The Supreme Court of Israel, sitting as the High Court of Justice

H.C. 5100/94
H.C. 4054/95
H.C. 6536/95
H.C. 5188/96
H.C. 7563/97
H.C. 7628/97
H.C. 1043/99

Before:

The Honourable President A. Barak
The Honourable Deputy President S. Levin
The Honourable Justice T. Or
The Honourable Justice E. Mazza
The Honourable Justice M. Cheshin
The Honourable Justice Y. Kedmi
The Honourable Justice I. Zamir
The Honourable Justice T. Strasberg-Cohen
The Honourable Justice D. Dorner

Applicant in H.C. 5100/94 Public Committee Against Torture in Israel
Applicant in H.C. 4054/95 The Association for Civil Rights in Israel
Applicant in H.C. 6536/95 Hat'm Abu Zayda

Applicants in H.C 5188/96 1. Wa'al Al Kaaqua
2. Ibrahim Abd'allah Ganimat
3. Center for the Defence of the Individual

Applicants in H.C. 7563/97: 1. Abd Al Rahman Ismail Ganimat
2. Public Committee Against Torture in Israel

Applicants in H.C. 7628/97: 1. Fouad Awad Quran
2. Public Committee Against Torture in Israel

Applicant in H.C. 1043/99 Issa Ali Batat

V.

Respondents in H.C. 5100/94 1. The State of Israel
2. The General Security Service

Respondents in H.C. 4045/95 1. The Prime Minister of Israel
2. The Minister of Justice

3. The Minister of Police
4. The Minister of the Environment
5. The Head of the General Security Service

Respondent in H.C. 6536/95
and H.C. 1043/99 — The General Security Service

Respondents in H.C. 5188/96
1. The General Security Service
2. The Prison Commander -Jerusalem

Respondents in H.C. 7563/97
and H.C. 7628/97
1. The Minister of Defence
2. The General Security Service

Hearing : Motion for an Order *Nisi*

Dates of the Hearings: 24 of Iyar, 5758 (20.5.98)
25 of Tevet 5759 (13.1.99)
11 of Sivan 5759 (26.5.99)

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Judgment

President A. Barak:

The General Security Service (hereinafter, the "GSS") investigates individuals suspected of committing crimes against Israel's security. Is the GSS authorized to conduct these interrogations? The interrogations are conducted on the basis of directives regulating interrogation methods. These directives equally authorize investigators to apply physical means against those undergoing interrogation (for instance, shaking the suspect and the "Shabach" position). The basis for permitting such methods is that they are deemed immediately necessary for saving human lives. Is the sanctioning of these interrogation practices legal? - These are the principal issues presented by the applicants before us.

Background:

1. The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding. Terrorist organizations have established as their goal Israel's annihilation. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas, public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy (For an in depth description of this phenomenon see the Report of the Commission of Inquiry Regarding the GSS' Interrogation Practices with Respect to Hostile Terrorist Activities headed by (ret.) Justice M. Landau, 1987 - hereinafter, "Commission of Inquiry Report") published in the Landau Book 269, 276 (Volume 1 , 1995).

The facts presented before this Court reveal that one hundred and twenty one people died in terrorist attacks between 1.1.96 to 14.5.98. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities. Many attacks-including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to highjack buses, murders, the placing of explosives, etc.- were prevented due to the measures taken by the authorities responsible for fighting the above described hostile terrorist activities on a daily basis. The main body responsible for fighting terrorism is the GSS.

In order to fulfill this function, the GSS also investigates those suspected of hostile terrorist activities. The purpose of these interrogations is, among others, to gather information regarding terrorists and their organizing methods for the purpose of thwarting and preventing them from carrying out these terrorist attacks. In the context of these interrogations, GSS investigators also

make use of physical means. The legality of these practices is being examined before this Court in these applications.

The Applications:

2. These applications are entirely concerned with the GSS' interrogation methods. They outline several of these methods, in detail, before us. Two of the applications are of a public nature. One of these (H.C. 5100/94) is brought by the Public Committee Against Torture in Israel. It submits that GSS investigators are not authorized to investigate those suspected of hostile terrorist activities. Moreover, they claim that the GSS is not entitled to employ those pressure methods approved by the Commission of Inquiry's Report ("the application of non-violent psychological pressure" and the application of "a moderate degree of physical pressure"). The second application (hereafter 4054/95), is brought by the Association for Citizen's Rights in Israel (ACRI) . It argues that the GSS should be instructed to refrain from shaking suspects during interrogations.

Five of the remaining applications involve specific applicants who turned to the Court individually. They each petitioned the Court to hold that the methods used against them by the GSS are illegal. Who are these applicants?

3. The applicants in H.C. 5188/96 (Wa'al Al Kaaqua and Ibrahim Abd'alla Ganimat) were arrested at the beginning of June 1996. They were interrogated by GSS investigators. They appealed to this Court (on 21-7-96) via the Center for the Defence of the Individual, founded by Dr. Lota Saltzberger. Their attorney petitioned the Court for an order *nisi* prohibiting the use of physical force against the applicants during their interrogation. The Court granted the order. The two applicants were released from custody prior to the hearing. As per their attorney's request, we have elected to continue hearing their case, in light of the importance of the issues they raise in principle.

4. The applicant in H.C. 6536/96 (Hat'm Abu Zayda), was arrested (on 21-9-95) and interrogated by GSS investigators. He turned to this Court (on 22-10-95) via of the Center for the Defence of the Individual, founded by Dr. Lota Saltzberger. His attorney complained about the interrogation methods allegedly used against his client (deprivation of sleep, shaking, beatings, and use of the "Shabach" position). We immediately instructed the application be heard. The Court was informed that the applicant's interrogation had ended (as of 19-10-95). The information provided to us indicates that the applicant in question was subsequently convicted of activities in the military branch of the Hamas terrorist organization. He was sentenced to seventy four months in prison. The convicting Court held that the applicant both recruited and constructed the Hamas' infrastructure, for the purpose of kidnapping Israeli soldiers and carrying out terrorist attacks against security forces. It has been argued before us that the information provided by the applicant during the

course of his interrogation led to the thwarting of an actual plan to carry out serious terrorist attacks, including the kidnapping of soldiers.

5. The applicant in H.C. 7563/97 (Abd al Rahman Ismail Ganimat) was arrested (on 13-11-97) and interrogated by the GSS. He appealed to this Court (24-12-97) via the Public Committee Against Torture in Israel. He claimed to have been tortured by his investigators (through use of the "Shabach" position", excessive tightening of handcuffs and sleep deprivation). His interrogation revealed that he was involved in numerous terrorist activities in the course of which many Israeli citizens were killed. He was instrumental in the kidnapping and murder of IDF soldier (Sharon Edry, of blessed memory); Additionally, he was involved in the bombing of the Cafe "Appropo" in Tel Aviv, in which three women were murdered and thirty people were injured. He was charged with all these crimes and convicted at trial. He was sentenced to five consecutive life sentences plus an additional twenty years of prison.

A powerful explosive device, identical to the one detonated at Cafe "Appropo" in Tel Aviv, was found in the applicant's village (Tzurif) subsequent to the dismantling and interrogation of the terrorist cell to which he belonged. Uncovering this explosive device thwarted an attack similar to the one at Cafe "Appropo". According to GSS investigators, the applicant possessed additional crucial information which he only revealed as a result of their interrogation. Revealing this information immediately was essential to safeguarding state and regional security and preventing danger to human life.

6. The applicant in H.C. 7628/97 (Fouad Awad Quran) was arrested (on 10-12-97) and interrogated. He turned to this Court (on 25-12-97) via the Public Committee against Torture in Israel. Before the Court, he claimed that he was being deprived of sleep and was being seated in the "Shabach" position. The Court issued an order *nisi* and held an immediate hearing of the application. During the hearing, the State informed the Court that "at this stage of the interrogation the GSS is not employing the methods alleged by the applicant against him". For this reason, no interim order was granted.

7. The applicant in H.C.1043/99 (Issa Ali Batat) was arrested (on 22-2-99) and interrogated by GSS investigators. The application, brought via the Public Committee Against Torture in Israel, argued that physical force was used against the applicant during the course of the interrogation. The Court issued an order *nisi*. While hearing the application, it came to the Court's attention that the applicant's interrogation had ended and that he was being detained pending trial; The indictment alleges his involvement in hostile activities, the purpose of which was to harm the "area's" (Judea, Samaria and the Gaza strip) security and public safety.

<u>The Physical Means</u>

8. The physical means employed by the GSS investigators were presented before this Court by the GSS investigators. The State's attorneys were prepared to present them for us behind closed doors (in camera). The

applicants' attorneys were opposed to this proposal. Thus, the information at the Court's disposal was provided by the applicants and was not tested in each individual application. This having been said, the State's position, which failed to deny the use of these interrogation methods, and even offered these and other explanations regarding the rationale justifying the use of an interrogation methods or another, provided the Court with a picture of the GSS' interrogation practices.

The decision to utilize physical means in a particular instance is based on internal regulations, which requires obtaining permission from various ranks of the GSS hierarchy. The regulations themselves were approved by a special Ministerial Committee on GSS interrogations. Among other guidelines, the Committee set forth directives pertaining to the rank authorized to allow these interrogation practices. These directives were not examined by this Court. Different interrogation methods are employed depending on the suspect, both in relation to what is required in that situation and to the likelihood of obtaining authorization. The GSS does not resort to every interrogation method at its disposal in each case.

Shaking

9. A number of applicants (H.C. 5100/94; H.C. 4054/95; H.C. 6536/95) claimed that the shaking method was used against them. Among the investigation methods outlined in the GSS' interrogation regulations, shaking is considered the harshest. The method is defined as 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. According to an expert opinion submitted in one of the applications (H.C. (motion) 5584/95 and H.C. 5100/95), the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches.

The State entered several countering expert opinions into evidence. It admits the use of this method by the GSS. To its contention, there is no danger to the life of the suspect inherent to shaking; the risk to life as a result of shaking is rare; there is no evidence that shaking causes fatal damage; and medical literature has not to date listed a case in which a person died directly as a result of having been only shaken. In any event, they argue, doctors are present in all interrogation compounds, and instances where the danger of medical damage presents itself are investigated and researched.

All agree that in one particular case (H.C. 4054/95) the suspect in question expired after being shaken. According to the State, that case constituted a rare exception. Death was caused by an extremely rare complication resulting in the atrophy of the neurogenic lung. In addition, the State argues in its response that the shaking method is only resorted to in very particular cases, and only as a last resort. The interrogation directives define the appropriate circumstances for its application and the rank responsible for authorizing its use. The investigators were instructed that in every case where they consider resorting to shaking, they must probe the severity of the danger

that the interrogation is intending to prevent; consider the urgency of uncovering the information presumably possessed by the suspect in question; and seek an alternative means of preventing the danger. Finally, the directives respecting interrogation state, that in cases where this method is to be used, the investigator must first provide an evaluation of the suspect's health and ensure that no harm comes to him. According to the respondent, shaking is indispensable to fighting and winning the war on terrorism. It is not possible to prohibit its use without seriously harming the GSS' ability to effectively thwart deadly terrorist attacks. Its use in the past has lead to the thwarting of murderous attacks.

Waiting in the "Shabach" Position

10. This interrogation method arose in numerous applications (H.C. 6536/95, H.C. 5188/96, H.C. 7628/97). As per applicants' submission, a suspect investigated under the "Shabach" position 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. According to the affidavits submitted, suspects are detained in this position for a prolonged period of time, awaiting interrogation at consecutive intervals.

The aforementioned affidavits claim that prolonged sitting in this position causes serious muscle pain in the arms, the neck and headaches. The State did not deny the use of this method before this Court. They submit that both crucial security considerations and the investigators' safety require tying up the suspect's hands as he is being interrogated. The head covering is intended to prevent contact between the suspect in question and other suspects. The powerfully loud music is played for the same reason.

The "Frog Crouch"

11. This interrogation method appeared in one of the applications (H.C. 5188/96). According to the application and the attached corresponding affidavit, the suspect being interrogated was found in a "frog crouch" position. This refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals. The State did not deny the use of this method, thereby prompting Court to issue an order *nisi* in the application where this method was alleged. Prior to hearing the application, however, this interrogation practice ceased.

Excessive Tightening of Handcuffs

12. In a number of applications before this Court (H.C. 5188/96; H.C. 7563/97), various applicants have complained of excessive tightening of

hand or leg cuffs. To their contention, this practice results in serious injuries to the suspect's hands, arms and feet, due to the length of the interrogations. The applicants invoke the use of particularly small cuffs, ill fitted in relation to the suspect's arm or leg size. The State, for its part, denies any use of unusually small cuffs, arguing that those used were both of standard issue and properly applied. They are, nonetheless, prepared to admit that prolonged hand or foot cuffing is likely to cause injuries to the suspect's hands and feet. To the State's contention, however, injuries of this nature are inherent to any lengthy interrogation.

Sleep Deprivation

13. In a number of applications (H.C. 6536/96; H.C. 7563/97; H.C. 7628/97) applicants have complained of being deprived of sleep as 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. They claim that the purpose of depriving them of sleep is to cause them to break from exhaustion. While the State agrees that suspects are at times deprived of regular sleep hours, it argues that this does not constitute an interrogation method aimed at causing exhaustion, but rather results from the prolonged amount of time necessary for conducting the interrogation.

Applicants' Arguments

14. Before us lie a number of applications. Different applicants raise different arguments. In principle, all the applications raise two essential arguments: First, they submit that the GSS is never authorized to conduct interrogations. Second, they argue that the physical means employed by GSS investigators not only infringe upon the human dignity of the suspect undergoing interrogation, but in fact constitute criminal offences. These methods, argue the applicants, are in violation International Law as they constitute "Torture," which is expressly prohibited under International Law. Thus, the GSS investigators are not authorized to conduct these interrogations. Furthermore, the "necessity" defence which, according to the State, is available to the investigators, is not relevant to the circumstances in question. In any event, the doctrine of "necessity" at most constitutes an exceptional *post factum* defence, exclusively confined to criminal proceedings against investigators. It cannot, however, by any means, provide GSS investigators with the preemptory authorization to conduct interrogations *ab initio*. GSS investigators are not authorized to employ any physical means, absent unequivocal authorization from the Legislator pertaining to the use of such methods and conforming to the requirements of the Basic Law: Human Dignity and Liberty. There is no purpose in engaging in a bureaucratic set up of the regulations and authority, as suggested by the Commission of Inquiry's Report, since doing so would merely regulate the torture of human beings.

We asked the applicants' attorneys whether the "ticking time bomb" rationale was not sufficiently persuasive to justify the use of physical means, for instance, when a bomb is known to have been placed in a public area and will

undoubtedly explode causing immeasurable human tragedy if its location is not revealed at once. This question elicited a variety of responses from the various applicants before the Court. There are those convinced that physical means are not to be used under any circumstances; the prohibition on such methods to their mind is absolute, whatever the consequences may be. On the other hand, there are others who argue that even if it is perhaps acceptable to employ physical means in most exceptional "ticking time bomb" circumstances, these methods are in practice used even in absence of the "ticking time bomb" conditions. The very fact that, in most cases, the use of such means is illegal provides sufficient justification for banning their use altogether, even if doing so would inevitably absorb those rare cases in which physical coercion may have been justified. Whatever their particular views, all applicants unanimously highlight the distinction between the ability to potentially escape criminal liability *post factum* and the granting of permission to use physical means for interrogation purposes *ab initio*.

The State's Arguments

15. The position of the State is as follows: The GSS investigators are duly authorized to interrogate those suspected of committing crimes against Israel's security. This authority emanates from the government's general and residual (prerogative) powers (Article 40 of the Basic Law: the Government). Similarly, the authority to investigate is equally bestowed upon every individual investigator by virtue of article 2(1) of the Criminal Procedure Statute (Testimony) and the relevant accessory powers. With respect to the physical means employed by the GSS, the State argues that these do not violate International Law. Indeed, it is submitted that these methods cannot be qualified as "torture," "cruel and inhuman treatment" or "degrading treatment," that are strictly prohibited under International Law. Instead, the practices of the GSS do not cause pain and suffering, according to the State's position.

Moreover, the State argues that these means are equally legal under Israel's internal (domestic) law. This is due to the "necessity" defence outlined in article 34(11) of the Penal Law (1977). Hence, in the specific cases bearing the relevant conditions inherent to the "necessity" defence, GSS investigators are entitled to use "moderate physical pressure" as a last resort in order to prevent real injury to human life and well being. Such "moderate physical pressure" may include shaking, as the "necessity" defence provides in specific instances. Resorting to such means is legal, and does not constitute a criminal offence. In any case, if a specific method is not deemed to be a criminal offence, there is no reason not to employ it even for interrogation purposes. As per the State's submission, there is no reason for prohibiting a particular act, in specific circumstances, *ab initio* if it does not constitute a crime. This is particularly true with respect to the GSS investigators' case, who, according to the State, are after all responsible for the protection of lives and public safety. In support of their position, the State notes that the use of physical means by GSS investigators is most unusual and is only employed as a last resort in very extreme cases. Moreover, even in these

rare cases, the application of such methods is subject to the strictest of scrutiny and supervision, as per the conditions and restrictions set forth in the Commission of Inquiry's Report. This having been said, when the exceptional conditions requiring the use of these means are in fact present, the above described interrogation methods are fundamental to saving human lives and safeguarding Israel's security.

The Commission of Inquiry's Report

16. The GSS' authority to employ particular interrogation methods, and the relevant law respecting these matters were examined by the Commission of Inquiry (whose report was published, as mentioned, in the Landau Book (1995) Volume 1 at 269). The Commission, appointed by the government by virtue of the Commission of Inquiry Statute (1968), considered the GSS' legal status [among other issues]. Following a prolonged deliberation, the Commission concluded that the GSS is authorized to investigate those suspected of hostile terrorist acts, even in absence of express statutory regulation of its activities, in light of the powers granted to it by specific legislation and the government's residual (prerogative) powers, outlined in the Basic Law: the Government (article 29 of the old statute and article 40 of the new version). In addition, the power to investigate suspects, granted to investigators by the Minister of Justice as per article 2(1) of the Statute of Criminal Procedure [Testimony], equally endows the GSS with the authority to investigate (*supra*, p.301 and following). Another part of the Commission of Inquiry's Report deals with, "the investigator's potential defences" (defences available to the investigator). With regards to this matter, the Commission concluded that in cases where the saving of human lives necessarily requires obtaining certain information, the investigator is entitled to apply both psychological pressure and "a moderate degree of physical pressure" (*supra*, at 328). Thus, an investigator who, in the face of such danger, applies that specific degree of physical pressure, which does not constitute abuse or torture of the suspect, but is instead proportional to the danger to human life, can avail himself of the "necessity" defence, in the face of potential criminal liability. The Commission was convinced that its conclusions to this effect were not in conflict with International Law, but instead reflect an approach consistent with both the Rule of Law and the need to effectively safeguard the security of Israel and its citizens.

The Commission approved the use of, " a moderate degree of physical pressure" with various stringent conditions including directives that were set out in the second (and secret) part of the Report, and for the supervision of various elements both internal and external to the GSS. The Commission's recommendations were duly approved by the government.

The Applications

17. A number of applications dealing with the application of physical force by the GSS for interrogation purposes have made their way to this Court

throughout the years (See, for example, H.C. 7964/95 *Billbissi v. The GSS* (unpublished); H.C. 8049/96 *Hamdan v. The GSS* (unpublished); H.C. 3123/94 *Atun v. The Head of the GSS* (unpublished); H.C. 3029/95 *Arquan v. The GSS* (unpublished); H.C. 5578/95 *Hajazi v. The GSS* (unpublished)). An immediate hearing was ordered in each of these cases. In most, the State declared that the GSS does not employ physical means. As a result, the applicants requested to withdraw their applications. The Court accepted these motions and informed the applicants of their right to set forth a complaint if physical means were or are in fact being used against them (See H.C. 3029/95 *supra*.). Only a in a minority of complaints did the State did not issue the above mentioned notice. In other instances, an interim order was issued. At times, the Court noted that, "we (the Court) did not receive any information regarding the interrogation methods which the respondent (generally the GSS) seeks to employ and we did not take any position with respect to these methods" (See H.C. 8049/96 *Hamdan v. The GSS* (unpublished). In a different case, the Court noted that, "[T]he annulment of the interim order does not in any way constitute permission to employ methods that do not conform to the law and binding directives" (In H.C. 336/96; In H.C. 7954/95 *Billbissi v. The GSS* (unpublished)).

Until now, therefore, the Court did not actually decide the issue of whether the GSS is permitted to employ physical means for interrogation purposes in circumstances outlined by the defence of "necessity". Essentially, we did not do so due to the fact that it was not possible for the Court to hear the sort of arguments that would provide a complete normative picture, in all its complexity. At this time, by contrast, a number of applications before us have properly laid out (both orally and in writing) complete arguments from sides' respective attorneys. For this we thank them.

Although the various applications are somewhat distinct in that some are rather general or theoretical while others are quite specific, we have decided to deal with them, since above all we seek to clarify (uncover) the state of the law in this most complicated question. To this end, we shall begin by addressing the first issue- namely, are GSS investigators generally authorized to conduct interrogations. We shall then proceed to examine whether a general power to investigate would potentially sanction the use of physical means- including mental suffering-the likes of which the GSS employs. Finally, we shall probe the circumstances under which the above mentioned methods are immediately necessary to rescue human lives and whether these circumstances justify endowing GSS investigators with the authority to employ physical interrogation methods.

The Authority to Interrogate

18. The term "interrogation" takes on various meanings in different contexts. For the purposes of the applications before the Court at present, we refer to the asking of questions which seek to elicit a truthful answer (subject to the limitations respecting the privilege against self-incrimination; See article 2 of the Criminal Procedure Statute [Testimony]). Generally, the investigation of a suspect is conducted at the suspect's place of detention. An interrogation

inevitably infringes upon the suspect's freedom, even if physical means are not used. Indeed, undergoing an interrogation infringes on both the suspect's dignity and his individual privacy. In a state adhering to the Rule of Law, interrogations are therefore not permitted in absence of clear statutory authorization, be it through primary legislation or secondary legislation, the latter being explicitly rooted in the former. This essential principle is expressed by the Legislator in the Criminal Procedure Statute (Powers of Enforcement-Detention - 1996) which states as follows:

"Detentions and arrests shall be conducted only by law or by virtue of express statutory authorization for this purpose" (article 1(a)).

Hence, the statute and regulations must adhere to the requirements of the Basic Law: Human Dignity and Liberty (see article 8 of the Basic Law). The same principle applies to interrogations. Thus, an administrative body, seeking to interrogate an individual- an interrogation being defined as an exercise seeking to elicit truthful answers , as opposed to the mere asking of questions as in the context of an ordinary conversation- must point to the explicit statutory provision which legally empowers it. This is required by the Rule of Law (both formally and substantively). Moreover, this is required by the principle of administrative legality. "If an authority (government body) cannot point to a statute from which it derives its authority to engage in certain acts, that act is *ultra vires (*beyond its competence) and illegal.". (See I. Zamir, *Administrative Authority* (1996) at 50; See also B. Bracha, *Administrative Law* (Vol. 1, 1987) at 25).

19. Does a statute, authorizing GSS investigators to carry out interrogations (as we defined this term above) exist? A specific instruction, dealing with GSS agents, in their investigating capacity was not found. "The Service's status, its function and powers are not in fact outlined in any statute addressing this matter" (Commission of Inquiry's Report, *supra*, at 302). This having been said, the GSS constitutes an integral part of the executive branch. The fact that the GSS forms part of the executive branch is not in itself sufficient to invest it with the authority to interrogate. It is true that the government does possess residual or prerogative powers, defined as follows:

> "The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another
> authority." (Article 40, Basic Law: The Government).

However, we are not to conclude from this provision the authority to investigate, for our purposes. As mentioned, the power to investigate infringes on a person's individual liberty. The government's residual (prerogative) powers authorize it to act whenever there is an "administrative vacuum" (See H.C. 2918/93 *The City of Kiryat Gatt v. The State of Israel and others*, 37 (5) P.D. 832 at 843).

A so called "administrative vacuum" of this nature does not appear in the case at bar, as the relevant field is entirely occupied by the principle of individual

freedom. Infringing upon this liberty therefore requires specific directives, as insisted upon by President Shamgar:

> "There are activities which do not fall within the government's powers or scope. Employing them, absent statutory authorization, runs contrary to our most basic normative understanding, an understanding which emanates from our system's very [democratic] character. Thus, it is respecting basic rights that forms part of our positive law, whether they have been spelled out in a Basic Law or whether this has yet to be done. Thus, the government is not endowed with the capacity to, for example, shut down a newspaper on the basis of an administrative decision, absent explicit statutory authorization to this effect, irrespective of whether a Basic Law expressly protects freedom of expression; An act of this sort would undoubtedly run contrary to our basic understanding regarding human liberty and the [democratic] nature of our regime, which provides that liberty may only be infringed upon by virtue of explicit statutory authorization...Hence, freedom of expression, a basic right, forms an integral part of our positive law, creates an exception binding the executive (branch) and does not allow it to stray from the prohibition respecting guaranteed human liberty, absent statutory authorization" (In H.C. 5128/94 *Federman v. The Minister of Police*, 48(5) P.D. 647 at 652.).

In a similar vein, Professor Zamir has noted:

> "While allowing the government to act, article 40 of the Basic Law: The Government (article 29 to the old Basic Law) simultaneously subjects it to the law. Clearly, this exception precludes the government from acting in a manner contrary to statutory directives. Moreover, it prevents the government from infringing upon individuals' basic rights. This is of course all the more true respecting specific rights protected explicitly by the Basic Laws Human Dignity and Liberty and Freedom of Occupation. Notwithstanding, this is also the case for human rights not specifically enumerated in the Basic Laws. For instance, article 29 (now article 40) does not in any way authorize the government to limit freedom of expression... Indeed, article 29 "(now 40) merely endows the administrative authority with general executive powers that cannot serve to directly infringe upon human rights, unless there is explicit or implicit statutory authorization for doing so" (I. Zamir, *Administrative Authority* (vol. 1, 1996) at 337).

This is the law relevant to the case at bar. An individual's liberty is not to be the object of an interrogation- this is a basic liberty under our constitutional regime. There are to be no infringements on this liberty absent statutory provisions which successfully pass constitutional muster. The government's general administrative powers fail to fulfill these requirements. Indeed, when the Legislator sought to endow the GSS with the power to infringe upon a person's individual liberty, he proceeded to legislate specific provisions accordingly. Thus, for instance, it is stipulated that the head of a security service, under special circumstances, is authorized to allow for the secret

monitoring of telephone conversations (See article 5 of the Secret Interception of Communication Statute-1979; Compare article 19(3)(4) of the Protection of Privacy Statute-1981). This requires that the following question be asked: Does there exist a special statutory instruction endowing GSS investigators with interrogating powers?

20. A specific statutory provision authorizing GSS investigators to conduct interrogations does not exist. While it is true that various interrogation directives, some with ministerial approval, followed the Commission of Inquiry's Report, these do not satisfy the requirement that the authority flow directly from statute or from explicit statutory authorization. The directives set out following the Inquiry Commission's Report merely constitute internal regulations. Addressing these directives, Justice Levin opined:

> "Clearly, these directives are not to be understood as being tantamount to a "statute", as defined in article 8 of the Basic Law: Human Dignity. They are to therefore be struck down if they are found not to conform to it" (H.C. 2581/91 *Salhat v. The State of Israel*, 47(4) P.D. 837, at 845).

From where then, do the GSS investigators derive their interrogation powers? The answer is found in article 2(1) of the Criminal Procedure Statute [Testimony] which provides (in its 1944 version, as amended):

> "A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorized officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined."

It is by virtue of the above provision that the Minister of Justice particularly authorized the GSS investigators to conduct interrogations regarding the commission of hostile terrorist activities. It has been brought to the Court's attention that in the authorizing decree, the Minister of Justice took care to list the names of those GSS investigators who were authorized to conduct secret interrogations with respect to crimes committed under the Penal Law-1977, the Prevention of Terrorism Statute-1948, the (Emergency) Defence Regulations-1945, The Prevention of Infiltration Statute (Crimes and Judging)-1954, and crimes which are to be investigated as per the Emergency Defence Regulations (Judea, Samaria and the Gaza strip-Judging in Crimes and Judicial Assistance-1967). It appears to us - and we have heard no arguments to the contrary- that the question of the GSS' authority to conduct interrogations can thus be resolved. By virtue of this authorization, GSS investigators are tantamount to police officers in the eyes of the law. If this solution is appropriate, is there not place for regulating the GSS investigators' powers by statute? We shall express an opinion on the matter at this time.

The Means Employed for Interrogation Purposes

21. As we have seen, the GSS investigators are endowed with the authority to conduct interrogations (See par. 20, *supra*). What is the scope of these powers and do they encompass the use of physical means in the course of the interrogation in order to advance it? Can use be made of the physical means presently employed by GSS investigators (such as shaking, the "Shabach" position, and sleep deprivation) by virtue of the investigating powers given the GSS investigators? Let us note that the State did not argue before us that all the means employed by GSS investigators are permissible by virtue of the "law of interrogation" per se. Thus, for instance, the State did not make the argument that shaking is permitted simply because it is an "ordinary" investigator's method in Israel. Notwithstanding, it was argued before this Court that some of the physical means employed by the GSS investigators are permitted by the "law of interrogation" itself. For instance, this is the case with respect to some of the physical means applied in the context of waiting in the "Shabach" position: the placing of the head covering (for preventing communication between the suspects); the playing of powerfully loud music (to prevent the passing of information between suspects); the tying of the suspect's hands to a chair (for the investigators' protection) and the deprivation of sleep, as deriving from the needs of the interrogation. Does the "law of interrogation" sanction the use of physical means, the like used in GSS interrogations?

22. An interrogation, by its very nature, places the suspect in a difficult position. "The criminal's interrogation," wrote Justice Vitkon over twenty years ago, "is not a negotiation process between two open and fair vendors, conducting their business on the basis of maximum mutual trust" (Cr. A 216/74 *Cohen v The State of Israel*) 29(1) P.D. 340 at 352). An interrogation is a "competition of minds", in which the investigator attempts to penetrate the suspect's thoughts and elicit from him the information the investigator seeks to obtain. Quite accurately, it was noted that:

> "Any interrogation, be it the fairest and most reasonable of all, inevitably places the suspect in embarrassing situations, burdens him, intrudes his conscience, penetrates the deepest crevices of his soul, while creating serious emotional pressure". (Y. Kedmi, *On Evidence*, Part A, 1991 at 25).

Indeed, the authority to conduct interrogations, like any administrative power, is designed for a specific purpose, which constitutes its foundation, and must be in conformity with the basic principles of the [democratic] regime. In crystallizing the interrogation rules, two values or interests clash. On the one hand, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. On the other hand, is the wish to protect the dignity and liberty of the individual being interrogated. This having been said, these interests and values are not absolute. A democratic, freedom-loving society does not accept that investigators use any means for the

purpose of uncovering the truth. " The interrogation practices of the police in a given regime," noted Justice Landau, "are indicative of a regime's very character" (Cr. A. 264/65 *Artzi v. The Government's Legal Advisor,* 20(1) P.D. 225 at 232). At times, the price of truth is so high that a democratic society is not prepared to pay it (See Barak, *On Law, Judging and Truth*, 27 Mishpatim (1997) 11 at 13). To the same extent however, a democratic society, desirous of liberty seeks to fight crime and to that end is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided it is done for a proper purpose and that the harm does not exceed that which is necessary. Concerning the collision of values, with respect to the use of evidence obtained in a violent police interrogation**,** Justice H. Cohen opined as follows:

> " On the one hand, it is our duty to ensure that human dignity be protected; that it not be harmed at the hands of those who abuse it, and to do all that we can to restrain police investigators from fulfilling the object of their interrogation through prohibited and criminal means; On the other hand, it is (also) our duty to fight the increasingly growing crime rate which destroys the positive aspects of our country, and to prevent the disruption of public peace to the caprices of violent criminals that were beaten by police investigators" (Cr. A. 183/78 *Abu Midjim v. The State of Israel*, 34(4) P.D. 533 at 546).

Our concern, therefore, lies in the clash of values and the balancing of conflicting values. The balancing process results in the rules for a 'reasonable interrogation' (See Bein, *The Police Investigation- Is There Room for Codification of the 'Laws of the Hunt'*, 12 Iyunei Mishpat (1987) 129). These rules are based, on the one hand, on preserving the "human image" of the suspect (See Cr. A. 115/82 *Mouadi v. The State of Israel* 35 (1) P.D. 197 at 222-4) and on preserving the "purity of arms" used during the interrogation (Cr. A. 183/78, *supra*, *ibid*.). On the other hand, these rules take into consideration the need to fight the phenomenon of criminality in an effective manner generally, and terrorist attacks specifically. These rules reflect "a degree of reasonableness, straight thinking (right mindedness) and fairness" (Kedmi, *supra*, at 25). The rules pertaining to investigations are important to a democratic state. They reflect its character. An illegal investigation harms the suspect's human dignity. It equally harms society's fabric.

23. It is not necessary for us to engage in an in-depth inquiry into the "law of interrogation" for the purposes of the applications before us. These vary from one matter to the next. For instance, the law of interrogation, as it appears in the context of an investigator's potential criminal liability, as opposed to the purpose of admitting evidence obtained by questionable means. Here, by contrast, we deal with the "law of interrogation" as a power activated by an administrative authority (See Bein *supra*.). The "law of interrogation" by its very nature, is intrinsically linked to the circumstances of each case. This having been said, a number of general principles are nonetheless worth noting:

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation (F.H. 3081/91 *Kozli v. The State of Israel*, 35(4) P.D. 441 at 446). Human dignity also includes the dignity of the suspect being interrogated. (Compare H.C. 355/59 *Catlan v. Prison Security Services*, 34(3) P.D. 293 at 298 and C.A.4463/94 *Golan v. Prison Security Services*, 50(4) P.D. 136). This conclusion is in perfect accord with (various) International Law treaties -to which Israel is a signatory -which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment" (See M. Evans and R. Morgan, Preventing Torture (1998) at 61; N.S. Rodley, The Treatment of Prisoners under International Law (1987) at 63). 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 potentially lead to the investigator being held criminally liable. (See, for example, article 277 of the Penal Law: Pressure on a Public Servant; *supra* at 130, 134; Cr. A. 64/86 *Ashash v. The State of Israel* (unpublished)). 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. Indeed, 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 machinations and specific sophisticated activities which serve investigators today (both for Police and GSS); Similar investigations- accepted in the most progressive of societies- can be effective in achieve 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 a use of an investigation method which surpasses the least restrictive means.

From the General to the Particular

24. We shall now turn from the general to the particular. Plainly put, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which does not form part of a legal investigation. It surpasses that which is necessary. Even the State did not argue that shaking is an "ordinary" investigation method which every investigator (in the GSS or police) is permitted to employ. The submission before us was that the justification for shaking is found in the "necessity" defence. That argument shall be dealt with below. In any event, there is no doubt that shaking is not to be resorted to in cases outside the bounds of "necessity" or as part of an "ordinary" investigation.

25. It was argued before the Court that one of the investigation methods employed consists of the suspect crouching on the tips of his toes for five minute intervals. The State did not deny this practice. This is a prohibited

investigation method. It does not serve any purpose inherent to an investigation. It is degrading and infringes upon an individual's human dignity.

26. The "Shabach" method is composed of a number of cumulative components: the cuffing of the suspect, seating him on a low chair, covering his head with an opaque sack (head covering) and playing powerfully loud music in the area. Are any of the above acts encompassed by the general power to investigate? Our point of departure is that there are actions which are inherent to the investigation power (Compare C.A. 4463/94, *supra*., *ibid*.). Therefore, we accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is an action included in the general power to investigate (Compare H.C. 8124/96 *Mubarak v. The GSS* (unpublished)). Provided the suspect is cuffed for this purpose, it is within the investigator's authority to cuff him. The State's position is that the suspects are indeed cuffed with the intention of ensuring the investigators' safety or to prevent fleeing from legal custody. Even the applicants agree that it is permissible to cuff a suspect in similar circumstances and that cuffing constitutes an integral part of an interrogation. Notwithstanding, the cuffing associated with the "Shabach" position is unlike routine cuffing. The suspect is cuffed with his hands tied behind his back. One hand is placed inside the gap between the chair's seat and back support, while the other is tied behind him, against the chair's back support. This is a distorted and unnatural position. The investigators' safety does not require it. Therefore, there is no relevant justification for handcuffing the suspect's hands with particularly small handcuffs, if this is in fact the practice. The use of these methods is prohibited. As was noted, "Cuffing causing pain is prohibited" (See the *Mubarak* affair *supra*.). Moreover, there are other ways of preventing the suspect from fleeing from legal custody which do not involve causing the suspect pain and suffering.

27. This is the law with respect to the method involving seating the suspect in question in the "Shabach" position. We accept that seating a man is inherent to the investigation. This is not the case when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is sitting in this position for long hours. This sort of seating is not encompassed by the general power to interrogate. Even if we suppose that the seating of the suspect on a chair lower than that of his investigator can potentially serve a legitimate investigation objective (for instance, to establish the "rules of the game" in the contest of wills between the parties, or to emphasize the investigator's superiority over the suspect), there is no inherent investigative need for seating the suspect on a chair so low and tilted forward towards the ground, in a manner that causes him real pain and suffering. Clearly, the general power to conduct interrogations does not authorize seating a suspect on a forward tilting chair, in a manner that applies pressure and causes pain to his back, all the more so when his hands are tied behind the chair, in the manner described. All these methods do not fall within the sphere of a "fair" interrogation. They are not reasonable. They impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner (or beyond what is necessary). They are not to be deemed as included within the general power to conduct interrogations.

28. We accept that there are interrogation related considerations concerned with preventing contact between the suspect under interrogation and other suspects and his investigators, which require means capable of preventing the said contact. The need to prevent contact may, for instance, flow from the need to safeguard the investigators' security, or that of the suspects and witnesses. It can also be part of the "mind game" which pins the information possessed by the suspect, against that found in the hands of his investigators. For this purpose, the power to interrogate- in principle and according to the circumstances of each particular case- includes preventing eye contact with a given person or place. In the case at bar, this was the explanation provided by the State for covering the suspect's head with an opaque sack, while he is seated in the "Shabach" position. From what was stated in the declarations before us, the suspect's head is covered with an opaque sack throughout his "wait" in the "Shabach" position. It was argued that the sack (head covering) is entirely opaque, causing the suspect to suffocate. The edges of the sack are long, reaching the suspect's shoulders. All these methods are not inherent to an interrogation. They do not confirm the State's position, arguing that they are meant to prevent eye contact between the suspect being interrogated and other suspects. Indeed, even if such contact should be prevented, what is the purpose of causing the suspect to suffocate? Employing this method is not connected to the purpose of preventing the said contact and is consequently forbidden. Moreover, the statements clearly reveal that the suspect's head remains covered for several hours, throughout his wait. For these purposes, less harmful means must be employed, such as letting the suspect wait in a detention cell. Doing so will eliminate any need to cover the suspect's eyes. In the alternative, the suspect's eyes may be covered in a manner that does not cause him physical suffering. For it appears that at present, the suspect's head covering - which covers his entire head, rather than eyes alone,- for a prolonged period of time, with no essential link to the goal of preventing contact between the suspects under investigation, is not part of a fair interrogation. It harms the suspect and his (human) image. It degrades him. It causes him to lose sight of time and place. It suffocates him. All these things are not included in the general authority to investigate. In the cases before us, the State declared that it will make an effort to find an "ventilated" sack. This is not sufficient. The covering of the head in the circumstances described, as distinguished from the covering of the eyes, is outside the scope of authority and is prohibited.

29. Cutting off the suspect from his surroundings can also include preventing him from listening to what is going on around him. We are prepared to assume that the authority to investigate an individual equally encompasses precluding him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success. Whether the means employed fall within the scope of a fair and reasonable interrogation warrant examination at this time. In the case at bar, the detainee is found in the "Shabach" position while listening to the consecutive playing of powerfully loud music. Do these methods fall within the scope or the general authority to conduct interrogations? Here too, the answer is in the negative. Being exposed to powerfully loud music for a long

period of time causes the suspect suffering. Furthermore, the suspect is tied (in place) in an uncomfortable position with his head covered (all the while). The use of the “Shabach” method is prohibited. It does not fall within the scope of the authority to conduct a fair and effective interrogation. Powerfully loud music is a prohibited means for use in the context described before us.

30. To the above, we must add that the "Shabach" position includes all the outlined methods employed simultaneously. Their combination, in and of itself gives rise to particular pain and suffering. This is a harmful method, particularly when it is employed for a prolonged period of time. For these reasons, this method does not form part of the powers of interrogation. It is an unacceptable method. "The duty to safeguard the detainee's dignity includes his right not to be degraded and not to be submitted to sub-human conditions in the course of his detention, of the sort likely to harm his health and potentially his dignity" (In Cr. A. 7223/95 *The State of Israel v. Rotenstein* (not yet published)).

A similar- though not identical- combination of interrogation methods were discussed in the case of *Ireland v. United Kingdom* (1978) 2 EHRR 25. In that case, the Court probed five interrogation methods used by England for the purpose of investigating detainees suspected of terrorist activities in Northern Ireland. The methods were as follows: protracted standing against the wall on the tip of one's toes; covering of the suspect's head throughout the detention (except during the actual interrogation); exposing the suspect to powerfully loud noise for a prolonged period and deprivation of sleep, food and drink. The Court held that these methods did not constitute "torture". However, since they treated the suspect in an "inhuman and degrading" manner, they were nonetheless prohibited.

31. The interrogation of a person is likely to be lengthy, due to the suspect's failure to cooperate or due to the information's complexity or in light of the imperative need to obtain information urgently and immediately (For instance, see The *Mubarak* affair, *supra*; H.C. 5318/95 *Hajazi v. GSS* (unpublished)). Indeed, a person undergoing interrogation cannot sleep as does one who is not being interrogated. The suspect, subject to the investigators' questions for a prolonged period of time, is at times exhausted. This is often the inevitable result of an interrogation, or one of its side effects. This is part of the "discomfort" inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator (Compare: H.C. 3429/94 *Shbana v. GSS* (unpublished)). So noted Justice Shamgar, in a similar instance:

> "The interrogation of crimes and in particular, murder or other serious crimes- cannot be accomplished within the confines of an ordinary public servant's work day...The investigation of crime is essentially mental resistance...For this reason, the interrogation is often carried out at consecutive intervals. This, as noted, causes the investigation to drag on ...and requires diligent insistence on its momentum and

> consecutiveness." (Cr. A. 485/76 *Ben Loulou v. The State of Israel* (unpublished)).

The above described situation is different from those in which sleep deprivation shifts from being a "side effect" inherent to the interrogation, to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or "breaking" him- it shall not fall within the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner surpassing that which is required.

32. All that was stated regarding the exceptions pertinent to an interrogation, flowing from the requirement that an interrogation be fair and reasonable, is the accepted law with respect to a regular police interrogation. The power to interrogate given to the investigator GSS investigator by law is the same interrogation powers the law bestows upon the ordinary police force investigator. It appears that the restrictions applicable to the police investigations are equally applicable to GSS investigations. There is no statutory instruction endowing a GSS investigator with special interrogating powers that are either different or more serious than those given the police investigator. From this we conclude that a GSS investigator, whose duty is to conduct the interrogation according to the law, is subject to the same restrictions applicable to a police interrogation.

Physical Means and the "Necessity" Defence

33. We have arrived at the conclusion that the GSS personnel who have received permission to conduct interrogations (as per the Criminal Procedure Statute [Testimony]) are authorized to do so. This authority-like that of the police investigator- does not include most of the physical means of interrogation which are the subject of the application before us. Can the authority to employ these interrogation methods be anchored in a legal source beyond the authority to conduct an interrogation? This question was answered by the State's attorneys in the affirmative. As noted, an explicit authorization permitting GSS to employ physical means is not to be found in our law. An authorization of this nature can, in the State's opinion, be obtained in specific cases by virtue of the criminal law defense of "necessity", prescribed in the Penal Law. The language of the statute is as follows: (Article 34 (1)):

> *"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, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm."*

The State's position is that by virtue of this "defence" to criminal liability, GSS investigators are also authorized to apply physical means, such as shaking, in

the appropriate circumstances, in order to prevent serious harm to human life or body, in the absence of other alternatives. The State maintains that an act committed under conditions of "necessity" does not constitute a crime. Instead, it is deemed an act worth committing in such circumstances in order to prevent serious harm to a human life or body. We are therefore speaking of a deed that society has an interest in encouraging, as it is deemed proper in the circumstances. It is choosing the lesser evil. Not only is it legitimately permitted to engage in the fighting of terrorism, it is our moral duty to employ the necessary means for this purpose. This duty is particularly incumbent on the state authorities- and for our purposes, on the GSS investigators- who carry the burden of safeguarding the public peace. As this is the case, there is no obstacle preventing the investigators' superiors from instructing and guiding them with regard to when the conditions of the "necessity" defence are fulfilled and the proper boundaries in those circumstances. From this flows the legality of the directives with respect to the use of physical means in GSS interrogations. In the course of their argument, the State's attorneys submitted the "ticking time bomb" argument. A given suspect is arrested by the GSS. He holds information respecting the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, however, the bomb my be diffused. If the bomb is not diffused, scores will be killed and maimed. Is a GSS investigator authorized to employ physical means in order to elicit information regarding the location of the bomb in such instances? The State's attorneys answers in the affirmative. The use of physical means shall not constitute a criminal offence, and their use is sanctioned, to the State's contention, by virtue of the "necessity" defence.

34. We are prepared to assume that- although this matter is open to debate - (See A. Dershowitz, *Is it Necessary to Apply 'Physical Pressure' to Terrorists- And to Lie About It?,* [1989] 23 Israel L. Rev. 193; Bernsmann, *Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposa- Some Remarks*, [1998] 30 Israel L. Rev. 171, 208-210) - the "necessity" defence is open to all, particularly an investigator, acting in an organizational capacity of the State in interrogations of that nature. Likewise, we are prepared to accept - although this matter is equally contentious- (See M. Kremnitzer, *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 L. Rev. 216, 244-247) - that the "necessity" exception is likely to arise in instances of "ticking time bombs", and that the immediate need ("necessary in an immediate manner" for the preservation of human life) refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence (See Kremnitzer and Segev, *The Application of Force in the Course of GSS Interrogations- A Lesser Evil?,* [1998] 4 Mishpat U' Mimshal 667 at 707; See also Feller, *Not Actual "Necessity" but Possible "Justification"; Not "Moderate Pressure", but Either "Unlimited" or "None at All",* [1989] 23 Israel L. Rev. 201, 207).

Consequently we are prepared to presume, as was held by the Inquiry Commission's Report, that if a GSS investigator- who applied physical interrogation methods for the purpose of saving human life-is criminally indicted, the "necessity" defence is likely to be open to him in the appropriate circumstances (See Cr. A. 532/91 *Anonymous v. The State of Israel* (unpublished)). A long list of arguments, from both the fields of Ethics and Political Science, may be raised for and against the use of the "necessity" defence, (See Kremnitzer and Segev, *supra*, at p.696; M.S. Moor, *Torture and the Balance of Evils*, [1989] 23 Israel L. Rev. 280; L. Shelf, *The Lesser Evil and the Lesser Good- On the Landau Commission's Report, Terrorism and Torture,* [1990] 1 Plilim 185; W.L. & P.E. Twining, *Bentham on Torture*, [1973] 24 Nothern Ireland Legal Quarterly 305; D. Stetman, *The Question of Absolute Morality Regarding the Prohibition on Torture,* [1997] 4 Mishpat U' Mimshal 161 at 175; A. Zuckerman, *Coersion and the Judicial Ascertainment of Truth*, [1989] 23 Israel L. Rev. 357. This matter, however, has already been decided under Israeli law. Israel's Penal Law recognizes the "necessity" defence.

35. Indeed, we are prepared to accept that in the appropriate circumstances, GSS investigators may avail themselves of the "necessity" defence, if criminally indicted. This however, is not the issue before this Court. We are not dealing with the potential criminal liability of a GSS investigator who employed physical interrogation methods in circumstances of "necessity." Moreover, we are not addressing the issue of admissibility or probative value of evidence obtained as a result of a GSS investigator's application of physical means against a suspect. We are dealing with a different question. The question before us is whether it is possible to infer the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of "necessity". Moreover, we are asking whether the "necessity" defence constitutes a basis for the GSS investigator's authority to investigate, in the performance of his duty. According to the State, it is possible to imply from the "necessity" defence, available (*post factum*) to an investigator indicted of a criminal offence, an advance legal authorization endowing the investigator with the capacity to use physical interrogation methods. Is this position correct?

36. In the Court's opinion, a general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the "necessity" defence. The "necessity" defence does not constitute a source of authority, allowing GSS investigators to make use physical means during the course of interrogations. The reasoning underlying our position is anchored in the nature of the "necessity" defence. This defence deals with deciding those cases involving an individual reacting to a given set of facts; It is an ad hoc endeavour, in reaction to a event. It is the result of an improvisation given the unpredictable character of the events (See Feller, *ibid.* at 209). Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power. The administrative power is based on establishing general, forward looking criteria, as noted by Professor Enker:

> "Necessity is an after-the-fact judgment based on a narrow set of considerations in which we are concerned with the immediate consequences, not far-reaching and long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values...The defence of Necessity does not define a code of primary normative behaviour. Necessity is certainly not a basis for establishing a broad detailed code of behaviour such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like (Enker, "The Use of Physical Force in Interrogations and the Necessity Defense," in Israel and International Human Rights Law: The Issue of Torture 61,62 (1995)).

In a similar vein, Kremnitzer and Segev note:

> "[t]he basic rationale underlying the necessity defence is the absence of the possibility to establish accurate rules of behaviour in advance, appropriate in concrete emergency situations, whose circumstances are varied and unexpected. From this it follows, that the necessity defence is not well suited for regulation a general situation, the circumstances of which are known and (often) repeat themselves. In similar cases, there is no reason for not setting the rules of behaviour in advance, in order that their content be determined in a thought out and well-planned manner, in advance, permitting them to apply in a uniform manner to all" (*supra,* at 705).

Moreover, the "necessity" defence has the effect of allowing one who acts under the circumstances of "necessity" to escape criminal liability. The "necessity" defence does not possess any additional normative value. In addition, it does not authorize the use of physical means for the purposes of allowing investigators to execute their duties in circumstances of necessity. The very fact that a particular act does not constitute a criminal act (due to the "necessity" defence) does not in itself authorize the administration to carry out this deed, and in doing so infringe upon human rights. The Rule of Law (both as a formal and substantive principle) requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect. The lifting of criminal responsibility does not imply authorization to infringe upon a human right. It shall be noted that the Commission of Inquiry did not hold that the "necessity" defence is the source of authority for employing physical means by GSS investigators during the course of their interrogations. All that the Commission of Inquiry determined is that if an investigator finds himself in a situation of "necessity", constraining him to choose the "lesser evil" - harming the suspect for the purpose of saving human lives - the "necessity" defence shall be available to him. Indeed, the Commission of Inquiry noted that, "the law itself must ensure a proper framework governing the [security] service's actions with respect to the interrogation of hostile terrorist activities and the related problems particular to it" (*ibid.* at 328).

37. In other words, general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not from defences to criminal liability. The principle of "necessity" cannot serve as a basis of authority (See Kremnitzer, *ibid*. at 236). If the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. This release would flow not from the "necessity" defence but from the "justification" defense which states:

> "A person shall not bear criminal liability for an act committed in one of the following cases:
> (1) He was obliged or authorized by law to commit it. "
>
> (Article 34(13) of the Penal Law)

The defence to criminal liability by virtue of the "justification" is rooted in a area outside of the criminal law. This "external" law serves as a defence to criminal liability. This defence does not rest upon the "necessity", which is "internal" to the Penal Law itself. Thus, for instance, where the question of when an officer is authorized to apply deadly force in the course of detention arises, the authority is found in a provision of the Law of Detention, external to the Penal Law. If a man is killed as a result of the application of force, the provision is likely to give rise to a defence, by virtue of the "Justification" (See Cr. A. 486/88, *Ankonina v. The Chief Army Prosecutor* 34(2) P.D. 353). The "necessity" defence cannot constitute the basis for the determination of rules respecting the needs of an interrogation. It cannot constitute a source of authority on which the individual investigator can rely on for the purpose of applying physical means in an investigation that he is conducting. The power to enact rules and to act according to them requires legislative authorization, by legislation whose object is the power to conduct interrogations. Within the boundaries of this legislation, the Legislator, if he so desires, may express his views on the social, ethical and political problems, connected to authorizing the use of physical means in an interrogation. These considerations did not, from the nature of things, arise before the Legislature at the time when the "necessity" defence was enacted (See Kremnitzer, *supra*, at 239-40). The "necessity" defence is not the appropriate place for laying out these considerations (See Enker, *supra*, at 72). Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latters' dignity and liberty, raise basic questions of law and society, of ethics and policy, and of the Rule of Law and security. These questions and the corresponding answers must be determined by the Legislative branch. This is required by the principle of the Separation of Powers and the Rule of Law, under our very understanding of democracy (See H.C. 3267/97 *Rubinstein v. Minister of Defence* (has yet to be published)).

38. Our conclusion is therefore the following: According to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and bestow authorization regarding the

use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. Similarly, the individual GSS investigator-like any police officer- does not possess the authority to employ physical means which infringe upon a suspect's liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.

An investigator who insists on employing these methods, or does so routinely, is exceeding his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the "necessity" defence, and according to our assumptions (See paragraph 35 *supra*.), the investigator may find refuge under the "necessity" defence's wings (so to speak), provided this defence's conditions are met by the circumstances of the case. Just as the existence of the "necessity" defence does not bestow authority, so too the lack of authority does not negate the applicability of the necessity defense or that of other defences from criminal liability. The Attorney General can instruct himself regarding the circumstances in which investigators shall not stand trial, if they claim to have acted from a feeling of "necessity". Clearly, a legal statutory provision is necessary for the purpose of authorizing the government to instruct in 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 this authority.

A Final Word

39. This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous, thereby requiring the authorization to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an 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 pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty "befitting the values of the State of Israel," is enacted for a proper purpose, and to an extent no

greater than is required. (Article 8 to the Basic Law: Human Dignity and Liberty).

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40. Deciding these applications weighed heavy 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. Our apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our bretheren require us to act according to the law. This is equally the standard that we set for ourselves. When we sit to judge, we are being judged. Therefore, we must act according to our purest conscience when we decide the law. The words of the Deputy President of the Supreme Court, Justice Landau, speak well to our purposes:

> "We possess proper sources upon which to construct our judgments and have no need, and while judging, are forbidden from, involving our personal views as citizens of this country in our decisions. Still, great is the fear that the Court shall be perceived as though it had abandoned its proper place and descended to the midst of public debate, and that its decision making will be obstructed by one side of the population's uproar and by the other side's absolute and emotional rejection. In that sense, I see myself here as someone whose duty is to decide according to the law in all cases legally brought before the Court. I am strictly bound by this duty. As I am well aware in advance that the public at large will not pay attention to the legal reasoning, but to the end result alone. And that the Court's proper status, as an institution above partisan debates, risks being harmed. What can we do, as this is our function and role as judges." (H.C. 390/79 *Dawikat v. The State of Israel*, 34(1) P.D. 1 at 4).

The Commission of Inquiry pointed to the "difficult dilemma between the imperative need to safeguard the State of Israel's very existence and the lives of its citizens, and preserving its character- that of a country subject to the Rule of Law and holding basic moral values" (*supra*, p.326). The Commission rejected an approach suggesting that the actions of security services in the context of fighting terrorism, shall take place in the recesses of the law. The Commission equally rejected the "ways of the hypocrites, who remind us of their adherence to the Rule of Law, while ignoring (being willfully blind) to what is being done in practice" (*ibid*. at 327). The Commission elected to follow a third route, "the way of Truth and the Rule of Law" (*Ibid*., at p.328). In so doing, the Commission of Inquiry outlined the dilemma faced by Israel in a manner both transparent and open to inspection by Israeli society.

Consequently, it is decided that the order *nisi* be made absolute, as we declare that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is

inherently required by the interrogation. Likewise, we declare that the "necessity" defence, found in the Penal Law, cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the "necessity" defence be available to GSS investigators, be within the discretion of the Attorney General, if he decides to prosecute, or if criminal charges are brought against them, as per the Court's discretion.

Deputy President S. Levin:
I agree.

Justice T. Or
I agree.

Justice E. Mazza
I agree.

Justice M. Cheshin
I agree.

Justice I. Zamir
I agree.

Justice T. Strasberg-Cohen
I agree.

Justice D. Dorner
I agree.

Justice J' Kedmi

I accept the result conclusion which has been reached by my fellow, the President, by which the use of exceptional interrogation methods,

according to the directives of the Ministerial Committee - that relies on a collection of legal provisions suggested by the attorneys for the State - "has no authority, and is therefore, illegal". Similarly, I am of the opinion that the time has arrived for this issue to be regulated by primary and explicit legislation, that is clear and non-partial.

Notwithstanding, it is difficult for me to accept a state of things in which, due to the absence of explicit legislation as noted (above), the State should be helpless from a legal perspective, in those rare emergencies that merit being defined as, "ticking time bombs"; and that the State would not be authorized to order the use of exceptional interrogation methods in those circumstances. As far as I am concerned, such an authority exists in those circumstances, deriving from the basic obligation of being a State- like all countries of the world- to defend (protect) its existence, its well-being, and to safeguard (the lives of) its citizens. It is clear that in those circumstances, the State - as well as its agents - will have the natural right of "self-defence", in the larger meaning of the term, since terrorist organizations, that seek the soul and the souls of its inhabitants, and carry out shocking terrorist attacks to advance their cause (objectives).

On this background, and deriving from the intention will to prevent a situation where the "time bomb will tick" before our eyes and the State's hand will be shortened to help, I suggest that the judgment be suspended from coming into force for a period of one year. During that year, the GSS could employ exceptional interrogative methods in those rare cases of "ticking time bombs", on the condition that explicit authorization is given by the Attorney General .

The suspension under these conditions, does not infringe the ruling of the judgment, that the use of exceptional interrogation methods - that relies on directives of the Ministerial Committee as noted above - is illegal. This is because according to the suggested conditions, the suspension of the judgment does not constitute an authorization to continue acting according to those directives; and the authorization of the Attorney General does not legalize the performance of an illegal action according to the judgment, but rather deals with the non-indictment (of a violator) for the employment of exceptional interrogation methods in those emergency circumstances defined as, "ticking bombs".

During the suspension period, the Knesset will be given an opportunity to consider the issue (speak its words) concerning the views of exceptional interrogation methods in security investigations, both in general and in times of emergency. The GSS will be given the opportunity to cope with emergency situations until the Knesset considers the issue. Meanwhile, the GSS will also have an opportunity to adapt itself, after a long period in which the directives of the Ministerial Committee have governed, to the new state of things, which expresses the development that has occurred in Israel concerning the status and weight of human rights.

I, therefore, join in the judgment of the President subject to my proposal regarding the suspension of the judgment from coming into force for a period of one year, as explained above.

Decided According the President's Opinion

Given today, the 6th of September, 1999.