The Role of National Courts in Preventing Torture of Suspected Terrorists

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I. Introduction

Three interim decisions of the Israeli High Court of Justice (the Court) issued during 1996 allowed the continuation of interrogations of suspected terrorists by the Israeli General Security Service (GSS), subject to some restrictions.[1] On 9 May 1997, after reviewing a special Israeli report on the subject, the Committee against Torture (CAT) decided that the methods mentioned in these cases and additional methods described by non-governmental organizations constituted breaches of Article 16 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and also amounted to torture as defined in Article 1 of that Convention.[2] CAT also criticized the Court for one of the above decisions,[3] whose effect, according to CAT, was to allow some of the interrogation practices to continue and to legitimize them for domestic purposes.[4] This comment examines these decisions and assesses the problems and challenges inherent in the domestic regulation of interrogations of suspected terrorists.

II. The Interim Decisions in Context

The three interim decisions can be seen as offsprings of the Report of the Landau Commission of Inquiry into the Methods of Investigation of the GSS Regarding Hostile

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1 The cases are: HCJ (High Court of Justice) 7964/95, HCJ-VR (Various Requests) 336/96, *Bilbeisi v. The General Security Service* (1 January 1996); HCJ 8049/96 *Hamdan v. The General Security Service* (14 November 1996); HCJ 3124/96 *Mubarak v. The General Security Service* (17 November 1996).

2 Conclusions and Recommendations of the Committee against Torture, UN Doc. CAT/L/SR. 297/Add. 1, 9 May 1997.

3 The *Hamdan* Decision, *supra* note 1.

4 *Supra* note 2, section 7.

Terrorist Activities issued a decade ago.[5] Until October 1987, the GSS followed what Michael Reisman calls an 'operational code': unwritten conventions which permitted the GSS to use force while interrogating suspected terrorists and later to deny it in courts, thereby protecting the 'myth system' of legality.[6] The Commission deliberately shattered this myth.[7] After its Report it was no longer possible to deny that GSS interrogators were instructed to follow secret guidelines (the Guidelines) which entailed, according to the Commission, 'a modest measure of physical pressure' while interrogating suspected terrorists.[8]

Despite several petitions against the Guidelines and against specific methods brought during the past decade, the Court managed to defer its decision, hoping that in the meantime the legislature would address the matter.[9] At first the Court rejected a general petition to declare the Guidelines void.[10] It reasoned that such a general examination, divorced of concrete circumstances, would amount to second-guessing the Landau Commission, and this would be beyond the proper role of the Court. It emphasized that the Guidelines were only the Commission's interpretation of the defence of necessity under the Israeli Penal Law, and did not change the law. The Guidelines notwithstanding, any GSS action could be subjected to judicial scrutiny on a case-by-case basis, examining all the particular circumstances which are crucial to evaluate whether the defence of necessity applied. Since an abstract examination of the Guidelines would thus not resolve the issue, the Court preferred not to comment on the legality of the Guidelines.[11] The Court postponed judgment on another general petition which raised serious doubts concerning the source of legal authority of the GSS administration under the principle of *ultra vires*. This petition, which was lodged in late 1994, is still pending in Court.[12] A more specific petition, addressing specifically the method of 'shaking' (a method apparently not among those approved in the Landau Guidelines), which was lodged in June 1995, is also pending.[13] This policy of deferring judgment on these petitions created an ambiguous legal situation in which the Guidelines were neither sanctioned nor condemned.

5 Commission of Inquiry into the Methods of Investigation of the GSS Regarding Hostile Terrorist Activities, October 1987. Excerpts of the official English translations appeared in 23 *Isr. L. Rev.* (1989) 146.The same volume carries a symposium on the Commission's report.

6 W.M. Reisman, *Folded Lies* (1979) Ch. 1.

7 Rejecting this as 'the hypocrites' way', the Commission asserted that '[t]here [was] no alternative but to opt for the ... truthful road of the rule of law', *supra* note 5 at 184.

8 *Ibid.* These measures may be resorted to only after non-violent psychological pressures do not attain their purpose (*ibid*).

9 A draft bill has been prepared by the Ministry of Justice but is yet to be introduced to the Knesset. The bill was intended to formally describe the status and powers of the GSS, which has so far operated under the residual authority of the Israeli government, as well as to address the thorny issue of interrogation methods.

10 *Salakhat v. The Government of Israel*, 47 *Piskei-Din* (Judgments (of the Supreme Court)) (4) 837.

11 Justice S. Lewin emphasized that judgment on the legality of the Guidelines is being reserved (*ibid*, at 845).

12 HCJ 5100/94 *The Public Committee against Torture in Israel v. The Government of Israel* (lodged 7 December 1994).

13 HCJ 4054/95 *Association for Civil Rights in Israel v. The Prime Minister of Israel* (lodged 27 June 1996).

While it was technically possible for the Court to defer judgment on the general questions by not scheduling the hearings, it could not do the same with the detainees' petitions to end their interrogations, during which, they claimed, they were being tortured. In several cases, the Court issued interim orders precluding the GSS from using force during the interrogations.[14] The orders were issued after the GSS noted that the interrogation had been completed, and that there was no need for further interrogations. No further legal action was taken in those cases after the issuance of these interim orders, and therefore no final judgment was given on the legality of the measures used during those interrogations. These decisions did not clarify the legal status of the interrogation methods, but did at the same time relieve the immediate suffering of the petitioners.

This legal standstill was shaken in 1996. On three occasions, the GSS decided to oppose the Court's issuance of interim orders.[15] Citing pressing operational needs, it requested a judicial 'green light' to continue interrogations. The Court tried to retain ambiguity while granting permission to continue interrogations. Its interim decisions in the first two cases, *Bilbeisi*[16] and *Hamdan*,[17] allowed the interrogation to continue without any restrictions on the methods used, but reserved judgment on the legality of such methods (under the defence of necessity) to a later stage, when the main arguments would be made. In each case, the Court's decision was based on the fact that the petitioner had confessed to being a terrorist, member of the extreme Islamic Jihad group, and on the GSS's substantiated suspicion[18] that the detainee had extremely vital information which, if procured, could save human lives. The Court cautioned that permission to continue the interrogation did not entail permission to act against the law.

It was only in the third and final case of the 1996 triad, the *Mubarak* decision,[19] that the Court came as close as condoning a number of methods of interrogation and thereby approving a significant part of the Landau Guidelines. This development took place during a hearing of a detainee's request for a temporary injunction against the continuation of his interrogation, when the GSS insisted not only that the request be refused but also that specific methods be continued. The GSS thus invited the Court to share responsibility for the use of these methods. Thus, for the first time, the Court examined specific methods used in GSS interrogations. These methods did not involve the direct infliction of pain. They did, however, subject the detainee to rather harsh conditions in the process of interrogations. As the succinct opinion describes, during a so-called 'waiting period' between interrogations, the detainee is seated on a low chair, his hands handcuffed in a painful position, his head covered with a sack which reaches

14 For a discussion of these cases see Y. Ginbar, 'The Face and the Mirror: Israel's View of its Interrogation Techniques Examined' (LLM Dissertation, University of Essex, 1996).
15 See the cases cited *supra* note 1.
16 *Supra* note 1.
17 *Supra* note 1.
18 In the *Bilbeisi* case, *supra* note 1, the detainee provided external evidence proving his participation in a particularly bloody terrorist attack.
19 *Supra* note 1.

his shoulders, and loud music is sounded. Consequently, the detainee is unable to sleep in this 'waiting period'. The GSS did not admit that these methods were aimed at breaking the detainee's obdurate will. It insisted that there was no 'active sleep deprivation', and explained that hooding and loud music were necessary to prevent communications between the detainees present in the same room, and that the low chair and handcuffs were necessary to prevent them from attacking the interrogators. The waiting period was explained as necessary for security and because of the pressing need to prevent loss of life, when a small number of interrogators must interrogate many detainees at the same time.

The Court did not strictly scrutinize these explanations. Its brief decision accepts the rationale of the 'waiting period', a rationale which renders the variety of other methods almost self-explanatory.[20] One gets the impression that only minimal deprivations, strictly required to facilitate the interrogation, are used. But as revealed in the schedule of the detainee's interrogation, which was attached to the GSS's response, it was the 'waiting period' itself which constituted the arena for weakening the detainee's resolve.[21] This schedule detailed the time spent in the cell, the interrogation room and during the 'waiting period'. The 'waiting period' extended at times to hours, sometimes more than ten hours, and one time more than 26 hours. 'Waiting' would be followed by much shorter periods of interrogations, sometimes even by rest periods in the cell. With the questionable rationale of the 'waiting period' left intact, the Court determined that hooding, which did not deprive the detainee of normal breathing and proper ventilation, did not cause 'pain which constitute[d] torture'. The Court did, however, prohibit painful shackling. Subject to this last caveat, the Court refused to issue an interim injunction preventing the continuation of the interrogation.

Significantly, in all its decisions, the Court failed to make any reference to the international standards regarding the prohibition on torture. Had it wanted to approve GSS practices, it could have endorsed the Landau Commission's assertion that its Guidelines were commensurate with the international standards.[22] Instead, the Court referred only to Israeli domestic law which could exonerate interrogators acting out of 'necessity'.[23]

Why did the Court prefer the doctrine of necessity over the international standard? One possible answer is that the Court wanted to dodge the flat ban on torture and legitimize GSS practices. This was the conclusion of CAT, which sharply criticized the Court.[24] It is, however, possible to offer a different answer, which would attribute to the Court an effort to curtail GSS brutality through domestic doctrines of penal law. The difference between the Court's attitude and CAT's calls for a comparison of the vices

20 On the 'waiting period', as reflected in GSS documents presented to the Court, see Ginbar, *supra* note 14, at 30-45.

21 The schedule appears in the report of B'Tselem, *Legitimizing Torture* (1997), at 23-25 (see also http://www.btselem.org).

22 *Supra* note 5, at 181, 185.

23 For a discussion of the appropriateness of using the necessity defence see *infra* text to notes 70-74.

24 *Supra* note 2, at Section 7.

and virtues of the two approaches. Such comparison requires attention to three distinct dimensions. The first dimension is moral, and relates to the appropriateness, under exceptional circumstances, of the use of force during interrogations of suspected terrorists in order to avert imminent danger to life and limb.[25] The second dimension is institutional, and is concerned with the interrogators' potential abuse of powers by the use of unnecessary force, or against innocent people, and the possible institutional checks against such abuse. The third dimension is legal, and relates to the proper means for implementing the conclusions gleaned from the discussion of the two previous dimensions.

III. The Moral Dimension

Any deliberation concerning the moral issue begins or ends with the ticking bomb paradigm, in which a bomb is about to explode causing damage to life and limb, and the only way to find and detonate it is to interrogate the person who set it off or knows how to defuse it. This paradigm assumes that using physical or mental pressure during that person's interrogation makes it possible to extract the necessary information. An incident supporting this assumption occurred in October 1994, when an Israeli soldier, Nachshon Wachsman, was kidnapped by members of Hamas, a militant Palestinian group which attempted to derail the Israeli-Palestinian peace process through attacks on Israelis, soldiers and civilians alike. As the deadline for the kidnappers' ultimatum drew near, the Israeli army caught an aide who had provided supplies to the kidnappers. His interrogation provided accurate information as to the house, including its layout, where Wachsman was held. This information was used in planning the rescue operation.[26] Although details of the interrogation methods were not disclosed, we cannot assume that the aide divulged the information upon his own free will.

The ticking bomb paradigm raises a moral debate concerning the legitimacy of using force to break a detainee's obdurate will in order to obtain life-saving information. One position opposes subjecting detainees to physical or mental suffering in order to make them speak because the detainees are then being used as objects to save others from harm. Sacrificing the well-being of some to protect the well-being of others contradicts the basic concept of human dignity, which precludes a utilitarian calculation of net gain in human lives.[27] One person's life cannot be endangered to save another's life, neither can one life be traded for the lives of many others: no person may be used as a means to

25 My discussion relates only to the use of force in such interrogations. It thus excludes discussion of interrogations of other people, or interrogations aimed at investigating previous crimes or at obtaining confessions.

26 See *The Jerusalem Post*, 17 November 1994, at 2.

27 See Kremnizter, 'The Landau Commission Report – Was the Security Services Subordinated to the Law or the Law to the "Needs" of the Security Services?', 23 *Isr. L. Rev.* (1989) 216, at 248-253. The principle that no person may be treated as an object by society is developed in German constitutional law, based on Article 1 of the German Basic Law (see I. von Muench and P. Kunig, *Grundgesetz-Kommentar* (4th ed., 1992), at 93-94; I. Richter and F. Schuppert, *Casebook Verfassungsrecht* (3rd. ed., 1996), at 72-79.

the well-being of other persons.[28] It follows that no person may be subject to torture even in a ticking bomb situation.

A less absolutist position accepts a net-gain cost-benefit calculus, based on the identification of the detainee as a 'terrorist' responsible for an about-to-occur deadly attack.[29] In balancing the interests of the culpable attacker against those of the innocent target, the former has a lesser claim.[30] Such balancing, however, is difficult to make in circumstances of international or inter-communal strife in which there is rarely a shared opinion as to which side is fighting out of self-defence and is therefore 'innocent', and which side is the aggressor whose life or limb deserves lesser protection. Each side is convinced that it uses force lawfully, and that its soldiers, whether interrogators or guerilla fighters, are themselves blameless. Under such circumstances, distinctions between innocent and blameworthy detainees are in the eye of the beholder and therefore quite problematic. Nevertheless, when non-combatants are the target of an attack, an objective criterion for moral blameworthiness can be found in the international norms concerning behaviour during military conflicts. These confirm that such victims are not legitimate targets, assign criminal liability to their attackers and identify some of them as terrorists.[31] Since terrorists are thus morally and legally blameworthy, their claim for respect of their human dignity and bodily integrity carries less moral strength than the similar claim of innocent individuals.

With an objective compass to determine who is an illegal target of a ticking bomb situation, it may be possible and legitimate to assign lesser value to the interests of the person responsible for endangering innocent lives. This type of balancing, however, requires attention to the institutional dimension, and particularly to the 'slippery slope' syndrome, issues which are presented below.

IV. The Institutional Dimension

Granted that under extreme conditions, the use of force in interrogations may be morally justified, the argument still remains that such extreme conditions elude legal definition, effective monitoring and enforcement. The paradigmatic concern with the slippery slope is that the authority granted to interrogators to identify and react to ticking bomb situations will lead to the excessive use of force in non-extreme circumstances.[32] At the outset it is rather difficult to identify a ticking bomb situation. Usually, the interrogators only have suspicions as to the existence of a bomb, the identity of the detainee, or the usefulness of the detainee's information. The possibility of error cuts both ways. Indeed, in one incident, the GSS claimed that they failed to discern such a situation,

28 Gewirth, 'Are There Any Absolute Rights?', 31 *Philosophical Quarterly* (1981) 1, at 9; Moore, 'Torture and the Balance of Evils', 23 *Isr. L. Rev.* (1989) 281, at 289, 314-15.

29 See Moore, *supra* note 28, at 333.

30 This is the moral basis for the claim of self-defence. On this defence *see infra* text to notes 64-74.

31 This insight from the laws of war will suffice, and will not require delving into the more complex question concerning the legal status of terrorists or guerilla fighters as lawful combatants.

32 See Kremnitzer, *supra* note 27, at 243-247, 253-257.

consequently did not put sufficient pressure on a detainee and, as a result, could not prevent a deadly explosion in a public bus which – they learned later – had been planned by the detainee.[33] However, there is greater concern that in the continuing battle against terrorism, security forces would tend to regard too many instances as ticking bomb situations and therefore act with unjustifiable violence against detainees. In most cases, the actual occurrence of the ticking bomb paradigm can only be known in retrospect, when it is too late, either for the innocent victims of the terrorist attack or for the innocent detainees.

Note that institutional concerns stem not only from a norm which approves the use of force in ticking bomb situations. An absolute ban on the use of force may also lead to institutional concern: facing what they perceive as a 'real' ticking bomb situation on the one hand, and an absolute prohibition on the use of force on the other, interrogators may be driven to follow their moral judgment, and then deny their unlawful action. When such threats recur, an 'operational code' would soon emerge underneath the myth of legality.[34] Such unregulated code would be more susceptible to the dangers of the slippery slope. Thus an absolute legal ban on the use of force in interrogations could have the opposite effect – unrestrained subversive and brutal activity which is detrimental to detainees and undermines the entire democratic system. Indeed, this concern was the reason for the Landau Commission's decision to pierce the myth of legality and legitimize the operational code of GSS conduct.[35]

Therefore, the question is whether legal prescriptions and institutional arrangements can be designed to enable decision-makers, including national courts, to recognize circumstances which justify the use of force in interrogations of suspected terrorists, and at the same time avert the slippery slope syndrome or at least minimize its likelihood to a tolerable level. The following section will analyse this question.

V. Legal and Institutional Responses

A. Two Possible Legal Responses

There are two possible legal responses to this challenge. The first, which I refer to as 'the conceptual approach', is embodied in international instruments and decisions of international institutions. This approach imposes a flat ban on 'torture', 'cruel', 'inhuman' and 'degrading' treatment, and thus provides national courts with the task of giving meaning to these terms. The second approach, which I term 'the self-defence approach', admits, under exceptional conditions, an exemption from culpability for using violence in interrogations.

33 See *The Jerusalem Post*, 25 August 1995, at 10.
34 See Reisman, *supra* note 6.
35 See *supra* note 7.

1. The Conceptual Approach

The absolute ban on 'torture', 'cruel',[36] 'inhuman' and 'degrading' 'treatment or punishment' appears in the texts of various international instruments: humanitarian law conventions;[37] general[38] and regional[39] human rights conventions; and particular conventions concerning torture.[40] This absolute ban is non-derogable.[41] It is part of customary international law, and arguably has attained the status of *jus cogens*.[42] The

36 'Cruel' appears only in some of the documents (see *infra* notes 37-40).

37 See Common Article 3 of the 1949 Geneva Conventions (prohibiting, in non-international armed conflicts, 'at any time and in any place whatsoever (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ... (c) outrages upon personal dignity, in particular humiliating and degrading treatment'.); The III Geneva Convention relative to the Treatment of Prisoners of War, Article 17 (proscribing 'physical or mental torture, [or] any form of coercion ... to secure [from POWs] information of any kind whatsoever'); The IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 31 (precluding occupants from using 'physical or moral coercion ... against protected persons, in particular to obtain information from them or from third parties') and Article 32 (explicitly prohibiting torture and any other measures of brutality). Under Article 147, '[t]orture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health' are grave breaches of the Convention and therefore carry penal consequences. Article 5(1) of the same Convention restricts the rights recognized in the Convention of a protected person who is in the territory of a party to the conflict and is 'definitely suspected of or engaged in activities hostile to the security of the State' if the exercise of such rights 'be prejudicial to the security of such State', but stipulates (in Article 5(3)) that in such cases, 'such persons shall nevertheless be treated with humanity...'.
See also Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (SC Res. 808, 3 May 1993, 32 *ILM* 1159, 1171) (the Tribunal shall have the power to prosecute persons committing or ordering to be committed ... '(2) torture or inhuman treatment, ... (3) willfully causing great suffering or serious injury to body or health ...'.), and Article 5, concerning 'Crimes against Humanity', which include as such crimes '(f) torture' and '(i) other inhumane acts'.

38 The Universal Declaration on Human Rights, Article 5: 'No one shall be subjected to torture or cruel, inhuman and degrading treatment or punishment.'; The 1966 Covenant on Civil and Political Rights (ICCPR), Article 7: 'No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment. In particular, no one shall be subject without his free consent to medical or scientific experimentation.'

39 The European Convention on Human Rights (ECHR), Article 3: 'No one shall be subjected to torture or to inhuman and degrading treatment or punishment;' The 1969 American Convention on Human Rights, Article 5(2): 'No one shall be subjected to torture or to cruel, inhuman or degrading punishment and treatment;' The 1981 African Charter on Human and Peoples' Rights, Article 5: 'All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

40 The 1984 Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment; The 1985 Inter-American Convention to Prevent and Punish Torture.

41 See ICCPR, Article 4; ECHR, Article 15. Accordingly, the Human Rights Committee ruled that according to Article 7 of the ICCPR 'no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reason ...'. General Comment 20, 1992, reprinted in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', UN Doc. HRI\Gen\1\Rev.1, at 7 (1994) (available on the internet in the University of Minnesota Human Rights Library (http://heiwww.unige.ch/humanrts/gencomm). The picture is less clear under the Torture Convention. Article 2(2) provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification for 'torture'. But this provision does not apply to the lesser forms of outlawed conduct, mentioned in Article 16 (on this see *infra* notes 51-52).

42 Higgins, 'Derogations under Human Rights Treaties', 48 *BYbIL* (1976-77) 281, at 282; N.S. Rodley, *The Treatment of Prisoners under International Law* (1987) 70; T. Meron,

prohibition of 'torture', 'cruel', 'inhuman' and 'degrading' 'treatment', calls for a conceptual analysis because the prohibition of such acts is not as clear and straightforward as a prohibition on the use of any physical or mental force. Indeed, as I shall argue below, this approach is sensitive to the moral and institutional dimensions discussed above, and takes a position regarding them. It rejects a ban on any forceful measures during interrogations, and invites decision-makers to elaborate on the boundaries separating tolerable and intolerable use of force.[43]

The implementation of the conceptual approach has led to a discussion regarding two questions. The first and less important one concerns the internal 'hierarchy' of unlawful practices ranging from 'torture' to 'degrading' treatment. The second and more important question relates to the distinction between the lesser forms of unlawful violence and the lawful use of force.

By distinguishing between 'torture' and the 'lesser' forms of violence, the texts themselves – and particularly the 1984 Convention against Torture – were interpreted as highlighting different degrees of violence. It was the Strasbourg organs which developed what may be called the 'degrees theory'.[44] In the *Ireland v. UK* case[45] the Commission and the Court differed both on whether the specific methods used during the interrogations (the so-called 'five techniques') constituted 'torture'[46] and, more importantly, disagreed on the appropriate tests for identifying 'torture'. While the Commission followed a rather clear criterion, namely the capacity of the detainee to retain his or her will to resist the interrogators' commands,[47] the Court invited subjective

Human Rights and Humanitarian Norms as Customary Law (1991), at 23; Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', 7 *Nordic J. Int'l L.* (1997) 1, at 9.

43 See Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment', in R. St. J. Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights* (1993) 225, at 241-242; A.H. Robertson and J.G. Merrills, *Human Rights in Europe* (1993), at 39; Sharvit, 'The Definition of Torture in the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment', 23 *Israel Yearbook on Human Rights* (1994) 147, at 175.

44 Following the Commission's statement in the *Greek* case that 'all torture must be inhuman and degrading treatment, and inhuman treatment also degrading'. 'The Greek Case, 1969', in 12 *Yearbook of the European Convention on Human Rights* (1972) 186.

45 See the Report of the Commission, in 19 *Yearbook of the European Convention on Human Rights* (1976) 512, and the Court's judgment, Series A, No. 25, rep. in 2 *European Human Rights Reports* (1978) 73.

46 The Commission found the combined effect of these techniques (which included hooding, wall-standing, deprivation of sleep, reduction of diet and noise) to constitute 'torture' (Commission, *supra* note 45, at 792), whereas the Court ruled that they amounted to inhuman and degrading treatment but did not constitute torture (*EHRR*, *supra* note 45, at 80).

47 Torture was found due to the 'combined application of methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality physically and mentally. The will to resist or give in cannot, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break or even eliminate the will.' (Commission, *supra* note 45, at 792). The Commission had used a similar reasoning when identifying 'degrading' treatment in the *Greek* case (*supra* note 44, at 186) as treatment which 'grossly humiliates [an individual] before others or drives him to act against his will or conscience'. Nigel Rodley uses the same test in identifying 'torture' as 'the infliction of extreme suffering to break a person's will for the purposes of the captor'. (Rodley, 'The Prohibition of Torture and How to Make It Effective', in The Center for

appraisals by emphasizing that only particularly intense and cruel suffering, an aggravated form of inhuman treatment, will constitute 'torture'.[48] The notion of 'unjustifiability', introduced by the European Commission as a component in the definition of 'inhuman' treatment,[49] highlighted the relative nature of the concepts which are absolutely banned.[50] The Convention against Torture further complicated the picture. While this Convention offers a definition of 'torture',[51] it distinguishes it from lesser forms of violence 'which do not amount to torture' and which acquire lesser legal sanctions.[52] To add complexity, the definition of torture under the 1984 Convention excludes 'pain or suffering arising only from, inherent in or incidental to lawful sanctions'.[53] The distinction between the different degrees of unlawful violence only has moral significance under the general instruments on human rights, with 'torture' carrying 'a special stigma'.[54] But under the 1984 Convention against Torture, the same distinction does create different legal consequences.[55]

The more important question relates to the delineation of the threshold separating lawful from unlawful measures against detainees. The conceptual approach does not offer a satisfactory solution to this question. As the European Court on Human Rights indicated in the *Northern Ireland* case, 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [of the Convention]'.[56] It emphasized that the 'assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim, etc'.[57] The Human Rights Committee (HRC), which has wisely refrained from the hierarchical

Human Rights, The Hebrew University of Jerusalem, *Israel and International Human Rights Law: The Issue of Torture* (1995) 5, at 8.

48 *EHRR*, *supra* note 45, at 80: The methods used 'did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood'.

49 See the *Greek* case, *supra* note 44, at 186: 'The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.'

50 See Cassese, *supra* note 43, at 248; Rodley, *supra* note 42, at 74-78.

51 See *supra* note 40.

52 Article 16. The other outlawed forms of violence, short of 'torture', are not explicitly exposed to the same harsh sanctions as torture (which include universal jurisdiction, payment of compensation, inadmissibility of evidence). Article 2(2) which excludes an exception for emergency situations is not made applicable to the other forms of harsh treatment. Note however that section 2 of Article 16 expresly adds that this distinction does not prejudice the applicability of 'any other international instruments or national law which prohibit cruel, inhuman or degrading treatment ...'

53 On this caveat, which, if understood to mean 'lawful sanctions' under the local law may undermine the entire Convention against Torture, see Danelius, 'Protection against Torture in Europe and the World', in Macdonald *et al*, *supra* note 43, 263, at 268; J.H. Burgers and H. Danelius, *The United Nations Convention against Torture* (1988), at 42-47; Sharvit, *supra* note 43, at 168–169.

54 *Ireland v. UK*, (Court), *supra* note 45.

55 However, since inhuman and degrading treatment is prohibited under the general human rights conventions, the distinction between these levels of unlawful measures carries little legal significance (see *supra* note 52).

56 *Supra* note 45, at 79.

57 *Ibid.*

analysis of unlawful practices,[58] also struggled with the definition of the threshold of prohibited acts. Deleting its previous reference to 'torture as normally understood',[59] the HRC decided in 1992 to refrain from establishing distinctions between the different kinds of punishment or treatment, emphasizing that 'the distinctions depend on the nature, purpose and severity of the treatment applied'.[60] Instead of developing a general definition, the HRC resorted to ad hoc findings of violations in specific cases.[61]

Therefore, the conceptual approach assigns to decision-makers a relatively wide margin of discretion in analysing whether the ban on torture, cruel, inhuman and degrading treatment was indeed violated.[62] An element of subjectivity is unavoidable. As Nigel Rodley soberly cautions, in deciding such issues, 'there will inevitably be an element of subjectivity in the willingness of the forum called upon to apply the prohibition to find a violation of it'.[63]

Can there be better ways of reducing subjectivity in decision-makers' discretion? To examine this question it is necessary to consider the alternative approach, which imposes a flat ban on any use of force, but at the same time recognizes an exception under extreme circumstances.

2. *The Self-Defence Approach*

This approach does not necessitate an analysis of what constitutes 'torture' or 'degrading treatment'. Instead, it assumes a ban on any physical or mental coercion during interrogations. However, at the same time, it acknowledges that under extreme conditions, the perpetrator of violence will be exempted from legal sanctions. This is the attitude of many criminal codes,[64] including the Israeli Penal Law. Article 277 of this Law prohibits 'public servants' from using or threatening to use 'force or violence against a person for the purpose of extorting from him or from anyone in whom he is interested a confession of an offence or information relating to an offence.[65] Any use of force would therefore constitute an offence. But at the same time, the Penal Law recognizes a defence called 'private defence', which provides that '[a] person shall bear no criminal liability for an act required to have been done immediately by him to repel an unlawful attack creating an imminent danger of injury to his or another's life,

58 In its initial General Comment 7 on Article 7, it emphasized that '[i]t may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment' (Article 2, as adopted in 1982, reported in the Compilation, *supra* note 41).

59 In its revised General Comment (number 20), which replaced Comment no. 7 in 1992, *ibid.*

60 *Ibid*, Section 4.

61 For a survey of such decisions see Rodley, *supra* note 42, at 80-82.

62 See the conclusions of Cassese, *supra* note 43, at 241-242.

63 Rodley, *supra* note 42, at 94.

64 See G.P. Fletcher, *Rethinking Criminal Law* (1978) 855-875; Conde, 'Necessity Defined: A New Role in the Criminal Defence System', 29 *UCLA L. Rev.* (1981) 409, at 409n; Bernsmann, 'Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal - Some Remarks', 30 *Isr. L. Rev.* (1996) 171, at 171.

65 See *Laws of the State of Israel* (LSI), Special Volume, 1977, at 77.

freedom, body or property'.[66] The ticking bomb paradigm discussed earlier[67] occurs when an unlawful attack creates imminent danger, and therefore the use of force against the attacker does not bear criminal liability.[68]

The justification of acts carried out in self-defence is recognized by all major national legal systems.[69] Although the various legal systems differ in defining this defence, they all converge on the salient elements of necessity, immediacy and proportionality as conditions for justifying an otherwise illegal use of force. This doctrine can arguably be considered a 'general principle of law' in the meaning of Article 38(I)(c) of the Statute of the International Court of Justice. The same principle is also rooted in customary international law regarding inter-state conduct and is recognized as an 'inherent right' under Article 51 of the United Nations Charter.

Similar to the conceptual approach discussed above, the self-defence approach also grants discretion to officials to decide whether a certain method of interrogation should be tolerated or condemned. This approach, however, provides a different set of criteria to determine this issue. Instead of a conceptual deliberation on the meaning of 'torture', it focuses directly on questions of necessity, immediacy and proportionality.

Note that this approach is strictly limited to self-defence situations. This limitation is mandated by a moral analysis of the problem. As concluded earlier,[70] there is no justification for balancing the interests of different innocent persons, rendering some of them objects for the others' well-being. This imperative implies that another widely-known defence, the defence of 'necessity',[71] cannot be used in the context of the ticking bomb situation. Although the defence of necessity also absolves from criminal liability an act which was immediately required to save a person's life, body, freedom or property from a serious injury,[72] it differs from self-defence in two important elements: it upholds the sacrifice of an interest of an innocent person not maliciously involved in creating the danger and it stipulates that the harm avoided was of an altogether different (greater) scale than the harm inflicted.[73] In conformity with the principle of human

66 Article 34J, adopted in 1994; unofficial translation appears in 30 *Isr. L. Rev.* (1996) 24. On this defence see Enker, 'Duress, Self-Defence and Necessity in Israeli Law', 30 *Isr. L. Rev.* (1996) 188.

67 See discussion in Part III *supra*.

68 See Moore, *supra* note 28, at 333; Enker, 'The Use of Force in Interrogations and the Necessity Defense', in *Israel and International Human Rights Law*, *supra* note 47, 55, at 76.

69 See *supra* note 63.

70 *Supra*, text to notes 29-31.

71 In English law, a more restrictive formula, called 'duress of circumstances' has been recognized instead of the more general necessity defence. *See R. v. Martin* [1989] 1 *All. E. R.* 652. See also M.J. Allen, *Textbook on the Criminal Law* (3rd ed., 1995) 157; Elliott, 'Necessity, Duress and Self-Defence', *Crim. L. Rev.* [1989] 611.

72 In the Israeli Penal Law the defence of necessity absolves from criminal liability 'for an act required to have been done immediately by him to save his or another's life, freedom, body or property, from an imminent danger of serious injury deriving from the circumstances at the time of the act, and for which no alternative act was available'. Article 34K, adopted in 1994; unofficial translation appears in 30 *Isr. L. Rev.* (1996) 24.

73 See Feller, 'Not Actual "Necessity" But Possible "Justification"; Not "Moderate" Pressure, But Either "Unlimited" or "None at all"', 23 *Isr. L. Rev.* (1989) 201, at 203.

dignity, the defence of necessity does not allow the balancing of one innocent life against other lives.[74]

3. An Evaluation of the Two Responses

The two legal approaches outlined above are conceptually different. They advance different tests for assessing unlawful conduct. The conceptual approach requires an evaluation of the nature, purpose and severity of the conduct, while the self-defence exemption approach emphasizes the necessity, immediacy and proportionality of the conduct. But, in fact, the two approaches conceal similar considerations and may have similar outcomes: the nature, purpose and severity of a certain conduct are relevant considerations in assessing the necessity, immediacy and proportionality of that conduct; the necessity, immediacy and proportionality of a conduct may influence the finding whether its nature, purpose and severity constituted 'torture'. This is not a coincidence: since there are no double moral standards, when a forceful measure is morally justified as legitimate self-defence, such measure cannot be regarded as morally repugnant as torture. And the use of force not in self-defence may very well be deemed torture. Thus, both approaches recognize that sadistic brutality against detainees is illegal. Both approaches would also converge in denouncing certain methods as inherently cruel, methods which will never be considered necessary or proportional. But at the same time, both approaches acknowledge exceptional circumstances in which the use of some coercion during interrogation would be tolerated. Both approaches do not provide clear guidelines as to the definition of these circumstances, and therefore relegate discretion to decision-makers to implement the unclear guidelines to specific cases. Thus, for example, depriving a terrorist of sleep so as to elicit life-saving information may pass the two tests.

Despite these similarities, the two approaches are different in two important ways. First, they are symbolically different. The conceptual approach has a clear symbolic advantage: the rhetorical force of an absolute and unqualified ban on 'torture' sends a clear message and sets a universal standard. The finding that 'torture' was committed constitutes a moral condemnation which in the international sphere is a relatively meaningful sanction. The conceptual approach, with its seemingly flat and uncompromising ban, has therefore much more appeal to the international system for protecting human rights.

The second difference between the two approaches lies in their potential influence on national decision-makers. Presumably, the self-defence approach would prove more resistant to the propensity of national decision-makers, including national courts, to adopt subjective views.[75] This assessment relies on the fact that the conceptual approach relates only to torture, whereas the self-defence approach relies on a general and well-

74 See Kremnitzer, *supra* note 27, at 248-253; Enker, *supra* note 68, at 71-75;This is clearly the position of the German law, see Bernsmann, *supra* note 64, at 180; Fletcher, *supra* note 64, at 858.

75 On this tendency see Rodley, *supra* note 42.

established doctrine in domestic criminal law. Hence, the domestic jurisprudence on self-defence, developed by courts in the context of numerous criminal cases unrelated to terrorism, might constrain their potential for partiality in torture cases more than the views of international organs. In contrast, a judicial deliberation on the conceptual approach, developed only in the context of violent struggle against a real or a perceived enemy, unconstrained by other general doctrines of domestic law, would thus be more susceptible to subjective, even partisan, interpretations.[76] Moreover, a national court might find it more difficult socially and politically to assign to public officials the moral stigma of having committed torture than to find them guilty of using force during interrogation.

This analysis suggests that while the conceptual approach is more appropriate in the international sphere, preference may be accorded to the self-defence exception in the internal sphere. Admittedly, this conclusion advocates incoherence between the international and national spheres. At the least, it can be said that such legal incoherence is a fair sacrifice for a national system which promises to be less prone to partiality. But perhaps this very incoherence is beneficial: the inherent friction it creates between the national and the international prisms helps to highlight the fact that there are no easy legal solutions to the moral and institutional questions and provides an opportunity to engage in a heightened dialogue between the national and the international spheres, which is in itself a means to maintain alertness to the need to protect against torture.

B. The Domestic Institutional Response: Judicial Review of Interrogation Methods by National Courts

As was already alluded to in the comparison between the two legal approaches, designing the optimal legal approach cannot be divorced from institutional considerations. While two possible approaches can be designed to appraise interrogation methods, the troubling question is who will do the appraisal and implement the prohibition. National courts hesitate to review their executive branch's opinion on security matters.[77] This reticence only grows when politicians are eager to show resolute efforts to curb terrorism, and when security personnel declare that bombs are about to explode which will kill innocent people and that they know of no better way to stop terrorism.

Despite this inherent institutional deficiency, courts can be, and sometimes are, effective. They can choose to intervene when the constraints within which they operate

76 Note that Israeli officials, following the Landau Commission Report's interpretation of the international standards (see *supra* note 22), have acknowledged that the prohibition on torture is absolute, and asserted that investigators have never been authorized to use torture even if its use might have possibly prevented deadly attacks (see the Israeli statement to the special session of CAT, 7 May 1997, On file with author).

77 See my 'Judicial Misgivings regarding the Application of International Norms: An Analysis of Attitudes of National Courts', 4 *EJIL* (1993) 159. See also H.P. Lee, P.J. Hanks and V. Morabito, *In The Name of National Security: The Legal Dimensions* (1995) Ch. 7.

are relatively weak. And they can defer judgment when pressing security interests are at stake. There are several opportunities for judicial scrutiny of interrogation practices: before interrogations, providing a general ruling on the legality of certain methods of interrogation; during a specific interrogation, approving or disapproving the use of methods in an ongoing investigation; or in retrospect, scrutinizing *ex post factum* the interrogators' conduct, possibly also in criminal or civil proceedings arising out of injuries sustained during an interrogation.

Potentially the most effective opportunity for judicial scrutiny of interrogation methods is the retrospective outlook. Such retrospective examination is removed from immediate threats and thus enables a closer and less frightened analysis. Thorough *post factum* judicial investigation could take place in the course of criminal, military or disciplinary proceedings brought against interrogators, or in civil proceedings for compensation brought by the former detainee. In such a setting, judges can benefit from the hindsight and detachment of the retrospective approach. The potential of such judicial intervention is underscored by the case of *X et al v. The State of Israel*, the first case in which GSS interrogators were convicted of negligently causing death to a Palestinian detainee.[78] In a decision affirming the punishment of GSS interrogators responsible for the death, the Court emphasized that GSS personnel acting outside the boundaries of the necessity defence violate the Penal Law and are subject to criminal sanctions. Taking into consideration mitigating circumstances, Justice Barak found that only by actual imprisonment 'can there be a proper expression of Israeli society's aversion to their actions. Only in this way can one deter others from following their path.'[79] The interrogators were sentenced to six months imprisonment out of the maximum three years prescribed by the Penal Law for 'causing death by negligence' (Section 304 of the Israeli Penal Law).

Abstract review of specific methods has also the benefit of disengagement from actual situations of emergency. Such prospective rulings could guide interrogators and prevent excessive harm to detainees. An example for a petition seeking such ruling is the petition concerning the method of 'shaking', a method proven to carry fatal consequences.[80] One problem with the prescription of general rules on interrogation methods, however, is the effect that such prescription may have on interrogators: a prospective approval of a certain method has more potential for misuse by interrogators who know that this method has been sanctioned in principle. Indeed, the Landau Guidelines were criticized *inter alia* for the effect that their very articulation had of increasing the probability of interrogators' violence.[81] Yet this critique does not apply to a 'reverse-Landau' approach, namely to rulings that define clearly which practices are proscribed under any circumstances, practices which are clearly brutal and can never be

78 C.A. (Civil Appeal) 532/91, unpublished, decided on 15 August 1991 (English translation appended to the Israeli statement to CAT, *supra* note 76).

79 (Author's translation), *ibid*, at section 8. The mitigating circumstances cited were the interrogators' clean record, their selfless motives, the pressing and difficult conditions under which they operated, their subsequent removal from the GSS, and this being a first conviction of this sort.

80 Decision on the petition to outlaw this method is still pending: *supra* note 13.

81 See Kadish, 'Torture, The State and The Individual', 23 *Isr. L. Rev.* (1989) 345, at 356.

justified. The general judicial denouncement of certain methods as absolutely banned will not imply that all other methods are necessarily permitted. Rather, the use of all other methods should be subjected to a strict ad hoc scrutiny (under either the conceptual approach or the self-defence approach, or both).

It is, of course, preferable that courts scrutinize interrogation methods also during an ongoing interrogation. But it is in this situation where judges are less inclined to do so. One can hardly expect judges to interrupt what could later be considered a morally justified action, which could have averted a major disaster. In such circumstances, a judicial decision to defer judgment until the threat is over, given the possibility of effective sanctions against interrogators in retrospect, may be the most one could expect of the courts. It is therefore essential that when a court issues an interim decision which does not prohibit the continuation of an interrogation, and even the use of certain methods, it clarify that its decision is not final. It should be clear to interrogators that any judicial authorization to act has only a conditional effect, and that impunity is contingent on a thorough retrospective judicial examination, immediately after the crisis is over. The ambiguity introduced by such interim decisions will increase interrogators' uncertainty regarding the adverse consequences of actions which may eventually be deemed unlawful. Since these interrogators – including the entire chain of command – are averse to risks of conviction, reprimand or payment of damages, the less clear the exemptions from liability are, the greater the precautions they will take against such risks; they will thus internalize the moral dilemma of the ticking bomb.

In order to ensure this possibility of *ex post factum* judicial evaluation, it is necessary to supplant the substantive norm with procedural safeguards that enable a thorough factual examination. These safeguards include the keeping of accessible registers with details of the interrogation process, and the right of access to the Court for detainees who complain of mistreatment. The right to claim compensation should be recognized under domestic law and no claim of immunity for the state and its officials should be allowed.[82]

VI. Conclusion

This comment explored two competing approaches to the regulation of interrogations of suspected terrorists, the conceptual approach and the self-defence approach. It suggested that while the first approach better suits international instruments, the second may be employed more effectively by domestic decision-makers. Examining the different opportunities for judicial review of such interrogations, this comment suggested a resolute retrospective review is the least-worse available domestic guarantee against harsh treatment of detainees which does not amount to clear examples of torture. While a general prohibition is called for with respect to particularly brutal methods, methods so harsh that no exceptional circumstances could condone, deferring judgment will be

82 See the HRC General Comment no. 20, *supra* note 41, Article 14.

appropriate when lesser methods are used and the moral issue is difficult to resolve without the benefit of hindsight. Security personnel must thus be exposed to the additional burden of criminal or civil liability, or disciplinary measures, should a court later find them responsible for torturing or inhumanely or degradingly treating a detainee. This additional burden decreases the exposure of detainees to harsh measures because it prompts interrogators to internalize the moral dilemma introduced by the ticking bomb paradigm. Judgment, however, should not be postponed for an indefinite period. Strict scrutiny of all circumstances must immediately follow after the emergency situation has subsided. Procedural guarantees must be kept in order to provide effective review.

These conclusions only partly support the jurisprudence of the Israeli Court: while the policy of avoiding 'real time' determinations is understandable under a real or perceived emergency situation, the Court should expedite its retrospective review, examining each case in an uncompromising manner. Similar scrutiny may also be provided by a court entertaining *post factum* civil or criminal proceedings against the interrogators. The Court is yet to prove that it is willing to complement its policy of avoiding 'real time' judgments with a strong retrospective review of interrogation methods. Although it once sent brutal interrogators to prison, its indefinite deferral of certain petitions concerning the legality of GSS action, and its casual treatment of the 'waiting period' concept, cast doubt on its determination to scrutinize interrogators' practice strictly. Civil suits seeking pecuniary compensation for damage inflicted during GSS interrogations are still pending before lower courts. Hopefully, the Court will fully use these additional avenues for judicial review to provide an effective remedy for unnecessary violations of human dignity in interrogations. In this sense it is necessary to emphasize that the three 1996 decisions discussed in this comment were only interim decisions. The Court still faces the more crucial challenge of a thorough retrospective review.