THIS DOCUMENT IS A DRAFT, AND IS SUBJECT TO FURTHER REVISION.

Comments, questions and suggestions are all welcomed, and may be directed towards metargem@supreme.court.gov.il

HCJ 5100/94
HCJ 4054/95
HCJ 6536/95
HCJ 5188/96
HCJ 7563/97
HCJ 7628/97
HCJ 1043/99

HCJ 5100/94

Public Committee Against Torture in Israel
v.
1. The State of Israel
2. The General Security Service

HCJ 4054/95

The Association for Civil Rights in Israel
v.
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

HCJ 6536/95

Hat'm Abu Zayda
v.
The General Security Service

HCJ 5188/96

1. Wa'al Al Kaaqua
2. Ibrahim Abd'allah Ganimat
3. Center for the Defense of the Individual
v.
1. The General Security Service
2. The Prison Commander—Jerusalem

HCJ 7563/97

1. Abd Al Rahman Ismail Ganimat
2. Public Committee Against Torture in Israel
v.
1. The Minister of Defense
2. The General Security Service

HCJ 7628/97

1. Fouad Awad Quran
2. Public Committee against Torture in Israel
v.
1. The Minister of Defense
2. The General Security Service

HCJ 1043/99

Issa Ali Batat
v.
The General Security Service

The Supreme Court Sitting as the High Court of Justice

[May 5, 1998, January 13 1999, May 26, 1999]

Before President A. Barak, Deputy President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, Y. Kedmi, I. Zamir, T. Strasberg-Cohen, D. Dorner

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: In its investigations, the General Security Service makes use of methods that include subjecting suspects to moderate physical pressure. The means are employed under the authority of directives. These directives allow for the use of moderate physical pressure if such pressure is immediately necessary to save human life. Petitioners challenge the legality of these methods.

Held: The Court held that the GSS did not have the authority employ certain methods challenged by the petitioners. The Court also held that the "necessity defense," found in the Israeli Penal Law, could serve to *ex ante* allow GSS investigators to employ such interrogation practices. The Court's decision did not negate the possibility that the "necessity defense" would be available *post factum* to GSS investigators—either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought were brought against them.

Petition denied.

Counsel for the petitioner in HCJ 5100/94—Avigdor Feldman; Ronit Robinson
Counsel for the petitioner in HCJ 4054/95—Dan Yakir
Counsel for the petitioners in HCJ 6536/95 HCJ 5188/96 and HCJ 1043/99—Andre Rosenthal
Counsel for petitioner Number Three in HCJ 5188/96—Eliyahu Abram
Counsel for petitioners in HCJ 7563/97 and HCJ 7628/97—Leah Tzemel; Allegra Pachko
Counsel for respondents—Shai Nitzan; Yehuda Scheffer

JUDGMENT

President A. Barak

The General Security Service [hereinafter the "GSS"] investigates individuals suspected of committing crimes against Israel's security. Authorization for these interrogations is granted by directives that regulate interrogation methods. These directives authorize investigators to apply physical means against those undergoing interrogation, including shaking the suspect and placing him in the "Shabach" position. These methods are permitted since they are seen as immediately necessary to save human lives. Are these interrogation practices legal? These are the issues before us.

Background

1. Ever since it was established, the State of Israel has been engaged in an unceasing struggle for its security—indeed, its very existence. Terrorist organizations have set Israel's annihilation as their goal. 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—in areas of 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 Interrogation Practices of the GSS with Respect to Hostile Terrorist Activities headed by Justice (ret.) M. Landau, 1987 [hereinafter the Report of the Commission of Inquiry]. *See* 1 The Landau Book 269, 276 (1995).

The facts before this Court reveal that 121 people died in terrorist attacks between January 1, 1996 and May 14, 1998. 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, and the placing of explosives—were prevented due to daily measures taken by authorities responsible for fighting terrorist activities. The GSS is the main body responsible for fighting terrorism.

In order to fulfill this function, the GSS also investigates those suspected of hostile terrorist activities. The purpose of these interrogations includes the gathering of information regarding terrorists in order to prevent them from carrying out terrorist attacks. In the context of these interrogations, GSS investigators also make use of physical means.

The Petitions

2. These petitions are concerned with the interrogation methods of the GSS. They outline several of these methods in detail. Two of the petitions are of a public nature. One of these (HCJ 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 methods approved by the Report of the Commission of Inquiry, such as "the application of non-violent psychological pressure" and of "a moderate degree of physical pressure." The second petition (4054/95) is brought by the Association for Civil Rights in Israel. It argues that the GSS should be ordered to cease shaking suspects during interrogations.

The five remaining petitions involve individual petitioners. They each petitioned the Court to hold that the methods used against them by the GSS are illegal.

3. Petitioners in HCJ 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

July 21, 1996 through the Center for the Defense of the Individual, founded by Dr. Lota Saltzberger. They petitioned the Court for an *order nisi* prohibiting the use of physical force against them during their interrogation. The Court granted the order. The two petitioners were released from custody prior to the hearing. As per their request, we have elected to continue hearing their case, in light of the importance of the issues they raise.

4. Petitioner in HCJ 6536/96 (Hat'm Abu Zayda), was arrested on September 21, 1995 and interrogated by GSS investigators. He turned to this Court on October 22, 1995 via the Center for the Defense of the Individual, founded by Dr. Lota Saltzberger. He complained of the interrogation methods allegedly used against him, including sleep deprivation, shaking, beatings, and use of the "Shabach" position. We immediately ordered the petition be heard. The Court was then informed that petitioner's interrogation had ended. Petitioner was subsequently convicted of activities in the military branch of the Hamas terrorist organization. He was sentenced to 74 months in prison. The court held that petitioner both recruited for Hamas and also helped construct its terrorist infrastructure. The purpose of this infrastructure was to carry out the kidnapping of Israeli soldiers as well as execute other terrorist attacks against Israeli security forces. During oral arguments, it was asserted that the information provided by petitioner during his interrogation led to the thwarting of a plan to carry out serious terrorist attacks, including the kidnapping of soldiers.

5. The petitioner in HCJ 7563/97 (Abd al Rahman Ismail Ganimat) was arrested on November 13, 1997 and interrogated by the GSS. He appealed to this Court on December 24, 1997 via the Public Committee against Torture in Israel. He claimed to have been tortured by his investigators, through use of the "Shabach" position," excessively tight handcuffs, and sleep deprivation. His interrogation revealed that he was involved in numerous terrorist activities, which resulted in the deaths of many Israeli citizens. He was instrumental in the kidnapping and murder of Sharon Edry, an IDF soldier. Additionally, he was involved in the

bombing of 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 in prison.

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

6. The petitioner in HCJ 7628/97 (Fouad Awad Quran) was arrested on December 10, 1997 and interrogated. He turned to this Court on December 25, 1997 via the Public Committee against Torture in Israel. Petitioners claimed that he was being deprived of sleep and was being seated in the "Shabach" position. The Court issued an *order nisi* and held oral arguments immediately. During the hearing, the state informed the Court that "at this stage of the interrogation, the GSS is not employing the alleged methods." For this reason, no interim order was granted.

7. The petitioner in HCJ1043/99 (Issa Ali Batat) was arrested February 2, 1999, and interrogated by GSS investigators. The petition, brought via the Public Committee against Torture in Israel, argues that physical force was used against petitioner during the course of the interrogation. The Court issued an *order nisi*. During oral arguments, it came to the Court's attention that the petitioner'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 security and public safety of the "area" (Judea, Samaria and the Gaza Strip).

Physical Means

8. The GSS did not describe the physical means employed by GSS investigators. The State Attorney was prepared to present this information *in camera*. Petitioners opposed this proposal. As such, the information before the Court was provided by the petitioners and was not examined in each individual petition. This having been said, the state did not deny the use of these interrogation methods, and even offered justifications for these methods. This provided the Court with a picture of the interrogation practices of the GSS.

The decision to utilize physical means in a particular instance is based on internal regulations, which requires obtaining permission from the higher ranks of the GSS. The regulations themselves were approved by a special Ministerial Committee on GSS interrogations. Among other guidelines, the committee set forth directives regarding the rank required of an officer who was to authorize such interrogation practices. These directives were not examined by this Court. Different interrogation methods are employed in each situation, depending what is necessary in that situation and 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 petitioners (HCJ 5100/94; HCJ 4054/95; HCJ 6536/95) claimed that they were subject to shaking. Among the investigation methods outlined in the GSS interrogation regulations, shaking is considered the harshest. The method is defined as the forceful and repeated shaking of the suspect's upper torso, in a manner which causes the neck and head to swing rapidly. According to an expert opinion submitted in HCJ 5584/95 and HCJ 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 opposing expert opinions into evidence. It admits the use of this method by the GSS. It contends, however, that shaking does not present an inherent danger to the life of the suspect, that the risk to life as a result of shaking is rare, that there is no evidence that shaking causes fatal damage, and that medical literature has not, to date, reported a case in which a person died as a direct result of having been shaken. In any event, they argue, doctors are present at all interrogation areas, and the possibility of medical injury is always investigated.

All agree that, in one particular case, (HCJ 4054/95) the suspect expired after being shaken. According to the state, that case was a rare exception. Death was caused by an extremely rare complication which resulted in pulmonary edema. In addition, the state argues that the shaking method is only resorted to in very specific cases, and only as a last resort. The directives define the appropriate circumstances for its use, and the rank responsible for authorizing its use. The investigators were instructed that, in every case where they consider the use of shaking, they must examine 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 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 ability of the GSS to effectively thwart deadly terrorist attacks. Its use in the past has lead to the prevention of murderous attacks.

Waiting in the "Shabach" Position

10. This interrogation method arose in several petitions (HCJ 6536/95, HCJ 5188/96, HCJ 7628/97). As per petitioners' 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 a sack that falls down to his shoulders. Loud music is played in the room. According to the briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation.

Petitioners 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. It submits that both crucial security considerations and the safety of the investigators require the tying of the suspect's hands as he is being interrogated. The head covering is intended to prevent contact with other suspects. Loud music is played for the same reason.

The "Frog Crouch"

11. This interrogation method appeared in one of the petitions (HCJ 5188/96). According to the petition, the suspect was interrogated 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, and the Court issued an *order nisi* in the petition. Prior to hearing the petition, however, this interrogation practice ceased.

Excessively Tight Handcuffs

12. In a number of petitions (HCJ 5188/96; HCJ 7563/97), several petitioners complained of excessively tight hand or leg cuffs. They contended that this practice results in serious injuries to the suspect's hands, arms and feet, due to the length of the interrogations. The petitioners contend that particularly small cuffs were used. The state, for its part, denies the use of unusually small cuffs, arguing that those used were of standard issue and were properly applied. Even so, the state is

prepared to admit that prolonged hand or foot cuffing is likely to cause injuries to the suspect's hands and feet. The state contends, however, that injuries of this nature are inherent to any lengthy interrogation.

Sleep Deprivation

13. In a number of petitions (HCJ 6536/96; HCJ 7563/97; HCJ 7628/97) petitioners complained of being deprived of sleep as a result of being tied in the "Shabach" position, while subject to the playing of loud music, or of being subjected to 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 long amount of time necessary for conducting the interrogation.

Petitioners' Arguments

14. Before us are a number of petitions. Different petitioners raise different arguments. All the petitions 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 the human dignity of the suspect undergoing interrogation, but also constitute criminal offences. These methods, argue the petitioners, are in violation of international law as they constitute "torture." As such, GSS investigators are not authorized to conduct these interrogations. Furthermore, the "necessity defense" is not relevant to the circumstances in question. In any event, the doctrine of "necessity" at most constitutes an exceptional *post factum* defense, exclusively confined to criminal proceedings against investigators. It cannot, however, provide GSS investigators with the authorization to conduct interrogations. GSS investigators are not authorized to employ any physical means, absent unequivocal authorization from the legislature which conforms to the constitutional 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 Report of the Commission of Inquiry, since doing so would merely regulate the torture of human beings.

We asked petitioners whether the "ticking bomb" rationale was sufficiently persuasive to justify the use of physical means. This rationale would apply in a situation where a bomb is known to have been placed in a public area and will cause human tragedy if its location is not revealed. This question elicited different responses from the petitioners. 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 acceptable to employ physical means in the exceptional circumstances of the "ticking bomb," these methods are used even in absence of "ticking bomb" conditions. The very fact that the use of such means is illegal in most cases warrants banning their use altogether, even if doing so would include those rare cases in which physical coercion may have been justified. Whatever their individual views, all petitioners unanimously highlight the distinction between the *post factum* possibility of escaping criminal liability and the advance granting of permission to use physical means for interrogation purposes.

The State's Arguments

15. According to the state, GSS investigators are authorized to interrogate those suspected of committing crimes against the security of Israel. This authority comes from the government's general and residual powers, as per article 40 of the Basic Law: the Government. Similarly, the authority to investigate is bestowed upon every individual investigator under article 2(1) of the Criminal Procedure Statute [Testimony]. With respect to the physical means employed by the GSS, the state argues that these methods do not violate international law. Indeed, it is submitted that these methods cannot be described as

"torture," as "cruel and inhuman treatment," or as "degrading treatment," which are all strictly prohibited under international law. The state further contends that the practices of the GSS do not cause pain and suffering.

Moreover, the state argues that these means are legal under domestic Israeli law. This is due to the "necessity defense" of article 34(11) of the Penal Law-1977. In the specific cases where the "necessity defense" would apply, 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. Resort 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. According to the state, there is no reason to prohibit a particular act if, in specific circumstances, it does not constitute a crime. This is particularly true with respect to GSS investigators who, according to the state, are 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 such cases, these methods are subject to strict scrutiny and supervision, as per the conditions and restrictions in the Report of the Commission of Inquiry. This having been said, when such exceptional conditions are present, these interrogation methods are fundamental to saving human lives and safeguarding Israel's security.

The Report of the Commission of Inquiry

16. The authority of the GSS to employ particular interrogation methods was examined by the Commission of Inquiry. The Commission, appointed by the government under the Commission of Inquiry Statute-1968, considered the legal status of the GSS. Following a prolonged deliberation, the Commission concluded that the GSS is authorized to investigate those suspected of hostile terrorist acts, even in absence of an express statute, in light of the powers granted to it by other legislation as well as by the government's residual powers, outlined in the Basic Law:

the Government. *See* The Basic Law: The Government, § 40. 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], also endows the GSS with the authority to investigate. Another part of the Report of the Commission of Inquiry deals with "defenses available to the investigator." With regard to this matter, the Commission concluded that, in cases where the saving of human lives requires obtaining certain information, the investigator is entitled to apply both psychological pressure and "a moderate degree of physical pressure." As such, an investigator who, in the face of such danger, applies a degree of physical pressure, which does not constitute abuse or torture of the suspect, but is proportionate to the danger to human life can, in the face of criminal liability, avail himself of the "necessity defense." The Commission was convinced that its conclusions were not in conflict with international law, but were rather consistent with both the rule of law and the need to effectively protect the security of Israel and its citizens.

The commission approved the use of "moderate degree of physical pressure." Such "moderate physical pressure" could be applied under stringent conditions. 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 commission's recommendations were approved by the government.

The Petitions

17. A number of petitions dealing with the application of physical force by the GSS for interrogation purposes have made their way to this Court over the years. *See, e.g.,* HCJ 7964/95 *Billbissi v. The GSS* (unreported decision); HCJ 8049/96 *Hamdan v. The GSS* (unreported decision); HCJ 3123/94 *Atun v. The Head of the GSS* (unreported decision); HCJ 3029/95 *Arquan v. The GSS* (unreported decision); HCJ 5578/95 *Hajazi v. The GSS* (unreported decision). Immediate oral arguments were ordered in each of these cases. In most of the cases, the

state declared that the GSS did not employ physical means. As a result, petitioners requested to withdraw their petitions. The Court accepted these motions and informed petitioners of their right to set forth a complaint if physical means were used against them *See* HCJ 3029/95. In only a minority of complaints did the state did not issue such a notice. In other instances, an interim order was issued. At times, we noted that we "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* HCJ 8049/96 *Hamdan v. The GSS* (unreported decision). In HCJ 336/96; HCJ 7954/95 *Billbissi v. The GSS* (unreported decision), 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."

As such, the Court has not decided whether the GSS is permitted to employ physical means for interrogation under the defense of "necessity." Until now, 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, in contrast, a number of petitions have properly laid out complete arguments. For this we thank them.

Some of the petitions are rather general or theoretical while others are quite specific. Even so, we have decided to deal with all of them, since we seek to clarify the state of the law in this most complicated question. To this end, we shall begin by addressing the first issue—are GSS investigators authorized to conduct interrogations? We shall then proceed to examine whether a general power to investigate could potentially sanction the use of physical means—including mental suffering—the likes of which the GSS employs. Finally, we shall examine circumstances where such methods are immediately necessary to rescue human lives and shall decide whether such circumstances justify granting GSS investigators 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 these petitions, we refer to the asking of questions which seek to elicit a truthful answer, subject to the privilege against self-incrimination. *See* the Criminal Procedure Statute (Testimony), § 2. Generally, the investigation of a suspect is conducted at the suspect's place of detention. Any interrogation inevitably infringes the suspect's freedom—including his human dignity and privacy—even if physical means are not used. In a country adhering to the rule of law, therefore, interrogations are not permitted in absence of clear statutory authorization, whether such authorization is through primary or secondary legislation. This essential principle is expressed in the Criminal Procedure Statute (Powers of Enforcement, Detention)-1996, §1(a):

> Detentions and arrests shall be conducted only by law or by virtue of express statutory authorization.

Hence, the statute and regulations must adhere to the requirements of the Basic Law: Human Dignity and Liberty. 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 an explicit statutory provision. 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 cannot point to a statute from which it derives its authority to engage in certain acts, that act is *ultra vires* and illegal." *See* I. Zamir, The Administrative Authority (1996) at 50. *See also* 1 B. Bracha, Administrative Law 25 (1987).

19. Is there a statute that authorizes GSS investigators to carry out interrogations? There is no specific provision that deals with the investigatory authority of GSS agents. "The status of the Service, its

function and powers, are not outlined in any statute addressing this matter." *See* the Report of the Commission of Inquiry, 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, under the Basic Law: The Government, § 40, the government does possess residual or prerogative powers:

> The Government is authorized to perform, in the name of the state, all actions which are not in the jurisdiction of another authority. In performing such actions, the Government is subject to all applicable laws.

We cannot, however, interpret this provision as granting the authority to investigate. As noted, the power to investigate infringes a person's individual liberty. The residual powers of the government authorize it to act whenever there is an "administrative vacuum." *See* HCJ 2918/93 *The City of Kiryat Gatt v. The State of Israel*. There is no so-called "administrative vacuum" this case, as the field is entirely occupied by the principle of individual freedom. Infringing this principle requires specific directives, as President Shamgar insisted in HCJ 5128/94 *Federman v. The Minister of Police*:

> There are means which do not fall within the scope of government powers. Employing them, absent statutory authorization, runs contrary to our most basic normative understanding. Thus, basic rights 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, for example, the government is not endowed with the capacity to shut down a newspaper on the basis of an administrative decision, absent explicit statutory authorization, 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.... Freedom of expression, a basic right, forms an integral part of our positive law. It binds the executive and does not allow it to stray from the prohibition respecting guaranteed human liberty, absent statutory authorization.

In a similar vein, Professor Zamir has noted:

> In areas where the government may act under section 40 of the Basic Law: The Government, its actions must conform to the law. Clearly, this precludes the government from acting contrary to statutes. Moreover, it prevents the government from infringing basic rights. This, of course, is true regarding the rights explicitly protected by the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. This is also the case for human rights not specifically enumerated in those Basic Laws. For instance, section 40 cannot authorize the government to limit the freedom of expression…. Section 40 only grants general executive powers that cannot serve to directly infringe human rights, unless there is explicit or implicit statutory authorization for doing so. This same conclusion can also be drawn from the fact that a grant of administrative authority cannot be interpreted as granting the power to infringe human rights, unless such powers are explicitly granted by statute.

See 1. I. Zamir, The Administrative Authority 337 (1996).

The same is true in this case. There are to be no infringements on an individual's liberty against interrogation absent statutory provisions which successfully pass constitutional muster. The government's general administrative powers do not fulfill these requirements. Indeed, when the legislature sought to endow the GSS with the power to infringe individual liberties, it anchored these powers in specific legislation. Thus, for

instance, statutes provide that the head of a security service, under special circumstances, is authorized to allow the secret monitoring of telephone conversations. *See* the Secret Interception of Communication Statute-1979, § 5; *Compare* the Protection of Privacy Statute-1981, § 19(3)(4). Is there 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 directives, some with ministerial approval, were promulgated in the wake of the Report of the Commission of Inquiry, these do not satisfy the requirement that a grant of authority flow directly from statute or from explicit statutory authorization. These directives merely constitute internal regulations. Addressing such directives, in HCJ 2581/91 *Salhat v. The State of Israel* , 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 be struck down if they are found not to conform to it

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:

> 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 authorized 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) Defense Regulations-1945, the Prevention of Infiltration Statute (Crimes and Judging)-1954, and crimes which are to be investigated as per the Emergency Defense 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 authority of the GSS to conduct interrogations can be resolved. By virtue of this authorization, GSS investigators are, in the eyes of the law, like police officers. We shall not now, however, express our opinion as to whether this arrangement, as opposed to the explicit statutory regulation of GSS officers, is an ideal arrangement.

The Means Employed for Interrogation Purposes

21. As we have seen, GSS investigators are endowed with the authority to conduct interrogations. What is the scope of these powers and do they include the use of physical means in the course of the interrogation? 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." Thus, for instance, the state did not make the argument that shaking is permitted simply because it is an "ordinary" method of investigation in Israel. Even so, it was argued 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 to prevent communication between the suspects, the playing of 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 necessary from the needs of the interrogation. Does the "law of interrogation" sanction the use of these physical means?

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 honest merchants, conducting their affairs in mutual trust." Cr. A 216/74 *Cohen v The State of Israel*, at 352. An interrogation is a "competition of minds," in which the investigator attempts to penetrate the suspect's mind and elicit the information that 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, penetrates the deepest crevices of his soul, while creating serious emotional pressure.

See Y. Kedmi, On Evidence 25 (1991)

Indeed, the authority to conduct interrogations, like any administrative power, is designed for a specific purpose, and must be exercised in conformity with the basic principles of the democratic regime. In setting out the rules of interrogation, two values clash. On the one hand, lies the desire to uncover the truth, in accord with the public interest in exposing crime and preventing it. On the other hand is the need to protect the dignity and liberty of the individual being interrogated. This having been said, these values are not absolute. A democratic, freedom-loving society does not accept that investigators may 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*. At times, the price of truth is so high that a democratic society is not prepared to pay. *See* A. Barak, *On Law, Judging and Truth*, 27 Mishpatim 11, 13 (1997). 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 the human dignity and liberty of a suspect—provided that 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 in Cr. A. 183/78 *Abu Midjim v. The State of Israel*, at 546:

> 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 that we do all that we can to restrain police investigators from prohibited and criminal means. On the other hand, it is also our duty to fight the growing crime rate which destroys the good in our country, and to prevent the disruption of public peace by violent criminals.

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 129 (1987). 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*, at 222-24, and on preserving the "purity of arms" used during the interrogation. Cr. A. 183/78, *supra*. On the other hand, these rules take into consideration the need to fight crime in general, and terrorist attacks in particular. These rules reflect "a degree of reasonableness, straight thinking, and fairness." *See* 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 petitions before us. These laws vary, depending on the context. For instance, the law of interrogation is different in the context of an investigator's potential criminal liability, and in the context of admitting evidence obtained by questionable means. Here we deal with the "law of interrogation" as a power of 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, 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. F.H. 3081/91 *Kozli v. The State of Israel*, at 446. Human dignity also includes the dignity of the suspect being interrogated. *Compare* HCJ 355/59 *Catlan v. Prison Security Services*, at 298 *and* C.A.4463/94 *Golan v. Prison Security Services*. 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." *See* M. Evans & R. Morgan, Preventing Torture 61 (1998); N.S. Rodley, The Treatment of Prisoners under International Law 63 (1987). 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. *See, e.g.*, the Penal Law: § 277. Cr. A. 64/86 *Ashash v. The State of Israel* (unreported decision).

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.

From the General to the Particular

24. We shall now turn from the general to the particular. Clearly, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which can not form part of a legal investigation. It surpasses that which is necessary. Even the state did not argue that shaking is an "ordinary" investigatory method which every investigator, whether in the GSS or the police, is permitted to employ. The argument before us was that the justification for shaking is found in the "necessity defense." 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 employed investigation methods consists of compelling the suspect to crouch on the tips of his toes for periods of five minutes. 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 an individual's human dignity.

26. The "Shabach" method is composed of several components: the cuffing of the suspect, seating him on a low chair, covering his head with a sack, and playing loud music in the area. Does the general power to investigate authorize any of the above acts? Our point of departure is that there are actions which are inherent to the investigatory power. *Compare* C.A. 4463/94, *supra*. Therefore, we accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is included in the

general power to investigate. *Compare* HCJ 8124/96 *Mubarak v. The GSS* (unreported decision). 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 the suspect from fleeing from legal custody. Even petitioners agree that it is permissible to cuff a suspect in such circumstances and that cuffing constitutes an integral part of an interrogation. The cuffing associated with the "Shabach" position, however, 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. Similarly, there is no justification for handcuffing the suspect's hands with especially small handcuffs, if this is in fact the practice. The use of these methods is prohibited. As has been noted, "cuffing that causes pain is prohibited." *Mubarak supra*. Moreover, there are other ways of preventing the suspect from fleeing which do not involve causing pain and suffering.

27. The same applies to 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, however, when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is seated in this position for long hours. This sort of seating is not authorized 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 to seat 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 tilted 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 infringe the suspect's dignity, his bodily integrity and his basic rights in an excessive manner. They are not to be deemed as included within the general power to conduct interrogations.

28. We accept that there are interrogation related concerns regarding preventing contact between the suspect under interrogation and other suspects, and perhaps even between the suspect and the interrogator. These concerns require means to prevent the said contact. The need to prevent contact may, for instance, flow from the need to safeguard the investigators' security, or the security of the suspects and witnesses. It can also be part of the "mind game" which pits 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—may include the need to prevent 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 a 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 a sack throughout his "wait" in the "Shabach" position. It was argued that the head covering causes the suspect to suffocate. The sack is large, reaching the shoulders of the suspect. All these methods are not inherent to an interrogation. They are not necessary to prevent eye contact between the suspect being interrogated and other suspects. Indeed, even if such contact is prevented, what is the purpose of causing the suspect to suffocate? Employing this method is not related 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 dignity. It degrades him. It causes him to lose his sense 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 a "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 may include preventing him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success. At the same time, however, we must examine whether the means employed to accomplish this fall within the scope of a fair and reasonable interrogation. In the case at bar, the detainee is placed in the "Shabach" position while very loud music is played. 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 very loud music for a long period of time causes the suspect suffering. Furthermore, the entire time, the suspect is tied in an uncomfortable position with his head covered. This is prohibited. It does not fall within the scope of the authority to conduct a fair and effective interrogation. In the circumstances of the cases before us, the playing of loud music is a prohibited.

30. To the above, we must add that the "Shabach" position employs all the above methods simultaneously. This combination gives rise to pain and suffering. This is a harmful method, particularly when it is employed for a prolonged period of time. For these reasons, this method is not authorized by 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." Cr. A. 7223/95 *The State of Israel v. Rotenstein.*

A similar—though not identical—combination of interrogation methods were discussed in the case of *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 3 (1976). In that case, the Court examined five interrogation methods used by England to investigate detainees suspected of terrorist activities in Northern Ireland. The methods included protracted standing against a 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 very loud noise for a prolonged period of time, and deprivation of sleep, food and drink. The Court held that these methods did not constitute "torture." However, since they subjected the suspect to "inhuman and degrading" treatment, they were nonetheless prohibited.

31. The interrogation of a person is likely to be lengthy, due to the suspect's failure to cooperate, the complexity of the information sought, or in light of the need to obtain information urgently and immediately. *See, e.g., Mubarak supra*; HCJ 5318/95 *Hajazi v. GSS* (unreported decision). Indeed, a person undergoing interrogation cannot sleep like 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. 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* HCJ 3429/94 *Shbana v. GSS* (unreported decision). Justice Shamgar noted as such in Cr. A. 485/76 *Ben Loulou v. The State of Israel* (unreported decision):

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

momentum and consecutiveness.

The above described situation is different from one in which sleep deprivation shifts from being a "side effect" of 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 is not part of the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner beyond what is necessary.

32. All these limitations on an interrogation, which flow from the requirement that an interrogation be fair and reasonable, is the law with respect to a regular police interrogation. The power to interrogate granted to the GSS investigator is the same power the law bestows upon the ordinary police investigator. The restrictions upon the police investigations are equally applicable to GSS investigations. There is no statute that grants GSS investigators special interrogating powers that are different or more significant than those granted the police investigator. From this we conclude that a GSS investigator, whose duty it is to conduct the interrogation according to the law, is subject to the same restrictions applicable to police interrogators.

Physical Means and the "Necessity" Defense

33. We have arrived at the conclusion that 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 in the petition before us. Can the authority to employ these methods be anchored in a legal source beyond the authority to conduct an interrogation? This question was answered by the state in the affirmative. As noted, our law does not contain an explicit authorization permitting the GSS to employ physical means. An authorization of this nature can, however, in the state's opinion, be obtained in specific cases by virtue of the criminal law defense of

"necessity," as provided in section 34(1) of the Penal Law. The statute 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.

The state's position is that by virtue of this defense against criminal liability, GSS investigators are authorized to apply physical means—such as shaking—in the appropriate circumstances and in the absence of other alternatives, in order to prevent serious harm to human life or limb. The state maintains that an act committed under conditions of "necessity" does not constitute a crime. Instead, the state sees such acts as worth committing in order to prevent serious harm to human life or limb. These are actions that society has an interest in encouraging, which should be seen as proper under the circumstances. In this, society is choosing the lesser evil. Not only is it legitimately permitted to engage in fighting terrorism, it is our moral duty to employ the means necessary 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 as to when the conditions of the "necessity" defense are fulfilled. This, the state contends, implies the legality of the use of physical means in GSS interrogations.

In the course of their argument, the state presented the "ticking bomb" argument. A given suspect is arrested by the GSS. He holds information regarding 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, the bomb may be neutralized. If the bomb is not neutralized, scores will be killed and injured. Is a GSS

investigator authorized to employ physical means in order to obtain this information? The state answers in the affirmative. The use of physical means should not constitute a criminal offence, and their use should be sanctioned, according to the state, by the "necessity" defense.

34. We are prepared to assume, although this matter is open to debate, that the "necessity defense" is available to all, including an investigator, during an interrogation, acting in the capacity of the state. *See* A. Dershowitz, *Is it Necessary to Apply 'Physical Pressure' to Terrorists—And to Lie About It?*, 23 Israel L. Rev. 193 (1989); K. Bernsmann, *Private Self-Defense and Necessity in German Penal Law and in the Penal Law Proposal— Some Remarks*, 30 Israel L. Rev. 171, 208-10 (1998). Likewise, we are prepared to accept—although this matter is equally contentious—that the "necessity defense" can arise in instances of "ticking bombs," and that the phrase "immediate need" in the statute 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 even in a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing it. *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?*, 23 Israel L. Rev. 216, 244-47 (1989). In other words, there exists a concrete level of imminent danger of the explosion's occurrence. *See* M. Kremnitzer & R. Segev, *The Petition of Force in the Course of GSS Interrogations- A Lesser Evil?*, 4 Mishpat U'Memshal 667, 707 (1989); *See also* S.Z. Feller, *Not Actual "Necessity" but Possible "Justification"; Not "Moderate Pressure", but Either "Unlimited" or "None at All"*, 23 Israel L. Rev. 201, 207 (1989).

Consequently we are prepared to presume, as was held by the Report of the Commission of Inquiry, that if a GSS investigator—who applied physical interrogation methods for the purpose of saving human life—is criminally indicted, the "necessity defense" is likely to be open to him in the appropriate circumstances. *See* Cr. A. 532/91 *Anonymous v. The State of Israel* (unreported decision). A long list of arguments, from the fields

of ethics and political science, may be raised in support of and against the use of the "necessity defense." *See* Kremnitzer & Segev, *supra*, at 696; M.S. Moor, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280 (1989); L. Shelf, *The Lesser Evil and the Lesser Good—On the Landau Commission's Report, Terrorism and Torture*, 1 Plilim 185 (1989); W.L. & P.E. Twining, *Bentham on Torture*, 24 Northern Ireland Legal Quarterly 305 (1973); D. Stetman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 Mishpat U' Mimshal 161, 175 (1997); A. Zuckerman, *Coersion and the Judicial Ascertainment of Truth*, 23 Israel L. Rev. 357 (1989). This matter, however, has already been decided under Israeli law. Israeli penal law recognizes the "necessity defense."

35. Indeed, we are prepared to accept that, in the appropriate circumstances, GSS investigators may avail themselves of the "necessity defense" if criminally indicted. This, however, is not the issue before this Court. We are not dealing with the criminal liability of a GSS investigator who employed physical interrogation methods under circumstances of "necessity." Nor are we addressing the issue of the 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, *ex ante*, to establish permanent directives setting out the physical interrogation means that may be used under conditions of "necessity." Moreover, we must decide whether the "necessity defense" can constitute a basis for the authority of a GSS investigator to investigate, in the performance of his duty. According to the state, it is possible to imply from the "necessity defense"—available *post factum* to an investigator indicted of a criminal offence—the *ex ante* legal authorization to allow the investigator to use physical interrogation methods. Is this position correct?

36. In the Court's opinion, the authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the "necessity defense." The

"necessity defense" does not constitute a source of authority, which would allow 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 defense." The defense deals with cases involving an individual reacting to a given set of facts. It is an improvised reaction to an unpredictable event. *See* Feller, *supra* at 209. Thus, the very nature of the defense does not allow it to serve as the source of authorization. Authorization of administrative authority 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 defense of necessity does not define a code of primary normative behavior. Necessity is certainly not a basis for establishing a broad detailed code of behavior 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.

See A. 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:

> The basic rationale underlying the necessity defense is the impossibility of establishing accurate rules of behavior in advance, appropriate in concrete emergency situations, whose circumstances are varied and unexpected. From this it follows, that the necessity defense is not well suited for the regulation of a general situation, the circumstances of which are known and may repeat themselves. In such cases, there is no reason

> for not setting out the rules of behavior in advance, in order that their content be determined in a thought out and well-planned manner, which would allow them to apply in a uniform manner to all.

The "necessity defense" has the effect of allowing one who acts under the circumstances of "necessity" to escape criminal liability. The "necessity defense" does not possess any additional normative value. It can not authorize the use of physical means to allow 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 defense"—does not in itself authorize the act and the concomitant infringement of human rights. The rule of law, both as a formal and as a substantive principle, requires that an infringement of human rights be prescribed by statute. The lifting of criminal responsibility does not imply authorization to infringe a human right. It shall be noted that the Commission of Inquiry did not conclude that the "necessity defense" 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 was that, if an investigator finds himself in a situation of "necessity," forcing him to choose the "lesser evil"—harming the suspect for the purpose of saving human lives—the "necessity defense" shall be available to him. Indeed, the Commission of Inquiry noted that, "the law itself must ensure a proper framework governing the actions of the security service with respect to the interrogation of hostile terrorist activities and the related problems particular to it." *Id.* 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 in defenses to criminal liability. The principle of "necessity" cannot serve as a basis of authority. *See* Kremnitzer, *supra* at 236. If the state wishes to enable GSS investigators to utilize physical means in interrogations, it must enact legislation for this purpose. This authorization would also free the investigator applying the physical

means from criminal liability. This release would not flow from the "necessity defense," but rather from the "justification" defense. This defense is provided for in section 34(13) of the Penal Law, 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.

This "justification" defense to criminal liability is rooted in an area outside the criminal law. This "external" law serves as a defense to criminal liability. This defense does not rest upon "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 answer is found in the laws of detention, which is external to the Penal Law. If a man is killed as a result of this application of force, the "justification" defense will likely come into play. *See* Cr. A. 486/88, *Ankonina v. The Chief Army Prosecutor*. The "necessity" defense cannot constitute the basis for rules regarding 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. The power to enact rules and to act according to them requires legislative authorization. In such legislation, the legislature, if it so desires, may express its views on the social, ethical and political problems of authorizing the use of physical means in an interrogation. Naturally, such considerations did not come before the legislature when the "necessity" defense was enacted. *See* Kremnitzer, *supra*, at 239-40. The "necessity" defense is not the appropriate place for laying out these considerations. *See* Enker, *supra*, at 72.

Granting GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the suspect's dignity and liberty, raises 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 understanding of democracy. *See* HCJ 3267/97 *Rubinstein v. Minister of Defense*.

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

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

A Final Word

39. This decision opened with a description of the difficult reality in which Israel finds herself. We conclude this judgment by revisiting that

harsh reality. We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open 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 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.

40. 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 properly deal 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. We recall the words of Deputy President Landau, in HCJ 390/79 *Dawikat v. The State of Israel*, at 4:

> We possess proper sources upon which to construct our judgments and have no need—and, indeed, are forbidden—to allow our personal views as citizens to influence our decisions. Still, I fear that the Court will appear to have abandoned its proper role and to have descended into the whirlwind of public debate; that its decision will be acclaimed by certain segments of the public, while others will reject it absolutely. It is in this sense that I see myself as obligated to rule in accordance with the law on any matter properly brought before the Court. I am forced to rule in accordance with the law, in complete awareness that the public at large will not be interested in the legal reasoning behind our decision, but rather in the final result. Conceivably, the stature of the Court as an institution that stands above the arguments that divide the public will be damaged. But what can we do, for this is our role and our obligation as judges?

The Commission of Inquiry pointed to the "difficult dilemma between the imperative to safeguard the very existence of the State of Israel and the lives of its citizens, and between the need to preserve its character—a country subject to the rule of law and basic moral values." Report of the Commission, at 326. The commission rejected an approach that would consign our fight against terrorism to the twilight shadows of the law. The commission also rejected the "ways of the hypocrites, who remind us of their adherence to the rule of law, even as they remain willfully blind to reality." *Id.* at 327. Instead, the Commission chose to follow "the way of truth and the rule of law." *Id.* at 328. In so doing, the Commission of Inquiry outlined the dilemma faced by Israel in a manner open to examination to all of Israeli society.

Consequently, it is decided that the *order nisi* be made absolute. 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

defense," found in the Penal Law, cannot serve as a basis of authority for interrogation practices, or for directives to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the "necessity defense" will be available to GSS investigators—either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought.

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 Y. Kedmi

I accept the conclusion reached by my colleague, the President, that the use of exceptional interrogation methods, according to the directives of the Ministerial Committee, "has not been authorized, and is illegal." I am also of the opinion that the time has come for this issue to be regulated by explicit, clear, and unambiguous legislation.

Even so, it is difficult for me to accept that, due to the absence of explicit legislation, the state should be helpless in those rare emergencies defined as "ticking bombs," and that the state would not be authorized to order the use of exceptional interrogation methods in such circumstances. As far as I am concerned, authority does exist under such circumstances, a result of the basic obligation of the state—like all countries of the world—to defend 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-defense," in the broad meaning of the term, against terrorist organizations that seek to take its life and the lives of its citizens.

Against this background, and in order to prevent a situation where the state stands helpless while the "bomb ticks" before our eyes, I suggest that this judgment be suspended for one year. During that year, the GSS will be allowed to employ exceptional interrogative methods in those rare cases of "ticking bombs," on the condition that explicit authorization is granted by the Attorney-General.

Such a suspension would not limit our present ruling that the use of exceptional interrogation methods—those that rely on directives of the Ministerial Committee—are illegal. The suspension of the judgment would not constitute authorization to continue acting according to those directives, and the authorization of the Attorney-General would not legalize the performance of an illegal action. This suspension would only

affect the employment of exceptional interrogation methods under the emergency circumstances of a "ticking bomb."

During such a suspension period, the Knesset would be given an opportunity to consider the issue of exceptional interrogation methods in security investigations, both in general and in times of emergency. The GSS would be given the opportunity to cope with emergency situations until the Knesset considers the issue. Meanwhile, the GSS would also have an opportunity to adapt, after a long period during which the directives of the Ministerial Committee have governed.

I therefore join the judgment of the President, subject to my proposal to suspend the judgment for a period of one year.

Decided according to the opinion of the President.
September 6, 1999