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“Moderate” Torture On Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods

By
Ardi Imseis*

“The rules pertaining to investigations are important to a democratic state. They reflect its character.”

—Justice Aaron Barak, Supreme Court of Israel,
*GSS Torture Case*¹

I.

INTRODUCTION

On September 6, 1999, the Supreme Court of Israel, sitting as the High Court of Justice (“HCJ”),² ruled on a governmental policy that has long been the subject of intense international criticism: Israel’s use of torture on Palestinian detainees interrogated by its secret police, the General Security Service (“GSS”).³ Since a 1987 governmental commission recommended that the GSS employ “moderate physical and psychological pressure” on Palestinians suspected of “security” offenses,⁴ the use of interrogation methods amounting to

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1. *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service’s Interrogation Methods*, 38 I.L.M. 1471, 1481 (1999) [hereinafter *GSS Torture Case*].

2. Under Israeli law, the Supreme Court has the jurisdiction to sit as a court of first instance as the High Court of Justice when hearing administrative and constitutional matters. See Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience* 38 ST. LOUIS L.J. 605, 608 (1994).

3. This comment is based on the Israeli Ministry of Foreign Affairs’ English language translation of the Hebrew language judgment of the HCJ as reproduced by the American Society of International Law in the International Legal Materials. See *GSS Torture Case*, *supra* note 1.

4. COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITIES, LANDAU COMMISSION REPORT, para. 4.7 (1987) [hereinafter *Landau Commission Report*], quoted in *Torture and Ill-treatment: Israel’s Interrogation of Palestinians from the Occupied Territories* (Human Rights Watch/Middle East, New York, N.Y.), June 1994, at 50 [hereinafter *Human Rights Watch*].

torture as contemplated by numerous international law treaties and conventions⁵ has been expressly endorsed by Israel’s parliament, the Knesset. While torture is utilized with impunity in many countries by state agents who operate with at least the tacit approval of governmental authorities, until recently Israel was the only country in the world with pretensions to democracy whose judiciary had legally sanctioned the use of torture as a legitimate means of extracting confessions and other information from so-called security suspects during interrogation.⁶ Under this system, untold numbers of Palestinians have been subjected to systematic torture, often resulting in permanent physical and psychological trauma and, on occasion, even death.⁷

International law imposes an absolute prohibition on the use of torture or other cruel, inhuman or degrading treatment or punishment.⁸ In other words, the right of all individuals to be free from such treatment is non-derogable, irrespective of the circumstances.⁹ Of course, the Israeli government has never admitted that its interrogation methods amount to torture as defined in international law.¹⁰ On the contrary, they have consistently denied such accusations insisting that any “measures instituted were [always] a response to ‘terrorist’ attacks.”¹¹ While it is true that Israel has been the target of political violence, international law makes no exception to the absolute prohibition on the use of torture. Moreover, the massive expanse of independent investigative evidence produced by highly regarded non-governmental organizations such as Amnesty International, Human Rights Watch, B’tselem, and al-Haq, confirms that many of those who are subjected to torture in Israeli interrogation cells are rarely charged with any

5. See UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 5, G.A. Res. 217 A (III), UN GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948) (ratified by Israel in 1948) [hereinafter UDHR]; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 7, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 (ratified by Israel in 1992) [hereinafter ICCPR]; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (ratified by Israel in 1951) [hereinafter Fourth Geneva Convention]; see generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (ratified by Israel in 1991) [hereinafter UN Convention Against Torture].

6. See *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases* (B’tselem - The Israeli Information Center for Human Rights in the Occupied Territories, Jerusalem, Israel) Jan. 1997 [hereinafter *Legitimizing Torture*].

7. Human Rights Watch, *supra* note 4, at 264-74. See also Joost Hiltermann, *Deaths in Israeli Prisons* 19 J. PALESTINE STUD. 101 (Spring 1990); NEVE GORDON & RUCHAMA MARTON, *TORTURE: HUMAN RIGHTS, MEDICAL ETHICS AND THE CASE OF ISRAEL* (Zed Books 1995); *infra* note 90.

8. MELISSA PHILLIPS, *TORTURE FOR SECURITY: THE SYSTEMATIC TORTURE AND ILL-TREATMENT OF PALESTINIANS BY ISRAEL* 25 (al-Haq 1995). See also relevant articles of the UDHR, ICCPR, Fourth Geneva Convention and the UN Convention Against Torture, *supra* note 5.

9. *The Interrogation of Palestinians During the Intifada: Ill-treatment, “Moderate Physical Pressure” or Torture?* (B’tselem - The Israeli Information Center for Human Rights in the Occupied Territories, Jerusalem, Israel) Mar. 1991, at 12 [hereinafter *The Interrogation*].

10. See Phillips, *supra* note 8, at 53.

11. Amnesty International Report - 1996, *Israel and the Occupied Territories* (London: Amnesty International, 1996) at 188.

crime.¹² Further, even when prisoners are charged, the “crime” is usually one that poses no real threat to state security, for example stone-throwing, possession of banned books and participation in non-violent political demonstrations.¹³

Now, after years of hearing petitions for interim injunctions and *orders nisi* in which the HCJ consistently affirmed the state’s use of torture on Palestinian detainees, the Court has finally ruled that the GSS lacks the required authority under Israeli law to employ certain methods of “moderate physical and psychological pressure” when interrogating Palestinian “security” suspects.¹⁴ Notwithstanding this long awaited development, however, a closer examination of the decision reveals that the Court failed to put an unequivocal end to a practice that “constitutes a criminally sanctionable war crime,” and in all likelihood continues to be perpetrated with impunity to this day.¹⁵ This comment will critically assess the judgment of the HCJ in an attempt to clarify the state of the rule of law in Israel and the Occupied Palestinian Territories.¹⁶ More specifically, it will illustrate that—contrary to what many were hoping would signal the end of a morally reprehensible practice—the HCJ has much more to do before this “sad episode in Israel’s legal history” is finally put to rest.¹⁷

II. BACKGROUND

A. *International Law Prohibitions On the Use of Torture, Cruel and Inhuman Treatment*

The internationally accepted legal definition of “torture” is articulated in Article 1(1) of the *UN Convention Against Torture*:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁸

12. *The Interrogation*, *supra* note 9, at 106; Human Rights Watch, *supra* note 4, at 89, 101-03; Phillips, *supra* note 8, at 17; Amnesty International Report - June 1979, *Report and Recommendations of an Amnesty International Mission to the Government of the State of Israel* (London: Amnesty International, 1980) at 40-43 [hereinafter *Amnesty International Report of Mission to Israel*].

13. PHILLIPS, *supra* note 8, at 60-61. See also Jordan J. Paust, Gerhard von Glahn & Günter Woratsch, *Report of the ICJ Mission of Inquiry Into the Israeli Military Court System in the Occupied West Bank and Gaza* 14 HASTINGS INT’L. & COMP. L. REV. 1, 13 (1990) [hereinafter *Report of the ICJ Mission of Inquiry*].

14. *The High Court of Justice Outlaws Torture*, B’TSELEM - THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, <http://www.btselem.org/Files/site/english/torture/index.asp> (last visited Aug. 9, 2000) [hereinafter *High Court Outlaws Torture*].

15. *Report of the ICJ Mission of Inquiry*, *supra* note 13, at 32.

16. The Occupied Palestinian Territories are comprised of the West Bank and Gaza Strip, including East Jerusalem.

17. *Legitimizing Torture*, *supra* note 6, at 29.

18. UN Convention Against Torture, *supra* note 5, at art. 1.1.

As previously noted, international law imposes an absolute prohibition against the use of torture, cruel, inhuman or degrading treatment or punishment. While the reasons for this prohibition are numerous, two stand out as most obvious. First is the principle of the inviolability of the physical and mental integrity of the person. Respect for the security of the person is a central tenet upon which all modern democracies are based. Second, evidence obtained through the use of torture is inherently unreliable. Thus, "[t]he validity of a confession elicited by force is suspect even if only modest force is used, since any use of force carries an implicit threat to use more, possibly greater, force."¹⁹

The absolute prohibition against the use of torture, cruel, inhuman or degrading treatment or punishment is to be found in two separate bodies of international law: human rights law and humanitarian law.²⁰ This prohibition is a codification of what many consider "a norm of *jus cogens*, or a 'peremptory norm of international law.'"²¹ Such norms constitute "the strongest kind of customary international law," to which all states are legally bound.²² As a signatory to each of the relevant international human rights law and humanitarian law instruments that govern the prohibition against the use of torture,²³ and as a member of the general community of nations, Israel is legally bound by each of these bodies of law.

International human rights law is designed to protect individuals, irrespective of their nationality or lack thereof, from being ill-treated by state authorities in any circumstances, peace-time or otherwise.²⁴ Although it is contemplated that "[c]ertain rights may be restricted in emergency situations," it is clear that such emergencies "must be proved to require a particular restriction on a right" before derogation will be permitted.²⁵ In any event, as discussed below, international human rights law permits no derogation whatsoever to be made from the right to be free from torture and ill-treatment. "Therefore, even in a situation of military occupation," such as is the case in the Occupied Palestinian Territories, "human rights law applies" to protect individuals from being subjected to torture.²⁶ The core of international human rights law is found in the International Bill of Rights which is composed of the Universal Declaration of Human Rights ("UDHR"),²⁷ the International Covenant on Civil and Political Rights ("ICCPR")²⁸ (with its *Optional Protocol*),²⁹ and the International Covenant on

19. John Quigley, *International Limits on Use of Force to Elicit Confessions: A Critique of Israel's Policy on Interrogation* 14 BROOK. J. INT'L. L. 485, 485 (1988) [hereinafter *International Limits*].

20. See PHILLIPS, *supra* note 8, at 25-33.

21. *Id.* at 32.

22. *Id.*

23. See *supra* note 5 for a list of those treaties Israel has ratified.

24. Quigley, *International Limits*, *supra* note 19, at 491.

25. *Id.* at 491-92.

26. *Id.* at 492.

27. UDHR, *supra* note 5.

28. ICCPR, *supra* note 5.

29. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force Mar. 23, 1976 [hereinafter *Optional Protocol to ICCPR*].

Economic, Social and Cultural Rights ("ICESCR").³⁰ International human rights law is also derived from numerous other treaties, covenants, conventions and declarations, such as the UN Convention Against Torture ("CAT").³¹ Each of these documents is founded upon the principles enunciated in the United Nations Charter,³² which constitutes, along with the UDHR, a central instrument of customary international law to which all states are bound.³³ The main prohibitions against the use of torture, cruel, inhuman or degrading treatment or punishment under international human rights law are to be found in the UDHR, the ICCPR and the CAT. Both Article 5 of the UDHR and Article 7 of the ICCPR provide that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." To this, Article 4(2) of the ICCPR expressly adds that "no derogation" may be made from this prohibition for whatever reason. Likewise, the preamble of the CAT adopts the general prohibition contained in Article 5 of the UDHR and Article 7 of the ICCPR, and adds in Article 2(2) that "[n]o 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 a justification of torture." In sum, "human rights instruments and treaties are consistent in their absolute prohibition of torture and ill-treatment."³⁴

International humanitarian law is the body of law that governs armed conflict, as well as the rights and duties of parties engaged in such conflict toward individuals, whether combatants or non-combatants.³⁵ As territory taken during the course of war, the Occupied Palestinian Territories are subject to a regime of international humanitarian law known as the law of belligerent occupation.³⁶ The law of belligerent occupation is governed in large part by the Fourth Geneva Convention,³⁷ the "overriding aim" of which "is to ensure that claims of military exigency do not result in the violation of basic political and human rights of the civilians under military occupation."³⁸ The Fourth Geneva Con-

30. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, G.A. RES. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [hereinafter ICESCR].

31. UN Convention Against Torture, *supra* note 5.

32. U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

33. PHILLIPS, *supra* note 8, at 29.

34. *Id.* at 31.

35. See generally THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman ed., 1972).

36. John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765, 774 (1996).

37. Fourth Geneva Convention, *supra* note 5.

38. UNITED NATIONS COMMITTEE ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE, THE QUESTION OF THE OBSERVANCE OF THE FOURTH GENEVA CONVENTION OF 1949 IN GAZA AND THE WEST BANK INCLUDING JERUSALEM OCCUPIED BY ISRAEL IN JUNE 1967 1 (1979) [hereinafter UNCEIRPP]. It is important to note that Israel has never recognized the *de jure* applicability of the Fourth Geneva Convention to the Occupied Palestinian Territories, and has only stated that it respects, *de facto*, the "humanitarian" provisions of the Convention as they pertain to those territories. See, e.g., Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279, 293-94 (1968); Meir Shamgar, *The Observance of International Law in the Administered Territories* 1 ISRAEL Y.B. HUM. RTS. 262, 266 (1971).

In contrast, the international community, through such bodies as the United Nations Security Council, the United Nations General Assembly, the United Nations Commission on Human Rights, the International Committee of the Red Cross, and the International Commission of Jurists, has

vention is replete with provisions that expressly outlaw the use of torture, foremost of which is Article 147 which classifies "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body or health" as "grave breaches" of the Convention, all of "which are the equivalent of war crimes" under international law.³⁹ Similarly, Article 31 states that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." Finally, Article 32 provides that the High Contracting Parties are all "prohibited from taking any measure of such a character as to cause the physical suffering . . . of protected persons in their hands [during a military occupation]," and that "this prohibition applies . . . to . . . torture." It is important to note that "[a]s civilians in occupied territories, Palestinians of the West Bank and Gaza Strip," including occupied East Jerusalem, "are protected persons as defined by these humanitarian laws,"⁴⁰ and therefore possess the absolute "right to be free from torture and ill-treatment" at the hands of Israeli interrogators.⁴¹

B. *The 1987 Landau Commission Report and its Aftermath*

In June 1987, following a public scandal in which the GSS used physical force in its interrogation of an Israeli army officer found guilty of treason,⁴² the then President of the Supreme Court of Israel, Justice Meir Shamgar, appointed an official "judicial commission of inquiry to investigate the interrogation practices" of the GSS.⁴³ The judicial commission, as its name suggests, was headed by the former President of the Supreme Court, Justice Moshe Landau. In October of that year the Commission issued its report entitled *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activities*.⁴⁴ Prior to the release of the report, "the overall position of Israeli governments was that [its] interrogators did not employ coercive methods during interrogations" of Palestinians.⁴⁵

The *Landau Commission Report*, as it widely came to be known, revealed that between 1971 and 1986 the GSS systematically employed the use of "physi-

unreservedly asserted that the West Bank and Gaza Strip, including East Jerusalem, are incontrovertibly subject to the provisions of the Fourth Geneva Convention. See, e.g., UNCEIRPP at 3-14; *Report of the ICJ Mission of Inquiry*, *supra* note 13, at 6; W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 252-62 (1986); Adam Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories 1967-1988*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES*, at 25 (Emma Playfair ed.) (1992); RAJA SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK*, xi-xiii (1988); Türkaya AİAÖV, *The Status of Jerusalem as a Question of International Law*, in *THE LEGAL ASPECTS OF THE PALESTINE PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM* 139 (Hans Köchler ed., 1981); Th. A. van Baarda, *Is it Expedient to Let the World Court Clarify, in an Advisory Opinion, the Applicability of the Fourth Geneva Convention in the Occupied Territories?*, 10 *NETHERLANDS Q. HUM. RTS.* 4 (1992).

39. PHILLIPS, *supra* note 8, at 26.

40. *Id.* at 27.

41. *Id.* at 33.

42. See *The Interrogation*, *supra* note 9, at 22.

43. Quigley, *International Limits*, *supra* note 19, at 486.

44. *Landau Commission Report*, *supra* note 4.

45. Human Rights Watch, *supra* note 4, at 46.

cal pressure” on Palestinian suspects under interrogation to procure “confessions,” which were then used to obtain convictions in military courts.⁴⁶ The report further noted that this physical abuse was committed on the direct orders of superiors via a set of internal guidelines secretly distributed among GSS interrogators.⁴⁷ Without publicly divulging any details about the specific forms of physical pressure the GSS employed (that information was published in a classified appendix to the report), the Commission stated that such pressure regularly involved “cases of criminal assault” which, under Israeli law, would have rendered any evidence obtained thereby inadmissible.⁴⁸ While the Commission seemed to go to great pains to avoid commenting on whether it believed that the physical pressure employed by the GSS in that period constituted torture, some commentators have suggested that, at the very least, such pressure must have “violated customary and conventional international laws.”⁴⁹

In addition, the Commission uncovered that between 1971 and 1986 GSS interrogators routinely committed perjury when called upon to testify about their investigatory practices, specifically whether any physical pressure had been used against Palestinian detainees to extract confessions. According to the Commission, the interrogators “denied using any form of physical pressure on suspects when they testified in court. In short they simply lied”⁵⁰ Despite being a clear offense under section 237(a) of the Israeli Penal Code, the commission found that “the practice” of committing perjury “was an unchallenged norm” within the GSS,⁵¹ and “was systematic and routine.”⁵²

Notwithstanding these disturbing findings, the Commission offered numerous “reasons and rationalizations” for the astonishing behavior of GSS interrogators.⁵³ Arguing that interrogations involving “hostile terrorist acts” are by necessity completely different from those that involve “regular” crime,⁵⁴ the Commission stated that the physical pressure employed by the GSS against Palestinian detainees was “largely to be defended, both morally and legally.”⁵⁵ According to the Commission, the “effective interrogation” of these detainees would be “inconceivable” without resort to some form of physical pressure.⁵⁶ Regarding the perjury of GSS investigators, while the Commission regretted its

46. Human Rights Watch, *supra* note 4, at 49. These signed “confessions” are usually drafted by the Israeli authorities in Hebrew, a language that most Palestinian detainees do not understand. Interestingly, this practice has been ignored by Israeli military courts for years, and is one that was not addressed in the *Landau Commission Report* whatsoever. See *Report of the ICJ Mission of Inquiry*, *supra* note 13, at 30.

47. *Landau Commission Report*, *supra* note 4, at para. 4.20, as quoted in Human Rights Watch, *supra* note 4, at 48.

48. *Id.*

49. PHILLIPS, *supra* note 8, at 55.

50. *Landau Commission Report*, *supra* note 4, para. 2.27, as quoted in PHILLIPS, *supra* note 8, at 54.

51. *Landau Commission Report*, *supra* note 4, para. 2.30, as quoted in Human Rights Watch, *supra* note 4, at 50.

52. *The Interrogation*, *supra* note 9, at 23.

53. *Id.*

54. *Landau Commission Report*, *supra* note 4, at para. 2.18.

55. *Id.* at para. 1.8.

56. *Id.* at para. 2.37.

widespread practice, it noted that in many cases convictions would never have been secured if courts knew that means of "physical pressure [were] exerted in interrogations."⁵⁷ It was thus understandable, according to the GSS, that investigators ensure that the court not know of any means of pressure used.⁵⁸ Recommending "that no criminal proceedings for perjury be brought against the responsible GSS operatives" because it would disrupt and paralyze the organization,⁵⁹ the Commission then offered its own notorious recommendations on how GSS interrogations ought to be conducted in the future.

In proposing to abandon "the hypocrisy of an interrogation system in which illegal methods were used and systematically covered up," the Commission brazenly recommended that "the government should acknowledge that some measure of coercion is permissible, and then codify and carefully monitor the allowable techniques."⁶⁰ According to the Commission, such techniques "should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, *the exertion of a moderate measure of physical pressure cannot be avoided.*"⁶¹

What exactly constituted a "moderate measure of physical pressure" was never published in the public portion of the report.⁶² Rather, the Commission concealed those crucial details in the classified appendix to the report, the contents of which still remain confidential.⁶³ Furthermore, in order to ensure that GSS interrogators remained immune from prosecution, the Commission recommended that the necessity defense, a standard defense in domestic Israeli criminal law, be made available to GSS defendants. This, the Commission contended, would allow a GSS interrogator to defend his actions on the basis that public safety required that physical force be used against "security" suspects.⁶⁴ In other words, a balancing of values would allow the necessity defense to be used to justify the predominance of state security over the individual liberty of the detainee.

In November 1987, the Knesset endorsed the *Landau Commission Report* and voted to implement its recommendations in full.⁶⁵ One month later, the Palestinian Uprising, or *Intifadah*, erupted in the Occupied Territories.⁶⁶ As a

57. *Id.* at para. 2.38.

58. *Id.*

59. *The Interrogation*, *supra* note 9, at 23.

60. Human Rights Watch, *supra* note 4, at 50.

61. *Landau Commission Report*, *supra* note 4, at para. 4.7 (emphasis added).

62. Human Rights Watch, *supra* note 4, at 50-51.

63. *See id.* at 48.

64. *See The Interrogation*, *supra* note 9, at 24-25.

65. PHILLIPS, *supra* note 8, at 53.

66. The *Intifadah* was a nation-wide, largely non-violent, spontaneous grassroots uprising that attempted to end Israel's then twenty-year illegal military occupation of the West Bank, Gaza Strip and East Jerusalem. Lasting from 1987 to 1993, the *Intifadah* witnessed an unprecedented level of mass participation and mobilization at every stratum of Palestinian society against the Israeli occupation authorities. The principle methods of civil disobedience employed by the Palestinians during the *Intifadah* included daily confrontations by stone-throwing youths with armed Israeli troops; regular mass demonstrations and rallies; road-blocks; workers' strikes; and economic boycotts. Al-

result, the number of Palestinians detained and interrogated by Israel on security grounds,⁶⁷ a great number of them without charge or trial,⁶⁸ drastically increased. Armed with the Landau Commission's express authorization to use physical and psychological force on persons suspected of being involved "*in political subversion . . . prohibited by law in Israel or the [Occupied Palestinian] territories*,"⁶⁹ the GSS tortured thousands of Palestinians for so-called "security violations"⁷⁰ that had nothing to do with "hostile terrorist activity." The violations included, *inter alia*, participating in gatherings or marches consisting of ten or more persons for political purposes;⁷¹ displaying flags or emblems of any political significance;⁷² possessing banned books or any publication deemed adverse by the military authorities;⁷³ and expressing any support or sympathy for the activities or aims of any "hostile organization."⁷⁴ According to B'tselem,

though the official Israeli public relations response to the *Intifadah* initially attempted to characterize it as a violent war waged and directed by Palestinian "terrorists," the plethora of independent media, intergovernmental and non-governmental reports on the uprising confirmed, in the words of Israeli lawyer Reuven Kaminer, that the *Intifadah* "was not 'terror,' nor could the Israeli 'information' apparatuses present it as such," rather it "was basically non-violent." REUVEN KAMINER, *THE POLITICS OF PROTEST* 42 (1996). The UN Human Rights Commission supported the *Intifadah* as constituting the legitimate exercise of the "right of the Palestinian people to regain their rights by all means in accordance with the purposes and principles of the Charter of the United Nations and with relevant United Nations resolutions." It also declared the uprising as "a form of legitimate resistance." UN Commission on Human Rights, *Situation in Occupied Palestine*, para. 3, quoted in JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 203 (1990).

The *Intifadah* ended with the onset of the Israel-PLO accords in 1993. In September 2000, largely due to the failure of those accords in ending Israel's now thirty-three year military occupation of Palestinian lands, a revived uprising in the Occupied Palestinian Territories emerged. Marked by even higher levels of violent Israeli military suppression of Palestinian civilian demonstrations than in the period from 1987-1993, Amnesty International has expressed concern "that in policing demonstrations since 29 September 2000 Israeli security forces [have] repeatedly resorted to excessive use of lethal force in circumstances in which neither their lives nor the lives of others were in imminent danger, resulting in unlawful killings." Amnesty International, *Israel and the Occupied Territories: Excessive Use of Lethal Force*, at <http://www.web.amnesty.org/ai.nsf/index/mdel150412000?opendocument&of=countries/israel%2foccupied%2fterritories>.

With respect to Israel's use of torture and ill-treatment in this recent uprising, Amnesty International has stated that "hundreds of people, most of them Palestinians, have been arrested" by Israeli occupation forces, and that it "is concerned by reports that some detainees, including children, were beaten or otherwise ill-treated during arrest and detention. Ill-treatment of detainees appears to be widespread by the Israel Police and the [Israeli] Border police and to be fostered by a culture of impunity." Amnesty International, *Israel and the Occupied Territories: Mass Arrests and Police Brutality*, available at http://www.web.amnesty.org/ai.nsf/index/mdel150582000?opendocument&of=soft_returncountries/israel%2foccupied%2fterritories.

67. See Human Rights Watch, *supra* note 4, at 53.

68. See *The Interrogation*, *supra* note 9, at 106; see also Human Rights Watch, *supra* note 4, at 89, 101-03.

69. PHILLIPS, *supra* note 8, at 60.

70. These violations are codified in hundreds of military orders promulgated by the Israeli military authorities. Since 1967 they have been employed to outlaw "virtually all forms of" indigenous Palestinian "political expression." See *id.* According to the International Commission of Jurists, many of these military orders "contain such overly-broad language that . . . embrace a wide spectrum of indigenous and permissible activity." *Report of the ICJ Mission of Inquiry*, *supra* note 13, at 13.

71. See PHILLIPS, *supra* note 8, at 60.

72. *Id.*

73. *Id.* at 61.

74. *Id.* at 60.

the Israeli human rights organization, "only by the most tendentious political reasoning" could such activity "be seen as [posing] direct threats to [Israel's] national survival."⁷⁵

Israel's detention and interrogation of Palestinians under these pretenses continued well after the *Intifadah* ended in 1993, and not merely by operatives of the GSS. Members of the Israeli armed forces ("IDF") and the Israeli police force regularly continued to arrest, detain and interrogate Palestinians suspected of being security threats.⁷⁶ Numerous independent studies, conducted by international and local human rights organizations,⁷⁷ revealed that Israel employed numerous methods of torture while interrogating Palestinians, including: electric shock;⁷⁸ beatings (with truncheons, rifle butts, rubber mallets, wrenches, whips, boots and fists) to all areas of the body including bottoms of feet, the torso and genitals;⁷⁹ sexual assault, including sodomy⁸⁰ and prolonged squeezing and beating of the testicles;⁸¹ application of burning cigarettes;⁸² violent shaking, entailing clutching the detainee by the lapels and shaking him into unconsciousness (usually combined with choking);⁸³ "partial suffocation (by pressure on the windpipe or by placing sacks on the head and pressing them against the nose and mouth);"⁸⁴ prolonged abusive body positioning, entailing the "chaining, handcuffing, shackling, confining or otherwise constraining of detainees in painful positions for hours or days;"⁸⁵ prolonged exposure to temperature extremes, including the use of refrigerator units;⁸⁶ prolonged sleep, space and toilet deprivation;⁸⁷ and threats, usually of death and/or rape of the detainee or female relatives.⁸⁸ Since the *Landau Commission Report* was issued in 1987, an average total of 4,000 to 6,000 Palestinian detainees have been subjected to these and other forms of torture and inhuman treatment each year,⁸⁹ many of whom have died during, or as a result of, the interrogation process.⁹⁰

75. *The Interrogation*, *supra* note 9, at 28.

76. See PHILLIPS, *supra* note 8, at 92-93. See also *Amnesty International Report of Mission to Israel*, *supra* note 12, at 28.

77. Most notably Amnesty International, Human Rights Watch, B'tselem, and al-Haq.

78. See Palestine Human Rights Information Center, *Israel's Use of Electric Shock Torture in the Interrogation of Palestinian Detainees* (Jerusalem: PHRIC, December 1991). See also *The Interrogation*, *supra* note 9, at 32, 35; Geoffrey Bindman, *The Rule of Law in Israel* 142 NEW L.J. 524, 524 (1992); PHILLIPS, *supra* note 8, at 23.

79. Human Rights Watch, *supra* note 4, at 187-98. See also *The Interrogation*, *supra* note 9, at 34, 87, 90.

80. *Amnesty International Report of Mission to Israel*, *supra* note 12, at 18.

81. PHILLIPS, *supra* note 8, at 103. See also Human Rights Watch, *supra* note 4, at 187-98.

82. *The Interrogation*, *supra* note 9, at 34.

83. Human Rights Watch, *supra* note 4, at 187 *et seq.*

84. *The Interrogation*, *supra* note 9, at 35.

85. Human Rights Watch, *supra* note 4, at 111 *et seq.*

86. *Id.* at 147 *et seq.*

87. *Id.* at 156 *et seq.*

88. *Id.* at 199 *et seq.*

89. *Id.* at x.

90. B'tselem has documented the following cases: 'Ata 'Iyad (d. 14 August 1988; 21 yrs.; stated cause of death, 'suicide by hanging'); Ibrahim al-Matur (d. 31 October 1988; 31 yrs.; stated cause of death, 'suicide by hanging'); Mahmud Yusuf Alayan al-Masri (d. 6 March 1989; 27 yrs.; stated cause of death, 'perforated stomach ulcer'); Jamal Muhammad Abed al-'Ati (d. 3 December

In June 1991, the Public Committee Against Torture in Israel ("PCATI"), a non-governmental organization, together with Murad 'Adnan Salahat, a former Palestinian "security" detainee, petitioned the HCJ "to rule on whether the Landau [Commission] report's classified interrogation guidelines should be declared illegal on the grounds that they contravened Israeli law and effectively sanctioned torture."⁹¹ In dismissing the petition in July 1993, the Court held that "the GSS guidelines had the status of internal directives whose legality . . . could not" be ruled on "except in connection with a specific case."⁹² Because there was no concrete case "with known facts" before the Court, it refused to grant the relief sought by the petitioners.⁹³

Subsequently, the HCJ "heard dozens of appeals by Palestinian detainees complaining of physical and psychological methods of "pressure" applied by [the] General Security Service,"⁹⁴ and in a string of 1996 cases the Court "allowed the use of physical force against detainees" accused of "security offences."⁹⁵ These cases bestowed upon Israel the rather odious distinction of being the only self-proclaimed democratic state in the world in which the use of torture had not only been authorized by the government, but also by the judiciary.⁹⁶ In response, the United Nations Committee Against Torture ("UNCAT") denounced the HCJ decisions as being "incompatible with the provisions of the [UN] Convention [Against Torture]."⁹⁷ After reviewing two "special reports" from the Israeli government on the status of the HCJ rulings pursuant to Article 19(1) of the Convention, the UNCAT concluded that the "methods of interrogation used by Israel constituted torture as defined in Article 1 of the [UN] Convention [Against Torture]."⁹⁸ Eventually, under intense pressure from the international community and a number of domestic human rights groups, the

1989; 23 yrs.; stated cause of death, 'suicide by hanging'); Khaled al-Sheikh 'Ali (d. 19 December 1989; 27 yrs.; stated cause of death, 'heart attack'). *The Interrogation*, *supra* note 9, at 40-43. Human Rights Watch has documented the following cases: Mustafa 'Akawi (d. 4 February 1992; 35 yrs.; stated cause of death, 'heart failure'); Hazem 'Eid (d. 8 July 1992; 23 yrs.; stated cause of death, 'suicide by hanging'); Mustafa Barakat (d. 4 August 1992; 23 yrs.; stated cause of death, 'bronchial asthma attack'); Ayman Sa'id Nassar (d. 2 April 1993; 22 yrs.; stated cause of death, 'lung failure'). Human Rights Watch, *supra* note 4, at 264 *et seq.* See also Hiltermann, *supra* note 7, who surveys the death of 19 Palestinian detainees in Israeli prisons for the period 1988-1990. The stated cause of those deaths break down as follows: 6 by 'suicide'; 4 by beatings; 4 by gunshot wounds; 3 by 'illness'; 1 by denial of medical treatment; and 1 by dehydration following a hunger strike.

91. Human Rights Watch, *supra* note 4, at 58.

92. *Id.* at 62.

93. *Id.*

94. *Legitimizing Torture*, *supra* note 6, at 4.

95. Amnesty International Report - 1997, *Israel and the Occupied Territories* (London: Amnesty International, 1997) at 193; See generally *Legitimizing Torture*, *supra* note 6.

96. See Amnesty International Report 1991, *Israel and the Occupied Territories*, *supra* note 95, at 193.

97. *Legitimizing Torture*, *supra* note 6, at Appendix 3.

98. Amnesty International Report - 1998, *Israel and the Occupied Territories* (London: Amnesty International, 1998) at 207.

HCI scheduled its "unprecedented hearing . . . to review the legality of interrogation methods used by the GSS"⁹⁹ in January 1998.

III.

THE DECISION IN THE GSS TORTURE CASE

A. Summary

The case was argued in three parts before the full nine-judge panel of the HCI¹⁰⁰ on March 20, 1998, January 13, 1999 and May 26, 1999.¹⁰¹ The unanimous decision was written by Justice Aaron Barak, President of the Court, and was delivered on September 6, 1999.¹⁰² Despite the efforts of a number of local human rights organizations, the Court "continued to reject petitions for injunctions to prevent the GSS from using physical force to interrogate named detainees"¹⁰³ while the case was being argued.

The case involved a total of seven applications brought by the PCATI, the Association for Civil Rights in Israel ("ACRI"), the Center for the Defence of the Individual ("CDI"), and six individual Palestinian "security" detainees against whom it was alleged the GSS was at that time employing "physical means."¹⁰⁴ The State respondents were the Government of the State of Israel, the GSS, the Head of the GSS, the Prison Commander of Jerusalem, the Prime Minister, and the Ministers of Defence, Justice, the Police and the Environment.¹⁰⁵

The Court found three essential issues in the case: (1) whether GSS investigators possess a general authority under Israeli law to conduct interrogations; (2) if so, whether such a general authority empowers GSS investigators to use "physical means" during interrogations of security suspects and (3) whether, in the alternative, the authority for GSS investigators to employ physical means during interrogations of security suspects can be anchored in the criminal defense of necessity.¹⁰⁶

The Court began its consideration of the first issue by noting that the very act of interrogation necessarily impinges "upon the suspect's freedom, even if physical means are not used."¹⁰⁷ Accordingly, because Israel is "a state adhering to the rule of law" GSS operatives would "not [be] permitted in [the] absence of clear statutory authorization" (the word "explicit" was also used) to

99. Amnesty International Report - 1999, *Israel and the Occupied Territories* (London: Amnesty International, 1999) at 208.

100. The panel consisted of Pres. Barak, Dep. Pres. Levin, and JJ. Or, Mazza, Cheshin, Kedmi, Zamir, Strasberg-Cohen, and Dorner.

101. *GSS Torture Case*, *supra* note 1, at 1472.

102. *Id.* at 1471.

103. Amnesty International Report - 1999, *supra* note 99, at 208.

104. The individual applicants were Hat'm Abu Zayda, Wa'al Al-Kaaqua, Ibrahim 'Abdallah Ghanimat, 'Abd Al-Rahman Ismail Ghanimat, Fouad 'Awad Qur'an and 'Issa 'Ali Batat. *See GSS Torture Case*, *supra* note 1, at 1473-74.

105. *Id.* at 1471-72 [hereinafter "the State"].

106. *Id.* at 1478.

107. *Id.*

conduct interrogations.¹⁰⁸ The Court then surveyed existing law and found that, despite the fact that the GSS possessed no governing legislation nor did there exist any “specific statutory provision authorizing [its] investigators to conduct interrogations,”¹⁰⁹ its general authority to interrogate could be derived from Article 2(1) of the Criminal Procedure Statute [Testimony], which governs the right of “police” or “other” officers to conduct interrogations. In the words of Justice Barak, “the question of the GSS’ authority to conduct interrogations” was properly analyzed under the Criminal Procedure Statute because “GSS investigators are tantamount to police officers in the eyes of the law.”¹¹⁰

On the more pressing issue of whether the general authority to interrogate endows GSS operatives with the power to employ physical means, the Court began its analysis by noting that “[t]he rules pertaining to investigations are important to a democratic state” in that “[t]hey reflect its character.”¹¹¹ The Court then examined what it called “the clash of values” between “the desire to uncover truth” and “the wish to protect the dignity and liberty of the individual being interrogated.”¹¹² In analyzing that clash, the Court concluded that “violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice,” and that “a reasonable investigation is necessarily one free of torture.”¹¹³ The Court then reviewed each of the five physical interrogation methods that were in evidence before it,¹¹⁴ and held that the GSS lacked the positive authority under existing Israeli law to employ those means.¹¹⁵

Finally, with respect to the necessity defense, the Court held that while it may be available, *post facto*, to a criminally indicted GSS investigator “who applied physical interrogation methods for the purpose of saving human life,” it may not be used to afford that investigator the general authority, *ab initio*, to use such methods. “In the Court’s opinion, a general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the ‘necessity’ defence [sic],” because by its very nature it is an exceptional doctrine that operates to exonerate one who has made “an after-the-fact judgment” under “a narrow set of considerations.”¹¹⁶ In this way, the Court opined, “[n]ecessity 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.”¹¹⁷

Thus, in concluding that GSS investigators do possess a general authority to interrogate, but that the authority does not empower them with the right to use certain physical means nor to avail themselves of the protection of the necessity

108. *Id.*

109. *Id.* at 1480.

110. *Id.* Article 2(1) of the Criminal Procedure Statute [Testimony] does not explicitly mention the GSS.

111. *Id.* at 1481.

112. *Id.*

113. *Id.* at 1482.

114. *See infra* text accompanying notes 124-29.

115. *GSS Torture Case*, *supra* note 1, at 1482-85.

116. *Id.* at 1486.

117. *Id.*

defense, the HCJ departed somewhat from the effect of its previous decisions in which the use of "moderate physical and psychological pressure" against Palestinian "security" suspects was permitted to continue unabated.¹¹⁸ However, while many have lauded the *GSS Torture Case* as finally putting an end to Israel's official sanctioning of torture,¹¹⁹ such a conclusion may be hasty and unwarranted.

B. Analysis

Generally speaking, there are three main deficiencies in the *GSS Torture Case* that render it less than a "landmark" decision vis-à-vis ending Israel's use of torture on Palestinians. The first concerns the decision's limited scope, the second its distorted contextual framework and the third, its concluding dicta, which does little to alter existing Israeli policy on the issue.

Without question, the greatest drawback of the HCJ's decision is that it is limited in its scope, and therefore in its overall effect. One of the most obvious factors contributing to this concerns the evidentiary record that was before the Court, specifically in relation to the torture methods used by the GSS interrogators. Recall that the *Landau Commission Report* only described GSS torture methods in its classified appendix.¹²⁰ At the hearing of the applications before the HCJ, this appendix remained classified and the full particulars of the GSS's torture methods were left within the exclusive knowledge of the State. Ideally, the Court would have issued an interim order compelling disclosure of this information. Unfortunately, no such order was issued, and the State refused to lead evidence in open court on the subject, offering instead to "present" the methods to the court *in camera*. This proposal was understandably rejected by the applicants.¹²¹ Ultimately, as noted by Justice Barak, "the information at the Court's disposal" had to be "provided by the applicants," with the State merely providing "a picture of the GSS' interrogation practices" that were discussed.¹²² Further, the State did not "deny the use of [any of the] interrogation methods" that were put into evidence by the applicants throughout the proceedings.¹²³

Thus, despite the fact that neither the applicants nor the Court had any conclusive means of confirming that the record before the Court on the central issue in the case was fully exhaustive,¹²⁴ the Court nevertheless ruled on what it implicitly assumed were the only five methods of "physical pressure" employed

118. See *supra* text accompanying notes 91-98.

119. See B'tselem, *High Court Outlaws Torture*, *supra* note 14.

120. See Human Rights Watch, *supra* note 4, at 48.

121. *GSS Torture Case*, *supra* note 1, at 1474.

122. *Id.*

123. *Id.*

124. For instance, in its deliberation of whether the practice of "excessive tightening of handcuffs" constituted a prohibited interrogation practice of the GSS, the Court made the following revealing statement: "there is no relevant justification for handcuffing the suspect's hands with particularly small handcuffs, if this is in fact the practice." *Id.* at 1483 (emphasis added). Of course, had an interim order been made compelling the State to disclose the exact physical methods the GSS was permitted to employ in its interrogations, the Court would not be left guessing on this point.

by the GSS: violent shaking,¹²⁵ 'shabeh',¹²⁶ the 'frog crouch',¹²⁷ excessive tightening of handcuffs¹²⁸ and prolonged sleep deprivation.¹²⁹ While it is important that the Court acknowledged the use of these interrogation methods, its failure to order the State to disclose all of its information regarding GSS interrogation methods severely weakened the effect of its decision. Such an order would have enabled the Court to scrutinize other, ostensibly harsher, methods of torture that the GSS has been implicated in employing against Palestinian "security" detainees. As noted above, those methods include, but are not limited to, electric shock, beatings to all areas of the body (often with the use of instruments), sexual assault, application of burning cigarettes, partial suffocation, prolonged exposure to temperature extremes, prolonged abusive body positioning (other than 'shabeh') and a multitude of methods of psychological torture including threats of death and rape.¹³⁰ Despite numerous human rights studies on the issue, the Court avoided the question of whether these harsher methods of torture are regulated in the *Landau Commission Report*. No inquiry was ever made into whether the *Landau Report* endorsed these additional methods. No discussion of whether the GSS employed these additional methods to torture security suspects was ever embarked upon. In this way, the Court "reinforced the very context of secrecy in which torture . . . take[s] place" in the Occupied Palestinian Territories.¹³¹

A second distinct failing that limits the scope and effect of the H CJ's decision is the fact that the Court's inquiry was confined to the investigatory methods of the GSS. However, the GSS is hardly the only Israeli organ actively engaged in the torture and ill-treatment of Palestinian security detainees. As previously noted, both the IDF and the Israeli police force are also empowered to interrogate Palestinians.¹³² These groups also engage in torture and cruel treatment, often with greater severity than the GSS.¹³³ In its exhaustive 1994 study of Israel's torture and ill-treatment of Palestinians in the Occupied Territories, Human Rights Watch noted that "[t]he relative neglect of IDF interrogation

125. The Court describes this as "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." *Id.* at 1474.

126. The Court describes this method as one in which the suspect "is [forcibly] seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room." *Id.* at 1475.

127. The Court describes this as referring "to [forced] consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.*

128. *Id.*

129. In the Court's words, such sleep deprivation is caused "as a result of being tied in the 'Shabach' [sic] position, being subjected to the playing of powerfully loud music, or intense non-stop interrogations without sufficient rest breaks." *Id.* at 1476.

130. See *supra* text accompanying notes 78-88.

131. *The Interrogation*, *supra* note 9, at 29.

132. See PHILLIPS, *supra* note 8, at 92-93.

133. *Report of the ICJ Mission of Inquiry*, *supra* note 13, at 29-33. See also Human Rights Watch, *supra* note 4, at 16-17, 233-40.

practices is a grave mistake,"¹³⁴ and that IDF "beating is systematic . . ." ¹³⁵
The study continued:

The army [IDF] has conducted a significant percentage of the tens of thousands of interrogations that have taken place since the start of the intifada [sic]. As this report documents, a detainee is far more likely to be beaten severely if his interrogators are IDF personnel than if they are from the GSS . . . Of our nineteen IDF interrogation subjects, sixteen reported being beaten, thirteen of them on the testicles . . . In contrast to the GSS, the IDF has steadfastly denied that physical pressure is ever permissible under the agency's interrogation guidelines . . . [Nevertheless, [t]he evidence collected in this report demonstrates that, whatever the regulations may be, beatings continue to be so commonplace in IDF interrogation wings that they could not take place without the knowledge and acquiescence of senior officers.¹³⁶

Additionally, units of the Israeli police force have worked both separately and in conjunction with the GSS in various police "interrogation centers."¹³⁷ The largest center is the Russian Compound in Jerusalem, dubbed al-Moscobiyyah by Palestinians, where many of Israel's "security" detainees have been tortured since 1967.¹³⁸ In addition, Israeli sources have also reported "the existence of a 'district police' interrogation unit which 'moved from one detention center to another using violent and brutal [interrogation] methods.'" ¹³⁹ Thus, by failing to address what likely comprises an even greater component of Israel's systematic campaign of torture and ill-treatment of Palestinians, the Court undermined the effect of its more positive pronouncements respecting the GSS and, moreover, contributed indirectly to the perpetuation of torture in the Occupied Palestinian Territories.

The scope and effect of the decision are further limited by a third failure, namely that the Court restricted its analysis to torture and ill-treatment *during* the interrogation phase of arrest and detention, neglecting to address the torture suffered in the period after arrest and prior to interrogation. Under Israeli law, any "soldier or policeman is authorized to arrest, without a warrant, a Palestinian for whom 'there is reason to suspect' that he [or she] has committed a security offense."¹⁴⁰ Officers are not required, and rarely offer, to inform suspects of the reasons for arrest.¹⁴¹ Once arrested, "security" detainees are transported to special holding facilities where they can be held for up to four days without a warrant, or for a longer period on the order of an officer or military court.¹⁴² As a number of studies have documented, Palestinian "security" suspects endure severe physical beatings, application of burning cigarettes, spraying of mace in the face, prolonged abusive body positioning, hooding, threats of death and/or

134. Human Rights Watch, *supra* note 4, at 63.

135. *Id.* at 64.

136. *Id.* at 63-65.

137. See PHILLIPS, *supra* note 8, at 94.

138. *The Interrogation*, *supra* note 9, at 37. See also *id.* at 94; Human Rights Watch, *supra* note 4, at 234.

139. PHILLIPS, *supra* note 8, at 136.

140. Human Rights Watch, *supra* note 4, at 88.

141. *Id.* at 89.

142. *Id.* at 88.

rape, and sleep, food and toilet deprivation during this period.¹⁴³ Rather than random outbursts of violence, these practices are so commonplace that they constitute a quasi-official policy,¹⁴⁴ designed to “soften up” the detainee immediately prior to interrogation.¹⁴⁵ For example, according to a 1989 Israeli military court judgment in which two soldiers were implicated in “the beating deaths of two Palestinians in Israeli army custody”:

the order given to [the defendants] was unequivocal that in every case in which they arrested a suspect for disturbing the peace, they must beat him . . . [with] hard blows and in order to deter him from repeating similar behavior in the future.¹⁴⁶

Thus, by failing to inquire into the pre-interrogation handling of Palestinian “security” suspects, the Court again undermined whatever positive steps it had taken towards ensuring that torture and ill-treatment cease to be employed in the future.

One underlying reason why the *GSS Torture Case* suffers from the aforementioned deficiencies in scope and effect is that the HCJ confined its inquiry to an extremely narrow contextual framework. The Court afforded heavy judicial notice to certain socio-political and legal assumptions while failing to recognize other equally important considerations that would have balanced the weight of those assumptions.

One obvious example is the Court’s invocation of the “hostile terrorist activity” paradigm, borrowed directly from the *Landau Commission Report*. At the very outset of the judgment, the Court opined that:

The State of Israel has been engaged in an unceasing struggle for both its very existence and security from the day of its founding. Terrorist organizations have established as their goal Israel’s annihilation. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas, public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy.¹⁴⁷

As a segue into the issues before it, the Court then stated that “[t]he main body responsible for fighting terrorism is the GSS” and that “[i]n order to fulfill this function” the GSS “investigates those suspected of hostile terrorist activity.”¹⁴⁸ The Court then simply began its consideration of the issues.

143. PHILLIPS, *supra* note 8, at 73-90. See also Human Rights Watch, *supra* note 4, at 88-93.

144. Interestingly, this policy was not always quasi-official. In January 1988, one month after the outbreak of the *Intifadah*, the then Israeli Defence Minister, Yitzhak Rabin, issued his now notorious “Iron Fist” policy by which the IDF was authorized to “break bones” and use “force, might and beatings” in order to quell the unrest. Although this “policy was officially rescinded in February 1988, evidence provided by soldiers serving in the [Occupied Palestinian Territories] shows that such beatings continued pursuant to oral instructions issued by Israeli army commanders.” PHILLIPS, *supra* note 8, at 74. See also Quigley, *Palestine and Israel*, *supra* note 66, at 203-04.

145. PHILLIPS, *supra* note 8, at 86.

146. *Id.* at 74.

147. *GSS Torture Case*, *supra* note 1, at 1472.

148. *Id.* at 1473.

As previously illustrated, however, the legal and political state of affairs in Israel-Palestine is not quite as simple or one-sided as the Court portrayed. The Court failed to disclose, for example, that in addition to its authorization of the use of "moderate physical and psychological pressure" on Palestinians suspected of "hostile terrorist activity," the *Landau Commission Report* also sanctioned the use of such methods on those suspected of "political subversion." As already noted, political subversion includes such benign acts as participation in non-violent demonstrations and protests, possession of banned books or publications, and other forms of legitimate political expression. The Court also failed to discuss the fact that Israeli law permits government authorities to, *inter alia*, arrest and detain Palestinians without charge or trial for renewable six month periods,¹⁴⁹ withhold notification of the arrest of Palestinians from their families or legal counsel for up to twelve days,¹⁵⁰ prevent Palestinian detainees from contacting legal counsel for up to ninety days at a time¹⁵¹ and convict Palestinians on the basis of written statements of third parties who are not required to present themselves in court for cross-examination.¹⁵² Finally, and perhaps most notably, the H CJ failed to acknowledge that for over three decades Israel has maintained an illegal military occupation in the West Bank and Gaza Strip that has been described by one of the Jewish state's pre-eminent human rights activists, Dr. Israel Shahak, as "one of the most cruel and repressive regimes in modern times."¹⁵³

While it is important not to make too much of the Court's obviously partisan contextualization of the case before it—after all, it is the *Israeli* Supreme Court—it is equally important to recognize the subtle effect such partisanship has not only on the Court's final disposition on the merits, but also on the concerned public's impression of the Court's role as the ultimate purveyor of justice in Israel-Palestine. Thus, in addition to the deficiencies of scope and effect, the Court's complete failure to address the issue of whether the GSS interrogation methods actually constitute torture,¹⁵⁴ and its express refusal to "address the issue of admissibility or probative value of evidence obtained" through the use

149. See B'tselem, *Detained Without Trial: Administrative Detention in the Occupied Territories Since the Beginning of the Intifada* (B'tselem - The Israeli Information Center for Human Rights in the Occupied Territories: October 1992).

150. Military Order No. 378 (as amended by Military Order No. 1220), Art. 78 D(b)(6). It is usually during this period of incommunicado detention that torture is alleged to take place.

151. Military Order No. 378, Art. 78(c).

152. This is known as the 'Tamir Law.' See *The Interrogation*, *supra* note 9, at 18; PHILLIPS, *supra* note 8, at 59-60.

153. *Middle East International - Supplement* (May 1975), as quoted in ISMAIL ZAYID, ZIONISM: THE MYTH AND THE REALITY 65 (1980). Dr. Israel Shahak is Chairman of the Israeli League for Human and Civil Rights and a survivor of Belsen Concentration Camp. He has written extensively on Israel's violation of Palestinian human rights. See Israel Shahak, *Israeli Apartheid and the Intifada* 30 RACE & CLASS 1; ISRAEL SHAHAK, JEWISH HISTORY, JEWISH RELIGION: THE WEIGHT OF THREE THOUSAND YEARS (1994); Israel Shahak, *Israeli Law: Some Facts*, in Köchler, *supra* note 38, at 260.

154. Although the Court states that "a reasonable investigation is one necessarily free of torture," it never does rule on whether the GSS methods amount to torture. *GSS Torture Case*, *supra* note 1, at 1482.

of “physical” methods of interrogation¹⁵⁵ are just two further problems that contribute to a conclusion that other forces may have been at work when the HCJ rendered its judgment.

Unfortunately, this conclusion is not refuted by the Court’s concluding dicta, the import of which merits extended citation:

According to the existing state of the law, neither the government nor the heads of security services [i.e. the GSS] possess the authority to establish directives and bestow authorization regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. Similarly, the individual GSS investigator—like any police officer— does not possess the authority to employ physical means which infringe upon a suspect’s liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.

.....
Clearly, a legal statutory provision is necessary for the purpose of authorizing the government to instruct in the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary “law of investigation,” and in order to provide the individual GSS investigator with the authority to employ these methods.

.....
 [T]here are those who argue that Israel’s security problems are too numerous, thereby requiring the authorization to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect’s liberty “befitting the values of the State of Israel,” is enacted for a proper purpose, and to an extent no greater than is required (Article 8 to the Basic Law: Human Dignity and Liberty).¹⁵⁶

These closing remarks are seminal to understanding the real meaning of the HCJ’s ruling. In effect, the Court ruled that GSS interrogators could not presently employ the five “physical means” in evidence, *but only* because such activity is not specifically provided for in any Israeli statute, as the law currently stands. To be sure, the Court did not state that these means are prohibited because they constitute torture. Likewise, it did not state that these means are prohibited because they contravene international law, or because they call into question the veracity of any evidence obtained thereby. As noted above, the Court was very careful to omit discussion of any of these issues. On the contrary, what the Court made clear is that given the special “security” needs of the state of Israel, a new law that will enable the GSS to employ such “physical means” should be enacted, so long as the means are—and here the Court invokes the quasi-constitutional limitation clause in its Basic Law: Human Dignity

155. *Id.* at 1486.

156. *Id.* at 1488 (emphasis added).

and Freedom—"befitting [of] the values of the State of Israel, 'designed' for a proper purpose, and [employed] to an extent no greater than is required."¹⁵⁷

But is any of this really different from what the *Landau Commission Report* recommended in 1987? It is submitted that it is not. Fourteen years ago, the Commission reviewed the "physical" interrogation methods of the GSS and judged them to be in contravention of Israeli law and Israel's "democratic character." The Court did the same in the case at bar. The Commission refrained from commenting on whether the "physical" interrogation methods constituted torture. Again, the Court did the same. The Commission purported to "ensure a proper framework for the activity of the GSS regarding [its] investigations" by outlining what "physical methods" of interrogation would be permissible, making it clear that the "rule of law" required that these methods be employed within strict guidelines, never to be exercised "disproportionately."¹⁵⁸ Although the Court did not specifically outline what "physical methods" of interrogation could be used henceforth (it too prefers the limpid euphemism over the word "torture"), it did instruct the legislature to do so. Finally, like the Landau Commission, the Court qualified its instruction with its own appeal to the maintenance of proportionality.

Which begs the inevitable question of what is proportional? To wit, what exactly constitute the "values of the State of Israel," and what effect would such "values" likely have on the determination of the "proper purpose" of torture sanctioning legislation? Despite the Court's continual praise of Israel as a "democratic" state committed to the "rule of law," it seems clear by now that insofar as its treatment of the Palestinian people is concerned, the Jewish state has been anything but those things. In point of fact, there remains to be produced any work of real repute that explains how a state legally and institutionally committed to the perpetual dominance of one ethno-religious group over all others under its control can possibly be democratic and committed to the rule of law, thirty-three year old military occupations aside. What we can glean from the *GSS Torture Case* and the *Landau Commission Report* before it, however, is that the state of Israel views itself, rightly or wrongly, as a nation besieged by wanton and inexplicable terrorist violence. Under these circumstances, the perceived need to protect state "security" at all costs appears to be far more powerful an influence on defining the "values" of the Jewish state than anything else.

157. *Id.* The state of Israel "is one of the few states that lacks a formal constitution in the sense of one written, unified document." Instead, the Knesset has decided that "a constitution would be adopted piecemeal" through the enactment of a series of "Basic Laws" which, when completed, "would then constitute the Constitution of the State." At present, there are eleven such Basic Laws: The Knesset (1958), Israel Lands (1960), The President (1964), The Government (1968), The State Economy (1975), The Army (1976), Jerusalem, Capital of Israel (1980), The Judicature (1984), State Comptroller (1988), Freedom of Occupation (1992), and Human Dignity and Liberty (1992). It is important to note that "as yet" there exists "no law, basic or otherwise, that deals with the relationship between Basic Laws and ordinary legislation. In this situation, the courts have held that despite the symbolic value of a Basic Law as distinguished from an ordinary statute, they have no legal superiority over ordinary laws." Goldstein, *supra* note 2, at 605-06. See also ALBERT P. BLAUSTEIN AND GIBBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD - ISRAEL (1994).

158. *Landau Commission Report*, *supra* note 4, at para. 3.16

Ultimately, this is likely to give rise to a very broad legislative construction of the “proper purpose” of Israeli interrogative powers, thereby permitting the continued use of torture in “emergency” situations.

Ultimately, however, engaging in the “proportionality” analysis suggested by both the HCJ and the *Landau Commission* misses the real point. In his 1988 critique of the *Landau Commission Report*, Professor John Quigley explained:

The level of force permissible . . . [in an interrogation] is not the proper focus of inquiry. Rather, [the] focus should be on the impact of an interrogator’s activity on the voluntariness of a confession extracted as a result of that activity . . . Any interrogation technique that leads a suspect to confess through fear of physical harm to himself or others is improper. It is improper not only as a violation of the rights of the accused but as a threat to the integrity of the judicial process.¹⁵⁹

Thus, for all its dicta attesting to the importance of the “rule of law,” and the maintenance of a legal system that is “reasonable” and “fair,” the HCJ’s ruling in the *GSS Torture Case* suggests that the integrity of the Israeli judicial process may have been forsaken for the cause of state “security.” The strongest affirmation of this is the fact that in October 1999, only one month after the HCJ’s judgment came down, the Israeli “ministerial committee overseeing the GSS set up a professional committee to investigate the implications of the Court’s decision,” and “draft legislation was submitted to the parliament . . . to empower the GSS to use physical force during interrogations in certain circumstances.”¹⁶⁰ While it is not yet known whether the proposed legislation will survive the scrutiny of the Knesset debates and ultimately become law, such an outcome would not be at all surprising given the express urging of the HCJ and the apparent latitude afforded by such quasi-constitutional concepts as the “values of the state of Israel.”¹⁶¹

IV. CONCLUSION

Contrary to what many in the human rights establishment were hoping, the *GSS Torture Case* did not decisively contribute to the end of Israel’s use of torture and ill-treatment in the Occupied Palestinian Territories. While the HCJ did find five of the “physical” methods of interrogation currently utilized by the

159. Quigley, *International Limits*, *supra* note 19, at 501.

160. Amnesty International Report - 2000, *Israel and the Occupied Territories* (London: Amnesty International, 2000) at 137.

161. Interestingly, this is an event that is also unfolding with respect to another of the Jewish state’s “security” problems. On April 12, 2000, the HCJ ruled that Israel’s kidnapping and imprisonment without charge or trial of Lebanese nationals as “bargaining chips” (i.e., hostages) was prohibited under Israeli domestic law, “making its detention of . . . Sheikh ‘Abd al-Karim ‘Obeid (held since 1989) and Mustafa al-Dirani (held since 1994)” illegal. Notwithstanding this ruling, however, on June 21, 2000, draft legislation entitled “The Imprisonment of Combatants not Entitled to Prisoner of War Status Law” passed its first reading in the Knesset by a vote of 22 to 6, permitting Israeli authorities to engage in a practice that is also absolutely prohibited under international law as a war crime. See Human Rights Watch, *Background Briefing—Israel, June 2000*, at <http://www.hrw.org/hrw/backgrounder/mena/isr-index.ht>; Human Rights Watch, *Israel Seeks to Legalize War Crimes: Hostage Law Strips Civilians of Rights Guaranteed by Laws of War*, at <http://www.hrw.org/press/2000/06/isr0622.htm>.

GSS to have no statutory authority under current Israeli law, its concluding recommendation that the Knesset enact legislation that will enable the GSS to engage in similar activity provided the same accords with the "values" of the Jewish state—a potentially sweeping qualification—effectively renders the decision meaningless in advancing the cause of the rule of law in Israel-Palestine.

Some of the deficiencies in the HCJ's judgment that contribute to this disappointing outcome include its failure to review other harsher methods of torture that GSS interrogators have been implicated in using; its failure to scrutinize the undoubtedly abusive interrogative activities of the IDF and the Israeli police force; its refusal to examine the torture and ill-treatment that occurs during the post-arrest/pre-interrogation period; and its overly simplistic contextualization of the case before it as merely requiring a balance between respecting the liberty rights of "hostile terrorists" and protecting the "security" of the state.

In the end, it is apparent that what the Court leaves us with is a sort of *Landau Commission Report*, circa 1999. In no uncertain terms it re-concludes that the physical means currently employed by the GSS are not permitted according to Israeli law as it presently stands, and because of Israel's special "security" dilemma, the use of some such methods (again unspecified) should be legislated and closely monitored to ensure 'proportionality' and the maintenance of limits commensurate with upholding the 'rule of law.'

The decision's transparency is betrayed, in large part, by its deliberate failure to address the central issue of whether the GSS's "physical" and "psychological pressure" amounts to torture, and its failure to engage in the equally important discussion of the negative impact that such interrogation methods must necessarily have on the purported "search for truth" in the investigation process.

Thus, in keeping with its long tradition of affording the state a "wide latitude" in its dealings with Palestinian "security suspects," the HCJ has once again undermined "the integrity of the [Israeli] legal system."¹⁶² In his 1992 comment on human rights and the rule of law in Israel and the Occupied Palestinian Territories, Geoffrey Bindman stated: "Just as in South Africa skillful and often humane judges lost credibility by their failure (or inability) to challenge barbarous security laws, so in Israel, a legal system which does not protect a large segment of the population against serious abuses (including torture) is drastically compromised."¹⁶³

Sadly, this evaluation still obtains, notwithstanding the Israeli Supreme Court's recent judgment in the *GSS Torture Case*.

162. Bindman, *supra* note 78, at 525.

163. *Id.*