ISRAEL'S HIGH COURT OF JUSTICE RULING ON THE GENERAL SECURITY SERVICE USE OF "MODERATE PHYSICAL PRESSURE": AN END TO THE SANCTIONED USE OF TORTURE?

I. INTRODUCTION

Omar Ghaneimat, a forty-five year old father of seven, was taken from his home in April of 1997 and detained until July of that same year.[1] During his detention, Ghaneimat was subjected to various forms of what the Israeli General Security Service ("GSS") describes as "moderate physical pressure" and what international human rights organizations consider as "torture."[2] Ghaneimat was put into *shabeh*,[3] where his hands and legs were shackled behind the back of a small chair with one leg shorter than the others. He was left in this position for hours with a hood over his head and music blaring, which effectively prevented him from sleeping.[4] During Ghaneimat's interrogation by GSS officers, he was forced into *qambaz*,[5] where he knelt on his toes while being questioned. When he fell over, the GSS officers would kick him until he returned to the *qambaz* position.[6] The officers beat Ghaneimat often, causing multiple contusions and a broken rib.[7] Although Ghaneimat was given three meals a day during his imprisonment, he was permitted to bathe only once every five days and prevented from sleeping more than two to three hours at a time within a two day period.[8]

One would expect that a prisoner treated in such a manner was a notorious criminal and an extreme threat to Israel. However, when Ghaneimat was finally charged with a crime, after being detained for two months, it was not murder or terrorism but concealing a rifle for which he

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1. *See* YUVAL GINBAR, ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE 39-40 (B'tselem 1998). The data collected in this text is based on the testimonies and affidavits of eleven interogees and on official documents.

2. *See id.* at 39.

3. *See id.* at 42. *Shabeh* is a combination of several interrogation methods used by the GSS. It typically involves shackling the interogee to a small chair, placing a hood over his head, and playing loud music for an extended period of time. *See id.*

4. *See id.*

5. *See id.* at 45. *Qambaz*, also known as the frog position, is where the interrogators force the interogee to squat on his toes with his hands shackled behind his back for long periods of time. *See id.*

6. *See id. Qambaz* may also refer to forcing an interogee to stand alongside a wall with his legs and hands tied behind his back. The interrogators force the interogee to bend his knees while keeping his body straight for up to thirty minutes. If the interogee falls during this time he is beaten until he resumes the *qambaz* position. *See id.*

7. *See id.* at 48.

8. *See id.* at 44.

received ninety days imprisonment, commencing on the day of his detention.[9] Ghaneimat served three more weeks in prison before his release on probation.[10] This is not an unique case. Data collected in 1996 and 1997 by HaMoked, the center for the defense of the individual, indicates that an astounding eighty-five percent of Palestinians interrogated by GSS officials were tortured.[11] The Israeli government was not only aware of the GSS interrogation methods but condoned them,[12] that is until the recent High Court of Justice's decision in *Public Committee Against Torture in Israel v. Israel*.[13]

This note will examine the High Court of Justice's decision to determine what effect it will have on the GSS's battle against terrorism. Part II of this note will focus on the historical and legal establishment of "moderate physical pressure" as a legitimate method of interrogation. The note will then address, in part III, whether these methods constitute "torture". Part IV will review the Court's ruling and its rationale in *Public Committee Against Torture in Israel v. Israel*. Finally, in parts V through VII, this note will discuss the structure of Israel's government, the potential effect the Court's decision will have on Israel's national security, and lastly the question of whether the Knesset (Israel's legislature) may circumvent the ruling.

II. THE GENERAL SECURITY SERVICE'S USE OF "MODERATE PHYSICAL PRESSURE"

A. The Israeli and Palestinian Conflict

The Zionist movement[14] began at the end of the nineteenth century with a philosophy that "preaches that the Jews are one people and one nation

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9. *See id.* at 40.

10. *See id.*

11. *See id.* at 36. The data indicated that the methods used against the Palestinians during GSS interrogations included painful binding, sensory isolation, and sleep deprivation. This combination of methods is commonly referred to as *shabeh*. *See id.*

12. *See Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR.L.R. 146, 184 (1989) [hereinafter *Landau Report*] (translating the 1987 Landau Commission Report that upheld the use of "moderate physical pressure" in investigations by the GSS of suspected terrorists).

13. H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 26, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. (translating the High Court of Justice's ruling stating that the GSS could no longer use physical force in the interrogations of suspected terrorists absent a legal statutory provision granting the GSS the power to use such methods).

14. *See* SAMI HADAWI, BITTER HARVEST 33 (4th ed., Olive Branch Press 1991). The Zionist movement, headed by the World Zionist Organization, "is an international political movement which aspires to link all Jews, by means of ethnic, nationalistic bonds into a world-wide nation, a peoplehood, having as its political and cultural center the state of Israel." *Id.*

requiring their own land, to which all Jews must eventually return."[15] In 1948, the Zionist movement watched its goal reach fruition with the establishment of the State of Israel.[16] By the late 1970s, the Israeli government began confiscating land under Section 103 of the Ottoman Land Law[17] to facilitate the settlement of Jewish persons and businesses in the West Bank.[18]

The Arab community opposed the Zionist movement from the beginning because it sought to take their homeland.[19] The consequence of the

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15. *Id.* at 34.

16. *See id.* at 35. The State of Israel legislated "the Jewish people" concept into legal form through the Law of Return and the Nationality Act which permitted any Jew to become a citizen of Israel. *See id.*

17. *See* ALTERNATIVE INFORMATION CENTER, ISRAELI SETTLEMENT IN THE WEST BANK: PAST, PRESENT, AND FUTURE 8-9 (Alternative Information Center 1995). Section 103 of the Ottoman Land Law states that:

> Empty land, such as mountains, rock-strewn or stony land, and grazing areas that are no one's property - for which no one has a deed of ownership - and that have never been intended for the use of any town or village, and that are located at such a distance from towns or villages that a person's voice cannot be heard in the nearest place of habitation, are called dead land ... Any person by whom such land is needed may, with the agreement of the custodian work it, but absolute proprietorship shall remain with the sultan.

Id. at 8. *See also* MERON BENVINISTI, THE WEST BANK DATA PROJECT 15 (1984).

18. *See* ALTERNATIVE INFORMATION CENTER, *supra* note 17, at 8-10. By 1982, approximately 55% of the lands in the West Bank had been declared to be state land and confiscated. "While only 5,000 Jewish settlers lived in the occupied territories in 1977, by the end of the period of Likud rule (1977-1992), an estimated 105,000-115,000 settlers were living in 133 settlements in the West Bank." *Id.* at 8. This period also saw the emergence of a dual system of law in which Jewish settlers were subject to the more generous laws of the State of Israel, while the local Palestinians were subject to the "authority of the Civil Administration, regulations of the military governor, and to the system of laws in place on the eve of the occupation." *Id.* at 10.

19. *See* HADAWI, *supra* note 14, at 192-93. "In the period 1935 to 1938, with Jewish immigration becoming a flood, the Palestinians became alarmed and rose in open rebellion against the mandate which necessitated the bringing into the country of additional military reinforcements." *Id.* at 192. Because the rebellion lasted longer than the British anticipated, they solicited help from neighboring Arab states. Thus, "[a]fter the establishment of the state of Israel in 1948, the Palestine problem . . . was overnight transformed into an Arab States-Israeli conflict in which the Palestinians no longer figured as a party and were from then on referred to, and dealt with, as mere refugees in need of shelter and maintenance." *Id.* at 193; *See also* Steve Fireman, *The Impossible Balance: The Goals of Human Rights and Security in the Israeli Administered Territories*, 20 CAP. U. L. REV. 421, 422 (1991) (referring to the text of E.R. COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982, 35 (1985)). In June of 1967, the state of Israel went to war against the combined forces of Egypt, Jordan, and Syria. As a consequence of Israel's conquest in the "Six-Day War", Israel found itself in control of territories that were previously not included within the boundaries of the State of Israel. These territories encompassed 70,000 square kilometers of land known as the West Bank, the Sinai Peninsula, Gaza Strip, and the Golan Heights. According to the census taken immediately following the Six-Day War, there were one million Arabs within these territories.

settlement of Jews in Palestine was the formation of the Palestinian Liberation Organization ("PLO") whose primary aim was to free Palestine from Israeli control.[20] The Israeli government immediately saw the PLO as a significant threat and labeled it as a terrorist organization. In order to prevent terrorist acts against Israel or its citizens, the government of Israel adopted a number of legal measures, including both the Prevention of Terrorism Ordinance,[21] which criminalized membership in a terrorist organization, and the Defense (Emergency) Regulations,[22] which afforded

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Id. (footnotes omitted).

20. *See* HADAWI, *supra* note 14, at 195-98. The Palestinian Liberation Organization serves as an umbrella organization for the following guerrilla groups: El-fateh, The Democratic Front for the Liberation of Palestine, The Popular Front for the Liberation of Palestine, the Arab Liberation Front, The Palestinian Liberation Front, The Palestinian Popular Front, and As-Saiqa. *See id.* at 196-97. In November of 1974, the General Assembly of the United Nations granted the PLO observer status with the right "to participate in the sessions and the work of the General Assembly." *Id.* at 198. *See also Landau Report*, *supra* note 12, at 154. The Commission makes reference to the Terrorist Organizations and "The Armed Struggle." Specifically the Commission cites the "Palestinian Convenant" (1968) Article 8, which states:

> The Palestinian people is at the stage of national struggle for the liberation of its homeland. For that reason, differences between Palestinian national forces must give way to the fundamental difference that exists between Zionism and imperialism on the one hand and the Palestinian Arab people on the other. On that basis, the Palestinian masses, both as organizations and as individuals, whether in the homeland or in such places as they now live as refugees, constitute a single national front working for the recovery and liberation of Palestine through armed struggle.

Id. (alteration in original). The Commission also made reference to Article 9 of the Palestinian Convenant which states:

> Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it.

Id. (alteration in original). *See also* Fireman, *supra* note 19, at 443. "The PLO's avowed goal has been the liquidation of the state [sic] of Israel." *Id.*

21. *See* Justus R. Weiner, *Terrorism: Israel's Legal Responses*, 14 SYRACUSE J. INT'L L. & COM. 183, 189 (1987). "This Ordinance criminalizes membership in and activities supporting a terrorist organization. It has been amended to also outlaw acts manifesting identification or sympathy with a terrorist organization in a public place and knowingly maintaining contacts with officials or representatives of a terrorist organization." *Id.* (footnotes omitted). This is the "primary weapon" for the state in bringing to trial members of a terrorist organization so that they may be punished accordingly. *See also* ISRAEL FOREIGN MINISTRY, PREVENTION OF TERRORISM ORDINANCE NO. 33 OF 5708-1948, *at* gopher://israel-info.gov.il/00/constit/laws/bas.22%09%09%2B (translating the ordinance into English).

22. *See* Weiner, *supra* note 21, at 191-94.

> The broad powers derived from the Regulations include the power to temporarily detain an individual administratively or to temporarily restrict his travel to within his town of residence. Other Regulations, which apply only in the Administered

broad powers to the government, including the right of the government to temporarily detain an individual suspected of terrorism.[23]

The Israeli government also utilized the General Security Service to combat terrorism. "The GSS is responsible for security matters and counter-intelligence within Israel and the occupied territories . . . . [It] apprehends and interrogates people who are believed to be involved in activities endangering the security of the state."[24] Although the Jewish citizens of Israel view the GSS as an effective tool in combating Palestinian violence towards Israeli citizens and their property, the agency's reputation among the millions of Palestinians living in the Occupied Territories[25] is "that of a secret police agency that exercises wide-ranging and non-accountable control over their

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> Areas, authorize the deportation of individuals from the Administered Areas who threaten security and the demolition or sealing-up of residences which are used as the base for a terrorist attack. . . .
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> The administrative measures embodied in the Regulations are not utilized to punish individuals for the offenses they have committed, but rather to prevent the perpetration of illegal acts by the individual in question.

Id. (footnotes omitted). *See also* HAROLD RUDOPH, SECURITY, TERRORISM AND TORTURE, 94-97 (Juta & Co., Ltd. 1984). "On March 5, 1979 . . . the Emergency Powers (Detention) Law 5739-1979, was passed by the Knesset, and so, for the first time, administrative detention in Israel was to be governed by truly indigenous law." *Id.* at 94.

23. *See generally* Weiner, *supra* note 21 (discussing the various legal responses Israel has taken in order to combat terrorism).

24. STANLEY COHEN & DAPHNA GOLAN, THE INTERROGATION OF THE PALESTINIANS DURING THE INTIFADA: ILL-TREATMENT, "MODERATE PHYSICAL PRESSURE" OR TORTURE? 19 (B'tselem 1991). This text draws its information from a selection of 41 cases in which the use of ill-treatment was alleged. *See also Landau Report*, *supra* note 12, at 157. In a description of the role of the GSS in the State of Israel, the Landau Commission distinguished between a police investigation and a GSS investigation when it stated:

> Basic differences exist between the essence of a police interrogation of an ordinary criminal, on the one hand, and an interrogation carried out by the GSS of persons suspected of HTA or subversive political activity, on the other. The police investigation is aimed at collecting evidence against individuals within the society, suspected of criminal offences, and its purposes are to have the accused convicted so that he will change his ways, to deter him and others from committing future crimes, and to give him the punishment he deserves. Whereas the direct goal of the GSS interrogation is to protect the very existence of society and the State against terrorist acts directed against citizens, to collect information about terrorists and their modes of organization and to thwart and prevent the perpetration of terrorist acts whilst they are still at a state of incubation, by apprehending those who carried out such acts in the past - and they will surely continue to do so in the future - and those who are plotting such acts, as well as seeking out those who guide them.

Id.

25. *See* ALTERNATIVE INFORMATION CENTER, *supra* note 17, at 6. The Occupied Territories refer to those lands, including the West Bank, that Israel gained as a result of winning the Six-Day War in 1967. *See id.*

daily lives, often by violent and/or coercive means."[26] By 1987, many Palestinians living in the occupied territories became disillusioned with their situation and started what became known as the Intifada,[27]or uprising. What began as stone-throwing at the occupying soldiers resulted in 892 Palestinian deaths and an estimated 106,000 wounded.[28]

B. The Israeli Government Endorses the "Use of Moderate Physical Pressure" in GSS Interrogations

Between 1967 and 1987, the Israeli government took the position that the GSS interrogators did not use "coercive" methods during interrogations.[29] Israeli officials flatly denied allegations by the media and human rights organizations that ill-treatment or torture was common.[30] The government reversed its position in 1987 after the outbreak of two scandals[31] that

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26. HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 14 (Human Rights Watch 1994) (documenting reports of torture based on interviews of 36 security suspects who were interrogated by GSS officials between 1992 and 1994).

27. *See* HADAWI, *supra* note 14, at 294.

> The uprising began in the Gaza Strip in response to an incident in which four Palestinian workers were run over by an Israeli truck. While the intention of the Israeli driver remains in dispute, for Palestinians the incident recalled the killing of seven members of an Arab family in Lebanon when their car was crushed by an Israeli tank on September 18, 1972. This time, the protests began in the Jabaliya refugee camp where the men had lived, and at the funeral a young Gazan teenager was shot and killed by Israeli soldiers. The demonstrations spread to other refugee camps and towns in Gaza, and very quickly to the West Bank as well, beginning in the Balata camp near Nablus. As the resistance spread, stone-throwing against the occupying soldiers became more organized, and soon emerged as a leitmotif among young Palestinians. . . .
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> The message of the Intifada is a clear and simple one: Palestinians assert their presence in the West Bank and the Gaza Strip and their determination not only to stay, but to claim their right to self determination and to the establishment of an independent Palestinian state. . . .

Id. at 295-98.

28. *See id.* at 296. *See also* Fireman, *supra* note 19, at 434. "From the beginning of the uprising in December of 1987 to December of 1989, over 50,000 Palestinians were arrested. As of December of 1989, over 13,000 Palestinians have been detained." *Id.* "According to Israeli figures, 95 percent of all Palestinians brought to trial in the military courts in the territories are convicted. Defense attorneys say the conviction rate is 97 to 99 percent." *Id.* at 439 (footnotes omitted).

29. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 46.

30. *See id.*

31. *See id.* at 48.

> In the first case, GSS officials fabricated evidence to cover up a 1984 incident in which agents beat to death two Palestinians who had been taken into custody after hijacking a civilian bus (an incident known as the "Buss 300 Affair"). In the second incident, Lieutenant Izzat Nafsu, a member of Israel's Circassian

tarnished the reputation of the GSS among Israeli citizens. These two scandals resulted in the formation of the Landau Commission which proceeded to investigate the methods of interrogation used by the GSS.

The Landau Commission published its findings in November of 1987. The Commission concluded that:

> We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of the tool of interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.
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> The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to [sic] disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information. . . .
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> The means of pressure should principally take the form of nonviolent 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.*[32]

The Commission based its rationale on a combination of the defense of necessity[33] and the threat of terrorism posed by the Palestinian Liberation Organization. As a result, the Commission ultimately extended the defense

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(Turkic Muslim) minority, was released from prison after the Supreme Court ruled that he had been convicted of espionage on the basis of a false confession extracted under duress by GSS agents, who later lied in court when Nafsu challenged his confession.

Id.

32. *See Landau Report*, *supra* note 12, at 184. (emphasis added) (footnote omitted). *See also* HUMAN RIGHTS WATCH, *supra* note 26, at 50-51; COHEN & GOLAN, *supra* note 24, at 24-25; AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: TORTURE AND ILL-TREATMENT OF POLITICAL DETAINEES 11 (Amnesty International USA 1994).

33. *See Landau Report*, *supra* note 12, at 169. The defense of necessity is found in Sec. 22 of the Penal Law which states:

> A person may be exempted from criminal responsibility for an act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge: Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided.

Id.

of necessity to the GSS in its role as the guardian against terrorism for the State of Israel.[34] The Landau Commission Report, thus, legitimized the use of "moderate physical pressure" in the interrogation of suspected Palestinian terrorists. This endorsement remained in effect for more than a decade.[35]

III. "MODERATE PHYSICAL PRESSURE" OR "TORTURE"?

The Landau Commission Report legalized the use of "moderate physical pressure" in interrogations by GSS officers, but the Report did not specify the meaning of that phrase. Instead, the Report prescribed GSS methods in the second chapter, which remained classified for security reasons.[36] Nonetheless, the various methods used by the GSS surfaced over

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34. *See id.* at 172-73. The Commission uses the "ticking time bomb" example to illustrate how the GSS falls under the protection of the defense of necessity.

> [I]t is a salient security interest of the State to protect the lives of its citizens, and the duty to defend them, imposed on the State, certainly falls within the category of the need to prevent bodily harm or grievous injury, as stated in Sec. 22.
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> . . .
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> The second condition embodied in Sec. 22 is that it was impossible to prevent the anticipated harm in any other way. . . . [I]n regard to GSS interrogations . . . the information possessed by a member of a terrorist organization . . . cannot be uncovered except through the interrogation of persons concerning whom the GSS has previous information about their affiliation with such an organization or group . . . .

Id. See also AMNESTY INTERNATIONAL, *supra* note 32, at 10-11.

35. *See* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 10, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court referred to the Commission of Inquiry Report, which was published in 1995, and legalized the GSS interrogation tactics:

> [T]he Commission concluded that in cases where the saving of human lives necessarily requires obtaining certain information, the investigator is entitled to apply both psychological pressure and "a moderate degree of physical pressure." Thus, an investigator who, in the face of such danger, applies that specific degree of physical pressure, which does not constitute abuse or torture of the suspect, but is instead proportional to the danger to human life, can avail himself of the "necessity" defense, in the face of potential criminal liability.
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> The Commission approved the use of "a moderate degree of physical pressure" with various stringent conditions including directives that were set out in the second (and secret) part of the Report, and for the supervision of various elements both internal and external to the GSS. The Commission's recommendations were duly approved by the government.

Id. at 10-11 (citation omitted).

36. *See* Tamar Gaulan, *Israel's Interrogation Policies and Practices, at* gopher://israel-info.gov.il/00/constit/leg/961200.leg (stating Israel's official position on the use of torture).

> [T]he Landau Commission went on, in a second section of its report, to precisely detail the exact forms of pressure permissible to the GSS interrogators. This section has been kept secret out of concern that, should the narrow restrictions binding the interrogators be known to the suspects undergoing questioning, the

the last decade, due mostly to the stories told by persons previously subjected to its interrogations.

The GSS employs a variety of interrogation methods under the heading of "moderate physical pressure" in order to combat the nature of the terrorist being investigated. Terrorist groups are trained not to reveal information, and those that succeed in thwarting investigators are viewed as heroic by their comrades.[37] "Under these circumstances, the interrogation of an HTA suspect by the GSS turns into a difficult confrontation between the vital need to discover what he knows . . . and the will of the person interrogated to keep silent . . . or to mislead the interrogators by providing false information."[38] The interrogation methods typically used involve shackling or binding of the suspect's limbs,[39] which is seen in the *shabeh (shabach)*;[40]

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interrogation would be less effective. Palestinian terrorist organizations commonly instruct their members, and have even printed a manual, on techniques of withstanding GSS questioning without disclosing any information. It stands to reason that publishing GSS guidelines would not only enable the organizations to prepare their members better for questioning, but would reassure the suspect as to his ability to undergo interrogation methods without exposing vital information, thus depriving the GSS of the psychological tool of uncertainty.

Id. at 2-3.

37. *See Landau Report*, *supra* note 12, at 157.

38. *Id.* at 157-58. *See also* Gaulan, *supra* note 36, at 1 (stating that "The Commission determined that in dealing with dangerous terrorists who represent a grave threat to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information, is unavoidable under certain circumstances.")

39. *See* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 8, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court referred to the GSS use of "excessive tightening" of hand or leg cuffs, which the applicants to the Court claimed "resulted in serious injuries to the suspect's hands, arms and feet, due to the length of the interrogations." *Id.*

40. *See* GINBAR, *supra* note 1, at 15.

> Regular *shabeh* entails shackling the interogee's hands and legs to a small chair, angled to slant forward so that the interogee cannot sit in a stable position. The interogee's head is covered with an often filthy sack and loud music is played non-stop through loudspeakers. Detainees in *shabeh* are not allowed to sleep.
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> The GSS generally uses "regular *shabeh*" for several days at a time, with extremely short breaks.

Id. See generally HUMAN RIGHTS WATCH, *supra* note 26, at 114-18 (describing *Shabeh* torture methods used by GSS); COHEN & GOLAN, *supra* note 24, at 62-65. *See also* Sahar Francis, *Torture and Widespread Arrest Campaigns: Legislating Torture: Testimony of Addameer's Lawyers*, *at* http://www.addameer.org/torture/ (describing various interrogation methods used by the GSS); *Mahmoud*, *at* http://www.lawsociety.org/prisoner/tstory/st2.html (accounting of a person forced into *shabeh* by GSS interrogators); H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 7, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court described *shabach* position as one in which, the suspect's hands are tied behind his back and he is seated on a small, low chair with the seat tilted forward. One hand is tied behind him and placed inside the gap between the chair's seat

qambaz;[41] *qas'at a-tawleh*;[42] and the banana tie[43] position. Other methods used may also include beatings and/or shaking,[44] physical threats,[45] the use

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and back support and his head is covered by an opaque sack. During all of this loud music is played in the room. These suspects are detained in this position for an extended period of time resulting in headaches and severe muscle pain in the arms and neck. *See id.*

41. *See* GINBAR, *supra* note 1, at 28-31. *Qambaz* is also know as the "frog position" because it requires the suspect to kneel on his toes with his hands tied behind his back. The interogee is forced to remain in this position for hours and is beaten if he falls over. *See also* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 7, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. The Court referred to this position as the "Frog Crouch" and described it as "periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.*

42. *See* GINBAR, *supra* note 1, at 26-28.

> The [*qas' at a-tawleh*] method combines a painful position with the application of direct violence by the interrogator, and is used during the interrogation itself. The interrogator compels the interogee to kneel or sit down (on the floor or on the *shabeh* chair) in front of a table, with the detainee's back to the table. The interrogator places the interogee's arms, bound and stretched behind him, on the table. The result is intense pain. Sometimes the interrogator sits on the table, his feet on the interogee's shoulders, and pushes the interogee's body forward, stretching his arms even more, or pulls his legs, creating the same painful effect.

Id. at 26.

43. *See* COHEN & GOLAN, *supra* note 24, at 65-67.

> There are two methods which are called the banana tie. One consists of binding the suspect's legs to the legs of a chair without a backrest, and then tying his hands to the back legs of the chair. The second is binding the detainee's hands to his legs so that his body is bent backward. Thus, the tied up body looks like a banana and is exposed and vulnerable to the blows of the interrogators.

Id. at 65.

44. *See id.* at 71. *See generally* HUMAN RIGHTS WATCH, *supra* note 26, at 187-89 (describing various prisoners' experiences with GSS interview techniques). *See also* PHYSICIANS FOR HUMAN RIGHTS, ISRAEL AND THE OCCUPIED TERRITORIES: SHAKING AS A FORM OF TORTURE - DEATH IN CUSTODY OF 'ABD AL-SAMAD HARIZAT 4-6 (Physicians for Human Rights 1995) (Shaking of a suspect results in injuries similar to shaken baby syndrome); GINBAR, *supra* note 1, at 31-34. Shaking is when "[t]he interrogator grabs the interogee, who is sitting or standing, by the lapels of his shirt, and shakes him violently, so that the interrogator's fists beat the chest of the interogee, and his head is thrown backward and forward." *Id.* at 31. *See also* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 6, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html B'tselem, *Shaken to Death: Torture in Interrogation, at* http://btselem.netgate.net/news/96spring/torture.html (reporting that detainee, Harizat, died "as a result of brain damage caused by violent shaking during interrogation"); B'Tselem, *Forcefully Shaken After the Death of Harizat, at* http://btselem.netgate.net/news/96spring/musa.htm (reporting testimony of a terrorist suspect regarding the interrogation methods used against him by the GSS); *Nawaf Al Kaissi, at* http://www.lawsociety.org/prisoner/tstory/st1.html (reporting testimony of interrogation methods used against a former GSS prisoner); *Abed, at* http://www.lawsociety.org/prisoner/tstory/st4.html (accounting of interrogation methods used against a detainee by the GSS); *PICCR: Another Palestinian Victim Dies in Israeli Prison, at* http://msanews.mynet.net/gateway/piccr/19980202.9.html (reporting the death of a Palestinian and condemning such practices); B'Tselem, *Torture During Interrogations: Testimony of*

of confined spaces,[46] and general humiliation.[47] The use of these methods was approved by not only the Landau Commission, but indirectly by the Israeli High Court of Justice.[48] Though the High Court of Justice never specifically ruled on the issue of whether the GSS interrogation methods were lawful prior to September of 1999, the Court faced numerous cases alleging abuse by the GSS and, in those cases, the Court ruled in favor of the GSS.[49]

Palestinian Detainees and Israeli Interrogators, at http://btselem.netgate.net/REPORTS/1994/nov_1.htm (listing GSS interrogation methods). The Court described this method 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." H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 6, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html B'tselem. An expert who testified before the Court stated that "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." *Id.*

45. *See* GINBAR, *supra* note 1, at 25. *See also* COHEN & GOLAN, *supra* note 24, at 56-57 (indicating that these threats often involve both sexual threats and death threats to the prisoner and/or his family).

46. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 129 (describing different prisoners' experiences with confined spaces). *See also* COHEN & GOLAN, *supra* note 24, at 59-60. Confined spaces are often times referred to as closets by interogees. These "closets" are extremely small, sometimes only one meter by one meter, and the interogee is usually detained while bound and hooded. *See id.* Some of these closets are referred to as "refrigerators" because of the extremely low temperatures. *Id.*

47. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 177-80. Detainees are frequently denied the use of a toilet, and when permitted, they are only given a few minutes in which to relieve themselves while also eating their meal. Detainees are also prevented from keeping clean because they are only permitted to bathe once a week, if at all. *See id.*

48. *See generally* YUVAL GINBAR & JESSICA MONTELL, LEGITIMIZING TORTURE: THE ISRAELI HIGH COURT OF JUSTICE RULINGS IN THE BILBEISI, HAMDAN, AND MUBARAK CASES: AN ANNOTATED SOURCEBOOK 7-21 (B'tselem 1997) (providing an English translation for three HCJ cases).

49. *See id. See also* H.C. 7964/95, *'Abd al-Halim Bilbeisi v. The General Security Service* (1995). Bilbeisi was a detainee who complained of abuse by the GSS interrogators. The Court ordered an interim injunction in which the GSS was prohibited from using physical force on Bilbeisi while the Court was investigating his allegations. While the interim injunction was still in effect Bilbeisi confessed to taking part in a prior terrorist attack and that he was currently hiding other explosives to be used in future terrorist attacks. Because of this confession, the Court found that "in this case there exists a clear and present danger of harm to human lives" and repealed the interim injunction. *Id.* at 8-10. *See also* H.C. 8049/96, *Muhammad 'Abd al-'Aziz Hamdan v. The General Security Service* (1996). Hamdan was a detainee of the GSS who complained about the use of physical force in his interrogation. The Court issued an interim injunction and an *order nisi* in which the GSS must come forth and defend the methods used against Hamdan. The GSS informed the Court that Hamdan possessed vital information, the procurement of which would save human lives. After reviewing the classified material, the Court agreed with the GSS and repealed the interim injunction. *Id.* at 14-16. *See also* H.C. 3124/96, *Khader Mubarak et al v. The General Security Service* (1996). Mubarak complained of the following interrogation methods used by the GSS: shackling his

Although the interrogation methods employed by the GSS taken alone may not appear odious, oftentimes these methods are used in combination and result in both psychological and physical trauma.[50] Because of the psychological and physical trauma frequently seen in GSS suspects, both human rights organizations and the United Nations have characterized the GSS's interrogation methods as "torture."

Although what one person's perception as torture may differ from another's, international law provides a ready definition. "Torture" is:

> [A]ny 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

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hands in a painful position, forcing him to wear a sack over his head and to listen to loud music between interrogations, and depriving him of sleep. The GSS argued that these were necessary for security reasons. The GSS claimed that the shackling was used to protect the interrogators from the suspects, and the sack was to prevent the prisoners from seeing other interogees which may harm the interogee. Moreover, the music was used to prevent interogees from conversing with one another, and the sleep deprivation was not really deprivation but forcing the interogee to wait for the next interrogation without rest. The Court found that "[t]he 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 that it was conducted . . . ." *Id.* at 20-21.

50. *See* GINBAR, *supra* note 1, at 38 (quoting from the UN's Special Rapporteur on Torture). In his report for 1997, Professor Nigel Rodley, U.N. Special Rapporteur, wrote:

> The following forms of pressure during interrogation appear so consistently (and have not been denied in judicial proceedings) that the Special Rapporteur assumes them to be sanctioned under the approved but secret interrogation practices: sitting in a very low chair or standing arched against a wall (possibly in alternation with each other); hands and/or legs tightly manacled; subjection to loud noise; sleep deprivation; hooding; being kept in cold air; violent shaking (an "exceptional" measure, used against 8,000 persons according to the late Prime Minister Rabin in 1995). Each of these measures on its own may not provoke severe pain or suffering. Together - and they are frequently used in combination - they may be expected to induce precisely such pain or suffering, especially if applied on a protracted basis of, say, several hours. In fact, they are sometimes apparently applied for days or even weeks on end. Under those circumstances, they can only be described as torture . . . .

Id. (quoting E/CN.4/1997, 10 January 1997, par. 121, p. 29).

or incidental to lawful sanctions.[51]

Although the Israeli government condoned the use of "moderate physical pressure" in GSS interrogations, it repeatedly denied that these methods constituted torture.[52] In support of its position, Israeli officials would point to their laws which prohibit torture and provide up to three years imprisonment for a public official who violates those laws.[53] Thus, by these

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51. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. High Commissioner for Human Rights, G.A. Res. 39 (1984), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.html.

52. *See* Gaulan, *supra* note 36, at 1-4.

> To prevent terrorism effectively while ensuring that the basic human rights of even the most dangerous of criminals are protected, the Israeli authorities have adopted strict rules for the handling of interrogations. These guidelines are designed to enable investigators to obtain crucial information on terrorist activities or organizations from suspects who, for obvious reasons, would not volunteer information on their activities, while ensuring that the suspects are not maltreated. . . .
>
> [A]ny allegations of maltreatment are taken seriously and are investigated on a case by case basis. However, it should be noted that individuals arrested, tried or convicted have both personal and political motives for fabricating claims of maltreatment during interrogation. . . .
>
> It is the unfortunate reality that, during times of political unrest and violence, restrictions must be placed on individuals who threaten the welfare of the State and its citizens. This paper has been aimed at demonstrating that, despite the harsh reality of continuing terrorism faced by the State of Israel, we are doing everything in our power to uphold the rights of all persons under our jurisdiction while ensuring the safety of innocent individuals.

Id. See also Second Periodic Report of Israel Concerning the Implementation of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Submitted to the Committee Against Torture March 1998, at gopher://israel-info.gov.il/00/constit/leg/980300.leg%09%09%2B (presenting Israel's position concerning methods used to prevent torture in interrogations of Palestinians).

53. *See* AMNESTY INTERNATIONAL, *supra* note 32, at 8-9, quoting Article 277 of 1977 Penal Law as follows:

> Article 277 of the 1977 Penal Law provides for up to three years' imprisonment for a public servant who does any one of the following:
>
> 1. uses or directs the use of force or violence against a person for the purpose of extorting from him or from anyone whom he is interested a confession of an offence 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 is interested for the purpose of extorting from him a confession of an offence or any information relating to an offence.

Id. But see HUMAN RIGHTS WATCH, *supra* note 26, at 7.

> While laws exist to punish interrogators who use force or ill-treat detainees, there are few known instances in which interrogators have been convicted or significantly punished for abuse. The problem is two-fold. There is first of all a lack of political will to punish abusive interrogators. There is only one known

officials' reasoning, the GSS's methods could not constitute torture because that would be illegal. Numerous human rights groups, however, disagree with both the conclusions of the Landau Commission Report[54] and Israel's position on GSS interrogation methods. Among these groups, Amnesty International declared that "[it] considers the interrogation methods employed by the Israeli authorities constitute torture or ill treatment: most of them,

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> case in which GSS agents received criminal sentences for mistreating a detainee in their charge; authorities have claimed that in an unspecified number of other cases, GSS and prison medical personnel have been disciplined.
>
> The other facet of the problem is that some forms of abuse are evidently permitted by the GSS's interrogation guidelines.

Id. (citation omitted).

54. *See* COHEN & GOLAN, *supra* note 24, at 26-29. There are four main criticisms of the Report. The first is its use of the "necessity defense" as a means to provide advanced authorization for the use of force by government officials. "In the realm of individual action, criminal liability is mitigated by 'necessity' only in situations where danger is imminent and unpreventable by any means other than force. In the realm of national security, the only equivalent might indeed be the extreme hypothetical case: [a ticking time bomb]." *Id.* at 26. Critics however, argue that the ticking time bomb case is far from typical and in fact there has been no known case like that in Israel's history. *See id.* at 27. The second critique is that the Report has a very elastic definition of the nature of the enemy. Individuals who may be subject to the interrogation methods sanctioned by the Report include not only those terrorists with ticking time bombs but also people who are members of the PLO and who may have written leaflets in its favor or thrown stones. According to this definition, "[t]here is no reason why the entire public who sympathize with the Palestinian cause should not be the enemy against whom 'special means' are permitted and who have no moral cause to demand ordinary civil rights." *Id.* at 28. A third criticism is that since the methods are laid out in the secret part of the report there is no way of knowing what methods are condoned. In addition, critics fear that the mere condoning of these methods will carry with it other risks. Namely that the use of force will become routine and that there will be a risk of the force escalating when an interrogator does not hear what he wants. *See id.* at 28-29. The fourth critique is that "[b]y placing all its exact description of interrogation methods in the secret Part B of its report, the Commission has reinforced the very context of secrecy in which torture can possibly take place. The already privileged legal status of the GSS is now condoned." *Id.* at 29. *See also* AMNESTY INTERNATIONAL, *supra* note 32, at 13-16.

> [T]he Landau Commission Report has been criticized for recommending that a governmental body, which is likely to receive significant advice from the GSS, is to review the secret guidelines on the use of "pressure" with the power to amend them. Some have also argued that such secrecy is unnecessary, as former detainees are bound to inform others on the methods of interrogation used, as in fact happens. By contrast, such secrecy may place medical and other personnel who visit GSS interrogation wings in a position of unwanted complicity.
>
> Critics have called for the interrogation guidelines to be published so as to allow their examination in light of international standards on the treatment of detainees and allow proper monitoring of their application.

Id. at 15.

especially when used in combination, certainly amount to torture."[55] Similarly, B'tselem[56] stated that "[b]y formal criteria, at least, these methods, particularly when used together . . . fall under most accepted definitions of 'torture.' Even if we object to using this word, these methods are self evidently forms of ill-treatment, abuse, or 'cruel and inhuman treatment.'"[57]

Human rights groups are not the only organizations that have expressed concern over the interrogation methods employed by the GSS. The United Nations Committee Against Torture has also expressed its disapproval. In its 1998 concluding observations, the Committee Against Torture acknowledged that Israel made some progress[58] but that the progress proved

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55. AMNESTY INTERNATIONAL, *supra* note 32, at 15. *See also* HUMAN RIGHTS WATCH, *supra* note 26, at 71. (stating that "[it] believes that the substantial evidence available indicates the existence of a clear pattern of systematic psychological and physical ill-treatment, constituting torture or other forms of cruel, inhuman or degrading treatment, which is being inflicted on detainees during the course of interrogation.")

56. *See* HUMAN RIGHTS WATCH, *supra* note 26, at 68. B'tselem is the Israeli Information Center for Human Rights in the Occupied Territories.

57. *Id.* The Human Rights Watch also concludes in this text that:

> [T]he methods used by Israeli interrogators in the occupied territories amount to a pattern of torture, as the term is defined in international law. This conclusion is based on an evaluation of the extent to which the methods are used in combination with one another, and of the lengths of time during which detainees are subjected to them. While not every Palestinian security detainee under interrogation experiences mistreatment amounting to torture, it is clear that thousands of Palestinians have been tortured since the Intifada began in late 1987.

Id. at 73. *See also* PHYSICIANS FOR HUMAN RIGHTS, *supra* note 44, at 6 (stating that "PHR believes that the use of shaking under any circumstances constitutes torture and should be strictly prohibited.")

58. *See Concluding Observations of the Committee Against Torture: Israel*, U.N. High Commissioner for Human Rights, G.A. 20th Sess., U.N. Doc. A/53/44 (1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/9c66.../daf82ddcda36946e80256609004b7df9?OpenDocument. The committee acknowledged the following:

> Israel has embarked upon a number of reforms, such as the creation of the Office of Public Defender, the creation of the Kremnitzer Committee to recommend oversight of police violence, amendments to the Criminal Code, ministerial review of several security service interrogation practices and the creation of the Goldberg Committee relating to the rules of evidence.

Id. at 1. *See also Second Periodic Report of Israel Concerning the Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted to the Committee Against Torture*, *supra* note 52, at 1-19.

> Israel submitted, to the Committee, several measures it had adopted to prevent torture, which included the following:
> Basic Law: Human Liberty and Dignity . . . [has] constitutional status in Israel's legislative framework. The Supreme Court arguably has the power to void any legislation enacted after the entry into force of the Basic Law which violates [its] provisions . . . . These provisions in the Basic Law, then, may be deemed to constitute a general prohibition of cruel, inhuman or degrading treatment or punishment, including torture, and are binding both vis a vis public and private

insufficient.[59] The Committee concluded that hooding, shackling in painful

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entities.

. . . The Kremnizter Committee . . . issued its report in June 1994, which included specific recommendations for the prevention and deterrence of violence by police officers.

. . . Following publication of the Kremnitzer Committee's Report, the Israel Police adopted its recommendations . . . .

In 1995, a national public defender's office was created by legislation . . . . [I]t is anticipated that the augmented protection of the rights of criminal defendants and detainees by a highly-trained corps of criminal [defence] attorneys will result, among other things, in a decrease in violent treatment on the part of law enforcement officials.

. . . The Goldberg Committee's report, published in 1994, included recommendations aimed at ensuring that false confessions were not extracted by illegal means. Among other things, the Committee recommended employment of investigation techniques and technologies which have been developed elsewhere, and which have proven effective in fulfilling the purposes of the criminal investigation without resort to violence; increasing supervision of investigation by senior investigators; videotaping of any interview at which the interviewee's lawyer is not present; and giving the judge who presides over detention hearings more of a role in actively investigating the conditions of detention and the investigation.

An amendment to the Evidence Ordinance [New Version], 1971 is currently being prepared at the Ministry of Justice to implement the above recommendations of the Goldberg Committee.

Id.

59. *See Concluding Observations of the Committee Against Torture: Israel*, U.N. High Commissioner for Human Rights, *supra* note 58, at 2. The Committee was concerned about the following:

1. The continued use of the "Landau rules" of interrogation permitting physical pressure by the General Security Services, based as they are upon domestic judicial adoption of the justification of necessity, a justification which is contrary to article 2, paragraph 2, of the Convention;
2. Resort to administrative detention in the occupied territories for inordinately lengthy periods and for reasons that do not bear on the risk posed by releasing some detainees;
3. The fact that, since military law and laws going back to the Mandate pertain in the occupied territories, the liberalizing effect of the reforms referred to in paragraph 235 above will not apply there; [and]
4. Israel's apparent failure to implement any of the recommendations of the Committee that were expressed with regard to both the initial and the special report.

Id. See also Associated Press, *UN Committee: Israel's Interrogation Methods Constitute Torture*, JERUSALEM POST, May 11, 1997, at 14, LEXIS, Nexis Library, UPI File (quoting Peter Thomas Burns, The Committee Against Torture member specializing in Israeli affairs).

The committee said that prolonged sleep deprivation, playing of loud music, death threats, violent shaking and other interrogation methods Israel used 'constitute torture.

This conclusion is particularly evident where such methods of

positions, sleep deprivation, and shaking violate articles 1, 2, and 16 of the Convention and should cease.[60]

Israel has signed numerous international human rights treaties, including the Convention Against Torture in 1986.[61] Although Israel ratified this treaty, its provisions are not considered to be the law of the State.[62] Therefore, the provisions set forth by agencies such as the Committee Against Torture constitute mere recommendations which Israel retains the discretion to adopt or ignore. As a result, Israel effectively ignored those

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interrogation are used in combination, which appears to be the standard case.

> [Because] Israel had signed the Convention Against torture [it] is precluded from raising before this committee exceptional circumstances as justification for acts prohibited by article 1 of the convention.

Id.

60. *See Concluding Observations of the Committee Against Torture: Israel*, U.N. High Commissioner for Human Rights, *supra* note 58, at 2-3.

> Since the State party admits to hooding, shackling in painful positions, sleep deprivation and shaking of detainees (through its delegates and courts, and supported by the findings of the United Nations Special Rapporteur on Torture) the bare assertion that it is "not severe" is not in and of itself sufficient to satisfy the State's burden and justify such conduct. This is particularly so when reliable evidence from detainees and independent medical evidence made available to Israel reinforce the contrary conclusion . . . .
>
> [Accordingly] . . . [i]nterrogations applying the methods referred to above are in conflict with articles 1, 2 and 16 of the Convention and should cease immediately . . . .

Id.

61. *See generally* Natan Lerner, *International Law and the State of Israel, in* INTRODUCTION TO THE LAW OF ISRAEL 391 (Amos Shapira & Keren DeWitt-Arar eds., 1995)(listing human rights treaties ratified by Israel). *See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. High Commissioner for Human Rights, *supra* note 51, at 1.

62. *See* Eyal Benvenisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28 ISR.L.R. 136, 138-41 (1994).

> Following the common law tradition, Israeli law distinguishes between customary international law and treaty-based law. Customary law is considered part of the domestic law. It is binding without the need of transformation by a statute, unless it conflicts with an existing statute. On the other hand, treaties have no legal effect as such. To take effect, a treaty must be incorporated by a statute, unless it is considered a declaratory rather than a constitutive treaty, the former being a treaty which merely restates customary norms . . . .
>
> To date, the Supreme Court has applied to international human rights law the general rules concerning the domestic applicability of international law. Therefore, under current case law, only customary human rights are applicable in the Israeli legal system.

Id. (footnotes omitted). *See also* LERNER, *supra* note 61, at 386; *Landau Report*, *supra* note 12, at 179 (noting the fact that Israel is not bound to International Conventions).

recommendations because it declared itself to be in a "state of emergency,"[63] which outweighs the need and/or desire to adhere to international law.

Israel has been the target of a large number of terrorist attacks. "Between 1969 and 1985, the PLO had perpetrated some 8,000 acts of terror causing the deaths of over 650 Israelis and the wounding of thousands more."[64] Due to the prevalence of acts of terrorism, Israel declared itself to be in a "state of emergency" soon after its formation, and this declaration still operates today.[65] The Landau Commission had that state of affairs in mind when it stated,

> To put it bluntly, the alternative is: are we to accept the offence of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The

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63. LAWYERS COMMITTEE FOR HUMAN RIGHTS, COMMENTS RELATING TO THE COMBINED INITIAL AND FIRST PERIODIC REPORT OF THE STATE OF ISRAEL BEFORE THE U.N. HUMAN RIGHTS COMMITTEE 1 (Lawyers Committee for Human Rights 1998). The Lawyers Committee referred to the *Lawless v. Ireland* case for a definition of state of emergency. "[A] state of emergency has been defined as those exceptional circumstances resulting from temporary factors which, to varying degrees, involve extreme and imminent danger which threaten the organized existence of the State and the population contained therein." *Id.* at 2.

64. Weiner, *supra* note 21, at 187. The author refers to a 1985 publication of the Israeli Ministry of Foreign Affairs, THE THREAT OF PLO TERRORISM, 3 (1985). *See id.*; *see also* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 3, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html. "The facts presented before this Court reveal that one hundred twenty-one [sic] people died in terrorist attacks between 1.1.96 to 14.5.98. Seven hundred and seven people were injured." *Id. See also* Fireman, *supra* note 19, at 442. "In proportion to its population, Israel has been the target of the largest number of terrorist attacks by organized terrorist networks. These attacks are usually not directed toward the military bases scattered throughout the administered territories but toward civilian populations." *Id.*

65. Asher Maoz, *The Institutional Organization of the Israeli Legal System, in* INTRODUCTION TO THE LAW OF ISRAEL 23 (Amos Shapira & Keren DeWitt-Arar eds., 1995).

> [T]he most serious deviation from the doctrine of separation of powers concerns the authority that is vested in the ministers to promulgate emergency regulations, which may alter, suspend, or modify any law of the Knesset. While it is true that this authority exists only as long as the Knesset declares that a state of emergency exists, such a declaration was made soon after the establishment of the State of Israel and is still in force. The only limitation upon the ministerial powers concerning the promulgation of emergency regulations is that said regulations expire after three months, unless they are either extended or revoked earlier by the Knesset.

Id.

answer is self-evident.[66]

In addition to declaring itself in a state of emergency, Israel made use of its Defense (Emergency) Regulations which give the State broad powers including the power to temporarily detain an individual and/or to restrict his travel within his town of residence.[67] In this manner, Israel justified the use of "moderate physical pressure." This justification operated until the recent High Court of Justice ruling on the GSS interrogation methods.

IV. HIGH COURT OF JUSTICE RULING ON THE USE OF "MODERATE PHYSICAL PRESSURE"

Although Israel's High Court of Justice heard numerous cases involving alleged abuse by GSS investigators,[68] the Court never decided the question of whether the methods employed by the GSS during its interrogations were legitimate. The Court confronted that question in *Public Committee Against Torture in Israel v. Israel*[69] on September 6, 1999.

In *Public Committee Against Torture in Israel*, the Court consolidated the complaints of seven applicants.[70] Each applicant waged specific

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66. *Landau Report*, *supra* note 12, at 174 (footnotes omitted). *See also* AMNESTY INTERNATIONAL, *supra* note 32, at 11 (referring to the same Landau Commission statement).

67. *See* Weiner, *supra* note 21, at 192-93.

> [T]he power to temporarily detain an individual administratively or to temporarily restrict his travel to within his town of residence. Other Regulations, which apply only in the Administered Areas, authorize the deportation of individuals from the Administered Areas who threaten security and the demolition or sealing-up of residences which are used as the base for a terrorist attack.

Id.

68. *See* GINBAR & MONTELL, *supra* note 48, at 7-21.

69. H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999), *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

70. *See id.* at 4-5. The first application was brought by the Public Committee Against Torture in Israel. It claimed that the GSS was not authorized to investigate suspected terrorists nor was it entitled to employ "moderate physical pressure." *Id.* The second application was brought by the Association for Citizen's Rights in Israel and argued that the GSS should be ordered to "refrain from shaking suspects during interrogations." *Id.* The remaining five applicants involved specific individuals. Kaaqua and Ganimat (H.C. 5188/96) were granted an order *nisi* preventing the GSS from using physical force against them during the interrogations. Zayda (H.C. 6536/96) complained of the following interrogation methods used against him: deprivation of sleep, shaking, beatings, and the use of *Shabach*. Zayda has been convicted of carrying out terrorist attacks and sentenced to seventy-four months in prison. Abd al Rahman Ismail Ganimat (H.C. 7563/97) claimed he was tortured by GSS interrogators through the use of the *Shabach* position, excessive tightening of his handcuffs, and sleep deprivation. These interrogations resulted in his being convicted of a murder of an IDF soldier and of a bombing in Tel Aviv for which he was sentenced to five consecutive life sentences. Quran (H.C. 7628/97) complained of both the *Shabach* position and of forced sleep deprivation. Batat (H.C.

allegations, but all generally asserted a two-fold argument. First, the parties argued that the "GSS [is] not authorized to investigate those suspected of hostile terrorist activities."[71] Second, they argued that "the GSS is not entitled to employ those pressure methods approved by the Commission of Inquiry's Report . . . [and] the methods used against [the applicants] by the GSS are illegal."[72]

The State of Israel responded with a three-part argument. First, the State argued that the GSS has the right to interrogate those suspected of committing crimes against the nation's security.[73] Second, the State asserted that the physical methods of interrogation used by the GSS did not constitute torture under international law. It stated, "[T]hese methods cannot be qualified as 'torture,' 'cruel and inhuman treatment' or 'degrading treatment,' that are strictly prohibited under international law. Instead the practices of the GSS do not cause pain and suffering . . . ."[74] Lastly, the State maintained that the use of "moderate physical pressure" was legal under Israel's domestic law due to the necessity defense.[75]

In determining whether the GSS had the authority to conduct interrogations of suspected terrorists, the Court focused on the inherent nature of interrogations and concluded that "[a]n interrogation inevitably infringes upon the suspect's freedom, even if physical means are not used . . . [it] infringes on both the suspect's dignity and his individual privacy. In a state adhering to the Rule of Law, interrogations are therefore not permitted in absence of clear statutory authorization . . . ."[76] The Court went on to state that the statutory authorization must comply with the requirements of the Basic Law: Human Dignity and Liberty.[77] When faced with the question of whether a specific statute provided authorization for GSS interrogations, the Court could not identify one. Instead, the Court determined that the GSS's authorization stemmed from the Minister of Justice's commission of the power to interrogate suspected terrorists, based

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1043/99) complained that physical force was used against him during the course of the interrogation. *See id.*

71. *Id.* at 4.

72. *Id.*

73. To support this contention the State cited the government's general and residual powers in Article 40 of the Basic Law: The Government and Article 2(1) of the Criminal Procedure Statue. *See id.* at 9.

74. *Id.*

75. *Id.* at 21-22. For a discussion of the necessity defense see supra note 33. The State contended that "GSS investigators are entitled to use 'moderate physical pressure' as a last resort in order to prevent real injury to human life and well being .... Resorting to such means is legal, and does not constitute a criminal offence." H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 9, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

76. *Id.* at 12.

77. *See id.*

on Article 2(1) of the Criminal Procedure Statute. That statute provides that a police officer may interrogate any person familiar with the facts and/or circumstances of any offense and the officer may reduce any statements made into writing.[78] The Court, therefore, concluded that the GSS investigators are "tantamount to police officers in the eyes of the law."[79]

Once the Court determined that the GSS had authority to interrogate suspected terrorists, the Court turned its attention to whether this authorization included the right to use "moderate physical pressure." The Court recognized that in order to accurately resolve this issue, an acknowledgment of the collision of values was involved.[80] The Court used this collision in postulating two general notions about a reasonable interrogation. First, there is an absolute prohibition on the use of torture in an investigation.[81] Second, the very nature of an investigation is likely to cause discomfort.[82] Thus, the Court concluded that "it is possible to conduct

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78. *See id.* at 14.

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

Id.

79. *Id.* at 15.

80. *See id.* at 16. The Court looked to a quote by Justice H. Cohen to illustrate that collision:

> On the one hand, it is our duty to ensure that human dignity be protected; that it not be harmed at the hands of those who abuse it, and to do all that we can to restrain police investigators from fulfilling the object of their interrogation through prohibited and criminal means; On [sic] the other hand, it is (also) our duty to fight the increasingly growing crime rate which destroys the positive aspects of our country, and to prevent the disruption of public peace to the caprices of violent criminals that were beaten by police investigators.

Id. (quoting Cr. A. 183/78, Abu Midjim v. The State of Israel, 34(4) P.D. 533 at 546).

> The Court recognized the threat of terrorism that Israel is forced to face on a daily basis and the fact that many attacks were prevented due to measures taken by the GSS.
>
> Terrorist organizations have established as their goal Israel's annihilation. . . . [T]hese groups do not distinguish between civilian and military targets. . . . They do not distinguish between men, women, and children. . . .
>
> . . . Many attacks . . . were prevented due to the measures taken by the authorities responsible for fighting . . . hostile terrorist activities on a daily basis, [and] [t]he main body responsible for fighting terrorism is the GSS.

Id. at 3.

81. *See id.* at 17.

82. *See id.*

an effective investigation without resorting to violence."[83] The Court then returned to the specific allegations of abuse in this case. The Court concluded that the shaking of a suspect,[84] the use of the *shabach* position,[85] the use of the frog position,[86] and the intentional deprivation of sleep[87] were

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83. *Id.*

> First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever .... These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing.... The use of violence during investigations can potentially lead to the investigator being held criminally liable.... Second, a reasonable investigation is likely to cause discomfort; It [sic] may result in insufficient sleep; The [sic] conditions under which it is conducted risk being unpleasant. Indeed, it is possible to conduct an effective investigation without resorting to violence.

Id.

84. *See id.* at 17-18. "Plainly put, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity.... It surpasses that which is necessary." *Id.* at 17.

85. *See id.* at 18-20. The Court focused on the several components of the *Shabach* method. As for handcuffing of the suspect, the Court stated the following:

> [W]e accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is an action 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.... Notwithstanding, the cuffing associated with the "Shabach" position is unlike routine cuffing.... This is a distorted and unnatural position. The investigators' safety does not require it. Therefore, there is no relevant justification for handcuffing the suspect's hands with particularly small handcuffs .... "Cuffing causing pain is prohibited ...."

Id. at 18. With respect to placing the suspect in a low chair, the Court said that:

> [It accepts] that seating a man is inherent to the investigation .... [The] sort of seating [in *Shabach*] is not encompassed by the general power to interrogate ... [because] there is no inherent investigative need for seating the suspect on a chair so low and tilted forward towards the ground, in a manner that causes him real pain and suffering.

Id. at 18-19. As for placing an opaque sack over a suspect's head, the Court found that the power to interrogate did allow one to prevent suspects from seeing one another or from seeing their interrogators. *Id.* The Court concluded, however, that the use of an opaque sack was not part of fair interrogation because "[it] harms the suspect and his (human) image. It degrades him. It causes him to lose sight of time and place. It suffocates him. All of these things are not included in the general authority to investigate." *Id.* at 19. The Court concluded the authority to investigate an individual "encompasses precluding him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success." *Id.* at 20. The Court found, however, that "[b]eing exposed to powerfully loud music for a long period of time causes the suspect suffering ... and is [therefore] a prohibited means [of interrogation]." *Id.*

86. *See id.* at 18. The Court concluded that the frog position "is degrading and infringes upon an individual's human dignity ... [and is therefore] a prohibited investigation method." *Id.*

87. *See id.* at 20-21.

> 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,

all prohibited interrogation methods.[88]

Subsequent to the Court's condemnation of "moderate physical pressure" as a mode of interrogation, the Court considered whether such methods were nevertheless permissible under the defense of necessity. The Court upheld the notion that the use of physical means in interrogations is permissible under the defense of necessity in "ticking time bomb" situations,[89] but the Court further distinguished that situation from the circumstances before the Court in that case. The Court concluded that,

> [the necessity defense] does not authorize the use of physical means for the purposes of allowing investigators to execute their duties in circumstances of necessity . . . . The Rule of Law (both as a formal and substantive principle) requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect.[90]

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

Id.

88. *See id.* at 19. The Court concluded that, "All these methods do not fall within the sphere of a 'fair' interrogation. They are not reasonable. They impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner . . . . They are not to be deemed as included within the general power to conduct interrogations." *Id.*

89. *Id.* at 22-23.

> [The] "necessity" exception is likely to arise in instances of "ticking time bombs", and that the immediate need . . . refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence . . . .
> Consequently we are prepared to presume . . . that if a GSS investigator - who applied physical interrogation methods for the purpose of saving human life - is criminally indicted, the "necessity" [defence] is likely to be open to him in the appropriate circumstances . . . .
> This however, is not the issue before this Court.

Id.

90. *Id.* at 24-25. The Court summarized its findings as follows:

> According to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and bestow authorization regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the

V. THE DEBATE AMONG ISRAELIS BETWEEN NATIONAL SECURITY AND HUMAN RIGHTS

The High Court of Justice ruling has since been met with both reservation and praise amongst Israeli citizens. Those with reservations worry that it will hamper the GSS investigations and ultimately effect the national security of Israel. Those who approve of the ruling, however, counter that no justification exists for a State to permit acts constituting torture.

Among those Israelis fearing this ruling will adversely effect national security are top governmental officials including State Attorney General Elyakim Rubinstein[91] and Likud[92] Knesset faction whip, Reuven Rivlin.[93]

> 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.

Id. at 26.

91. *See AG Rubinstein Supports Legislation to Bypass High Court's GSS Ruling*, ISRAEL WIRE, Sept. 9, 1999, *at* http://www.israelwire.com/New/990909/99090928.html. Rubinstein stated:

> [T]he judiciary must find a way to assist the GSS in fulfilling its responsibility to stop terrorists from blowing up buses . . . . [T]he decision limits their ability to do so and in a case dealing with what security agents call a "ticking bomb," the appropriate legislation must be available to permit investigators to use measures not permitted under the 'regular' law. . . .
>
> [U]ntil such time that the necessary legislation can be invoked into law, temporary measures must be taken to protect GSS agents from criminal charges in the event an interrogator crosses the line during an interrogation in extenuating circumstances.

Id. See also Dan Izenberg & Liat Collins, *Barak to Begin Debate on GSS Court Ruling Today. PM, Beilin Differ on Legislation*, JERUSALEM POST, Sept. 15, 1999, at 1, LEXIS, Nexis Library, UPI File (reporting differences of opinion among Israeli officials on the Court's ruling).

92. *See* DR. YAACOV S ZEMACH, THE JUDICIARY OF ISRAEL 33 (Institute of Judicial Training for Judges in Israel 2d ed. 1998). The Likud is a faction in the Knesset. "The list of candidates that wins a number of valid votes which is not less than the blocking percentage, as determined by law (which is to-day one and a half percent), becomes a faction in the Knesset. The number of factions represented in the Knesset has never been less than ten." *Id.*

93. *See* Liat Collins, *Likud to Discuss Formulating GSS Bill*, JERUSALEM POST, Sept. 8, 1999, at 3, LEXIS, Nexis Library, UPI File. Rivlin stated,

> The Basic Law: Human Dignity and Freedom must protect the dignity and freedom of citizens who are the potential victims of terror and not protect the dignity and freedom of the murderers . . . . This sums it all up, and any democracy which gives up on the need and duty to protect itself will not remain a democracy.

Id.

Prime Minister Ehud Barak also expressed his concern publicly when he stated, "there must be an authority that can, in time of need, take rapid action to approve necessary interrogations in 'ticking bomb' situations which present an immediate danger."[94] In addition, those closely associated to the anti-terrorism campaign in Israel believe that this ruling will prove extremely detrimental to intelligence gathering and national security.[95]

Although many Israelis express concern over the ruling, others, in addition to those belonging to human rights groups,[96] feel that the High Court of Justice came to the correct conclusion in this case. Among them is Justice Minister Yossi Beilin who has stated, "I am very proud of the court's decision and believe in the GSS and its ability to cope with the difficult tasks that Israeli society has invested it with."[97] Similarly, Emmanuel Gross, a

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94. *PM Barak Comments on Terrorist Attacks and GSS ruling*, ISRAEL WIRE, Sept. 9, 1999, *at* http://www.israelwire.com/New/990909/99090916.html. *See also* Danna Harman & Liat Collins, *Barak Hints of Ways to Bypass Anti-torture Ruling*, JERUSALEM POST, Sept. 9, 1999, at 3, LEXIS, Nexis Library, UPI File; Aluf Benn, *Barak Proposes New Limits on Shin Bet Interrogations*, HA'ARETZ MAGAZINE, Sept. 9, 1999, http://www.haaretzdaily.com/htmls/kat17_5.asp (reporting Barak's desire to find a legal arrangement that would permit Shinbet to use special interrogation methods in cases of immediate security risks).

95. *See* Herb Keinon, *Civil Rights vs. Security*, JERUSALEM POST, Sept. 10, 1999, at 1B, LEXIS, Nexis Library, UPI File. Brig-Gen. Yigal Pressler, who worked as a counter-terrorism expert under four prime ministers, stated that "those sending the terrorists will have an easier time training them to stand tough during interrogations, knowing that the most the interrogator can do is 'give them juice without sugar.'" *Id.* Pressler went on to say that "The Court's decision is great as a candidate for the Israel Prize in democracy. But you can't fight terror waving prizes in democracy." *Id.* The former head of the GSS, Ya'acov Perry was in agreement with Pressler and stated, "First of all, those being interrogated will know that no one can frighten or do anything to them, they are ordinary criminals - like catching a thief. As a result they will be much more stubborn and determined, and it will take a long time to get results." *Id.* Perry also forecast that the interrogators will continuously ask themselves all kinds of questions such as who will defend them if they step beyond the line, and "why should I work so hard, since if I make a false step, charges will be brought against me." *Id.*

96. *See* Dan Izenberg & Ben Lynfield, *Human-Rights Groups Applaud GSS Ruling*, JERUSALEM POST, Sept. 7, 1999, at 2, LEXIS, Nexis Library, UPI File. Dan Yakir, legal advisor for the Association for Civil Rights in Israel, said, "We welcome the decision and consider it historic, courageous and moral." *Id.* at 1. Hanna Friedman, head of the Public Committee Against Torture, said that the decision was "very progressive, [and] very serious. I am very proud of our country and of our High Court, which is capable of passing such progressive rulings. We will have to find other, more sophisticated ways to fight against terrorism." *Id.* Eitan Felner, executive director of B'tselem welcomes the decision and has stated that "the justices performed their duty as primary defenders of human rights." *Id.*

97. *Id. See also Deputy Attorney General Opposes Interrogation Law*, ISRAEL WIRE, Sept. 15, 1999, *at* http://www.israelwire.com/New/990915/99091530.html. Deputy Attorney General Yehudit Karp agrees with Beilin. In her report to Prime Minister Barak, Karp recommended that, "no law be legislated that would permit coercive methods to be used by the General Security Service . . . in its interrogations." *Id.* She went on to state that, "her recommendation is grounded in ethical, moral and legal considerations; international opinion of Israel, which

professor of criminal law at Haifa University, believes that although the ruling may make it more difficult for the GSS in some of their investigations, the ruling will not necessarily harm national security because it still allows for the use of force in "ticking time bomb situations" under the defense of necessity.[98]

The court anticipated the potential concerns voiced by many Israelis, and in response it seems to have left a means for the Knesset (Israeli legislature) to circumvent this ruling and reinstate the GSS practice of the use of "moderate physical pressure" in its interrogations. In its ruling, the Court stated that if it is determined that because of Israel's security situation it is appropriate to permit the GSS to use "moderate physical pressure," it is for the legislature to make lawful and not the Court.[99] A determination of whether the Knesset could effectively reinstate the use of "moderate physical pressure" in GSS interrogations first requires an examination of the general organization of the Israeli government and the power of judicial review.

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would be diminished by such a law; and fear that sanctioned use of force could be exploited or abused." *Id.*

98. Emmanuel Gross, *High Court Ruling Won't Harm the GSS*, JERUSALEM POST, Sept. 8, 1999, at 3, LEXIS, Nexis Library, UPI File.

> Does this mean that GSS investigators will now be unable to extract information from suspects in a situation of a "ticking time bomb?" The answer is no.
>
> Firstly, there are other interrogation methods that are legal. But even if a GSS investigator decides that he has no choice but to use exceptional methods, he is still protected by the "necessity defense." In this a GSS investigator is no different from any other person who finds himself in an emergency situation in which he is called upon to set aside one legitimate interest to defend another, more important interest.
>
> There is no doubt that the High Court's ruling will make it more difficult for the security services. But in the long run, if they learn to live with it, it will only strengthen the state's moral position and its democratic basis.

Id.

99. H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999) 27, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

> 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. . . . 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).

Id.

VI. ISRAEL'S GOVERNMENT, LAWS AND JUDICIAL REVIEW

A. Constitutional Law

Although both the United Nations Resolution calling for an established Jewish State and Israel's own Declaration of Independence[100] mandated that Israel adopt a constitution, the first Knesset chose not to.[101] Instead, it adopted what became known as the Harrari Resolution, which postponed the adoption of a constitution as a single document and instead recommended its preparation in piecemeal - chapter by chapter -in a series of basic laws eventually integrated to form Israel's constitution.[102]

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100. ISRAEL, ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS 6-9 (Aryeh Greenfield-AG Publications 3d ed. 1999).

101. *See* ITZHAK ZAMIR & ALLEN ZYSBLAT, PUBLIC LAW IN ISRAEL 3 (Clarendon Press 1996).

> Indeed, the 1947 United Nations Resolution calling for the establishment of a Jewish State and an Arab State in former Palestine mandated that each would enact a democratic constitution, including entrenched guarantees for the civil rights of all citizens. Israel's own Declaration of Independence specified that the provisional bodies of state would govern until an election would be held 'pursuant to the provision of a constitution to be prepared . . . no later than 1 October, 1948'.
>
> For a whole host of reasons, Israel's tumultuous first year of existence did not include the preparation of a constitution.

Id. See also Maoz, *supra* note 65, at 11; DAPHNA SHARFMAN, LIVING WITHOUT A CONSTITUTION 44 (M.E. Sharpe 1993). A quote by Ben Gurion stated, in essence, the position of the ruling party in regards to not adopting a constitution.

> In a free country like Israel, there is no need for a declaration of freedoms. In this state a person is free to do anything not prohibited by law. In the eighteenth century, which was an era characterized by the rule of tyrants - there was need for a Bill of Rights. In countries in which freedom and the people's right to decide, of its own free will, what kind of government and law it desires are still denied - there is need to fight for human rights.
>
> But in free countries, democratic lands in which the people rule, what is needed is a Bill of Obligations, which for us means - duties to the homeland, the nation, immigration, the ingathering of the exiles, the building of the country, and safety for the other, for the weak.

Id. (quoting *Knesset Protocols*, vol. 4, p. 819 (Hebrew)) (footnote omitted).

102. *See* ZAMIR & ZYSBLAT, *supra* note 101, at 4. "One argument advanced at the time to justify postponing the entrenching of basic civil liberties in a written constitution was that British experience had proven that a formal constitution was not essential for democracy." *Id. See also* Maoz, *supra* note 65, at 11-12. The Harrari Resolution states the following:

> The first Knesset charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft constitution for the State. The constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work and all the chapters

Over the next forty years, the Knesset adopted twelve different Basic Laws.[103] These laws cover much of what one would expect to see in a constitution. The Basic Laws, for example, outline the roles of the three branches of government, the location of the State capitol, and civil rights.[104]

Prior to 1992, when Israel enacted Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty, Israel did not have a bill of rights.[105] At that time, the basic rights were considered "soft principles" because they did not limit the power of the Knesset.[106] "In the absence of a formal constitution or Bill of Rights, the Supreme Court was not prepared to subject primary legislation to judicial review in order to examine whether it places unacceptable restrictions on those basic rights that are recognized as legal principles."[107] The exceptions to this rule, however, were those entrenched basic laws. In those instances, the Court "exercised judicial

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together will form the state constitution.

Id. "The rather cryptic decision served as a compromise between two political blocs in the Knesset - one demanded the immediate adoption of a constitution, the other opposed the adoption of a constitution." *Id.* at 12.

103. ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND THE BASIC LAWS, *supra* note 100, at 5.

104. *See* Maoz, *supra* note 65, at 12. *See also* ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND THE BASIC LAWS, *supra* note 100, at 10-77. Israel's Basic Laws include: Human Dignity and Freedom, Freedom of Occupation, Jerusalem - Capital of Israel, The State President, The Knesset, The Government, State Economy, The Army, Israel Lands, Administration of Justice, and The State Comptroller. *See id.*

105. *See* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR.L.R. 238 (1992).

> A bill of rights fulfills at least one of three normative functions in a legal system. It's first and most obvious function is to define those basic rights that are recognized and protected by the system. The second function is to set standards for resolving clashes between the protected rights themselves and for balancing those rights and other values or policies recognized by the system. The final function is to establish the status of the recognized rights within the legal system itself. This means determining whether the bill of rights binds the legislative body itself and whether legislation that is inconsistent with basic rights may be struck down by a court or by some other constitutional body.

Id. at 239.

106. ZAMIR & ZYSBLAT, *supra* note 101, at 143. *See also* Kretzmer, *supra* note 105, at 239.

107. ZAMIR & ZYSBLAT, *supra* note 101, at 143.

> Although basic laws are supposed to be chapters in Israel's emerging constitution the Supreme Court held in the past that in the absence of express provisions granting them preferred status, basic laws are not inherently superior to ordinary legislation. Thus, in the case of a clash between a special provision in ordinary Knesset legislation and a general provision in a basic law, the former prevails. Furthermore, the Court held that the Knesset may amend a provision in a basic law by ordinary legislation passed with a simple majority.

Id. at 144 (footnote omitted).

review in order to ensure that legislation inconsistent with entrenched provisions was indeed enacted with the special majority [expressly] required by those provisions."[108]

The two basic laws, Basic Law: Freedom of Occupation ("Occupation Law") and Basic Law: Human Dignity and Liberty ("Human Dignity Law"), comprise the civil rights in Israel. The Occupation Law protects "the right of every citizen or resident of the State to engage in any occupation, profession, or trade."[109] The Human Dignity Law includes a number of fundamental rights such as "the right to life, body, and dignity and to protection of [those] interests; the right to property; the right to liberty of the individual; the right to leave and enter the country, and the right to privacy and personal confidentiality."[110] Although these laws make up the civil rights in Israel, they differ in one major respect. Basic Law: Freedom of Occupation has an expressed entrenchment by which it may not be changed

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108. *Id. See also* Kretzmer, *supra* note 105, at 241.

109. ZAMIR & ZYSBLAT, *supra* 101, at 148; *see also* ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS, *supra* note 100, at 13-15; *Basic Law: Freedom of Occupation, available at* http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00hj0 (translating Basic Law: Freedom of Occupation into English).

110. ZAMIR & ZYSBLAT, *supra* note 101, at 148 (citations omitted).

> Many of the rights expressly mentioned in human rights covenants or charters are part and parcel of the rights listed in the Basic Law: Human Dignity and Liberty, even if not explicitly mentioned. Thus, for example, the prohibitions against slavery and against torture and cruel, inhuman, and degrading treatment or punishment are covered by the right to human dignity.
>
> . . . Barak J, now president of the Court, has dismissed the idea that original intent should be the guiding principle in interpreting basic laws that are part of Israel's developing formal constitution. Following Barak J's general theory of interpretation, the concept of human dignity must be interpreted in the light of its 'objective purpose', which can be gleaned from its meaning in international human rights documents and other democratic constitutions, and which in the end must include 'all those human rights that have a close substantive connection to human dignity and liberty according to prevailing concepts among the enlightened public in Israel'.

Id. at 149 (footnote omitted). *See also* ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS, *supra* note 100, at 10-12. Section One provides:

> The basic rights of human beings in Israel are founded on the recognition of the worth of the human being, of the sanctity of his life and of the fact that he is free, and they shall be respected in the spirit of the principles in the Declaration of the Establishment of the State of Israel.

Id. at 10. *See also Basic Law: Human Dignity and Liberty, available at* http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00hi0 (translating Basic Law: Human Dignity and Liberty into English).

"except by a Basic Law enacted by a majority of Knesset members."[111] Basic Law: Human Dignity and Liberty does not contain such an entrenchment.[112] The Supreme Court later did away with the significance of this difference by declaring that these Basic Laws have formal constitutional status and that they may be changed only by "expressly amending those basic laws or by enacting other basic laws."[113]

Although the basic laws of Israel are considered to be the law of the land, most are subject to the emergency regulations that Israel adopted to cope with it existing in a state of emergency.[114] These emergency regulations

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111. ZAMIR & ZYSBLAT, *supra* note 101, at 144.

> [I]n the case of a clash between a special provision in ordinary Knesset legislation and a general provision in a basic law, the former prevails. Furthermore, the Court held that the Knesset may amend a provision in a basic law by ordinary legislation passed with a simple majority. The only exception to this rule recognized before the new basic laws on civil rights were enacted related to those provisions in basic laws that are entrenched . . . .

Id. (footnotes omitted).

112. *See id.*

> Section 11 of the Basic Law: Human Dignity and Liberty states expressly that all government authorities are bound to respect the rights protected under that law. Furthermore, section 8 of that basic law states that no restrictions may be placed on protected rights except by a statute that meets defined substantive standards. These provisions would seem to leave little room for doubt that the basic law is meant to place restrictions on the legislative power of the Knesset. Nevertheless, given the existing case law of the Supreme Court regarding the status of basic laws, and the absence from that basic law of an express entrenchment clause, some doubts were raised whether legislation that did not meet the demands of the Basic Law: Human Dignity and Liberty would be regarded as invalid.

These doubts were dispelled in a decision handed down by an expanded bench of nine justices of the Supreme Court in November, 1995. . . .

> The majority of judges on the Court held that the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation have formal constitutional status and therefore enjoy a status superior to that of ordinary legislation. Thus all legislation passed after these basic laws came into force must meet their demands. Furthermore, the courts have the power to review legislation in order to determine whether it does indeed meet those demands and to invalidate legislation that does not.

Id. at 145-46 (footnotes omitted).

113. *Id.* at 145-46.

114. *See* Joseph M. Wolf, *National Security v. The Rights of the Accused: The Israeli Experience*, 20 CAL. W. INT'L L.J. 115, 129-30 (1989). The Knesset has adopted three different emergency regulations which include:

(1) The Defense (Emergency) Regulations of 1945 are security laws which were enacted by the British Mandatory Authority and were later adopted by Israel. These regulations empower the military to obstruct freedom of movement, disband unlawful associations and set curfews when security requires such actions.

(2) Section 9 of the Law and Administration Ordinances of 1948 grants

may "alter, suspend, or modify any law of the Knesset."[115] Though both the Occupation Law and the Human Dignity Law are equally important to the establishment of civil rights in Israel, this note will focus on the Basic Law: Human Dignity and Liberty as it relates to whether the Knesset may bypass the High Court of Justice ruling regarding GSS interrogation methods. Additionally, this analysis will take into account the aforementioned emergency regulations and whether they will aid the Knesset in bypassing the ruling, if it chooses to do so.

B. The Government of Israel (Executive and Legislative Branches)

Israel is considered a representative parliamentary republic centered around its legislature.[116] Israel's legislature, the Knesset, is unicameral[117] and composed of 120 members.[118] In addition to serving as the legislative branch of Israel, the Knesset is a constituent assembly.[119] It can, therefore,

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emergency powers to the legislature, allowing it to proclaim a state of emergency and to enact emergency regulations in order to protect state security. In so doing, the legislature can derogate from any existing laws. Such powers have been exercised mostly during times of war.

(3) Emergency Powers (Detention) Law of 1979 grants Defense Minister the power to issue administrative detention for up to six months when he has reason to believe that a person poses a threat to national security. Such a procedure may only be exercised during a state of emergency.

Id. (footnotes omitted). "The Supreme Court held that detention orders shall be granted only if 'it is proven that the risk of security . . . is so serious that it is necessary to infringe upon the rights of the detained.'" *Id.* at 131.

115. Maoz, *supra* note 65, at 23.

> [T]he most serious deviation from the doctrine of separation of powers concerns the authority that is vested in the ministers to promulgate emergency regulations, which may alter, suspend, or modify any law of the Knesset. While it is true that this authority exists only as long as the Knesset declares that a state of emergency exists, such a declaration was made soon after the establishment of the State of Israel and is still in force. The only limitation upon the ministerial powers concerning the promulgation of emergency regulations is that said regulations expire after three months, unless they are either extended or revoked earlier by the Knesset. Only a handful of basic laws are shielded from the possible effects of the emergency regulations: the Basic Law: The Knesset; the Basic Law: The Government; the Basic Law: Freedom of Occupation; and the Basic Law: Human Freedom and Dignity.

Id.

116. *See* ZEMACH, *supra* note 92, at 31.

117. *See id.* at 33 (Unicameral refers to the Knesset being composed of only one branch).

118. *See id.*

119. *See* Maoz, *supra* note 65, at 11. Israel's Declaration of Independence called for the election of a constituent assembly to create a constitution for the State of Israel. This constituent assembly was elected shortly after Israel's formation, but that assembly did not create a constitution. Instead, it declared itself to be the legislative body of the State, and, consequently, the Knesset acts as both the legislature of Israel and as the body capable of making a

"bind future Knessets by virtue of its authority."[120] The Knesset reigns supreme over the other branches of government because in the absence of a formal constitution there are no restrictions on its legislative activities, except for a handful of entrenched clauses found in certain basic laws.[121] In addition to its role as the legislative branch of government, the Knesset acts as the supervisor of the other branches. This is particularly so with the executive branch. The State Comptroller, who reports directly to the Knesset, supervises the executive branch by examining the legality of measures taken, reviewing their proper and efficient functioning, and providing cost analysis of the measures involved.[122] The State Comptroller also serves as the Public Ombudsman to address complaints made by the public concerning government bodies and persons.[123]

The executive branch of the government is composed of the Prime Minister and the President of the State. The Prime Minister serves as the head of the executive while the President serves as a figurehead with few authoritative powers.[124] The Government, or executive branch, is subject to the approval and/or confidence of the Knesset — "A Knesset's vote of no-confidence in the Prime Minister . . . brings with it the dissolution of the Knesset and the holding of Knesset and Prime Minister elections."[125] Although understanding the role of the executive branch of the Israeli government is essential to comprehending the functions of the Israeli government as a whole, it is not particularly relevant to the topic in this note. This note will instead focus on the Knesset and its relationship to the judicial branch, particularly with regards to whether the Knesset can bypass the court's ruling on GSS interrogation methods.

C. *The Judicial Branch*

The judicial system is divided into two categories. The first is comprised of general courts of law which enjoy general jurisdiction.[126] The

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constitution. *See id.*

120. *Id.* at 15.

121. *See id.*

122. *See* ZEMACH, *supra* note 92, at 42.

123. *See id.*

124. *See* Maoz, *supra* note 65, at 28.

> The Supreme Court described the position of the President as follows: 'The President is supreme over the various branches of the Government in that he symbolizes the whole of the State and of its institutions.' However, the President holds merely a figurehead position. Indeed, the President lacks any governing authority, not only in comparison with presidential regimes, but also in comparison with most parliamentary regimes.

Id. (footnote omitted).

125. ZEMACH, *supra* note 92, at 41.

126. *See* Maoz, *supra* note 65, at 31.

second constitutes the tribunals which enjoy only limited jurisdiction.[127] Israel's judicial system differs from that of the United States because it does not rely on a jury system. Instead, the judges decide both questions of law and questions of fact.[128] The High Court of Justice heads the judicial system, and its success may be attributed to the independent nature of that system.[129] The Court distinguishes itself from most other Supreme Courts in that every citizen enjoys direct access to it.[130] Because every citizen has the opportunity to be heard by the Court, it has taken on the role as the guardian of civil rights.[131]

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127. *See id.* The tribunals recognized by the Israeli legal system are the military, labour, and religious courts. "The administration of each of these systems is independent, and there is an appellate framework within each system." *Id.* All of the judges that sit for these courts hold law degrees, except for the religious judge who is instead trained in the religious laws of their religious community. *See id.*

> The system of regular courts may be distinguished on three levels: (1) the Supreme Court; (2) the district courts; and (3) the magistrates' courts. The district courts and the magistrates' courts function as trial courts, and the distinction between them depends on the gravity of the matter. The jurisdiction of the district courts is residual to that of the magistrates' courts, in both criminal and civil matters.

Id. at 34.

128. *See* Wolf, *supra* note 114, at 123. "Israel has never adopted the jury trial. It was believed that the heterogeneous population - in particular, the political and social differences between Jews and Arabs - would not foster the concept of a jury trial." *Id.* (footnote omitted). *See also The Judicial System in Israel,* 34 TULSA L.J. 527 (1999) (The text is from a speech by the Honorable Amnon Straschnov and describes the general differences between the judicial systems of Israel and the United States.)

129. *See* Maoz, *supra* note 65, at 35. "All persons with judiciary powers enjoy complete independence with respect to the exercise of such powers. Such persons are, per section 2 of the Basic Law: Judicature, 'in judicial matters, subject to no authority but that of the law.'" *Id. See also* SHARFMAN, *supra* note 101, at 94 (stating that "The independence of the High Court of Justice was not a foregone conclusion; rather, it was established by the justices themselves in the course of their deliberations.")

130. *See* ZAMIR & ZYSBLAT, *supra* note 101, at 48.

131. *See* Wolf, *supra* note 114, at 121. The Court has stated its function as follows:

> In our state, lacking a constitution which protects the individual's fundamental freedoms explicitly, this court, sitting as a High Court of Justice is obliged to guarantee these freedoms and to bestow the remedy applied for by the citizen when one of his basic rights was injured by an act of government.

Id. at 121 (quoting the Court in H.C. 152/71, *Kremer, et. al. v. Municipality of Jerusalem, et. al.*, 2591 P.D. 767, 782 (1971)). *See also* Maoz, *supra* note 65, at 34.

> [It] functions as both an appellate court and a High Court of Justice. In its capacity as an appellate court, the Supreme Court entertains appeals from decisions rendered by the district courts . . . . In its capacity as a High Court of Justice, however, the Supreme Court sits as a trial court from which there is no appeal, and in that capacity is also authorized to issue prerogative writs against State authorities and against other authorities and individuals that operate by virtue of law.
>
> . . . [O]f all the courts in Israel, the High Court of Justice is the only one that is

The scope of judicial review of the Supreme Court is expansive — "no public authority is immune from judicial review."[132] The doctrine of standing[133] supports the broad scope of judicial review because the Court typically grants standing even if the petitioner lacks a personal interest in the claim, so long as the matter involves a constitutional dimension.[134] The justiciability doctrine of the Israeli Supreme Court is also not as limiting as that of other nations. "The Court has jurisdiction to deal with any public matter that comes before it, but can nevertheless decide that a certain matter is unsuitable for judicial determination."[135] In the beginning, the Court failed to recognize this broad scope of review and justiciability, particularly in areas of national security. For example, Justice Haim Cohen, who served as attorney general during the 1950s, described the prevailing attitude:

> competent to issue a mandamus order against the State and its organs. Thus, the High Court of Justice serves in principle as an administrative court. The Supreme Court's judicial review of administrative action serves as a method to both supervise governmental activities and protect civil liberties.

Id.

132. Zeev Segal, *Administrative Law, in* INTRODUCTION TO THE LAW OF ISRAEL 69 (Amos Shapira & Keren DeWitt-Arar eds., 1995).

133. *See id.* at 67. There are two approaches to the doctrine of standing in administrative law. The first is the subjective approach, "which places the emphasis on the role of judicial review in protecting individuals whose particular and personal interests have been affected." *Id.* The second approach is the objective approach, which "regards judicial review as a method for enforcing the rule of law and the legality of administrative acts." *Id.*

134. *See id.*

> In recent years, the Supreme Court has adopted a flexible attitude towards standing and abandoned the conservative and traditional approach. The Court has shown its readiness to grant standing when the matter at hand is of constitutional importance. The Supreme Court has, for example, recognized the standing of lawyers and law professors to challenge the President's decision to grant clemency to several members of the General Security Services who had been charged with alleged crimes in the course of their interrogating terrorists. The Court stated that 'the absence of a real personal interest does not justify dismissal of the petition.' The Justices noted that a liberal view of standing should be adopted where the question is 'of public interest related directly to the advancement of the rule of law.'

Id. (quoting H.C.J. 428/86, Barzilai v. Government of Israel, 40(3) P.D. 505, *translated in* 6 SELECTED JUDGMENTS SUP. CT. ISR. 1, 43 (1986)) (footnote omitted).

135. Segal, *supra* note 132, at 68.

> In recent years, the Supreme Court has clearly indicated that the range of cases that it considers to be unjusticiable has been substantially narrowed down. Apparently, the Court will only avoid matters that are of a predominantly political nature, as opposed to those of a legal nature. . . . However, it is also clear that the Court will examine a whole range of state acts that might be held to be unjusticiable in other legal systems.

Id.

> If the chief of the Security Services told me that something was a vital necessity, I didn't give it a second thought. The security situation during the first years of statehood was such that if I was told that the security of the state required a particular action, I accepted it even at the expense of human rights.[136]

The judicial review of classified materials became permissible after the 1968 Amendment to the Law of Evidence.[137] The prevailing view of the Court today in regard to matters of national security can be summarized in a statement by Justice Olshan, who stated, "While it is true that state security, which requires detaining an individual, is no less important than the need to preserve civil rights, whenever it is possible to achieve both aims, one should not ignore one or the other."[138] Today, when the Court is faced with a claim involving national security and human rights it employs a balancing of interests test. This requires the Court to weigh the restricted freedom of an individual against the need for public order and/or national security.[139]

Although the Court derives its jurisdiction and power directly from the legislature, the High Court of Justice ruled that "it has the authority to review any administrative action, including that of the Knesset."[140] Since the

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136. SHARFMAN, *supra* note 101, at 98 (quoting T. Segev, *Interview with Justice Haim Cohen*, HA'ARETZ, Mar. 12, 1981 (footnote omitted)).

137. *See id.* Although this law permitted the Court to hear sensitive material, this was not the case for the petitioner. The Court would hear the classified information behind closed doors. Neither the petitioner, nor his counsel, was permitted to sit in on these meetings. *See id.* at 99.

138. *Id.* at 96 (quoting Y. OLSHAN, LAW AND JUDGMENTS 106 (Jerusalem and Tel Aviv: Shocken, 1979) (Hebrew)) (footnote omitted).

139. *See* ZAMIR & ZYSBLAT, *supra* note 101, at 331.

> [I]n cases involving the restriction of [some] freedom . . . on the ground of public order or national security, the Supreme Court has repeatedly held that the freedom concerned . . . is a relevant consideration for the authority. The authority must weigh this consideration against other relevant considerations. . . . Once [the Court has] established [a standard], the standard serves as a guideline in the future exercise of administrative discretion . . . .

Id.

140. Maoz, *supra* note 65, at 35.

> In determining its scope of intervention *vis-à-vis* the Knesset, the Court distinguishes between various functions of the Knesset. For example, although the scope of the Court's judicial review over legislation is 'narrow,' its scope of judicial review over both administrative action and quasi-judicial decisions is quite broad. . . . Moreover, the Court does not hesitate to invalidate laws that contradict any of the entrenched provisions of the basic laws, unless the particular law in question is adopted by the mandatory special majority.
>
> In the recent *La'or* case, Justice Barak stated that the Court, in principle, has the power to declare a law void if it contradicts a fundamental principle of the system, even in the absence of either a written constitution or an entrenched

adoption of the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty, Supreme Court decisions have adhered to these laws and protected human rights. In support of this notion, Justice Aharon Barak stated, "Human rights are no longer subject to the laws of the Knesset. From today forward, the laws are subject to human rights."[141]

VII. THE KNESSET OPTION TO BYPASS THE HIGH COURT OF JUSTICE RULING ON TORTURE

The Supreme Court ruling on the use of torture prompted strong and divergent responses among many Israeli citizens, including those occupying high level government positions. The Court anticipated such a controversy and, thus, provided for a potential method of bypassing its conclusion.[142] In addition to the Court's invitation to the legislature to resolve the issue, the Knesset, by virtue of its superiority over the three branches of the Israeli government, always retains the ability to circumvent the Court's rulings through ex-post facto legislation.[143]

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basic law according such power.

Id. (citing H.C. 142/89, La'or Movement v. Chairman of the Knesset, 44(3) P.D. 529 (1990)). *See also* Wolf, *supra* note 114, at 120.

> Although the judiciary does not have equal standing with the Knesset, civil rights have not been seriously curtailed. Viewing itself as the sole guardian against governmental impropriety, the Supreme Court of Israel has prevented the erosion of civil liberties and kept government in check. It has accomplished this by internalizing the legal norms of a democratic society through judge-made law.

Id. (footnote omitted).

141. Segal, *supra* note 132, at 71 (quoting Aharon Barak, 3 *Interpretation in Law-Constitutional Interpretation* 29 (1994)).

142. *See* H.C. 5100/94, Public Committee Against Torture in Israel v. Israel, (Sept. 9, 1999) 25-26, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html.

> Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latters' dignity and liberty, raise basic questions of law and society, of ethics and policy, and of the Rule of Law and security. These questions and the corresponding answers must be determined by the Legislative branch. This is required by the principle of the Separation of Powers and the Rule of Law, under our very understanding of democracy . . . .
>
> If the state wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability.

Id.

143. *See* Wolf, *supra* note 114, at 120.

> In the absence of a written constitution, the Supreme Court of Israel cannot strike down a law: "[e]very law or part of a law which is passed by the Knesset must be enforced." In addition, the decisions of the Supreme Court are susceptible to circumvention through ex post facto legislation and administrative emergency

The Occupation Law and the Human Dignity Law have paved "the way for judicial review of Knesset legislation on the grounds that it violates human rights."[144] If the Knesset decided to pass legislation to circumvent the Court's ruling, the Court would examine that legislation as it relates to the Human Dignity Law because any proposed legislation would involve the use of physical means in interrogations. Thus, the legislation could potentially violate someone's human dignity, which the Court is required to protect.[145] The Court would likely use the balancing test proscribed in the Human Dignity Law to determine the legality of any legislation passed by the Knesset. This test provides that the rights proscribed in the Human Dignity Law shall only be infringed by a statute that is directed towards a worthy purpose and does not exceed what is necessary.[146]

Although Israeli emergency regulations may dispose of any law passed by the Knesset, it is doubtful that they would affect the Court's ruling. This is so for two reasons. First, the Court indicated that even with respect to emergency laws judicial control exists to monitor the civil and military administration.[147] Second, the Basic Law: Human Dignity and Freedom is

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legislation. Therefore, the judiciary is the subordinate branch of government. *Id.* (footnotes omitted).

144. David Kretzmer, *Constitutional Law, in* INTRODUCTION TO THE LAW OF ISRAEL 52 (Amos Shapira & Keren DeWitt-Arar eds., 1995).

145. *See id.* "The term 'human dignity' is not defined in the basic law and may be employed to include many fundamental rights not expressly mentioned, such as . . . the right not to be subjected to cruel, unusual or degrading punishment or treatment." *Id.*

146. *See* Kretzmer, *supra* note 105, at 246.

> This test appears in section 8 that states: "The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary."
>
> This section must be read together with section 1 of the Law that . . . refers to the "values of the State of Israel as a Jewish and democratic state". . . . [The Supreme Court] will have to decide not only whether legislation that restricts basic rights is directed towards a worthy purpose and that the restrictions on those rights do not what is necessary, but that such legislation "befits the values of the State of Israel as a Jewish and democratic state."

Id. See also ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATIONS OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS, *supra* note 100, at 10-12.

147. *See* Wolf, *supra* note 114, at 131.

> Since 1948, the Supreme Court has demonstrated increased willingness to scrutinize security action. The subsequent change in attitude of the Court to the continuous state of emergency and defense regulations is typified by Supreme Court Justice Haim Cohn, who has stated, "even in respect of all emergency laws and regulations, judicial control has at all times been, and will continue to be very zealous, and readily available to watch over the civil and military administration to insure that nobody exceed or misuse the authority vested to him by law."

Id. (quoting Cohn, *The Spirit of Israeli Law*, 9 ISR.L.R. 456, 457 (1974)) (footnote omitted).

shielded from the possible effects of emergency regulations.[148] Therefore, any legislation passed by the Knesset must also pass the balancing test found in Basic Law: Human Dignity and Freedom in order to sustain constitutional scrutiny.

VIII. CONCLUSION

Due to the inherent controversial nature of the High Court of Justice's ruling on torture, the Knesset will likely attempt to draft legislation bypassing the ruling and, in effect, reinstating the use of "moderate physical pressure" as a legitimate means of interrogation. In order for this legislation to withstand constitutional scrutiny however, it must pass the Court's balancing test. This test requires the Court to consider both the security issues at stake as well as the potential violation of the rights of the accused. For the legislation to be declared lawful by the Court, it must not exceed what is necessary.

It is unlikely that the Court would declare the large scale use of "moderate physical pressure" in GSS interrogations as not exceeding what is necessary. This is so for a number of reasons. First, the Court champions itself as the guardian of civil rights. To allow the government to use physical means in its interrogations would be a clear violation of the rights the Court has sworn to protect. Second, the Court is sensitive to the international condemnation of such methods. Although the Court is not bound to follow international laws, it is likely that it would consider those laws when it examined any legislation that legitimized the use of physical means in GSS interrogations. Lastly, because the Court did not forbid the use of physical means in "ticking time bomb" scenarios, it left the door open for the use of "moderate physical pressure" in extreme situations. It, therefore, would not see a reason to justify the broad scale use of "moderate physical pressure" in GSS interrogations. Thus, legislation legitimizing the large scale use of physical means in interrogation will fail the Court's balancing test and be declared as a violation of constitutional law. The High Court of Justice's ruling, therefore, will likely withstand any Knesset attempt to reinstate the broad scale use of "moderate physical pressure" as a legitimate form of interrogation.

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148. *See* Maoz, *supra* note 65, at 23.

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