

## A. Report of the Landau Enquiry Commission of 1987

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Report of the Landau Commission, Report (Part I), Jerusalem, October 1987; translation from an unofficial French translation.]

### REPORT OF THE LANDAU COMMISSION – OCTOBER 1987

Commission of inquiry on interrogation methods employed by the General Security Services with regard to terrorist acts – Extracts from the report [...]

3.24 Article 31 of the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War, the humanitarian clauses of which Israel has undertaken to respect, stipulates: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties”. This provision should be read together with Article 5 of the Convention, under which a protected person definitely suspected of or engaged in activities hostile to the security of the State is deprived of the rights and privileges conferred by the Convention, where the exercise of such rights would be prejudicial to State security. These persons are nevertheless entitled to humane treatment and, if they are brought to justice, to a fair and regular trial. [...]

4.7 Means of coercion should generally be limited to the psychological, non-violent aspect of intensive and prolonged interrogation and to the use of stratagems, including deceit, but if these means do not suffice, a moderate degree of physical coercion cannot be avoided. The interrogators of the Service must be instructed to set themselves definite limits in this regard, so as to avoid excessive physical coercion administered arbitrarily by the interrogator. As mentioned in the second part of this report, instructions regarding these limits have existed in the Service since the increase in the number of terrorism-related interrogations,

inevitable in the wake of the Six-Day War. These directives have been amended now and again, often at ministerial initiative and usually leading to the establishment of further safeguards in the use of physical coercion, to the point where authorized physical contact with the person under interrogation has been restricted to a minimum. [...]

4.8 These directives are scattered throughout various internal instructions of the Service; they should be collected in a single document. In a chapter which, for obvious reasons, will be included in the second, confidential, part of the report, we have compiled a set of directives for the attention of Service interrogators [...].

[...]

4.13 Concerning methods of interrogating persons suspected of acts of terrorism. In the previous pages we have shown at length the vital importance that we attach to the protection of the principle of necessity in accordance with Article 22 of the Penal Code. We have analysed the “lesser evil” principle incorporated in the provisions of the Code and have explained that the grave harm caused by hostile terrorist activities justifies counter-measures based on the need to take action within the meaning of Article 22, not only when such an act is imminent, but also as soon as it becomes virtual and likely to materialize at any moment. [...]

Made in Jerusalem, today, October 30, 1987

Moshe LANDAU, President

Yacoov MALTZ, Member of the Commission

Itzhak HOFFI, Member of the Commission

## B. The Laws

[Source: B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases: An Annotated Sourcebook*, January 1997, p. 6]

### 1. Section 277 of the Israeli Penal Code (verbatim translation):

A public servant who commits one of the following is liable to imprisonment for three years:

1. uses or directs the use of force or violence against a person for the purpose of extorting from him or from anyone in whom he has interest a confession of an offense [*sic*] or information relating to an offence;
2. threatens any person, or directs any person to be threatened, with injury to his person or property, or to

the person or property of anyone in whom he has interest, for the purpose of extorting from him a confession of an offence or information relating to an offence.

## **2. Article 34 (11) of the Penal Code (verbatim translation):**

### **Necessity**

A person shall not bear criminal liability for an act which was immediately necessary in order to save the life, freedom, person or property, be it his own or that of another, from a concrete danger of severe harm stemming from the conditions existing at the time of act, and having no other way but to commit it.

Relevant restrictions on the above (summary):

34(15) Obligation to withstand danger or threat (when a person is obliged by law or according to his official capacity to withstand danger or threat)

34(16) Exceeding the reasonable (when the act was not reasonable under the circumstances to prevent the harm) [...]

## **C. Decisions of the Israeli High Court of Justice**

### **1. Muhammad ‘Abd al-’Aziz Hamdam v. the General Security Service**

[Source: B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases: An Annotated Sourcebook*, January 1997, pp. 14-16; footnotes omitted.]

**At the Supreme Court sitting as High Court of Justice HCJ 8049/96 [...] Appellant: Muhammad ‘Abd al-’Aziz Hamdan [an inhabitant of the Israeli Occupied Territories] [...] v. Respondent: The General Security Service [...]**

### **Decision**

#### **President A. Barak:**

1. The Appellant is under administrative detention. He is interrogated by the Respondent. He presented (on 12.11.96) an appeal to this Court. In it he complained about the use of physical force against him during interrogation. He requested that the Respondent come and give reason why it does not stop using these means of interrogation. An interim injunction was also requested to prohibit the use of physical force pending a decision on the appeal. [...] It was [...] remarked that “from the inquiries conducted by telephone it has emerged that the Respondent has no intention of using physical force against the Appellant at this stage of the interrogation. Therefore, and without admitting the accuracy of the facts included in the appeal, the Respondent informs the Court that it agrees to the issuance of an interim injunction, which prohibits the use of physical force against the Appellant, pending a hearing of

the appeal.” On the basis of this statement an interim injunction was issued, as requested in the appeal (on 13.11.96).

2. Today (14.11.96) a request was presented to us on behalf of the Respondent for an urgent hearing of a request to annul the interim injunction. [...]

[...]

1. The Respondent goes on to note in the request presented to us, that a few days prior to the Appellant's arrest [on 24.10.96] the Respondent received information from which emerged a well-founded suspicion that the Appellant possesses extremely vital information the immediate procurements of which would help save human lives and prevent serious terrorist attacks in Israel which there is real concern are to be carried out in the near future. The Appellant was therefore transferred to the detention centre in Jerusalem, and his interrogation began. In the course of the interrogation further data accumulated, which strengthened the information and the concerns which the Respondent alludes to above. The Respondent noted [...] that such information was actually received during the last few days, including last night. The Respondent has reached the conclusion that a vital and urgent need exists to continue immediately the interrogation of the Appellant, without the needs of interrogation being subjected to the restriction imposed by the interim injunction. The removal of these restrictions is necessary, in the opinion of the Respondent, so that the information which Appellant possesses can be exposed immediately and the danger to human lives prevented. The Respondent noted further that, in its opinion, the application of such force, in the present situation, is permitted by law, which allows the application of physical force as well, in a situation where the conditions for the defence of necessity provided for in article 34(11) of the Penal Code (1977) exist.
2. During the evening we discussed the request. We heard the arguments of Mr. Nitzan [the Counsel for the Respondent]. He stated before us that the physical means which the Respondent intends to use do not constitute “torture” (within the meaning of this term under the Convention Against Torture). Mr. Nitzan further noted that all these means fall under the defence of necessity (stipulated in article 34(11) of the Penal Code), the conditions for which exist in his opinion in the present circumstances. In contrast, Mr. Rosenthal [Representative of the Appellant] noted that this defence is not available to the interrogators of the Respondent. [...]
3. After having studied the classified material presented to us, we are satisfied that the Respondent indeed possesses information which could substantiate a substantiated suspicion that the Appellant possesses extremely vital information, the immediate procurement of which would prevent an awful disaster, would save human lives, and would prevent very serious terrorist attacks. Under these circumstances, we believe that there is no justification for the continued existence of the interim injunction [...]. Needless to add, the annulment of the interim injunction does not constitute permission to take during interrogation of the Appellant measures which are not in accordance with the law, and which are in breach of the law. On this point, no information has been provided to us regarding the ways of interrogation which the Respondent intends to pursue, and we do not express any opinion regarding them. Furthermore: Our decision is directed solely at the interim injunction and does not constitute a final position regarding the questions of principle which were put before us, and which relate to the applicability of the defence of necessity and its scope.

Therefore, we have decided to annul the interim injunction issued on 14.11.96.

**Justice E. Matza:** I agree.

**Justice M. Heshin:** I agree.

Decided in accordance with the ruling of President Barak.

Given today, 14.11.96

## **2. Khader Mubarak, et al. v. the General Security Service**

[Source: B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases: An Annotated Sourcebook*, January 1997, pp. 20-21]

**At the Supreme Court sitting as High Court of Justice HCJ 3124/96 [...]**

**Appellants: 1. Khader Mubarak [an inhabitant of Israeli Occupied Territories] 2. The Public Committee against Torture in Israel v. Respondent: The General Security Service**

### **Decision**

The Appellant has presented four arguments, each of which, according to him, could point to torture during interrogation.

The first argument is that he has been interrogated with his hands shackled, in a painful position whereby his arms are stretched backwards, through a low chair on which he sits. Regarding this issue we have heard the explanations of Counsel for the Respondent that shackling at the back during waiting for interrogation is done in order to safeguard the security of the interrogation facility and of the interrogators, and in order to prevent the interrogee from attacking his interrogators, which indeed has happened in the past. In any case, it was stated before us that shackling interrogees, including the Appellant, is not for purposes of interrogation, and that the interrogee's hands are not stretched backwards, and all measures are taken, as much as is possible, so that the shackles do not press or rub against the interrogee's hands. It is nevertheless clear, and agreed, that shackling the interrogee as described by the Appellant [...] is forbidden.

The second argument of the Appellant deals with covering his head with a sack which reaches his shoulders. Regarding this issue we have heard the explanations of the Security Service representative as to the nature of covering the head thus, which is principally intended to prevent the interrogee from identifying other interrogees during waiting, the identification of whom may harm the interrogation or cause other security harm. We are satisfied that this measure is used in a reasonable manner for the purposes of interrogation, and it does not deprive the interrogee of proper ventilation and normal breathing, and it does not, either by its

intention or in actual practice, cause pain which constitutes torture.

The Appellant added that while he waits for interrogation loud music is sounded. It becomes clear from the statement by Attorney-General's Office that the music is sounded in the interrogation facility while the interrogee waits for interrogation with others, and this is done in order to prevent the interrogees waiting for their interrogation from communicating with each other. According to this explanation the music is heard by everyone present in the area, including the security personnel.

The Appellant raises a fourth argument, to wit that the interrogators deprive him of sleep for long hours during waiting his interrogation. We have heard, in camera, the explanations of the Security Service representative regarding this subject, and it emerges from them that the issue is not one of active sleep deprivation, but of periods of time during which the Appellant was held waiting for interrogation without being given a break designed especially for sleep. Regarding this subject it appears to us that the necessities of security, the reasons for which the Appellant was detained, and the pressing need to prevent loss of life, as brought to our attention in camera, justified an intensive interrogation of the Appellant in the way it was conducted, and when it became possible the Appellant was sent to his cell to sleep.

Subject to what we have said, to wit that painful shackling is a prohibited act, we do not find it necessary to issue an interim injunction in this case.

Given today, 17.11.96

### **3. Wa'al Al Kaaqua, et al. v. The State of Israel**

[Source: Supreme Court of Israel, *Wa'al Al Kaaqua, et al. v. the State of Israel et al.*, 6 September 1999, available at: <http://elyon1.court.gov.il/eng/home/index.html>]

**The Supreme Court of Israel, sitting as the High Court of Justice [...] 1. Wa'al Al Kaaqua [et al.] v. 1. The State of Israel [et al.] [...]**

#### **Judgment**

##### **President A. Barak**

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

[...]

## **The Petitions**

1. [...] [Petitioners] claim that the GSS is not entitled to employ those methods approved by the Report of the Commission of Inquiry [the Landau Commission], such as “the application of non-violent psychological pressure” and of “a moderate degree of physical pressure.” [...] [They also argue] that the GSS should be ordered to cease shaking suspects during interrogations.

[...]

## ***Physical Means***

[...]

### *Shaking*

1. A number of petitioners [...] claimed that they were subject to shaking. Among the investigation methods outlined in the GSS interrogation regulations, shaking is considered the harshest. The method is defined as the forceful and repeated shaking of the suspect's upper torso, in a manner which causes the neck and head to swing rapidly. According to an expert opinion [...], the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches.

The state [...] admits the use of this method by the GSS. It contends, however, that shaking does not present an inherent danger to the life of the suspect [...]. In any event, they argue, doctors are present at all interrogation areas, and the possibility of medical injury is always investigated.

All agree that, in one particular case, [...] the suspect expired after being shaken. According to the state, that case was a rare exception. Death was caused by an extremely rare complication which resulted in pulmonary edema. In addition, the state argues that the shaking method is only resorted to in very specific cases, and only as a last resort. [...]

### *Waiting in the “Shabach” Position*

1. [...] As per petitioners' submission, a suspect investigated under the “Shabach” position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by a sack that falls down to his shoulders. Loud music is played in the room. According to the briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation.

Petitioners claim that prolonged sitting in this position causes serious muscle pain in the arms, the neck and headaches. The state did not deny the use of this method. It submits that both crucial security considerations and the safety of the investigators require the tying of the suspect's hands as he is being interrogated. The head covering is intended to prevent contact with other suspects. Loud music is played for the same reason.

### *The "Frog Crouch"*

1. [...] This refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals. The state did not deny the use of this method, and the Court issued an order nisi in the petition. Prior to hearing the petition, however, this interrogation practice ceased.

### *Excessively Tight Handcuffs*

1. In a number of petitions [...], several petitioners complained of excessively tight hand or leg cuffs. They contended that this practice results in serious injuries to the suspect's hands, arms and feet, due to the length of the interrogations. [...]

### *Sleep Deprivation*

1. In a number of petitions [...] petitioners complained of being deprived of sleep as a result of being tied in the "Shabach" position, while subject to the playing of loud music, or of being subjected to intense non-stop interrogations without sufficient rest breaks. They claim that the purpose of depriving them of sleep is to cause them to break from exhaustion. While the state agrees that suspects are at times deprived of regular sleep hours, it argues that this does not constitute an interrogation method aimed at causing exhaustion, but rather results from the long amount of time necessary for conducting the interrogation.

[...]

### ***The Means Employed for Interrogation Purposes***

[...]

1. [...] The "law of interrogation" by its very nature, is intrinsically linked to the circumstances of each case. This having been said, a number of general principles are nonetheless worth noting.

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation. [...] Human dignity also includes the dignity of the suspect being interrogated. [...] This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment." [...] These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can



lead to the investigator being held criminally liable. [...]

### ***From the General to the Particular***

1. [...] Clearly, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which can not form part of a legal investigation. It surpasses that which is necessary. Even the state did not argue that shaking is an "ordinary" investigatory method which every investigator, whether in the GSS or the police, is permitted to employ. [...]
2. It was argued before the Court that one of the employed investigation methods consists of compelling the suspect to crouch on the tips of his toes for periods of five minutes. The state did not deny this practice. This is a prohibited investigation method. It does not serve any purpose inherent to an investigation. It is degrading and infringes an individual's human dignity.
3. The "Shabach" method is composed of several components: the cuffing of the suspect, seating him on a low chair, covering his head with a sack, and playing loud music in the area. Does the general power to investigate authorize any of the above acts? Our point of departure is that there are actions which are inherent to the investigatory power. [...] Therefore, we accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is included in the general power to investigate. [...] Provided the suspect is cuffed for this purpose, it is within the investigator's authority to cuff him. [...] The cuffing associated with the "Shabach" position, however, is unlike routine cuffing. [...] This is a distorted and unnatural position. The investigators' safety does not require it. Similarly, there is no justification for handcuffing the suspect's hands with especially small handcuffs, if this is in fact the practice. The use of these methods is prohibited. [...] Moreover, there are other ways of preventing the suspect from fleeing which do not involve causing pain and suffering.
4. The same applies to seating the suspect in question in the "Shabach" position. We accept that seating a man is inherent to the investigation. This is not the case, however, when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is seated in this position for long hours. This sort of seating is not authorized by the general power to interrogate. [...] All these methods do not fall within the sphere of a "fair" interrogation. They are not reasonable. They infringe the suspect's dignity, his bodily integrity and his basic rights in an excessive manner. They are not to be deemed as included within the general power to conduct interrogations.
5. We accept that there are interrogation related concerns regarding preventing contact between the suspect under interrogation and other suspects, and perhaps even between the suspect and the interrogator. These concerns require means to prevent the said contact. [...] For this purpose, the power to interrogate – in principle and according to the circumstances of each particular case – may include the need to prevent eye contact with a given person or place. In the case at bar, this was the explanation provided by the state for covering the suspect's head with a sack, while he is seated in the "Shabach" position. [...] Indeed, even if such contact is prevented, what is the purpose of causing the suspect to suffocate? Employing this method is not related to the purpose of preventing the said contact and is consequently forbidden. Moreover, the statements clearly reveal that the suspect's head remains covered for several hours, throughout his wait. For these purposes, less harmful means must be employed, such as letting the suspect wait in a detention cell. [...] For it appears that, at present, the suspect's head covering – which covers his entire head, rather than eyes alone – for a prolonged period of time, with no essential link to the goal of preventing contact between the suspects under

investigation, is not part of a fair interrogation. It harms the suspect and his dignity. It degrades him. It causes him to lose his sense of time and place. It suffocates him. All these things are not included in the general authority to investigate. In the cases before us, the State declared that it will make an effort to find a “ventilated” sack. This is not sufficient. The covering of the head in the circumstances described, as distinguished from the covering of the eyes, is outside the scope of authority and is prohibited.

6. Cutting off the suspect from his surroundings can also include preventing him from listening to what is going on around him. We are prepared to assume that the authority to investigate an individual may include preventing him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success. [...] In the case at bar, the detainee is placed in the “Shabach” position while very loud music is played. Do these methods fall within the scope or the general authority to conduct interrogations? Here too, the answer is in the negative. Being exposed to very loud music for a long period of time causes the suspect suffering. Furthermore, the entire time, the suspect is tied in an uncomfortable position with his head covered. This is prohibited. It does not fall within the scope of the authority to conduct a fair and effective interrogation. In the circumstances of the cases before us, the playing of loud music is a prohibited.
7. To the above, we must add that the “Shabach” position employs all the above methods simultaneously. This combination gives rise to pain and suffering. This is a harmful method, particularly when it is employed for a prolonged period of time. For these reasons, this method is not authorized by the powers of interrogation. It is an unacceptable method. [...]
8. The interrogation of a person is likely to be lengthy, due to the suspect's failure to cooperate, the complexity of the information sought, or in light of the need to obtain information urgently and immediately. [...] Indeed, a person undergoing interrogation cannot sleep like one who is not being interrogated. The suspect, subject to the investigators' questions for a prolonged period of time, is at times exhausted. This is often the inevitable result of an interrogation. This is part of the “discomfort” inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator. [...]

The above described situation is different from one in which sleep deprivation shifts from being a “side effect” of the interrogation to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or “breaking” him, it is not part of the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner beyond what is necessary.

[...]

### ***Physical Means and the “Necessity” Defense***

1. [...] Can the authority to employ these methods be anchored in a legal source beyond the authority to conduct an interrogation? [...] An authorization of this nature can, however, in the state's opinion, be obtained in specific cases by virtue of the criminal law defense of “necessity,” as provided in section 34(1) of the Penal Law. [...]

The state's position is that by virtue of this defense against criminal liability, GSS investigators are authorized to apply physical means – such as shaking – in the appropriate circumstances and in the absence of other

alternatives, in order to prevent serious harm to human life or limb. The state maintains that an act committed under conditions of “necessity” does not constitute a crime. Instead, the state sees such acts as worth committing in order to prevent serious harm to human life or limb. [...] In this, society is choosing the lesser evil. [...]

In the course of their argument, the state presented the “ticking bomb” argument. A given suspect is arrested by the GSS. He holds information regarding the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, the bomb may be neutralized. If the bomb is not neutralized, scores will be killed and injured. Is a GSS investigator authorized to employ physical means in order to obtain this information? The state answers in the affirmative. The use of physical means should not constitute a criminal offence, and their use should be sanctioned, according to the state, by the “necessity” defense.

1. [...] [W]e are prepared to accept that, in the appropriate circumstances, GSS investigators may avail themselves of the “necessity defense” if criminally indicted. This, however, is not the issue before this Court. [...] The question before us is whether it is possible, ex ante, to establish permanent directives setting out the physical interrogation means that may be used under conditions of “necessity.” Moreover, we must decide whether the “necessity defense” can constitute a basis for the authority of a GSS investigator to investigate, in the performance of his duty. According to the state, it is possible to imply from the “necessity defense” – available post factum to an investigator indicted of a criminal offence – the ex ante legal authorization to allow the investigator to use physical interrogation methods. Is this position correct?
2. In the Court’s opinion, [...] the “necessity defense” does not constitute a source of authority, which would allow GSS investigators to make use physical means during the course of interrogations. The reasoning underlying our position is anchored in the nature of the “necessity defense.” The defense deals with cases involving an individual reacting to a given set of facts. It is an improvised reaction to an unpredictable event. [...] Thus, the very nature of the defense does not allow it to serve as the source of authorization. [...]
3. In other words, general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not in defenses to criminal liability. The principle of “necessity” cannot serve as a basis of authority. [...] If the state wishes to enable GSS investigators to utilize physical means in interrogations, it must enact legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. [...]
4. We conclude, therefore, that [...] the individual GSS investigator – like any police officer – does not possess the authority to employ physical means that infringe a suspect’s liberty during the interrogation, unless these means are inherent to the very essence of an interrogation and are both fair and reasonable.

An investigator who employs these methods exceeds his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the “necessity defense.” Provided the conditions of the defense are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the “necessity defense” does not bestow authority, the lack of authority does

not negate the applicability of the necessity defense or of other defenses from criminal liability. The Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from “necessity.” [...]

### ***A Final Word***

1. This decision opened with a description of the difficult reality in which Israel finds herself. [...] We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous, and require the authorization of physical means. Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time. [...]
2. Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. We must decide according to the law. This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. [...]

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

Consequently, it is decided that the order nisi be made absolute. The GSS does not have the authority to “shake” a man, hold him in the “Shabach” position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a “frog crouch” position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the “necessity defense,” found in the Penal Law, cannot serve as a basis of authority for interrogation practices, or for directives to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the “necessity defense” will be available to GSS investigators – either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of

the court if criminal charges are brought.

Decided according to the opinion of the President.

September 6, 1999

## D. Report of Human Rights Organizations

[Source: B'Tselem and HaMoked, "Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees", Report, May 2007, available at: <http://www.hamoked.org.il/>]

### ABSOLUTE PROHIBITION

## The Torture and Ill-treatment of Palestinian Detainees

May 2007

[...]

### Executive Summary

In recent years, Israel has openly admitted that Israel Security Agency (formerly the General Security Service) interrogators employ "exceptional" interrogation methods and "physical pressure" against Palestinian detainees in situations labeled [sic] "ticking bombs." B'Tselem and HaMoked – Center for the Defence of the Individual have examined these interrogation methods and other harmful practices and the frequency with which they are used. The report's findings are based on the testimonies of seventy-three Palestinian residents of the West Bank who were arrested between July 2005 and January 2006 and interrogated by the ISA. Although it is not a representative sample, it does provide a valid indication of the frequency of the reported phenomena.

### The ISA Interrogation Regime: Routine Ill-treatment

The ISA interrogation regime includes seven key elements that harm, to varying degrees, the dignity and bodily integrity of the detainees. This injury is intensified given the combined use of these elements during the interrogation period which, for the detainees in the sample, lasted an average of thirty-five days.

1. *Isolation from the outside world* – prohibiting meetings between detainees and their attorneys or International Red Cross representatives;
2. *The use of the conditions of imprisonment as a means of psychological pressure* – holding in solitary confinement and in putrid, stifling cells;
3. *The use of conditions of imprisonment as a means for weakening the body* – preventing physical activity, sleep disturbance, inadequate food supply;
4. *Cuffing in the "shabah" position* – painful binding of the detainee's hands and feet to a chair;

5. *Cursing and humiliation* – such as cursing, strip searches, shouting, and spitting;
6. *Threats and intimidation* – for example, the threat of physical torture and arrest of family members;
7. *The use of informants to extract information* – this method is not harmful, as such, but its efficacy largely depends on the ill-treatment of detainees immediately preceding its implementation.

These methods were employed against the vast majority of detainees included in the sample. These measures are not inevitable side-effects of the necessities of detention and interrogation, but are intended to break the spirit of the interrogees. As such, they deviate from the High Court's ruling in PCATI and constitute, under international law, prohibited ill-treatment. Moreover, under certain circumstances, these measures may amount to torture.

### **“Special” Interrogation Methods**

In addition to routine measures, in some cases, probably those considered “ticking bombs,” ISA interrogators also use “special” methods that mostly involve direct physical violence. The sample group described seven such methods:

1. Sleep deprivation for over twenty-four hours (15 cases);
2. “Dry” beatings (17 cases);
3. Painful tightening of handcuffs, sometimes cutting off blood flow (5 cases);
4. Sudden pulling of the body, causing pain in the arms, wrists, and hands, which are cuffed to the chair (6 cases);
5. Sharp twisting of the head sideways or backwards (8 cases);
6. The “frog” crouch (forcing the detainees to crouch on tiptoes), accompanied by shoving (3 cases);
7. The “banana” position – bending the back of the interrogee in an arch while he is seated on a backless chair (5 cases).

These measures are deemed torture under international law. Though not routine, their use is not negligible. The High Court held that ISA interrogators who abused interrogees in “ticking bomb” situations may be exempted from criminal liability, but this only when the ill-treatment was used as a spontaneous response by an individual interrogator to an unexpected occurrence. In practice, all evidence points to the fact that “special” methods are preauthorized and used according to fixed instructions.

[...]

## **Discussion**

1.
  - a. Does IHL apply to the interrogation methods described in the case? Does it apply because Israel is considered to be an occupying power? Does IHL apply to all detentions of Palestinians by Israeli forces?
  - b. If IHL applies, how does it protect Palestinian detainees? Do the interrogation methods used by the General Security Service (GSS) amount to inhuman treatment? Do they amount to torture? (GC IV,



Arts 32 and 147)

- c. Does IHL prohibit the interrogation methods described? Does international human rights law (HRL) apply to them? If so, does it replace IHL or apply in addition to IHL? Does it make a difference in terms of protection for the Palestinian detainees which body of law, IHL or HRL, applies to the interrogation methods? Is the obligation to treat protected persons humanely more restrictive than the prohibition of cruel, inhuman or degrading treatment? Is there a difference between the protection against torture afforded by IHL and that afforded by HRL? (GC I-IV, Art. 3; GC IV, Arts 32 and 147; P I, Art. 11, 75(2)(a), and 85; P II, Art. 4(2))

2.

- a. Under IHL, may physical violence be used in order to obtain information from a detainee? May it be used insofar as it does not reach the level of cruel, inhuman or degrading treatment, or of torture? Does the obligation to treat protected persons humanely exclude all forms of physical violence? Does it exclude psychological violence? (GC IV, Art. 31)
- b. Do you think that psychological, non-violent pressure and a moderate degree of physical coercion may be tolerated? (*Landau Commission, para. 4.7*) May they be tolerated for the sake of security requirements? Do you think that physical or moral coercion may be compatible with humane treatment?
- c. Taken individually, do you think that the methods used by the GSS may amount to torture? Do you think they may amount to cruel, inhuman or degrading treatment? Do they amount to torture only when used in combination?

- 3. Does Art. 5 of GC IV allow a State to violate other provisions of the Convention? Do you agree with the Landau Commission that Art. 5 of GC IV allows States Parties to derogate from Art. 31 thereof? Which paragraph of Art. 5 is applicable to the situation of Palestinian detainees? Does it make a difference in terms of protection whether the person is arrested on Israeli territory or on occupied Palestinian territory? Under Art. 5 of GC IV, which rights may a protected person be deprived of if arrested on Israeli territory? Which rights may the person be deprived of if arrested on occupied territory? May the prohibition of torture and ill-treatment ever be waived?

4.

- a. Can a state of necessity justify violations of IHL? Since IHL is already meant to regulate situations of armed conflict, in which States are by definition in a state of necessity, should “state of necessity” be accepted as a defence?
- b. May a State invoke the defence of necessity when it instructs its agents in a foreseeable situation to violate domestic and international law? Or is the defence of necessity only a defence for individuals who violate penal laws in an unforeseeable, immediate situation of danger? May an individual invoke a state of necessity to avoid punishment for an act of torture?
- c. What is the difference between instructions to interrogators that they may use physical pressure (rejected by the High Court of Justice in Document C) and guidelines by the Attorney-General regarding circumstances in which investigators shall not stand trial, if they claim to have used physical pressure in a state of “necessity” (admitted by the High Court of Justice in Document C, para. 38)? Do not both condone *ex ante* torture?
- d. How does an interrogator know that he will save lives (and that he is therefore in a state of necessity) when he starts to apply the condoned “pressure”, but before he obtains the information which enables lives to be saved? Must the interrogator be punished under Art. 277 of the Israeli Penal Code if it emerges from the interrogation that the detainee had no such information? Or is it

sufficient that the interrogator thought the detainee had such information?

- e. How does the interrogator know that he is interrogating a terrorist before that person has given information or is sentenced by a court for acts of terrorism? Are the described practices compatible with the presumption of innocence?
  - f. Has a terrorist a right to fair trial? Can the trial of an accused who did not have the right to remain silent during interrogation be fair? Is the “pressure” described in the present case compatible with the ban on compelling a suspect to testify against himself?
5. Do the described interrogation methods constitute grave breaches of IHL? (GC IV, Art. 147)

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