of facts were common GSS practices. Although details of the testimony itself were classified, “it cannot be assumed that he did not specify to which cases he meant. If he did so, there is little doubt that he bothered to mention the most striking one - that in which an IDF officer, Nafsu, was convicted for the offense of treason.”¹⁶

2. *The Nafsu Case*

Izzat Nafsu was an IDF officer who was convicted by a military court of serious offenses including treason and assistance to the enemy at war in accordance with the Military Justice Law, 5715-1955¹⁷ and the Penal Law, 5737-1977.¹⁸ Nafsu’s conviction was based mainly on his confessions. In a special procedure (“trial within the trial”) held concerning the evidentiary value of his confessions Nafsu maintained that

[d]uring his interrogation GSS interrogators committed acts of violence against him, which included pulling his hair, shaking him, throwing him to the ground, kicks, slaps and insults. He was ordered to strip and was sent to take a shower with cold water. He was prevented from sleeping for hours at a stretch, during the day but chiefly at night, and was forced to stand in the yard of the prison premises for long hours also when he was not being interrogated. He was also threatened with the arrest of his mother and wife, as well as with the publication of personal information about himself that the interrogators possessed.¹⁹

The appellant’s allegations specified above were

[d]enied in the testimony under oath of the interrogators. ... The Court Martial preferred their denial over Nafsu’s testimony, and after weighing the evidence, in a very detailed

¹⁴ RACHUM, Ch. 5, p. 74, *supra* note 12.

¹⁵ RACHUM, Ch. 7, *supra* note 12.

¹⁶ *Id.* at 161-62.

¹⁷ 9 LSI 184 (5715-1954/55).

¹⁸ LSI Special Volume, Penal Law, 5737-1977.

¹⁹ COMMISSION OF INQUIRY, *supra* note 9, Part One 6-7.

judgment, it accepted Nafsu's confessions as truthful and lawfully obtained and convicted him ...²⁰

The military court of appeals did not see a reason for intervention in the lower court's decision because it was based on first hand testimony of the witnesses. The appellant then requested and received permission to appeal to the Supreme Court.

At the opening of the hearing before the Supreme Court the state representative informed the Court that new evidence was disclosed verifying the appellant's claims regarding undue pressure directed at him, that affected his free will, and therefore nullified his confessions. The state representative therefore requested that the court approve a plea bargain reached by both sides. Accordingly, the appellant admitted that he had committed an offense of exceeding authority to the extent of endangering the security of the state, under Sec. 73(a) of the Military Justice Law, 5715-1955.²¹ The offense was committed by his failure to report to IDF his two meetings with a person who first had claimed to be connected to terrorists and was willing to provide IDF important information, and then threatened the appellant, so that the appellant would transfer to him information regarding IDF activities in South Lebanon. Although the appellant refused to provide such information, he never reported these meetings to the IDF

Although the law imposes a five-year imprisonment for the said offense, and in spite of the severity of the circumstances under which the appellant failed to report the conversation, the Court decided to reduce the appellant's penalty to a period of twenty-four months from the date of his arrest and to recommend lowering his rank. The Court considered the fact that at the time of the appeal the appellant already had been incarcerated seven and a half years for a totally baseless offense, namely treason, conviction of which was based on fraudulent and inadmissible testimony of investigators. The Court assumed that the military authorities would consider compensating the appellant who had served a much longer prison sentence than that imposed on him by the Supreme Court.²²

The Court's decision, however, has had a serious impact on future GSS practice concerning interrogation and court appearances. In addressing the GSS investigators' lying under oath before the special military hearing concerning the evidentiary value of the appellant's confessions, the Supreme Court held:

The severity of this conclusion, that reflects the disregard of the said witnesses to the duty to say the truth before a judicial body, should not be underestimated. These acts carry a far-reaching harm to the trustworthiness of agents of the said state arm. This has deprived the court of the ability to determine the appellant's case based on true facts, and has harmed the status and the authority of the court that was misled by the investigators' statements.

²⁰ *Id.*

²¹ 9 LSI 184 (5715-1954/55).

²² CrimA. 124/87 Nafsu v. Major Military Prosecutor, 41(2) Piske Din (Decisions of the Supreme Court, hereinafter P.D.) 631, at 638 (5747/48-1987).

The severe act revealed in this case, as a consequence of which the court relied in its findings and conclusions on admissions regarding which the court was provided with incorrect facts on the way they were derived, requires the adoption of decisive measures in order to eliminate such a phenomenon, and we direct the attention of the Attorney General to this fact.²³

III. The Landau Commission

The *Nafsu* case was the second incident in the same year in which GSS personnel were accused of giving false testimony to courts and investigating committees. In response to the strong condemnation by the Supreme Court in the *Nafsu* decision and political pressure from all the political parties constituting the coalition government, the government decided to establish a commission of inquiry in accordance with the Commissions of Inquiry Law, 5729-1968.²⁴ The Commission was charged with the investigation of methods and procedures of the GSS regarding hostile terrorist activity, and the GSS practices in giving court testimony in connection with these investigations. The government further ordered the Commission to “make recommendations and proposals, as it sees fit, also regarding the appropriate methods and procedures concerning these investigations in the future, while taking into account the unique needs of the struggle against Hostile Terrorist Activity.”²⁵ The Commission was given discretion regarding whether and to what extent to publish its report. On June 2, 1987, the President of the Supreme Court, in accordance with section 4(a) of the Commissions of Inquiry Law, appointed retired Justice Moshe Landau as chairman of the Commission.

The Commission report describes the *Nafsu* case as “the point of departure for (its) ... appointment.”²⁶ It concluded that

this case serves as an alarm and a warning, not only because of the miscarriage of justice to Nafsu himself, but no less because of the corruption inherent in perjury, which was exposed to the light of day and which must now be wholly eradicated.²⁷

After reviewing the testimony of forty-two witnesses, including Prime Ministers, GSS heads and personnel among others, and considerable written materials the commission concluded that

[t]he GSS which has done and is doing work of the utmost importance in preserving Israel’s security and has to its credit many outstanding achievements in this area, failed utterly, in permitting itself to violate the law systematically and for such a long period by assenting to, approving, and even encouraging the giving of false testimony in Court. The GSS top echelon failed by not comprehending that no activity in the field of security, however important and vital it may be, can place those acting above the law. It did not

²³ *Id.* at 636.

²⁴ 23 LSI 32 (5729-1968/69).

²⁵ COMMISSION OF INQUIRY, *supra* note 9. Part One at 1..

²⁶ *Id.* at 6.

²⁷ *Id.* at 10-11.

understand that it was entrusted with a vital task, which perhaps justifies means, but not all means, and certainly not the means of giving false testimony.

The Commission notes with satisfaction that this harmful practice has now been totally abolished.²⁸

The Commission recognized the “grave dilemma between the vital need to preserve the very existence of the State and its citizens, and to maintain its character as a law-abiding State which believes in basic moral principles- for the methods of police interrogation which are employed in any given regime are a faithful mirror of the character of the entire regime.”²⁹ In trying to find a balance between the public security and basic democratic principles the Commission rejected both the option of excluding GSS counter-terrorism activity from the rule of law as well as that of “turn(ing) a blind eye to what goes beneath the surface.”³⁰ The Commission concluded that it was essential for the moral strength of Israeli society and of the GSS to regulate by law the methods used by the GSS in investigations of hostile terrorist activities. The Commission concluded:

We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of the tool of the interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.

The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information.

The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided.³¹

The Commission thus recognized the importance and the difficulty of obtaining information during interrogation of terrorist suspects. It expressed preference for “non violent psychological pressure” as a tool of interrogation, but authorized the use of a “moderate degree of physical pressure” subject to very stringent conditions, in case other non-violent methods failed. Directives to this effect were set out in the second, secret part of the report, and subject to the supervision of bodies both internal and external to the GSS. The government approved the Commission’s recommendations.

²⁸ *Id.* at 39-40.

²⁹ *Id.* at 77.

³⁰ *Id.* at 78.

³¹ *Id.* at 79-81

IV. Between the Landau Report and the 1999 High Court Decision

Numerous Israeli legal scholars criticized the Landau report;³² some also objected to the fact the Supreme Court, in its role as a High Court of Justice, had not undertaken a serious review of the issue until 1999.³³ Several petitions regarding the use of physical pressure in GSS interrogations were submitted to the High Court following the issue of the Landau Report. Most such petitions were closed according to petitioners' request after being informed that they would not be subjected to such pressure. Other petitions resulted in the High Court issuing temporary injunctions. The issue of the legality of using physical pressure in circumstances of necessity, to save human life, had not been adjudicated until 1999, when the Court finally decided to hear several petitions centered on the authority of GSS interrogators to use physical measures.³⁴

V. The 1999 High Court's Decision in the *Public Committee Against Torture in Israel Case*

Sitting as the High Court of Justice in an extended bench of nine justices, the Supreme Court had before it seven separate petitions challenging the methods used by the GSS in the interrogation of terrorism suspects. All the petitions raised two essential arguments: first, that the GSS was never authorized to conduct interrogations; and second, that physical means employed by GSS interrogators amounted to torture, thus not only infringing on the human dignity of the suspect in violation of Basic Law: Human Dignity and Liberty, but also in violation of international law. Petitioners further argued that the defense of "necessity" provided by Israel's Penal law for a perpetrator of "any act immediately necessary for the purpose of saving the life, liberty, body or property ... from substantial danger of serious harm" does not provide GSS interrogators authority to employ such means.³⁵

President Barak, with the other eight justices concurring,³⁶ wrote the opinion. After having concluded that GSS investigators were empowered by article 2(1) of the Criminal Procedure Ordinance (testimony)³⁷ to conduct interrogations of suspected terrorists, he analyzed the legality of exerting physical pressure in interrogations and the impact of the necessity

³² See, e.g., Amihud Gilad, *Absolute Moral Commandment: It is Prohibited to Torture*, 4(2) MISHPAT U-MIMSHAL (Law and Government) 425 (June 1998).

³³ Mordechai Kremnizer & Reem Segev, *Use of Force in Interrogations of the General Security Service-The Least Harmful?*, D(2) MISHPAT U-MIMSHAL (Law and Government) 667 (June 1998).

³⁴ HJC 5100/94 Public Committee Against Torture in Israel v. The State of Israel et al. 53(4) P.D. 817 (5759/60-1999); *Judgments of the Israel Supreme court: Fighting Terrorism Within the Law*, ISRAEL SUPREME COURT 25 (2004).

³⁵ HJC 5100/94 Public Committee Against Torture in Israel v. The State of Israel et al.; *Judgments of the Israel Supreme court: Fighting Terrorism Within the Law*, ISRAEL SUPREME COURT, *id* at 33-34.

³⁶ While accepting the conclusions reached by President Barak and all other justices, Justice Kedmi expressed his worry about situations of "ticking bombs" and suggested that the judgment be suspended for one year to enable the Knesset (Israel's Parliament) to consider the issue. See *id.* at 55-56. Constituting a minority opinion, naturally this suggestion did not materialize.

³⁷ Hukei Eretz Israel (Palestine Gazette), Ch. 34, No. 33 (1927), as amended; up-to date copy available at the Nevo legal database at <http://www.nevo.co.il>.

defense. President Barak further concluded that interrogation procedures pursuant to the “Landau rules” were illegal under Israel’s law.

1. The Means that can be Employed for Interrogation Purposes

President Barak recognizes the clash that exists in a democratic regime between the desire to uncover the truth, expose and prevent crime and the need to protect the dignity and liberty of the individual being interrogated. He states that a “democratic, freedom-loving society does not accept that investigators may use any means for the purpose of uncovering the truth.”³⁸

He lists the following general principles that govern interrogations:

First, 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. ... This conclusion is in accord 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 balancing. Indeed, violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable. ...

Second, a reasonable investigation is likely to cause discomfort. It may result in insufficient sleep. The conditions under which it is conducted risk being unpleasant. Of course, it is possible to conduct an effective investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various sophisticated techniques. Such techniques—accepted in the most progressive of societies—can be effective in achieving their goals. In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. Thus, for instance, sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time-wise, may be deemed disproportionate.³⁹

Based on the above principles, the Court found the methods which were the subject of the petitions, including shaking, waiting in the “Shabach” position, the “frog crouch,” excessively tight handcuffs, and sleep deprivation unlawful. The Court determined that all these methods did not fall within the sphere of a fair interrogation: they were unreasonable, and infringed upon the suspect’s dignity, his bodily integrity and his basic rights in an excessive manner. The GSS’s authority to interrogate, thus, did not include such physical means.

³⁸ HJC 5100/94 Public Committee against Torture in Israel v. The State of Israel et al. *Judgments of the Israel Supreme court: Fighting Terrorism within the Law*, ISRAEL SUPREME COURT 42 (2004).

³⁹ HJC 5100/94 Public Committee Against Torture in Israel v. The State of Israel et al. *Judgments of the Israel Supreme court: Fighting Terrorism Within the Law*, ISRAEL SUPREME COURT 43-44 (2004).

2. *Physical Means and the “Necessity” Defense*

The Court then rejected the State’s claim that an authorization to use physical means in interrogations may be derived in specific cases by virtue of the criminal law defense of “necessity.” Section 34(1) of the Penal Law provides:

A person will not bear criminal liability for committing any 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, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.⁴⁰

President Barak stated that he was prepared to assume that in the appropriate circumstances, including in instances of “ticking bombs” when “there exists a concrete level of imminent danger of the explosion’s occurrence. ... GSS investigators may avail themselves of the ‘necessity defense’ if criminally indicted.”⁴¹ The “necessity defense,” however, even in cases where it may be allowed, does not imply any authorization to establish directives respecting the use of physical means during the course of a GSS interrogation. According to President Barak, “[t]he lifting of criminal responsibility does not imply authorization to infringe upon a human right.”⁴²

3. *“A Final Word” by President Barak*

President Barak’s decision began with a description of the harsh reality in which “the state of Israel has been engaged in an unceasing struggle for its security- indeed, its very existence.” He noted that terrorist groups do not distinguish between civilian and military targets, between men, women and children and that “[t]hey act out of cruelty and without mercy.”⁴³ In concluding the decision, President Barak revisits that reality in which the GSS investigators operate in an effort to save lives. He noted:

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 before 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.

This having been said, there are those who argue that Israel’s security problems are too numerous, and require the authorization of physical means. Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an

⁴⁰ LSI Special Volume, Penal Law, 5737-1977, cited *id.* at 49.

⁴¹ HJC 5100/94 Public Committee Against Torture in Israel v. The State of Israel et al. *Judgments of the Israel Supreme court: Fighting Terrorism Within the Law*, ISRAEL SUPREME COURT 50-51 (2004).

⁴² *Id.* at 52.

⁴³ *Id.* at 27-28.

issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The debate must occur there. It is there that the required legislation may be passed, provided, of course, that the law “befit[s] the values of the State of Israel, is enacted for a proper purpose, and [infringes the suspect’s liberty] to an extent no greater than required.” See article 8 of the Basic Law: Human Dignity and Liberty.

Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to deal properly with terrorists and terrorism disturbs us. We are, however, judges. We must decide according to the law. This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. Therefore, in deciding the law, we must act according to our purest conscience. ...⁴⁴

VI. Developments in the Aftermath of the Supreme Court Decision

1. *Developments in the ISA*

According to a report submitted by Israel to the United Nations Office of the High Commissioner for Human Rights (OHCHR) Committee Against Torture on March 15, 2001⁴⁵ (hereinafter the 2001 report), the Supreme Court decision “had an immediate and profound effect on the conduct of all investigations by the Israel Security Agency (ISA).”⁴⁶ Whereas the ISA had previously conducted investigations in accordance with the directives pertaining to such investigations, on September 6, 1999, the day that the Supreme Court decision was announced, “the authorities of the ISA issued a directive to all personnel, including all investigators, directing that the decision of the Court should be strictly adhered to in all investigations conducted by the ISA.”⁴⁷ The ISA currently requires its employees to attend courses, educational seminars and training programs on the subject. It disciplines and, in appropriate cases, dismisses from the agency investigators who were found to have used physical pressure against a suspect during an investigation.

According to the 2001 report, persons who are detained by the Israel Police or by the ISA for purposes of investigation are entitled to file complaints concerning any alleged mistreatment during such investigations. All such complaints are thoroughly investigated. If the investigation reveals evidence of a criminal offence, the case is transferred to the office of the District Attorney in the area where the offense occurred for a final decision on whether to file an indictment. Disciplinary actions are possible as well.

⁴⁴ *Id.* at 54-56.

⁴⁵ *Committee Against Torture, Consideration of reports submitted by States Parties under article 19 of the Convention, Israel, U.N. Doc. CAT/C/54/Add.1 (2001)*, p. 7, UNIVERSITY OF MINNESOTA, HUMAN RIGHTS LIBRARY, available at <http://www1.umn.edu/humanrts/cat/israel2001.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

2. Legislation Concerning Israel's Security Agency

Following a comprehensive examination of the significance of the 1999 Supreme Court decision and its implications for the ISA's ability and effectiveness to prevent ongoing terrorist attacks, the Israeli Government decided not to initiate legislation that would authorize the use of physical means in investigations conducted by the ISA. According to the 2001 report, "[t]he Government decided, instead, to focus on the improvement and strengthening of the ISA's general capabilities by an increase in manpower, improved technological equipment and similar measures."⁴⁸

On February 21, 2002 the Knesset (Israeli Parliament) passed the General Security Service Law, 5762-2002.⁴⁹ In accordance with the law, the ISA is subject to the authority of the Government. The Government appoints the director of the ISA, on the recommendation of the Prime Minister. The law provides that a special ministerial committee of the Government is to be established. The committee is responsible for ministerial scrutiny and oversight of the ISA. The law also provides for parliamentary oversight of the activities of the ISA, which is provided by a special committee of the Knesset. The law further sets out the functions and powers of the ISA. The objectives of the ISA include protecting the security of the State and protection for State authorities and State institutions from terrorism, espionage and other similar threats. The ISA is empowered under the law to conduct investigations. The director of the ISA should provide periodic reports to the ministerial committee and to the Knesset committee.

VII. Geographical Application of the Norms Governing Interrogation Techniques

The General Security Service Law, 5762-2002,⁵⁰ as amended, defines "a service employee" as a State employee in the General Security Service."⁵¹ The Law authorizes the Service, through its employees, among other things, to investigate suspects and suspicious activity in connection with the commission of offenses, or to conduct investigations for the purpose of preventing offenses, foiling and preventing illegal activities aimed at harming State security or the order or institutions of the democratic regime, and collecting and receiving information for safeguarding and promoting vital interests listed by law. Such interests include protecting persons and collecting intelligence. Activities of the General Security Service and its employees are not limited to Israeli geographical jurisdiction.

In exercising authorities under the law, service employees are subject to the norms established by the Supreme Court in its 1999 leading decision regarding investigation techniques. The Supreme Court has established its *in personam* (personal) jurisdiction over actions of government officials wherever they operate. In extending judicial review over Israel Defense Forces' (IDF) actions in the West Bank (Judea and Samaria), the former Supreme Court President held that "every Israeli soldier carries in its backpack the rules of public customary

⁴⁸ *Id.* at paragraph 40.

⁴⁹ SEFER HA-HUKIM (Official Gazette) Issue No. 1832, p. 179 (5762-2002), as amended.

⁵⁰ SEFER HA-HUKIM (Official Gazette) Issue No. 1832, p. 179 (5762-2002), as amended.

⁵¹ *Id.* §1.

international law on the law of war and the basic rules of Israel's administrative law.”⁵² Accordingly, the extension of *in personam* jurisdiction may, at times, apply to actions carried out by State operatives outside of Israeli territorial jurisdiction.

The same rationale that applies to IDF extra-territorial activities applies to the General Security Service operations outside of the Green Line. The norms applicable to investigative techniques exercised by State employees in Israel equally apply to their operations elsewhere on behalf of the State.

VII. Conclusion

The use of physical pressure on suspected terrorists interrogated by the ISA has been subjected to fierce scrutiny in Israel. The important mission the ISA plays in preventing numerous terrorist attacks against Israelis has been recognized extensively. Until the 1980s, the ISA interrogation methods were considered classified. Not only was there no open discussion of their nature or appropriateness, as revealed by the two scandals involving bus no. 300 and the *Nafsu* case, personnel of the ISA, or the GSS, as the agency was known then, routinely lied to judicial authorities regarding the nature of admissions made by defendants. The ISA's practices, therefore, violated two major legal prohibitions. The first was in violating the personal liberties of the suspect; the second was in misleading judicial authorities to accept admissions that were extracted in violation of the absolute prohibitions on the use of torture, cruelty, and degrading treatment.

The 1980 scandals resulted in the establishment of the Landau Commission of Inquiry that was empowered with the authority to investigate the working methods of the ISA, an issue considered top secret at the time. Although its report was seriously criticized and its recommendations finally nullified by the Supreme Court, the committee has been recognized by its willingness to balance the security threats posed by terrorism and the State's democratic values. The committee also exposed the difference between police investigations and ISA investigations regarding hostile terrorist activities.

The 1999 High Court decision in the *Public Committee Against Torture in Israel* case nullified the general directives, established pursuant to the Landau Commission report that authorized the use during an interrogation of physical means that infringe upon a suspect's liberty. The Court determined that at that time there was no appropriate legislation authorizing such a use. No such authorizing law has passed since the decision was rendered. Awareness of the importance of respecting human dignity and liberty even at a time of security crisis has been emphasized and taught at all levels of IDF and ISA. As President Barak has so eloquently stated, the “rule of law and the liberty of an individual constitute an important component in its

⁵² H.C. 393/82 Land Association Registered in the Judea & Samaria Area v. IDF Commander in Judea & Samaria, 37(4) 785 para. 33 (5743/44-1983), available at the Nevo Legal Database at <http://www.nevo.co.il> (by subscription, last visited December 30, 2008)

understanding of [a democracy's] security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”⁵³

The prohibition on the use of torture in investigations applies to all interrogators acting on behalf of the State, on both sides of the Green Line and elsewhere. The norms applicable to investigative techniques personally apply to State investigators and are not based on territorial jurisdiction.

Prepared by Ruth Levush
Senior Foreign Law Specialist
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⁵³ HJC 5100/94 Public Committee Against Torture in Israel v. The State of Israel et al; *Judgments of the Israel Supreme Court: Fighting Terrorism Within the Law*, ISRAEL SUPREME COURT 55 (2004).