LEGAL ASPECTS OF TACKLING TERRORISM: THE BALANCE BETWEEN THE RIGHT OF A DEMOCRACY TO DEFEND ITSELF AND THE PROTECTION OF HUMAN RIGHTS

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"Terrorism is the cancer of the modern world. No state is immune to it. It is a dynamic organism which attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer: unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags it down to destruction," said P. Johnson in an article some years ago.[1]

This article tries to study whether there are or should be special rules of evidence and procedure to govern interrogations of terrorists.

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[1] P. Johnson, *The Cancer of Terrorism, in* TERRORISM: HOW THE WEST CAN WIN 31 (B. Netanyahu ed., 1986).

My conclusion is that, though terrorism might be an existential problem to a democratic state, human rights should be preserved, nonetheless. The balance between the right of democracy to defend itself against terrorism and the preservation of human rights should be derived from the concepts of democracy, the rule of law and humanity. This article also embraces the remark of our great scholar and Chief Justice Bark when he stated: "Human rights are extremely important and a democracy should respect them, but a democracy does not have to commit suicide and sacrifice the lives of her citizens for the sake of proving her viability."

I. INTRODUCTION

Often, we hear of terrorist attacks. Every state desires to defend itself against terrorism that threatens its citizens and instills fear in their hearts. The organizations fighting terrorism generally carry out their operations covertly, to prevent terrorist organizations from circumventing them. Yet, the secrecy of the organizations also affords the potential for them to improperly exploit the powers at their disposal.[2]

Today, terrorism poses a threat to humanity as a whole, without distinguishing race, religion or gender. It is a global problem that challenges communities throughout the world.

Liberal democratic states are confronted with an exceptional and grave challenge when fighting terrorism:

> Liberal democracies face a unique challenge in maintaining the security of the state. Put very simply, that challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process. Authoritarian and totalitarian states do not have to face this challenge. In such countries there is no need to ensure that security agencies, whose techniques inevitably involve a great deal of secrecy, be accountable to an elected legislature. Nor is there a requirement in such states that all of their security measures be authorized or provided for by law and that none of their officials be above the law. Only liberal democratic states are expected to make sure that the investigation of subversive activity does not interfere with the freedoms of political dissent and association which are essential ingredients of a free society.[3]

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[2] Iain Cameron, *Report of Committees: Second Report of the Royal Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, 48 MOD L. REV. 201, 206 (1985).

[3] 1 COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE – FREEDOM AND SECURITY UNDER THE LAW, SECOND REPORT (1981) 43 [hereinafter *The Canadian Second Report*].

From its establishment, Israel has been subject to recurring acts of terrorism. These acts have spread fear and panic among the population. They disrupt daily life. No one knows where or when the next attack will take place. Terrorist attacks are generally carried out in public places, bus stations, coffee houses and pedestrian malls; persons of every description and every age are affected. Yet, the numerous terrorist attacks in Israel are a drop in the ocean compared to the attacks, attempted attacks, and subversive operations that have been prevented by the Israeli state. The General Security Service (GSS) is the central body carrying the burden of the war against terrorism. It conducts investigations during which it gathers relevant information and makes use of physical interrogation techniques.

Recently, the High Court of Justice in Israel[4] heard a petition regarding the legality of these methods of interrogation. The petition argued that GSS interrogators had no authority to interrogate persons suspected of terrorist activities. It asserted that the GSS did not have the authority to use methods of interrogation entailing moderate physical pressure or non-violent psychological pressure. More importantly, the petition argued that the physical measures applied during the course of interrogations infringed the human dignity of suspects and involved criminal offenses that violated international conventions prohibiting torture. Further, the Association for Civil Rights in Israel petitioned the Court to prohibit the GSS from shaking suspects during interrogations. In a number of supplemental petitions joined to the main petition, the Court was asked to find that the investigative measures employed against specific persons were unlawful. The Court found that the GSS was not authorized to make use of the interrogation techniques employed.

In light of the Court's judgment, the question of the scope of the prohibition on interrogations involving physical and psychological measures arises more insistently. Is there indeed justification for prohibiting every type of physical interrogation or is there merely a line that cannot be crossed? The purpose of this article is to

[4] H.C. 5100/94 The Public Committee Against Torture v. Israel (not yet published) *available at* www.court.gov.il/mishpat/html.en/verdict/judgment.rtf (last visited Feb. 27, 2001) [hereinafter *GSS Interrogation Case*].

circumscribe and identify those measures that may be employed and those measures that may be deemed torture and therefore prohibited.

The first section of this article examines a number of definitions proposed for the term "torture." It considers the distinction between torture and inappropriate treatment or treatment which may be inhumane. The second section attempts to define terrorism and who should be regarded as a terrorist, in contrast, for example, to legitimate political opposition. The judgment in the *GSS Interrogations case*, referred to above, also raised the question whether the GSS interrogators, when employing the interrogation methods under attack, indeed infringed on provisions of the criminal law, and whether they could use the defense of necessity. The third section of this article examines whether the necessity defense is appropriate in these circumstances or whether there is a more fitting criminal defense, such as justification. In this context, this section considers the question of whether torture during interrogations may be justified, for example in the situation elaborated upon below of a "ticking bomb." Additionally, this section looks at the question of whether confessions should be admissible in the light of the defenses possibly afforded to the activities of the interrogators -- should we aspire for harmonization between the Penal Law and the defenses conferred by it and the laws of evidence? The fourth section describes a number of interrogation methods, some of which have been acknowledged and declared to be torture. This section compares the investigative methods employed in Israel and Britain to the methods employed by the United States and Canada. The fifth section considers the problem of the admissibility of confessions made during interrogations. The final section looks at whether there is a need for a counter-terrorism law particularly in the light of the problems arising from existing statutory arrangements.

II. WHAT IS TORTURE?

Prior to turning to an examination of permitted means of interrogation, and whether such existing means may amount to torture, it is necessary to consider what may be deemed torture. There is no clear definition of this term. According to Article 3 of the European Convention for the Protection of Human Rights,[5] there is a distinction between "torture" and "inhuman or degrading treatment," however, in that Article too, the meaning of torture is not clear.

Torture may be either physical or psychological. While physical torture is bodily pain, deliberately and directly caused, psychological or mental torture injures the person's soul. The form of the torture a person undergoes is irrelevant, the assumption is that any torture will cause both physical and mental pain.[6]

The majority opinion in the case of *The Republic of Ireland v. The United Kingdom*,[7] in the European Court of Human Rights, held that there is a difference between torture and inhumane treatment. Torture is the deliberate use of inhumane treatment that causes severe and cruel pain and suffering.[8] In contrast, Judge Matscher was of the

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[5] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222, 224 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). *See also* Universal Declaration of Human Rights, G.A. Res. 217(A)III, U.N. GAOR, 3d Sess., pt. 1, art. 5, U.N. doc. A/810 (1948); International Covenant on Civil and Political Rights Dec. 19, 1966, art. 7, 999 U.N.T.S. 171,175.

[6] Human Rights Watch, TORTURE AND ILL-TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 77-78 (1994).

[7] Republic of Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H. R. Rep. 25 (1978) [hereinafter *The Ireland Case*].

[8] *See id. at* 80. *See also* Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39,46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51.

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

opinion that the difference between the two categories does not arise from the intensity of the suffering, but rather from the fact that the torture is calculated, routine and deliberate, and causes physical or mental suffering, all for the purpose of breaking the spirit of the suspect, and to coerce him into performing an act, or to cause him pain for another reason, such as sadism *per se*. The judge, however, did not reject the existence of a certain threshold needed to constitute torture.[9] A number of judges in the same case viewed the definition of torture differently. Judge Zekia believed that it is necessary to examine whether torture is being practiced in particular circumstances using a subjective test and not only an objective test. Thus, in his opinion, the definition of torture should include a number of additional criteria that must also be taken into account, such as the nature of the inhumane treatment, the means and practices entailed by it, the duration and repetitiveness of that treatment, the age, sex, and state of health of the person undergoing the treatment, and the likelihood that the treatment will cause psychological, mental, or physical pain to that person.[10] The need for this analysis was explained by the judge in the following excerpt from the opinion:

> It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. art. 1.

[9] *The Ireland Case*, *supra* note 7, at 145. The judge further noted that modern practices often amount to torture, whereas brutality leading to greater physical pain does not fall within the definition of torture:

> One is aware of those modern methods of torture which, superficially, are quite different from the brutal and primitive methods which were used in the past. In that sense, torture is in no wise inhuman treatment raised to a greater degree. On the contrary, one can think of brutality causing much more painful bodily suffering but which does not thereby necessarily fall within the concept of torture.

Id. at 145.

[10] *See id.* at 108-09; *see also* Natan Lerner, *The U.N. Convention on Torture*, 16 ISR. Y.B. ON HUM. RTS. 126, 132 (1986) (explaining that the term "severe" hints at a relative test, which takes into account the physical condition of the person under consideration, his ability to protest, the psychological view of his understanding of what he is being coerced to do or refrain from doing, and numerous other circumstances which must be considered. The terms "pain" and "suffering," appearing in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, must be defined by each state separately).

> [T]he case of an elderly sick man who is exposed to a harsh treatment -- after being given several blows and beaten to the floor, is dragged and kicked on the floor for several hours. I would say without hesitation that the poor man has been tortured. If such treatment is applied [to] a wrestler or even a young athlete, I would hesitate a lot to describe it as an inhuman treatment and I might regard it as a mere rough handling.[11]

Judge Sir Gerald Fitzmaurice, in the same case, held that Article 3 of the European Convention did not define torture broadly. The judge pointed out that there are a number of circumstances which, from an objective point of view, may always be considered torture,[12] even though not all suffering may be torture.[13]

The very application of the term "torture" to a particular case signifies the adoption of a negative moral stance in relation to it; in other words, it is an assertion that the particular act is prohibited. Accordingly, not every infliction of severe pain is torture, it may merely be the prohibited infliction of pain.[14]

Notwithstanding that the term has not been accorded a clear definition, there are a variety of distinctions between different types of torture, which depend upon the purpose of the torture. There are four discrete situations in which there is a temptation to employ torture: (1) interrogation, (2) instilling fear, (3) punishment, and (4) prevention. With regard to torture for the purpose of punishment, there is apparently a consensus that it is prohibited.[15] Among the other types of torture, there is also interrogational torture and terrorist torture. Terrorist torture refers to torture aimed at deterring those members of the group to which the suspect is affiliated by instilling fear, so that

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[11] *See The Ireland Case*, *supra* note 7, at 109.

[12] *See id.* at 125.

[13] *See id.* at 127.

[14] Daniel Statman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 MISHPAT U-MIMSHAL [LAW & GOV'T IN ISR.] 161, 163 (1997).

[15] Leon Sheleff, *On The Lesser Evil -- On the Landau Committee Report*, 1 PLILIM [ISR. J. OF CRIM. JUST.] 185, 199-200 (1990). (stating that the prohibition on the use of torture for the purpose of punishment was set out, for example, in the Eighth Amendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*" (emphasis added)).

they shall cease their activities. Interrogational torture is the infliction of severe physical or mental pain during the course of the interrogation, with the purpose of extracting certain information from the suspect, and not for the purpose of deterrence or instilling fear alone.[16]

III. WHAT IS TERRORISM AND WHO IS A TERRORIST?

Like the term "torture," it is difficult to classify the term "terrorism" or provide it with a clear definition or interpretation. This term was conceived during the French Revolution when the government created a reign of terror to execute political opponents, requisition their property and impose terror over the remainder of the population until they yielded to the government.[17] Nonetheless, the majority of the definitions have a common basis -- terrorism is the use of violence and the imposition of fear to achieve a particular purpose, generally entailing the aspiration to overthrow an existing regime, or fight it, and where the persons forming the group organize in a tightly controlled structure. An additional aspect of this distinction is provided by an examination of whether the activities of the particular group are morally supported by the state.[18] If, in the past, terrorism was localized and confined to a particular area, today, the problem is worldwide. Today, terrorist organizations exchange intelligence information, fighting tactics, weaponry, etc. Further, the support of states such as Iran, Libya and Iraq, in the provision of funds, weapons, intelligence, and training facilities, promotes terrorist activities. Nowadays, the terrorist groups also organize swiftly, without registering any regular activities. Terrorism draws its power both from political sources and from religious sources.[19] Moreover, a new

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[16] Statman, *supra* note 14, at 162.

[17] David B. Kopel and Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 251 (1996).

[18] David C. Marshall, *Political Asylum: Time for a Change -- The Potential Effectiveness of Reforms to Prevent Terrorist Attacks in America*, 99 DICK. L. REV. 1017, 1018-19 (1995).

[19] *See id.* at 1020-21, 1031-32.

medium has been opened for terrorist activities -- terrorism *via* the Internet, expressed through web sites or the temporary closing of web sites, thereby causing significant damage. Accordingly, today, this form of terrorism must also be taken into account when defining terrorism.

Section 14(1) of the English Prevention of Terrorism (Temporary Provision) Act, 1984, and Section 20(1) of the English Prevention of Terrorism (Temporary Provision) Act, 1989, defines "terrorism" as follows:

> Terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.[20]

Use of the term "violence" hints at unlawful behavior, or, more precisely, at the commission of offenses that entail a threat to the safety of an individual. The term "political ends" emphasizes the fact that terrorist violence is a symbol for other issues.[21] However, there are a number of difficulties with this definition. First, the definition embraces a number of offenses that, as a matter of common intuition, should not be deemed terrorist activities. Thus, persons who, in the course of demonstrating against government policy, are involved in a brawl may be deemed to be terrorists, in light of this definition.[22] An additional problem ensues from the construction of the term "terrorist" in Section 31 of the Northern Ireland (Emergency Provisions) Act, 1978.[23]

In *McKee v. Chief Constable of Northern Ireland*,[24] the Irish Court of Appeal held that it was necessary to prove active and not passive participation, in order for the accused to be deemed a terrorist. Thus,

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[20] Prevention of Terrorism (Temp. Provisions) Act, § 20 (1989) (Eng.), in LEXIS Statutes and Statutory Instruments of England and Wales database.

[21] Clive Walker, THE PREVENTION OF TERRORISM IN BRITISH LAW 5 (1986).

[22] *Id.* at 6.

[23] *Id.* "[T]errorist ... a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organizing or training persons for the purpose of terrorism...." (quoting Northern Ireland (Emergency Provisions) Act, 1978).

[24] *See* Walker, *supra* note 21 at 6.

members of terrorist organizations or supporters thereof, would not be regarded as terrorists so long as they remained passive.[25] This construction was not adopted in the Prevention of Terrorism (Temporary Provision) Act, 1989, as may be seen from the provisions of that statute.[26] Schedule 1 of the statute declares two organizations to be terrorist organizations -- the Irish Republican Army (IRA) and the Irish National Liberation Army (INLA). In addition, it declares that anyone affiliated with or supporting these organizations will be deemed a terrorist. The Secretary of State may add or remove organizations from this list.[27]

The characteristics of terrorist organizations and their structure are as follows: a traditional and effective terrorist organization is based on a number of key figures positioned at the core of the organization. A larger organization generally consists of a number of cells, each of which is responsible for a particular activity and reports directly to the cell above it. Terrorist organizations comprise both men and women, typically from prosperous families in their twenties. Many are solicited from college campuses. Inside the organization itself, the background of the members is of no importance. Each member is trained to carry out his particular task.[28]

The definition of terrorism as a violent act may be problematic. An accidental killing or act of preservation of public order by the police or army, which no one would deem to be an act of terror, might fall within such a definition of violence. However, as already noted, they will not be defined as acts of terrorism *per se*. Possibly, the distinction lies in the legal motive for the violence, *i.e.*, violence which is carried out in order to preserve public order will not be deemed a violent act in the nature of terrorism. Similarly, a person demonstrating against a particular government policy will not be declared a terrorist despite the fact that he may fall within certain of the definitions of terrorism. Generally, agreement will exist as to what is terrorism and what is not, although not on the basis of a formal construction of the term. An additional problem in categorizing

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[25] *See id.*

[26] *Supra* note 20.

[27] *See* Walker, *supra* note 21 at 34.

[28] Marshall, *supra* note 18, at 1019-20.

terrorism is that terrorism is treated in the same way as every other criminal offense. The moment a person is caught and convicted, he is a criminal prisoner for every purpose. No special distinction is drawn between terrorist offenses and other criminal offenses.[29] It is also very difficult to distinguish between terrorist offenses and offenses that involve violence or the threat of violence.[30] If we fail to preserve the clear dichotomy between a "regular" criminal offense and a "terrorist offense," a slippery slope problem may arise. In the absence of a clear dichotomy, unique measures applicable to terrorist offenses may enter the ordinary criminal procedure. An additional example of the lack of a clear dichotomy may also be seen in the United States. A number of U.S. federal statutes define terrorist acts, for example, as the threat to place a bomb. The definition of terrorism in the U.S. in legislative proposals include all the violent crimes -- sex offenses, assault with a dangerous weapon, assault causing grievous bodily harm, and every offense of kidnapping, manslaughter, creating a risk of grievous bodily harm, causing an injury in the course of destroying property, causing invalidity, *etc.*[31]

An additional attempt to define and circumscribe acts that may be deemed terrorism is set forth in the following, somewhat extreme, provision that is based on the characteristics and motives of terrorists:

> Terrorism is the crassest antithesis to democracy. It is the attempt to subjugate and pervert the will of the people and its elected leadership by a minute bunch of reckless people resorting to terrifying threats and unbridled violence. They say they kill for the cause. What is that cause? Liberty from oppression? Freedom from want? Justice for people? If that would be their cause, how could they plot the extermination of another people, terrorize their

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[29] *See* Wilson Finnie, *Old Wine in New Bottles? The Evolution of Anti-Terrorist Legislation*, 1990 L. J. OF SCOT. U. JUD. REV. 1, 2-3 (1990). The Prevention of Terrorism Ordinance -- 1948 includes criminal terrorist offenses, notwithstanding that the purpose of the Ordinance is to assist in the war against terrorism and not be penal in nature. *Inter alia*, provision is made for criminal offenses in relation to activities in a terrorist organization and membership in a terrorist organization.

[30] W.L. Twining, *Emergency Powers and Criminal Process: The Diplock Report*, CRIM. L. REV. 406, 412 (1973).

[31] Kopel and Olson, *supra* note 17, at 323. *See also* 18 U.S.C. § 2332b (2000).

> own kinsmen and stuff their war chests with oil money from Saudi Arabia, to finance the assault against the regimes of these countries? Their cause is killing. Their vocation is violence.[32]

There are three facets essential to a liberal democratic regime. The first is that there must be a responsible government; second, that the rule of law prevail in the state; and third, that no prohibition be imposed on legitimate political opposition to the regime.[33] Accordingly, not all opposition to the existing regime will be defined as terrorist activity, and caution should be exercised not to include permitted opposition within the framework of what is prohibited. In contrast, it should be recalled that democracy is also maintained by the preservation of security, and not only by the preservation of rights and freedoms.

IV. THE DEFENSE OF NECESSITY VERSUS THE DEFENSE OF JUSTIFICATION

The terms "torture" and "terrorism" do not possess a definitive interpretation. As we have seen, there are a number of degrees of suffering that do not fall within the boundaries of torture, but rather within the boundaries of suffering or inhumane treatment. However, assuming that the suffering imposed on the suspect during the course of interrogation reaches the level of torture, the question arises whether that torture may, on occasion, be justified, at least from a moral point of view. If so, it appears that those interrogators who have employed unacceptable interrogation methods may possess a defense.

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[32] Gideon Rafael, Chairman's Opening Remarks, Third Session of Jerusalem Conference on International Terrorism (July 3, 1979), *in* INT'L TERRORISM: CHALLENGE & RESPONSE 111-12 (Benjamin Netanyahu ed., 1980), *reprinted in* Ileana M. Porras, *On Terrorism: Reflection on Violence and Outlaw*, 1 UTAH L. REV. 119, 122 (1994).

[33] Cameron, *supra* note 2, at 203.

A. Can Torture be Morally Justified?

The very fact that there are no exceptions to the definition of torture in the Conventions referred to above, and the prohibition on torture is absolute, does not mean that there are no situations where torture may be justifiable. In contrast to the approach contending that moral obligations in general, and the obligation not to torture in particular, are absolute in nature, there is an approach which asserts that one should not make haste to attach the label "absolute" to moral obligations.

One situation where it may be morally possible to justify torture, is the case of the "ticking bomb," which shall be considered below.

1. Torture in a "Ticking Bomb" Situation

The phrase "ticking bomb" refers to the situation where there is no other choice, in the limited period of time available to prevent anticipated damage. One example is a situation where a bomb has been activated or is due to be activated. In such a situation, there may be no choice but to employ torture during the interrogation of a suspect. The premise is that the suspect is thought to know, directly or indirectly, details that may prevent potential damage, or at least minimize it. This phrase is employed not only where there is a bomb in the background, but also in situations where a captured criminal is known to torture his victims.[34] This article will only refer to the terrorist aspect -- to a bomb or the like.

It is not always clear when a particular situation may be regarded as a "ticking bomb" situation. This is because, generally, there is only information about an abstract intention to lay a bomb and it is not known whether this intention is serious or immediate. The "duration of the ticking" may theoretically be very long, and, on occasion, only an empty threat. The investigators dealing with the suspect do not know for certain how much time they have to extract relevant information from him. Further, they do not know for certain what the particular suspect knows. They can only make conjectures and assumptions as to the nature of the suspect's knowledge, and use their

[34] Statman, *supra,* note 14, at 171.

discretion to decide whether the case requires the adoption of measures that are generally prohibited from a moral point of view.[35] Following the 1995 explosion in Oklahoma, the press defined all terrorist militias, indiscriminately, as ticking time bombs.[36] In times of emergency, or in times that are unstable security-wise, any person who is suspected of being a terrorist may be improperly regarded as a "ticking bomb." Accordingly, it is necessary to exercise caution in evaluating the nature of the "ticking bomb" situation. It is also important to establish clear limits regarding the "duration of the ticking" that may justify torture. It appears that a situation wherein a bomb might be set off after a year, should not fall within the definition; however, a situation in which a bomb will certainly be set off within twenty-four hours, or within a very short period of time, should almost certainly fall within the definition.

In reality, "ticking bomb" situations are extremely rare. It is hardly ever known with great certainty that the particular suspect being interrogated possesses information that may frustrate a planned attack. Despite the rarity of these circumstances, the term "ticking bomb" is attached to numerous situations that do not fall within the definition, most likely to justify particular methods of interrogation.[37] An additional problem is that from the moment it is decided that the

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[35] *See id.*, at 173. Adding to these difficulties:

> As torture is one of the most serious and shocking acts from a moral point of view, a very heavy burden of proof lies on the person seeking to justify it. He must know with great certainty that there is indeed a bomb (notwithstanding that no one saw it apart from the terrorists); that it will explode if we do not neutralize it (that the terrorists were sufficiently professional); that it can indeed be neutralized (that it will not explode the moment it is touched); that the person in our hands indeed knows where the bomb is located (perhaps he was not privy to the information, or perhaps when they heard that he was caught, they transferred the bomb to another place); that if we torture him he will provide the desired information (and will not expire prior thereto, or keep silence, or provide false information); that if he provides the information we will be able to neutralize the bomb (it will not be too late); and that there is no other way of uncovering the bomb (for example, by means of sophisticated electronic means); and so forth.

(Translated from Hebrew).

[36] Kopel & Olson, *supra* note 17, at 282.

[37] M. Kremnitzer & R. Segev, *Exercising Force in GSS Interrogations*, LAW & GOV'T 667, 714 (1998) (Hebrew).

required information is within the possession of the suspect, a situation may arise where nothing said by that suspect will shift the interrogators from their determination to uncover information from him.[38] In other words, the moment the investigators decide that they are dealing with a person who possesses information that can prevent serious damage nothing will prevent them from torturing him until they are convinced that he has surrendered all the information they seek. Even if the suspect swears that he knows nothing, interrogators are not likely to believe him, even if he speaks the truth.

Furthermore, to justify torture from a moral point of view, the means of interrogation must be proportional to the situation. Thus, if there is information about the existence of a bomb that may kill many people, it may be possible morally to justify the torture of a suspect, even to the point of his death, to prevent the deaths of those people. However, if it is known that the explosion has been laid in a derelict place where no loss of life will occur, torture to the point of death cannot be justified.

Torturing the suspect is more justified when the suspect's responsibility for the crime that is about to be committed is greater and more direct. If, for example, the suspect only incidentally heard details of the crime and was threatened with death if he disclosed those details, there is little justification for using torture. Another aspect of that justification may be found in the fact that it is solely up to the suspect himself to end the torture applied during his interrogation. If he delivers the information that he had hoped to conceal, there is an assumption that his torture will be terminated.[39]

According to the utilitarian approach, to preserve the maximum general good of society, the interrogator will, on occasion, also have to breach values that are regarded as morally right. Professor Michael S. Moore points out that the proponents of the theory of utilitarianism will never be consistent in preserving a rule such as "never torture an innocent child." This moral tenet, in his view, has a place in academic

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[38] *See* Statman, *supra* note 14, at 174 (pointing out that the interrogators may torture with fervor simply in order to justify their existence, without any real need for this type of interrogation).

[39] *See id.*, at 185, 191.

debate but not as a rule of life because of the drawbacks of this approach in certain circumstances:

> If the rightness of action is ultimately a function of achieving the maximally good consequences available to the agent in that situation -- which is what *any* consequentialist believes -- then sometimes an agent ought to violate what he himself admits is the right rule. Suppose, for example, a GSS interrogator was certain about the immediately relevant facts ... he knows there is a bomb, that it will kill innocents unless found and dismantled, that the only way to find it is to torture the child of the terrorist who planted it. Suppose further he is already in possession of this information, and the costs of calculating utility are thus already "sunk"; suppose further that he himself is about to die and that he can keep his action secret, so that the long-term bad consequences stemming from his own or other's corruption of character will be minimal. In such a case, adhering to the best rule will not be best, on consequentialist ground[s].[40]

In Professor Moore's opinion, despite the above passage, it is forbidden to torture or harm innocents, even if the result of such activity will save other lives.[41]

B. Necessity or Justification?

On May 31, 1987, Israel decided, after two cases, to establish a commission of inquiry to examine interrogation methods used by the GSS during times of terrorist activity. The first case concerned Nafso,

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[40] Michael S. Moore, *Torture and the Balance of Evils*, 23 ISRAEL L. REV. 280, 296 (1989).

[41] *See id.* at 315. The article considers the example of the torture of a family member of the terrorist, in particular torture of his child, in order to break the terrorist and cause him to disclose information in relation to the bomb or terrorist activity, which can lead to the prevention of harm to many others. The article points out that if one continues with the line of thought of the pure theory of utilitarianism, then in such a situation, according to that theory, one is not entitled but actually obliged to torture the child. In the view of Professor Moore it is wrong to justify the torture of an innocent child, even if that torture will lead to favorable results, such as the saving of other innocent lives. In his opinion, the state should not authorize such a practice. *See id.* at 291-93.

a lieutenant in the army, who was convicted of treason and espionage as the result of a confession obtained by GSS investigators. Following his conviction, Nafso claimed that his confession had been coerced by torture. The second case related to the incident known as the *Bus 300 Affair*. In that incident, terrorists hijacked a bus. After gaining control of the bus, GSS agents were seen to capture two terrorists alive. Some time later, it was stated that these terrorists had been killed. The question that arose was: how did these terrorists die after they were captured alive? These two cases led to a debate regarding the investigative practices of the GSS in cases of terrorist activity. Ultimately, it was decided that this was an issue of great public importance that had to be examined. As a result, in 1987 a commission was established in Israel under the chairmanship of Justice Landau. The commission was charged with examining the investigative procedures of the GSS in cases of terrorist activities. The commission held 43 hearings during which it heard 42 witnesses, including prime ministers, GSS personnel -- from the heads of the service to the level of field officers -- members of the civilian and military services, and other public servants. Additionally, the commission examined experts in different fields and suspects who had been investigated by GSS interrogators. The commission also visited GSS interrogation centers.[42]

1. The Defense of Necessity

The commission concluded that even if the interrogation methods of the GSS interrogators entailed torture, these interrogators could avail themselves of the criminal law defense of necessity.[43] This

[42] Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, 1-3 (1987) [hereinafter The Landau Report] (Hebrew).

[43] *See* The Penal Law, 1977, S.H. 34 (at the time the Landau Report was issued, this was § 22 of the Penal Law, which had already been amended that year).

> A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things, at the requisite timing, and absent alternative means for avoiding the harm.

(Translated from Hebrew). *Id.*

determination has been the subject of extensive criticism. The defense of necessity was created for the situation in which a person commits an offense, but, from a social and moral point of view, it is undesirable that criminal liability be imposed on him. The defense of necessity is applicable in the case where a situation is forced on a person whereby, in order to prevent a real danger, his only recourse is to impair the protected interest of another. The concept underlying the defense is to prevent a great wrong by performing a lesser wrong. With regard to the difference between the wrong preferred and the wrong that is prevented, a number of approaches exist. One requires a clear difference. The logic behind this demand is to reduce mistakes. A second approach demands a great difference. The rationale behind this demand relates to the typical situation giving rise to the defense. If there is a great discrepancy between the act that is prevented in comparison to the prohibited act, it is clear that society would wish to apply the defense. However, if the rationale behind the defense is the prevention of mistakes, we would also want the defense to apply in the situation where the discrepancy is clear, but not necessarily great.[44]

In the past, there was no requirement of imminence in relation to the emergency situation that it was desired to prevent through the defense of necessity. The Landau Report stated that there was no need whatsoever for the requirement of imminence for the defense of necessity.[45] Extensive criticism has been voiced at this statement. The

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The language of § 22 which preceded this section included two defenses concurrently – self defense and necessity:

> A person may be exempted from criminal responsibility for any act or omission if he can show that it was only 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.

(Translated from Hebrew). *Id.*

But see S.Z. Feller, *Not Actual 'Necessity' but Possible 'Justification'; Not 'Moderate' Pressure, but either 'Unlimited' or 'None at All'*, 23 ISRAEL L. REV. 201 (1989). *See also* Oded Givon, *Use of Violence in GSS Interrogations or the Element of Immediacy in the Defense of 'Necessity'*, 10 LAW & MIL. 95 (1989) (Hebrew).

[44] Kremnitzer & Segev, *supra* note 35, at 723.

[45] *See* Landau Report, *supra* note 42, at 49-52 (clarifying the ground put forward in the Report for stating that there was no need for the requirement of immediacy, by the example of

commission put forward an example from the scholar Williams to illustrate its contention. Williams made a reference to a ship having a small hole in its hull. The ship is still safely anchored at harbor when the small hole is discovered. Accordingly, Williams contended, the situation is not one of imminent danger; moreover, the hole is a small one. The imminent danger will only arise in the open sea, but at that time, it will be too late to take action and the ship will sink. Therefore, the preventive step must be taken while the vessel is still at port, when the danger is not imminent.[46] Professor Feller disputes this analogy used by the commission:

> Every drop of water that enters the ship's hull at the beginning forms part of the flood that will capsize her in the end; the water's "attack" begins with the very first drop ... Every advance out to sea takes time and retreat to shore will require at least equal time, if not more ... There is no better example than this to demonstrate and define the "immediacy" condition inherent to "necessity."[47]

In the case of the "ticking bomb," there is an element of imminence, and the interrogator may have available to him the defense of necessity regardless of whether the timer is set for an hour later or for a day later. So long as the interrogator does not know with certainty how much time he has at his disposal to neutralize the bomb, for him, the danger could materialize at any minute. Accordingly, for the interrogator, the danger is imminent.[48] Today, the requirement of imminence has been incorporated into the law itself.[49]

2. Justification Defense

In contrast to the defense of necessity, which is available only in cases where the crime is anticipated, the defense of justification is

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the "ticking bomb." It was contended there that it was immaterial if the timer of the bomb was set for five minutes later or five days later).

[46] *See id.*

[47] Feller, *supra* note 43, at 207. *See also* Mordechai Kremnitzer, *The Landau Commission Report -- Was the Security Service Subordinated to the Law, or the Law to the 'Needs' of the Security Service?*, 23 ISRAEL L. REV. 216, 244 (1989).

[48] *See* Feller, *supra* note 43, at 207.

[49] *See* The Penal Law, *supra* note 43, at § 34K.

available only when a person acts for some justified reason given to him before the commission of the offense. Such justification can be a statutory provision, a provision in a statutory regulation, *etc.*[50] The rationale behind this defense is to enable people to act in accordance with the provisions of various laws without fear that they may be put on trial for such activity. The defense provides a predetermined defense for certain acts that are deemed worthwhile and beneficial to society. The defense of justification will apply only where other conditions of the law have been met. In contrast, the defense of necessity will apply only where the conditions of the defense itself have been met.

3. Which is More Appropriate -- Necessity or Justification?

The Landau Report recognized the defense of necessity as an appropriate defense for the GSS interrogators. However, is it actually the defense of necessity that is appropriate in such circumstances?

The commission itself called for the enactment of legislation to authorize and justify the activities of the GSS in general. Accordingly, in practice, the most appropriate defense in these cases is not the defense of necessity, as was asserted, but rather the defense of justification.

A criminal defense that is available to every citizen, including civil and public servants, cannot also provide a source of authorization for

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[50] *See id.* at § 34M.

> A person shall be exempt from criminal liability for an act performed in one of the following cases:
> (1) He was obliged or authorized, by law, to perform it;
> (2) He performed it by virtue of an order of a competent authority which he was obliged by law to obey, save if the order was manifestly unlawful;
> (3) The act as a matter of law required consent, where the act was required immediately in order to save human life or his person, or to prevent serious damage to his health, and if in the circumstances of the case it was not possible for him to obtain the consent;
> (4) He performed it on a person with lawful consent, during a medical act or treatment, the purpose of which was his good or the good of another;
> (5) He performed it during a sporting activity or sporting game,
> which are not prohibited by law and which are not contrary to the public good, and in accordance with the rules practiced therein.

(Translated from Hebrew).

certain activities. Only when a person is subject to the pressure of the moment, without prior preparation for the situation, is he likely to act out of necessity to save a number of people. The position is different if the same person attempts to act in a situation that could have been foreseen, relying on authorization available to him by virtue of the defense of necessity. The defense of necessity was not created for these situations. The defense of necessity is tested in the light of a particular situation, whereas an empowering statute confers authorization to act in advance and not retroactively. In addition, the power is granted for a general and not a particular situation. An additional danger inherent in the defense of necessity ensues from the lack of clarity as to when a situation is in the nature of a "necessity." Every interrogator will interpret "necessity" in a different manner. In a democratic state where the rule of law prevails, it is necessary to specify by statute the boundaries of individual rights. If certain exceptions are desired, these too must be prescribed by statute, as must be the identity of those entitled to the exceptions.[51]

The contentions raised against statutory regulation of GSS activities, in order that the defense of justification be available to the interrogators, include the contention that in order to preserve the effectiveness of the interrogation, it is necessary to maintain the

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[51] *See* Kremnitzer, *supra* note 47, at 216, 237-239, 241-242. Today, in the constitutional age, human rights determine the source of power of the governmental authorities. It is necessary to draw a balance between infringement of human rights and the rights themselves:

> The purposive interpretation of human rights determine the extent of their application. The internal balance between the purposes underlying the human rights determines the constitutional framework in which the human rights operate which enjoy supra-law constitutional superiority. In principle, every constitutional right is entitled to protection to its full extent. At the same time, on occasion, legal effect is given to regular legislation which infringes basic constitutional rights. The result is that a human right does not enjoy protection to its full extent.... At the basis of this partial protection lies the recognition that there are values, interests and principles, which justify lawful infringement of a constitutional human right.... In Israel this balance has been primarily established in the limitation clause. According to that, infringement of a constitutional human right is only possible "in a law according with the values of the State of Israel, which are intended for a fitting purpose, and to an extent which does not exceed what is necessary."

Basic Law: Human Dignity and Liberty, § 8. (Translated from Hebrew). *See also* AHARON BARAK, 3 INTERPRETATION OF LAW 386-388 (1994) (Hebrew).

element of uncertainty. Among the factors influencing the suspect being interrogated is the element of lack of knowledge as to the boundaries of the interrogation and what he may expect as it proceeds. If these matters are prescribed by statute or in other provisions, the suspects themselves will know the permitted boundaries of the interrogation, and will know how to prepare for and anticipate them, and the elements of fear and uncertainty will disappear. If the suspect does not know whether the next stage of the interrogation will be more painful, it is likely that he will break earlier.

However, the argument is weakened by the fact that today many interrogation practices are known, whether by reason of being documented in the case law itself, or by reason of being attested to by persons who were the subject of interrogations. Furthermore, persons who have been interrogated once will generally be interrogated again on a number of occasions, so that they will know more or less what is in store for them, and will know how to mentally prepare for the interrogation. Accordingly, the contention that it is necessary to preserve the secrecy of the interrogation practices in order that the suspects will not know where they stand and what they may expect, is partially untrue.[52] Yet, it is also arguable that the contention is still valid so long as the limits of what is permissible and what is prohibited during interrogations have not been definitively established. Opponents of statutory regulation of GSS activities also contend that whereas possibly, from a moral point of view, use can be made of extreme measures against a person, it is not customary for a state to proclaim the same in a statute. Sanford H. Kadish notes "while it is morally permissible to use cruel measures against a person if the gains in moral goods are great enough, it is not acceptable for the state to proclaim this in its law."[53]

In Kadish's view, it is wrong to declare in a law that a state is permitted to make use of cruel measures under certain conditions. A single interrogator, on the other hand, may decide, as an individual, to make use of such measures, a decision that may later be regarded as justified from a moral point of view.

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[52] Kremnitzer & Segev, *supra* note 37, at 678.

[53] S.H. Kadish, *Torture: The State and the Individual*, 23 ISRAEL L. REV. 345, 354 (1989).

Even if there were statutory provisions prohibiting the use of cruel measures under any conditions, interrogators would still have discretion, according to the approach of utilitarian morality regarding whether or not to actually use them.[54] Thus, a statute that prohibits the use of such measures will in practice be an obstacle, but it will not completely prohibit the use of such measures. In contrast, a statute that permits the use of such measures in particular circumstances will fail to encourage people to follow a desirable morally conscientious line and the hoped-for result will not be achieved. Legislation that permits the adoption of such tactics will only lead to a worsening of the existing situation, such as occurred in the Middle Ages, when torture was regulated by law.[55]

The state cannot justify the activities of the GSS and enable a person to be injured to achieve social good. This is because such an outcome is not consistent with the respect that a state accords human rights.[56] However, some are of the opinion that the power to authorize this form of conduct in interrogations should not be left in the hands of individual interrogators; rather these decisions should be addressed by an authorized body -- a body such as a security committee.[57]

Following the Landau Report that authorized the use of moderate physical pressure on suspects, criticism was raised that this determination turned the suspect into a mere object comprising a source of information. The commission unknowingly created a form of "law" authorizing torture, contrary to its primary intention -- the prevention of torture. Consideration must also be given to the possible danger ensuing from the authorization given for the use of moderate physical pressure. Psychologically, lowering the threshold may lead to its complete disappearance -- the danger of the slippery slope. Moreover, a situation may arise in which the development of sophisticated investigative methods may be brushed aside, to the

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[54] *See id.* at 355-56.

[55] *See id.* at 355-56. *See generally* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF (1977).

[56] A. A. S. Zuckerman, *Coercion and Judicial Ascertainment of Truth*, 23 ISRAEL L. REV. 357, 371 (1989).

[57] A.M. Dershowitz, *Is it Necessary to Apply 'Physical Pressure' to Terrorists -- and to Lie about It?*, 23 ISRAEL L. REV. 192, 197-98 (1989).

extent that the use of force becomes a legitimate and acceptable practice.[58] This criticism will have greater validity if legislation is enacted which permits such GSS activity.

Until the enactment of a law, interrogators must receive authorization for each activity separately from those overseeing them.[59] In this way, in practice, the defense of justification will be available to them. This defense may be available to interrogators depending on whether the instruction to torture a suspect is found in an order of their superiors or is a matter of statutory authorization. Currently, no express written provision exists that permits the torture of a suspect under certain conditions. Accordingly, the interrogators may have available to them the defense of justification on the basis of instructions that they receive from their superiors, as was mentioned earlier. In contrast, the defense of necessity is not available in interrogations that have been conducted in routine situations where a suspect refuses to cooperate in an amicable manner. Recently, in the *GSS Interrogation case*, Justice Y. Kedmi stated:

> General directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not from defenses to criminal liability. The principle of "necessity" cannot serve as a basis of authority.... If the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. This release

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[58] *See* Kremnitzer, *supra* note 47, at 250-54.

[59] *See id.* at 240. The Canadian Second Report provided that ministerial authorization *per se* will not confer a defense for improper activities:

> Senior members of the R.C.M.P. have a habit of referring to Ministers as their "political masters." Does this mean that such authority might be regarded as a "superior order" (to the extent that there is a defense of superior orders)? The answer must be no in the case of the Cabinet, which is not in law a "superior" to members of the R.C.M.P. unless it speaks by regulation.... However, the kind of hypothetical situation which we are considering here is the effect in law not of an "order" but an "authority," that is some sort of express or implied permission or license to do that which is unlawful. Does the law recognize that such a license can relieve a member of the R.C.M.P. from liability for a statutory offence or a civil wrong such as trespass? The answer is no....

1 The Canadian Second Report, *supra* note 3, at 393.

> would flow *not from the "necessity" defense but from the "justification" defense* ... The "necessity" defense cannot constitute the basis for the determination of rules respecting the needs of an interrogation. It cannot constitute a source of authority on which the individual investigator can rely for the purpose of applying physical means in an investigation that he is conducting.[60]

Justice Y. Kedmi proposed that the effectiveness of the judgment be deferred for a year in order to enable the government to adapt to the new state of affairs established by the Court, and out of a desire to ensure that in a genuine case of a "ticking bomb," the state would be able to cope. Thus, during the proposed year, the GSS interrogators would be prohibited from utilizing extraordinary interrogation methods except in rare cases of suspects defined as "ticking bombs," and even then it would be necessary to obtain the express consent of the Attorney General for use of exceptional measures.[61]

C. *Defenses Available to Interrogators and Non-Admissibility of Confessions*

Today, the Court has a tendency to refuse confessions made by suspects during interrogations in which measures defined as torture were employed even though, in some cases, the confessions were substantiated.[62] The question is whether this situation is desirable, on

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[60] *See GSS Interrogation Case*, *supra* note 4, para. 37 (emphasis added). It should be noted that in that judgment it was not decided conclusively whether the defense which should be available to the interrogator is the defense of necessity or the defense of justification, and whether such a defense is actually valid.

[61] *See id.*

[62] Cr.A. 124/87, Nafsu v. Military Prosecutor General 41(2) P.D. 631. Lieutenant Nafsu was convicted of treason and espionage on the basis of his confession during the course of a GSS interrogation. He contended that this confession was extracted from him by torture including sleep deprivation, forced showering in cold water, standing in the prison yard for hours in between interrogations, and threats that his family would be detained. The GSS did not keep the records of his interrogations and accordingly there was no opportunity to examine them. According to the testimony of the interrogators during the first trial, Nafsu was not subjected to the torture alleged and therefore his confession was admitted as having been given freely and voluntarily. Afterwards, when it was discovered that he was indeed

the assumption that the interrogators will be protected against criminal conviction in regards to the interrogation conducted by them. In the prevailing situation, the Court sends a dual message. On one hand, these methods of interrogation are accepted as legal by virtue of being excused whether by way of necessity or by way of justification. However, on the other hand, the confessions extracted during these interrogations, cannot be introduced at trial.

The question that arises is: why is a distinction made between the validity of the interrogations and the validity of the confessions? A supplementary question is whether it would actually be appropriate to admit the confessions and in this way create harmony and uniformity?

The demands of Section 12(a) of the Evidence Ordinance [New Version]-1971 regarding the admissibility of confessions are as follows (translated from Hebrew):

> Evidence of confession by the accused that he has committed an offense is admissible only when the prosecution has produced evidence as to the circumstances in which it was made and the court is satisfied that it was free and voluntary.

In the past, GSS interrogators used to lie in Court regarding the methods of interrogation, partly because if they did not lie, the confessions would not have been admissible. Consequently, many accused would have been acquitted of all charges.[63]

Possibly, the rationale behind the existing dichotomy is based on the diversity of the objectives of the interrogations conducted by the GSS as opposed to those of criminal law. In a criminal inquiry, it is desired to uncover the greatest possible quantity of evidence in relation to a crime that has been committed with the intention of using the evidence to catch and punish the offender. In GSS interrogations, the objective is to protect society and gather intelligence essential for that purpose. Generally, there is no body of evidence, as the crime has not yet been committed.[64]

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subjected to tortuous interrogation methods, the Court held that his conviction on the basis of his confession lacked legal foundation. No comment was made regarding the illegality of the interrogators' conduct.

[63] *See* Dershowitz, *supra* note 57, at 195.

[64] *See* The Landau Report, *supra* note 42, at 14-16.

As it is possible for the GSS to interrogate a suspect in a solitary cell without an attorney,[65] and, until the judgment in the *GSS*

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[65] The Criminal Procedure Law, § 35 (Powers of Enforcement -- Arrest) (1996), enables the deferral of legal advice:

> (A) Where an arrested person, suspected of security offenses, requests to meet with an attorney, or an attorney appointed by a person related to the arrested person has requested to meet with the person arrested as aforesaid -- the person in charge shall enable the meeting as soon as possible, save if one of the following applies:
> (1) The meeting is likely to hamper the arrest of other suspects;
> (2) The meeting is likely to interfere in the uncovering of evidence or its seizure, or hamper the investigation in any other way;
> (3) Preventing the meeting is required in order to frustrate an offense or in order to preserve human life.
> Nothing in this subsection shall prevent the deferral of a meeting in accordance with Section 34(d) and the power of the officer in charge, provided in that section, shall be conferred on the person in charge according to this section.
> ...
> (C) Deferral of a meeting between an arrested person and an attorney in accordance with subsection (A) shall not extend beyond 10 days and shall be for reasons which shall be recorded; notice of the deferral of the meeting shall be sent to the arrested person, and at his request notice of the deferral and the period of deferral shall be sent to a person related to him named by the arrested person.
> (D) The President of the District Court is entitled to order that an arrested person will not meet with an attorney or to extend the period stated in subsection (C), if an application has been made for this purpose, with the authorization of the Attorney General, and if one of the grounds specified in subsection (A) applies; provided that the total period in which the meeting with the attorney has been prevented does not exceed 21 days; an application according to this subsection, shall be heard ex parte only, and a policeman of the rank of superintendent and above shall appear on behalf of the applicant; the parties are entitled to appeal against a decision made on the basis of this subsection to the Supreme Court, which shall hear the matter with a single judge.
> ...
> (J) Where the Court has decided to enable the meeting between an attorney and the person arrested, according to this section, and a representative of the state has given notice at the time of delivery of the decision, of the wish to appeal against it, the Court is entitled to order the suspension of the meeting for a period which shall not exceed 48 hours. For this purpose, no account shall be taken of Sabbaths and holidays.
> (K)Where an arrested person has requested as provided in subsection (A) to appoint a defense counsel and he has been prevented from doing so, he is entitled to petition against the same to the District Court and the hearing on his

Interrogation case, referred to above, to make use of moderate physical pressure,[66] the Court does not have the tools to oversee the conduct of the interrogators and determine the guilt of the suspect in an objective and independent manner. In other words, the Court does not have the evidentiary tools to determine whether a confession is genuine or fabricated, and whether the confession has been given freely and voluntarily. Additionally, the judges' confidence in the testimony of GSS interrogators was undermined following the discovery that they had been systematically lying over a period of fifteen years regarding confessions obtained during interrogations and the measures used to extract them.[67]

A further problem is that it is not possible to protect innocent persons who, because of tension and the nature of the investigation, make false confessions if the judge relies only on the evidence of the interrogators.[68]

In order to make it possible to admit confessions, it is necessary to establish rules and principles that will ensure that desired standards are

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petition will be heard by it within 48 hours from the submission of the petition. (Translated from Hebrew).

[65] Today, in the light of the judgment in the *GSS Interrogation case*, it is prohibited to exert any physical pressure whatsoever on the suspects. A different question is whether in cases where moderate physical pressure is exerted on suspects, any defense will be available to the interrogators. In relation to the term "freely and voluntarily," Israeli case law has held that it is necessary to examine the degree of physical pressure applied. However, even in cases where extreme invalid measures were adopted, it is necessary to examine whether in fact they had an influence on the suspect. Accordingly, confessions extracted under moderate physical pressure, would also not be automatically invalidated, but an examination would have to be conducted in relation to each case individually to determine whether the prohibited measures had an influence on the suspect himself. In relation to extreme measures and the laws of invalidity of confessions, see Cr./App. 115, 168/82 *Ha'el Mu'adi and others v. State of Israel*, 38(1) P.D. 197. At present, there is a proposal to the effect that every confession obtained by extreme invalid means will be automatically invalidated. However, this is not the prevailing law. With regard to the invalidity of confessions extracted by torture, in relation to convictions based exclusively on confessions and in relation to the grounds for a retrial, *see also* Landau Report in relation to convictions based exclusively on confessions and in relation to the grounds for a retrial, (December 1994), 16-18, 23-26. There it was recommended, in the light of Israel's ratification of the Convention Against Torture and Against Inhuman and Degrading Treatment and Punishment, to automatically invalidate any confession obtained by torture. However, confessions obtained by invalid means, which are not in the nature of torture, will not be automatically invalidated.

[67] *See* Zuckerman, *supra* note 56, at 360-62.

[68] *See id.* at 366.

preserved during the course of interrogations. Moreover, in order to enable judicial review, it is necessary to document the entire interrogation process and preserve the records. In England, this problem has been overcome by enabling consultation with an attorney during the actual course of the interrogation itself. In Israel, the Landau Commission decided that the presence of an attorney during interrogations is not practicable because it will hamper the success of the interrogations.[69]

Further, if confessions made by suspects during interrogations are held to be admissible, notwithstanding that they were obtained in ways that raise doubt as to whether the confessions were given freely and voluntarily, such procedural rules are likely to penetrate into the ordinary criminal legal process.[70] Accordingly, caution must be exercised before admitting the confessions.

On the other hand, this dual message is not healthy. If the confession is not obtained freely and voluntarily, but is substantiated by an objective examination, there is no reason to reject the objective evidence as inadmissible. As in both Israel and Britain, the doctrine of the "fruit of the poisoned tree" is not applied. Thus, it will be possible to admit confessions in an indirect manner.

If a confession is verified, it would be unconscionable, from a social point of view, to exempt a suspect because of a defect in obtaining the confession. Accordingly, if the rationale underlying the test of the admissibility of a confession is the credibility of the confession,[71] substantiation of the confession eliminates the risk of lack of credibility, and therefore the confession should be regarded as admissible. However, if the rationale underlying the test of admissibility is the risk of self-incrimination,[72] then there is a problem with this contention. Apparently, the prevailing rationale underlying the test of the admissibility of a confession is the test of truth.[73] In contrast, it seems that behind the doctrine applicable in the United

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[69] *See id.* at 368-69.

[70] *See id.* at 372.

[71] *See* F.H. 23/85 State of Israel v. Tobol, 42(4) P.D. 309.

[72] *See* Cr.A. 636/77 Levy v. State of Israel, 32(3) P.D. 768, 776-77.

[73] *See* Cr.A. 6251/94 Ben Ari v. State of Israel, 49(3) P.D. 45.

States stands the rationale of due process.[74] In other words, when determining whether the confession is admissible, an examination is made as to whether the person freely waived his right against self-incrimination. The right against self-incrimination is an essential right in the criminal law. Therefore, if the right against self-incrimination is not waived, the admission of the confession is not only a procedural defect, but also a substantive one.[75]

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[74] *See, e.g.*, White v. State of Texas, 310 U.S. 530 (1940); *see also* Degraffenreid v. Mckellar, 494 U.S. 1071 (1990); *see also* Cr.A. 196/85 Zilberberg v. State of Israel, 44(4) P.D. 485.

[75] The Canadian Second Report, *supra* note 3, at 1041-45, sets out the factors pro and con in relation to the question whether illegally obtained evidence should be held admissible in Court:

> (a) A rule excluding illegally obtained evidence would divert a criminal trial away from its essential function of discovering the truth and making a correct finding as to the guilt or innocence of the accused.... (b) A rule excluding illegally obtained evidence would reduce the effectiveness of law enforcement.... (c) Since criminals are unrestrained in the way they carry out their activities, the police should be given some leeway in pursuing them: they should be allowed to "fight fire with fire...." (d) If the police know a person to be guilty but a rule of law excluding illegally obtained evidence would result in the person's acquittal, the police, as witnesses, will be tempted to lie about such matters as whether the search was lawful.... (e) A rule excluding illegally obtained evidence would result in the acquittal and release of persons guilty of crime, which would shock the conscience of the community....

The Report also set out arguments against the admissibility of this evidence in Court, *inter alia*, noting as follows:

> There is a need to protect the integrity of the judicial process. The government ought not to profit from its own lawless behaviour.... (b) The exclusionary rule serves to educate people, including the police, as to a serious commitment which our society has to the proper and restrained exercise of power.... (c) A rule excluding illegally obtained evidence will deter the police from breaking the laws....

The Report reached the conclusion that it would be wrong to state generally that all illegally obtained evidence must be excluded. It was stated that the judges would retain discretion to determine whether that evidence would be admissible or not.

V. PROCESS OF INTERROGATION -- PERMITTED AND PROHIBITED PRACTICES

A. In Israel

An investigation, by its very nature, places the suspect in a strenuous position. Every investigation comprises a form of a "battle of wits" in which an investigator attempts to uncover the greatest number of details about a suspect. Not all measures are legitimate in this battle. It is necessary to determine which investigative procedures are permitted, and which are prohibited. In crystallizing the rules of investigation, a balance must be drawn between two interests. On one hand lies the public interest in uncovering the truth by exposing offenses and preventing them; on the other hand lies the wish to protect the dignity and liberty of the suspect.

In addition to the conditions of imprisonment and detention which have an enormous impact on the mental state of the suspect, during the course of interrogations, the GSS, on occasion, makes use of interrogation methods that have recently been held by the High Court of Justice in Israel,[76] to be unlawful. These methods of interrogation include a number of techniques. The first is the practice known as "Shabach," described as follows:

> "Shabach" is a combination of means of sense deprivation, pain and sleep deprivation, which are conducted over a long period of time. "Regular Shabach" includes tightly cuffing the hands and legs of the suspect while he is seated on a small and low chair, whose seat is tilted forward, towards the ground, so that the suspect's seat is not stable. The suspect's head is covered by a sack, which is generally opaque, and powerful loud music is played ceaselessly, through loudspeakers. The suspect is not allowed to sleep throughout the course of the "Shabach." The sleep deprivation is carried out through the above measures, as well as in an active

[76] In the *GSS Interrogation case*, it was held for the first time that the methods described below are illegal. We shall consider the judgment and its conclusions below.

manner, with the guards shaking all who try to doze.[77]

There are variations of the "Shabach" position. There is a "Shabach" combined with an air conditioner that blows cold air directly onto the suspect, generally while the suspect is in the interrogation room. This variation is known as the "freezer." A different variation is "standing Shabach," in which the suspect stands with his hands cuffed to a pipe attached to the wall behind him, the pipe is either on the same level as his hands, or his hands are pulled upwards and his body inclined forwards. The second method is essentially a psychological one -- a system of threats and curses. During the interrogation, the interrogators curse and threaten the suspect. The threats include threats of murder, with the ability to kill illustrated by references to persons who were killed while in detention or under interrogation; threats are also directed at members of the suspect's family.[78]

The third method is known as "Kasa'at a-tawlah," and is intended to cause painful stretching, using a table and direct pressure:

> The measure, which combines a painful posture and application of direct violence by the interrogator, is practiced during the interrogation itself. The interrogator forces the suspect to crouch or to sit (on the floor or on the "Shabach" chair) in front of a table, with the back of the suspect to the table. The interrogator places the arms of the suspect, cuffed and stretched backwards, on the table... part of the time, the interrogator sits on the table, trampling with his feet on the shoulders of the suspect and pushing him forwards, so that his arms are stretched even further backwards, or he pulls the legs of the suspect, and thereby achieves the same effect.[79]

Another method is the "Qumbaz" or "frog crouch." In this method, the suspect is forced to crouch on tiptoe, with his hands tied behind his back. If the suspect falls or tries to sit, he is forced to

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[77] *Routine Torture: The Methods of Interrogation of the General Security Service*, BEZELEM 14 (Jerusalem, February 1998) (Translated from Hebrew).

[78] *See id.* at 16, 22.

[79] *See id.* at 23 (Translated from Hebrew).

resume his crouching position.[80] An additional method takes the form of violent shaking. Using this method, direct and potentially deadly violence is exercised. The interrogator holds the suspect by the edges of his clothes, while the latter is either seated or standing, and shakes him violently, his fists striking the chest of the suspect and the suspect's head being thrown backwards and forwards. According to the organization Bezelem:

> In April 1995, Abd al-Samed Kharizat died as a result of violent shaking at the hands of his interrogators. Notwithstanding that the state admitted this, and even though it could not undertake unequivocally that the use of violent shaking would not lead to deaths in the future, and a fortiori lesser damage....[81]

Yet other violent practices, that are taking place during the interrogation, include slapping, hitting, kicking, etc.[82] Moreover, use is made of the handcuffs themselves in order to cause pain, beyond the ordinary pain resulting from handcuffing a person over a long period of time. From time to time, the interrogation methods are renewed and changed.[83]

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[80] *See also Torture and Ill-treatment–Israel's interrogation of Palestinians from the Occupied Territories,* HUMAN RIGHTS WATCH/ MIDDLE EAST 111-46 (1994) [hereinafter *Torture and Ill-treatment*] (for the description of physical means of interrogation). It should be noted that there, the "Shabach" method is called the "kindergarten chair."

[81] *See Routine Torture, supra* note 77, at 28 (Translated from Hebrew).

[82] *See Torture and Ill-treatment, supra* note 80, at 196-97 (describing one violent method termed "the gas pedal:"

> 'Gas Pedal' -- Interrogator sits on his desk and rests his boot on the crotch of the detainee, whose hands are cuffed behind him. The interrogator then presses his foot down when the detainee does not cooperate. Ex-detainees likened this method to a driver pressing on an automobile's accelerator pedal.)

[83] *See Routine Torture, supra* note 77, at 16, 25, 28, 30-31. It is possible to learn of the new techniques from the testimony of Nawaf Al-Qaysi:

> They began to employ a number of new means of interrogation during the course of the interrogation. One was the Al-Kasa. In this method, the interrogators, sometimes two and sometimes three, would seat me on a high stool, at the height of an ordinary chair, something like half a meter over 25 cm, which was fixed to the floor, and would force me to lie on my back, where part of my back, neck and head were outside the area of the stool. My hands were handcuffed behind my back and my pelvis and legs outside the other part

The state attempted to contend that some of the practices described above were necessary under the circumstances and not designed to torture or cause suffering to the suspect. The "Shabach" position, it asserted, was an integral part of the interrogation itself, and was carried out in order to ensure the safety of the interrogation facility, and in order to prevent the suspect from attacking the interrogators, as had happened in the past. The sealed sack was intended to prevent the suspect from making eye contact with his interrogators or with other people in the interrogation facility, including other detainees, out of a fear that identification would impair the interrogations and cause other security damage. Shackling with handcuffs was for the security of the interrogators. Isolating the suspects and playing loud music was not done out of a desire to ill-treat the suspect, but to prevent any possibility of communication between the various suspects which could endanger the success of the interrogation. Sleep deprivation was required, according to the state, because of the need for intensive interrogation and nothing else.[84]

> of the stool and my two legs were also cuffed. This posture causes enormous pressure on the spine, particularly in the area of the pelvis, as well as on the stomach muscles and also to pressure on the head, because all the blood flows there.... An additional method: the hands and legs are tied, behind, and you are left thrown on the floor for an hour, two, three -- whatever they want.... Another method -- the interrogator would put the Shabach sack on me, and close the sack from the bottom in order to block the air. Occasionally, the interrogator would wet the sack with water, which would cause breathing difficulties. When it was wet the smell, which in any event was bad, would become terrible.

(Translated from Hebrew). *Id.* at 31.

Additional testimony regarding other methods of humiliating the accused is found in the Bezelem journal. Y. Ginber, *Torture in Interrogations*, BEZELEM 8-12 (November 1994) (Hebrew). Shakur, a youth of fifteen testified that he was ordered to strip and even remove his underwear, and after he stood naked, the interrogator seized his testicles with a handkerchief and hurt him this way for five minutes. Throughout that time, he was ordered to confess. An additional interrogation practice to which the suspects testified was prevention of washing for periods ranging from 15 to 43 days. Another technique was depriving the suspect of food and drink. This was conducted in a number of ways. Complete deprivation of food and drink, making the food and drink conditional upon confessions by the suspects, or by allocating a few minutes only to eating. A different technique was to hold the suspect in a tiny, airless and dark cell for a lengthy period of time -- a technique termed "the cupboard." Often it was not possible to lie or stand in these cells.

[84] *See Routine Torture, supra* note 77, at 17-18. For an additional description of the various methods used, see *Torture and Ill-treatment, supra* note 80, at 27-29.

Until recently, the Court refrained from making decisions of principle on such issues. Rather, the Court judged each case on the merits, leaving the decisions of principle to a later stage. In the judgment given recently, decisions of principle were made. As a rule, in this judgment, the Court prohibited torture or degrading treatment during interrogations. In addition, the Court held that GSS interrogators, for the purpose of conducting investigations, possessed the same powers as police officers, and enjoyed no additional special powers:

> A reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation.... Human dignity also includes the dignity of the suspect being interrogated.... This conclusion is in perfect accord with (various) International Law treaties -- to which Israel is a signatory -- which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment...." These prohibitions are "absolute." There are no "exceptions" to them and there is no room for balancing.[85]

The Court was willing to partially accept the explanations proffered by the state in respect to the rationale underlying these methods of interrogation, but not the explanations in their entirety. Thus, sitting is indeed an integral part of the interrogation, but not sitting in the "Shabach" position on a low chair inclined forwards for long hours. Had it only been sitting on a low chair, this could possibly have been seen as legitimate in the power play forming part of the interrogation. However, inclining the chair forwards was an unfair and unreasonable interrogation method. This measure injured the bodily integrity, rights and dignity of the suspect beyond what was necessary. The contention regarding blindfolding, namely, that the blindfold was required for security reasons, in order to prevent eye contact, could have been accepted had it been a matter of blindfolding only, and not a long sack ending on the shoulders of the suspect,

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[85] *See GSS Interrogation Case, supra* note 4, paras. 20-23.

making breathing difficult.[86] Such a measure, even if it entails a better ventilated sack, is not an integral part of the interrogation. Similarly, handcuffing, for protection, is acceptable so long as the handcuffing is not conducted out of a desire to cause additional pain and suffering to the suspect by excessive tightening. Playing loud music intended to cause the isolation of the suspect is not legitimate, as very loud music for long periods of time also causes undue suffering to the suspect. Depriving the suspect of sleep is within the power of the interrogators. However, sleep deprivation out of an intention to break the spirit of the suspect is not a fair and reasonable use of this measure. This measure is in the nature of an impairment of the dignity and rights of the suspect beyond what is necessary.[87] Accordingly, use of all the measures referred to above is prohibited so long as the intention is to break the suspect by degrading him or infringing his rights.

The GSS refrains from fully documenting their various interrogations. The interrogators maintain a "memo book" in which they record the course of interrogations. These writings contain general information only in respect to the conditions in which the suspect is held. From the writings, one may learn of interrogation schedules, eating schedules, etc.; however, the writings do not document the means employed against the suspect during the course of the interrogation itself and during the waiting period. Thus, any attempt to reconstruct the course of the interrogation itself is difficult and complex. Only "subjective evidence" is available, namely, a description of the situation according to the suspect himself, and the description by the interrogator. At present, no official body oversees the activities of the GSS, and the interrogators may take improper advantage of this deficiency.[88]

Those asserting that the GSS methods must be permitted contend that the only way to safeguard the security of the state is to extract essential information from the suspects. The extraction of this essential information is only possible through the use of techniques that entail the use of physical pressure. Similarly, security officials,

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[86] For the sack covering, see *Torture and Ill-treatment*, *supra* note 80, at 155-62.

[87] *See GSS Interrogation Case*, *supra* note 4, paras. 24–31.

[88] *See* Y. Ginber, *supra* note 83, at 5-6.

following the High Court of Justice case which held that the investigation methods were prohibited, stated that this decision would prevent them from conducting their work efficiently because it left them without efficient investigative methods to prevent future terrorist attacks during times of need. There are those who contend that the GSS has not tried any other method of overcoming terrorism. So long as it has not tried other investigative tactics, and so long as it has no proof of the contention that physical pressure is the sole way of tackling terrorism, it is not possible to accept the assertion that the Court's judgment will prevent GSS investigators from carrying out their work efficiently. Further, it is argued that the GSS has drawn an extreme picture. The situation is not a black and white one -- either the GSS will conduct its investigations as it wishes, using techniques that entail moderate physical pressure, or it will not be possible at all for the GSS to investigate and obtain relevant and essential information from the suspect immediately during times of need. There is a third option, namely, conducting sophisticated, professional and single-minded investigations using advanced techniques that enable the extraction of information from suspects without the use of force. For example, eavesdropping, undercover officers, and infra-red cameras may all be used to gather information without the use of force. Others argue that the GSS is ignoring the fact that torture will lead many suspects to confess even though they are innocent, in order to put an end to the torture employed against them. In contrast, there are some suspects who will not give up information even if they are subjected to torture. In sum, violent interrogation methods will on occasion lead to false information, as well as to charging innocent persons of crimes attributed to them, notwithstanding that they did not commit any crimes.

B. *In Britain*

Investigations conducted by the security services in Britain are not very different from those applied in Israel. In the beginning of the 1970s, between 1971-1975, more than 1,100 people were killed and about 11,500 persons injured in Britain as a result of a sharp rise in

Irish terrorist activities. The IRA claimed responsibility for these attacks.[89] In consequence, persons suspected of involvement in IRA activities were interrogated with the help of extraordinary investigative measures. As a result, a complaint was filed against Britain in the European Court of Human Rights. The judgment dealt with five investigative measures that were termed "the five techniques." A description of these methods appears in the judgment of the European Court:

> (a) *wall-standing*: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
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> (b) *hooding*: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
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> (c) *subjection to noise*: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
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> (d) *deprivation of sleep*: pending their interrogations, depriving the detainees of sleep;
>
> (e) *deprivation of food and drink*: subjecting the detainees to reduced diet during their stay at the centre and pending interrogations.[90]

The investigators of the Royal Ulster Constabulary (RUC) learned these interrogation methods in a seminar conducted in 1971, as part of their training. In a commission chaired by Sir Edmond Compton, appointed in 1971, it was found that these techniques entailed an improper use of investigative powers but were not brutal. This conclusion drew sharp criticism and it was decided to set up a new commission, chaired by Lord Parker of Waddington. In 1972, the

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[89] *See The Ireland Case*, *supra* note 7, at 30.

[90] *See id.* at 59.

majority opinion by the commission found that it was not necessary to "rule out" the implementation of these techniques on moral grounds. Lord Gardiner, who represented the minority opinion by the commission, asserted that even in "emergency terrorist situations" these interrogation methods were not justified from a moral point of view. Notwithstanding this, both majority and minority views held that the techniques were illegal in terms of the domestic law prevailing at the time. Concurrently with the publication of the commission's report, the former Prime Minister declared in Parliament that no further use would be made of these techniques in security service interrogations.[91]

Some of the people interrogated with these techniques sued the government of Britain for damages. Often, these suits were concluded by out-of-court settlements.[92] The interrogators who applied these interrogation techniques were not subjected to disciplinary trials or criminal proceedings, and indeed, no steps were taken against them whatsoever. Special guidelines setting out appropriate measures that could be used by RUC interrogators, were not available until 1972 after the Parker Commission Report was issued. Initially, ordinary regulations provided that humane treatment had to be used and that violence should not be used. In consequence of the Parker Commission Report, the five techniques were specifically prohibited and the investigative body was required to maintain medical files for the suspects and immediately report complaints of ill-treatment. In April 1972, army instructions in the form of RUC Force Order 64/72 were issued prohibiting the use of massive force in all circumstances. The instructions clearly prohibited inhumane conduct, violence, use of the five techniques, threats, and insults. The crown prosecutor also made sure to clarify that anyone infringing the prohibitions in the order would be subject to prosecution. In 1973, new regulations in

[91] *See id.* at 60-61.

[92] *See id.* at 62-66. In a number of cases the suspects suffered physical harm and obtained compensation ranging from £200 to £25,000, depending on the injuries. For example, a person interrogated and suffering physical injuries, who could prove that the injuries were caused during the interrogation, obtained compensation in the sum of £14,000 by way of an out-of-court settlement.

relation to detention by the army emphasized the need for appropriate conduct.[93]

The European Court held that while the majority of the articles of the European Convention for the Protection of Human Rights of 1950 are not absolute, Article 3 of the Convention, which prohibits torture, inhumane and degrading treatment, left no room for exceptions.[94] With regard to the inhumane treatment referred to in the article, it was held that there is a certain minimum level of conduct that must not be passed, and beyond which the conduct falls within the definition of inhumane treatment. This minimum level is not objective. It is determined by the length of time, circumstances of the case, physical and mental repercussions, and, on occasion, even by the gender of the suspect, his age, state of health and the like. The Court held that whereas the five techniques detailed above are regarded as inhumane treatment under Article 3 of the 1950 Convention, they are not in the nature of torture, in the light of the distinction between the term "torture" and the term "inhuman treatment."[95] Opposing this view, the minority judge Sir Gerald Fitzmaurice held that the five techniques did not even fall within the definition of "inhuman treatment":

> To many people, several of the techniques would not cause "suffering" properly so called at all, and certainly not "intense" suffering. Even the wall-standing would give rise to something more in the nature of strain, aches, and pains.... The sort of epithets that would in my view be justified to describe the treatment involved ... would be "unpleasant," "harsh," "tough," "severe" and others of that order, but to call it "barbarous," "savage," "brutal" or "cruel," which is the least that is necessary if the notion of the

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[93] *See id.* at 66, 70-71.

[94] Similarly, in the International Covenant on Civil and Political Rights (1966), the provisions are not absolute and may be infringed in times of crisis or emergency, apart from four obligations which may not be breached irrespective of the circumstances. These include the right not to be subjected to torture (Article 7). Indeed, international protection of human rights in times of crisis is important, but it is possible to breach some international obligations on those occasions. For the breach of covenants in emergency situations and the prohibition thereof, see Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22(1) HARV. INT'L L.J. 1 (1981).

[95] *See The Ireland Case*, *supra* note 7, 79-80. For the distinction between inhumane treatment and torture, see *supra* Part 2.

> inhuman is to be attained ... should be kept for much worse things.[96]

A fortiori, in Sir Fitzmaurice's view, the techniques could not be classified as torture. If the five techniques would be classified as torture, he noted, he would not know how to classify acts such as extracting nails or propelling a stick into the suspect's rectum -- would they be classified only as torture, equal to the five techniques, or as more serious torture than the latter.[97] In contrast, the minority judge, Evrigenis, was of the opinion that the five techniques were not in the nature of inhumane acts, but amounted to torture proper. In his view, if the Court failed to hold these acts as torture, it would miss the purpose and language of the article and deprive the Convention of any meaning.[98]

In conclusion, in the judgment, 16 out of 17 judges reached the conclusion that the five techniques were inhumane or degrading treatment. Thirteen judges to four held that these five techniques did not amount to torture. Unanimously, it was decided that it was not within the jurisdiction of the European Court of Human Rights to order Britain to institute criminal or disciplinary proceedings against security service investigators who infringed the provisions of Article 3 of the Convention.[99]

Members of the security services can indeed justify their activities, as mentioned above, by relying on one of the criminal law defenses. However, the very fact that a person is suspected of being connected to terrorist activities does not confer a right to use deadly force against him.[100]

There are a number of similarities and distinctions between the situation in Britain and that prevailing in Israel. The British methods of interrogation, insofar as they are known by virtue of the judgment of the European Court of Human Rights, did not include direct physical violence such as violent shaking or unnecessary tightening of

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[96] *See id.* at 133.

[97] *See id.* at 138.

[98] *See id.* at 143-44.

[99] *See id.* at 107.

[100] R.J. Spjut, *The 'Official' Use of Deadly Force by the Security Forces against Suspected Terrorists: Some Lessons from Northern Ireland, 1986* PUB. L. 38, 39-41, 46 (1986).

handcuffs. Another difference may be found in the length and persistence of the use of unusual interrogation methods. The argument is that while the British techniques were applied for four or five days, the GSS measures could continue for a number of weeks. Similarly, the wall standing technique in Britain was a technique applied for thirty hours at the most, with occasional rest breaks, whereas it was argued that on occasion, the GSS implemented its painful measures for as long as sixty hours, without breaks. The British sleep deprivation technique was carried out for a period of up to four or five days with breaks, whereas the GSS prevented the suspect from sleeping for longer periods.[101]

Terrorism did not end in Britain in the 1970s. However, since then a continuous improvement has taken place in the respect shown for the rights of suspects. In the light of the recommendations of the Commission chaired by Lord Bennet, the right of a person suspected of terrorist activities to meet his attorney within forty-eight hours of his detention has been anchored in statute. Similarly, interrogations are documented on video and, consequently, there has been a decline in the number of complaints by detainees. In 1992, a senior lawyer was appointed on behalf of the state as an external ombudsman for prisons and interrogation facilities. He was given the power to conduct surprise visits in these facilities and to be present during interrogations of suspects as well as interview them regarding their conditions of confinement and the interrogations conducted. In 1998, video cameras were introduced into three interrogation facilities in Northern Ireland.[102] The new British statute -- the Criminal Justice (Terrorism and Conspiracy) Act 1998 -- CJTCA -- also did not derogate from the right of the detainee to meet his attorney and did not enable interrogators to apply physical or psychological pressure.

In contrast, under the old law, there have been cases where it is known that persons remained in custody for a period of seven days, without being brought before a judge -- even though they were known to be innocent. The investigators were aware that there was no new

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[101] *See Legislation Permitting Physical and Mental Pressure in GSS Interrogations*, Position Paper, Bezelem (Jerusalem, January 2000) at 49 (Hebrew).

[102] *See id.* at 50-51.

information that these people could disclose; however, they preferred to draw out the interrogation to the end. In addition, the fear felt by suspects, deriving from their detention and conditions of confinement, was exploited by the interrogators. It is also known that, in general, suspects were prevented from having access to attorneys. Transferring suspects from one police station to another in order to prevent them from identifying their location, and thereby undermining their self-confidence was an accepted practice. There is also evidence that various interrogation techniques were used, such as dirty cells and sleep deprivation, in order to humiliate the suspects and break their spirit. Testimony also exists relating to the use of physical force during police interrogations against persons suspected of terrorist activities.[103]

In contrast, according to the report of the European Commission for the Prevention of Terrorism, which visited Britain in 1994, there were no accounts of cases of torture and almost no accounts of cases of brutality directed against persons arrested and interrogated.[104] Accordingly, it is possible to conclude that degrading and tortuous interrogation practices, have lessened since the 1970s.

C. *In the United States*

In contrast to the position described in Britain and Israel regarding the various interrogation methods applied against terrorists, in the United States no such extensive description is available. In the United States, there are accounts of different and more sophisticated techniques.

The prohibition on torture is entrenched in the Eighth Amendment to the United States Constitution.[105] Even though the United States also contends with extensive terrorist activities, the FBI does not have

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[103] David R. Lowry, *Draconian Powers: The New British Approach to Pretrial Detention of Suspected Terrorists*, 8-9 COLUM. HUM. RTS. L. REV. 185, 204-05 (1976-1977).

[104] *See Legislation Permitting Physical and Mental Pressure in GSS Interrogations*, *supra* note 101, at 50.

[105] *See supra* note 15.

the authority to apply physical pressure during interrogations of persons suspected of terrorist activities, or to deprive the suspect of his right to meet an attorney. Thus, even at the time of the bombing in Oklahoma in 1995, when Timothy McVeigh was captured, and it was suspected that he had worked with others, no physical pressure whatsoever was applied to him. Moreover, upon his arrest, he was permitted to meet his attorney, and that attorney was present during each interrogation session. A retired senior FBI official asserted that the GSS interrogation methods were in effect a short-cut. In his view, it was not a smart move to bring a person to interrogation and extract information from him with blows. In his opinion, the smart step was to reach these findings through sophisticated methods -- by laboratory work, eavesdropping, following people, and infra-red cameras. Further, in his view, in most cases, the GSS did not obtain usable or credible information through the use of violent interrogation methods.[106]

The power of the FBI is derived from the power of the Attorney General to appoint people to investigate crimes committed against the United States, to help safeguard the President, and to conduct investigations concerning official matters under the supervision of the Department of Justice and the State Department.[107]

Often, in the past, when the FBI implemented its powers, it deprived innocent people of the rights of freedom and privacy on the grounds of state security. Ultimately, in 1976, when this injustice was acknowledged, internal security guidelines were set for the FBI that provided particular standards and investigative procedures preventing infringement of the rights of innocent persons. These guidelines were revised in 1983.[108]

These guidelines circumscribe the boundaries of FBI activities; however, they are not binding in Court. Notwithstanding that these general guidelines do not have direct legal ramifications, they have a

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[105] *See Legislation Permitting Physical and Mental Pressure in GSS Interrogations*, *supra* note 101, at 51-52, 55.

[107] John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 786 (1984).

[108] Melissa A. O'Loughlin, *Terrorism: The Problem and the Solution -- the Comprehensive Terrorism Prevention Act of 1995*, 22 J. LEGIS. 103, 104 (1996).

central function in protecting the constitutional rights of citizens in the face of improper state investigations. Some of the guidelines have not been publicized and remain under wraps. Executive Order 12,333 empowers the FBI to investigate these types of terrorist activities, on the basis of guidelines.[109]

According to these guidelines, the FBI is permitted to initiate an investigation on the basis of a person's words or declarations alone, where these create a reasonable fear that the persons uttering them are involved or connected in some way to terrorist activity. Likewise, where there is reasonable cause for believing that two or more people have organized a group with the aim of achieving a political purpose in a manner that will breach the criminal law or make use of violence, it is possible to open a security or terrorist investigation against them.[110]

In order to open a full investigation that can continue for a long period of time and violate a greater number of civilian rights than would be the case in an ordinary investigation, a number of requirements must be met. Only the heads of the FBI can authorize such investigations, and such investigations will only be allowed in cases where there is evidence that the persons suspected are involved, or will be involved, in unlawful violent activities. There are four additional factors that must be weighed: the damage that is anticipated from the violent activity, the likelihood that the activity will in fact take place, the immediacy of the threat and the danger to freedom of speech and privacy from the implementation of the full inquiry. With regard to the initiation of investigations prior to the commission of the crime itself, the guidelines are not conclusive. It is not clear if certain circumstances or certain facts, together with the existence of an operational terrorist basis, comprise sufficient evidence that a criminal conspiracy exists. It is possible that investigations of future crimes, in relation to groups that are still only suspected of being terrorists, must be based on a firmer suspicion that criminal activity will indeed be carried out.

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[109] *See* Elliff, *supra* note 107, at 786, 791.

[110] *See* Kopel & Olson, *supra* note 17, at 320.

The length of time of an investigation relating to security or terrorist activity must be proportionate to the violent history of the suspected group. The investigation can continue even if, at the time of the investigation, the group has not been active for some time.[111]

In contrast to the situation prevailing in Britain and Israel, in the United States, the motto followed is one of thorough and comprehensive intelligence investigations without making use of any violent interrogation techniques. It is possible to argue that the difference in approach arises from the difference in the situations prevailing in the respective countries -- as in the United States, the existing threat of terrorism is not equivalent to the threat existing in Israel or Britain. Accordingly, the different countries should not be compared in terms of their manner of battling terrorism. The FBI can conduct full investigations of terrorist organizations as are conducted in Israel. In Israel and Britain, terrorist activity is much more intensive than in the United States. Thus, so long as the basic needs for eliminating terrorism differ, and until the United States finds itself in the same shoes as Britain or Israel, there is no room whatsoever for comparison.

In contrast to this argument, it is possible to assert that moral questions -- such as whether it is possible to apply torture during interrogations, in order to save others -- are general in nature. Morality and its various approaches are not relative to a particular place. If, from a moral point of view, there are those who believe that tortuous interrogations should be prohibited, their location is irrelevant. Accordingly, there is room for comparison between the different forms of interrogation applied throughout the world, and for conclusions to be drawn from them.

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[111] *See* Elliff, *supra* note 107, at 797-803; Athan G. Theoharis, *FBI Surveillance: Past and Present*, 69 CORNELL L. REV. 883, 889 (1984).

D. In Canada

In contrast to the interrogation methods applied in Israel and Britain, in Canada, as in the United States, the interrogation methods are based on the gathering of intelligence. Until the trial in which Ralph Samson, a former constable in the Royal Canadian Mounted Police (RCMP) testified in March 1976, violations of any rights whatsoever during the course of intelligence gathering were unknown. In that trial, for the first time, it was revealed that the RCMP, which, *inter alia*, is responsible for the security of Canada, had carried out a number of activities that deviated from their powers or were unlawful. Thus, for example, they would kidnap followers of persons suspected of being terrorists and force them to turn into informants. The organization also unlawfully invaded individual privacy by opening mail and trespassing without authorization. Following the exposure of these activities, a commission was set up with the task of examining which measures taken by the RCMP were unlawful and to provide recommendations as to desirable reforms. The initial commission report was issued in July 1977, and was followed by an additional two reports.[112] The second report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police -- Freedom and Security Under the Law, set out five basic and important principles that must be followed when collecting any intelligence, namely: preservation of the rule of law; the principle of proportionality between the investigative means and the gravity of the threat -- the investigative means must be proportional to the threat being faced; a balance must be drawn between the investigative techniques required and the possible damage to freedoms and rights, on one hand, and the gain which society will earn from that investigation, on the other; the more injurious the investigative means, the higher the authority that should be required to approve its use; except in emergency circumstances, the least intrusive techniques of intelligence gathering must be used before more intrusive techniques.

[112] Daniel C. Chung, Recent Development, *Internal Security: Establishment of a Canadian Security Intelligence Service*, 26 HARV. INT'L. L.J. 234, 235 (1985).

This must be the normal rule, however, in emergency situations, where it is only possible to obtain the information by using more intrusive techniques, it is possible to make direct use of those techniques, without meeting the requirement of progressiveness.[113]

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[113] 1 The Canadian Second Report, *supra* note 3, at 513-14:

(a) The rule of law must be observed.... No technique of intelligence collection should be employed which entails the violation of criminal law, other statutory law or civil law (federal, provincial, or municipal). If for national security purposes it is considered essential that the security intelligence agency use an investigative technique which involves the violation of law, then those responsible for enacting laws -- federal, provincial or municipal -- must be persuaded to change the law so that the use of the technique by the security intelligence agency is made lawful.

(b) The investigative means used must be proportionate to the gravity of the threat posed and the probability of its occurrence. In a liberal society, which as a matter of principle wishes to minimize the intrusion of secret state agencies into the private lives of its citizens and into the affairs of its political organizations and private institutions, techniques of investigation that penetrate areas of privacy should be used only when justified by the severity and imminence of the threat to national security. This principle is particularly important when groups may be subjected to security intelligence investigations although there is no evidence that they are about to commit, or have committed, a criminal offense.

(c) The need to use various investigative techniques must be weighed against possible damage to civil liberties or to valuable social institutions. The indiscriminate use of certain techniques of investigation by a security intelligence agency, even though lawful, may do great damage to the fabric of our liberal democracy. Spying on political organizations that are critical of the status quo can have a chilling effect on freedom of association and political dissent. Similarly, the widespread, indiscriminate use as informants, of journalists, trade unionists, and professors, can do grave damage to the effective functioning of a free press, free collective bargaining, and freedom of intellectual inquiry.

(d) The more intrusive the technique, the higher the authority that should be required to approve its use. The authorizing of security intelligence officers to use various techniques of information collection must be carefully structured. The least intrusive techniques should not require any prior approval by senior authorities, but as the investigation of a group or individual intensifies, the use of more covert and intrusive techniques should require the approval of more senior officials. At the other end of the spectrum, where the most intrusive techniques of all are involved, the approval of authorities external to the agency itself should be required. Where the agency is authorized by statute under strictly defined conditions to use extraordinary techniques of investigation which would be a criminal offense if used by an ordinary citizen, the judiciary should make the authoritative determination as to whether the

In addition, it is prohibited to open a file or initiate an investigation against a private individual unless there is reason to suspect that he poses a threat to the security of Canada.[114] A typical investigation of a suspect in Canada is described in the third report of the Commission. There, for example, an account is given of the case of a person possessing a criminal record, who was asked to accompany the RCMP investigators to their vehicle. After a journey of about ten minutes in the streets of Montreal with the suspect sitting alone on the back seat, they stopped at a restaurant and talked over a cup of coffee. The suspect stated that he did not wish to cooperate. However, after five or ten minutes he agreed to continue the conversation in a discrete place. They moved to a motel room, where the suspect confessed to the activities alleged, regarding relevant information in his possession. Afterwards, it was proposed that he turn informer. The suspect delayed answering on the ground that he was tired. Later, he claimed that he had been afraid that they would frame him with a drugs offense if he refused. Before leaving the motel, the suspect agreed to meet the two investigators again. This method of investigation, "taking" a man off the street and driving him to a motel to be interrogated, was reiterated in a number of additional accounts of investigations in the report. The report stated that there had been no improper conduct, there had been no attempt to threaten the suspect, and no force of any type had been used against him. Also, in the other cases brought before the Commission, it was found that the suspects had not been taken against their will to be interrogated, everything was done with the consent and free will of the suspects themselves.[115]

The second Commission report states that while the protection granted by the intelligence service to the state is important, it would be

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statutory conditions have been met.

(e) Except in emergency circumstances, the least intrusive techniques of information collection must be used before more intrusive techniques. Situations may arise in which the only opportunity for obtaining information on a subject is through the application of one or more relatively intrusive techniques. But the normal rule should be to use the least intrusive techniques first.

[114] *See* Cameron, *supra* note 2, at 201, 207-08.

[115] COMM'N OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE -- CERTAIN R.C.M.P. ACTIVITIES AND THE QUESTION OF GOVERNMENTAL KNOWLEDGE, THIRD REPORT (1981) 224-29.

wrong for its activities to derogate from the basic values of democracy and essential freedoms. Indeed, the activities of the service cannot be an "open book" for everyone, however, they can be subject to the oversight, for example, of the responsible ministers. Likewise, the opposition must be allowed to know about these activities in order to preclude their possible exploitation by the government and responsible ministers against opposition members and legitimate political activities targeting the existing regime. Thus, police and security officials are not above the law and ought not be allowed to breach the law in the name of state security.[116]

It should be noted that if the situation in the United States is not equivalent to that prevailing in Britain and Israel, *a fortiori* the situation prevailing in Canada is not comparable. In Canada the threat of terrorism is less than it is in Israel or in Britain, and therefore it is arguable that no comparison can be drawn between the methods of investigation, as there too, like in the United States, the primary needs are different.

E. Interrogations Within the Framework of Administrative Detentions or Within the Framework of Detentions Without an Order

In addition to the various investigative means already described, possible additional psychological pressure on the suspect is plied by the detention *per se*. In Israel, suspects are subjected to administrative detention, even when they have not committed any offense. The purpose of the administrative detention in Israel is to prevent these terrorists from committing future acts of terror. In other words, this detention is intended to prevent the commission of future crimes, both by the investigation of the person suspected of possessing information relevant to the prevention of the offense, and the detention of a person suspected of planning the commission of the offense. Upon the establishment of the state, draconian regulations, left by the British,

[116] 1 The Canadian Second Report, *supra* note 3, at 44-45.

were adopted in relation to administrative detention. In 1979, the regulations on administrative detention were repealed and the Emergency Powers (Detention) Law (1979) enacted on the basis of which administrative detentions are now carried out. The Minister of Defense (hereinafter "the Minister") must have reasonable cause to believe that reasons of state security or public security (hereinafter "security") require that a particular person be detained.[117] The grounds include preservation of public order and suppressing attempted insurrection or revolt.[118] State security refers also to specific groups and not only to the state as a whole in the broad sense.[119] The Minister can obtain assistance from field reports that relies on evidence that would not be admissible in court (for example, hearsay evidence)[120] prepared for him by his aides (for example, the GSS); however, the final decision is subject to the Minister's exclusive discretion.[121]

Since detentions entail a serious infringement of human rights, particularly in the light of Basic Law: Human Dignity and Liberty,[122] the Court must be persuaded that there is a real fear or a real danger to public safety and human life,[123] and that there is a near certainty that requires the administrative detention of the suspect in order to protect the state against serious harm.[124] Evidence must be adduced that the release of the suspect is likely to immediately endanger state

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[117] Emergency Powers (Detention) Law § 2 (1979) [hereinafter: The Detention Law].

[118] A.D.A. 1-2/88 Raja Mahmoud Agbariya and others v. State of Israel, 42(1) P.D. 840, 844-45 [hereinafter A.D.A. 1-2/88].

[119] Eyal Nun, Ma'azar Minhali Be'Israel [*Administrative Detention in Israel]*, 3 PLILIM 168, 189 (1992) (Hebrew).

[120] A.D.A. 1/82 Hazem Mahmoud Qawsma v. Minister of Defense, 36(1) P.D. 666, 670-71. A.D.A. 1/80 Rabi Meir Cahana and others v. Minister of Defense, 35(2) P.D. 253, 258-59 [hereinafter A.D.A. 1/80]; Y. Weiss, Ha'Ma'azar Ha'Minhali -- Megamot, Sidray Din Ve'Reayot. [*The Administrative Detention -- Tendencies, Procedures and Evidences*], 10 LAW & MIL. 3, 11, 14 (1989) [hereinafter *The Administrative Detention--Tendencies, Procedures, and Evidences*] (Hebrew).

[121] *See* Nun, *supra* note 119, 178-79; *see also* A.D.A. 1-2/88, *supra* note 118, at 843-44; The Detention Law, *supra* note 117, at § 11.

[122] A.D.A. 7/94 Baruch Ben Yosef v. State of Israel, (not yet published) [hereinafter A.D.A. 7/94].

[123] H.C. 8259/96 Association for the Preservation of Rights v. General Uzi Dayan (not yet published).

[124] *See* A.D.A. 7/94, *supra* note 122; A.D.A. 4/94 Michael Ben Horin v. State of Israel, 48(5) P.D. 329, 335-36 [hereinafter A.D.A. 4/94].

security.[125] In the constitutional era, it is necessary to examine whether the detention is for a fitting purpose and does not exceed what is necessary. If it is possible to achieve the purpose through less injurious methods, such as criminal arrest of the suspect until the end of proceedings, these methods must be adopted; the detention cannot be used as an alternative to routine criminal proceedings.[126] The Court must be persuaded that the Minister acted reasonably on the basis of the evidence before him. The Court has greater powers of judicial review than in the case of other forms of administrative discretion.[127] An examination of the lawfulness of the factors considered, that he did not exceed his jurisdiction and that he acted in good faith must be conducted. According to a different approach, the Court will not replace the discretion of the Minister with its own.[128] Nor will the Court examine the credibility of the factual basis of the decision, only whether it has a sufficient basis.[129] The test is objective, *i.e.*, whether the Minister has reasonable cause to believe that the conditions for the issue of the order exist.[130] Yet another approach holds that the Court must exercise independent discretion and not only examine the legality of the detention, but whether it is justified on the merits.[131] The case law refers to a number of possible tests for examining the factual basis: evidence which a reasonable man would regard as sufficient,

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[125] A.D.A. 2/90 Farid Ibrahim Abu Mokh v. State of Israel, (not yet published) [hereinafter A.D.A. 2/90].

[126] Cr.A. 3514/97, A.D.A. 6/97 Anonymous v. State of Israel (not yet published) [hereinafter A.D.A. 6/97]. *See also* A.D.A. 7/94, *supra* note 122; A.D.A. 2/90, *supra* note 125; A.D.A. 1-2/88, *supra* note 118, 846-47; A.D.A. 1/80, *supra* note 119, 259-60; Basic Law: Human Dignity Liberty, § 8; Nun, *supra* note 111, at 183, 195.

[127] A.D.A. 2/86 Anon. v. Minister of Defense, 41(2) P.D. 508, 515-16 [hereinafter ADA 2/86]; The Detention Law, § 4(c), *supra* note 117. *See also* A.D.A. 6/97, *supra* note 126, and Weiss, *supra* note 120, at 15.

[128] *See* A.D.A. 2/86, *supra* note 127, at 514-16.

[129] A.D.A. 6/94 Baruch Ben Yosef v. State of Israel (forthcoming).

[130] *See* A.D.A. 1/80, *supra* note 120, at 262-63.

[131] *See* Weiss, *supra* note 120, at 15; A.D.A. 2/86, *supra* note 127, at 516-17; A.D.A. 6/97, *supra* note 126; A.D.A. 1-2/88, *supra* note 118, 845-46; Nun, *supra* note 119, 183-84; A.D.A. 4/96 Rabbi Itzhak Ginsburg v. Minister of Defense and others, 50(3) P.D. 221, 223-24.

that non-implementation of the order would lead to a concrete danger of a high degree, or the test of near certainty ("likelihood").[132]

Apparently, in light of Basic Law: Human Dignity and Liberty, the issue of the order must be based on firm foundations that show a concrete danger. As reference is to a grave violation of the freedoms of the suspect, and administrative detention is an anomaly in our free and democratic regime, the suspect's freedom should only be denied on the basis of open, free and lawful proceedings.[133] Special and weighty factors are needed in order to justify negation of freedom in this manner, without a trial.[134] If there is *prima facie* evidence pointing to the existence of an imminent danger to security, this compels detention.[135] In addition, administrative detention comprises grounds for asserting the privilege of keeping evidence relating to the person being detained from the defense. Thus, the President of the District Court may hear evidence without the presence of the detainee or his attorney.[136] It is appropriate that the scrutiny of privileged evidence be conducted with the consent of the parties, and if there are objections, they must be weighed.[137] Holding the evidence to be privileged must only be done in exceptional cases.[138] The Court must draw a balance between the rights of the suspect and the interest of the state in preserving the secrecy of the evidence. It is necessary to examine whether the material disclosed to the suspect would enable him to defend himself in a fair and proper manner, or would be merely peripheral to his defense.[139] It is arguable that the facts that are central to the decision to detain the person should be revealed in order to provide him with the minimum capacity to defend himself.[140] If, in the

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[132] *See* A.D.A. 1-2/88, *supra* note 118, 845-46, where the issue was not decided because the evidence also met the more severe test; *see also* Nun, *supra* note 119, 187-89; Weiss, *supra* note 120, at 15.

[133] A.D.A. 2/96 State of Israel v. Aryeh Fridman (not yet published) [hereinafter A.D.A. 2/96]. *See also* Ruth Gavison, *Administrative Detention*, 3 C.R. 1, 2 (1982) (Hebrew).

[134] *See* A.D.A. 4/94, *supra* note 124, 334-35.

[135] A.D.A. 2/80 Baruch Ben Yosef (Green) v. Minister of Defense, 35(3) P.D. 474, 531.

[136] *See* A.D.A. 6/97, *supra* note 126; The Detention Law, *supra* note 117, at § 6(c); A.D.A. 2/82, at 532.

[137] *See* A.D.A. 6/97, *supra* note 126.

[138] *See id.*, at 256-57.

[139] *See* A.D.A. 2/96, *supra* note 133, at 128; Nun, *supra* note 119, at 171.

[140] *See* A.D.A. 1/80, *supra* note 120, at 256-57; Nun, *supra* note 119, at 192.

general balance, the right of the detainee to know the evidence against him is greater, that evidence should be revealed in order to allow the detainee to defend himself in a better fashion.[141] Every doubt must act to the benefit of the detainee.[142] Not every non-disclosure will lead to the revocation of the order of detention; however, an examination must be conducted as to the degree of danger posed by the suspect compared to the severity of the restrictions that the privileged evidence imposes on his defense.[143] A final decision regarding the privilege of the evidence will be given after the judge has examined its substance and content.[144] If it is decided to deviate from the rules of evidence, the Court must record the reasons prompting its decision.[145]

In Britain, it is possible to detain a person without a warrant if the police officer is persuaded that the suspect was or is still suspected of committing, planning or inciting terrorist activities.[146] This process, detention without a warrant of persons suspected of terrorist activities, violates the freedom of movement and security of the individual. It is possible to detain a person without any warrant for a period of forty-eight hours unless the Secretary of State authorizes the extension of this period for an additional five days.[147] Thus, a person may be the subject of interrogation even before he is charged with a specific offense. Such an interrogation does not enable the suspect to conduct a proper defense because he does not know what he has to try and defend himself against.[148] There is a theory which asserts that numerous people will be detained in this manner because the GSS will try to extract intelligence of relatively low importance from them, and that many people possess information which is likely to be regarded as useful. In the majority of cases, according to this theory, it will not be possible to obtain the maximum cooperation of the suspect if he is not subjected to some real threat. Thus, the detention itself may, on

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[141] *See* A.D.A. 2/96, *supra* note 133, at 125.
[142] *See* Weiss, *supra* note 120, at 9.
[143] *See* A.D.A. 1/80, *supra* note 120, at 260-61.
[144] *See* A.D.A. 2/80, *supra* note 135, at 532; Weiss, *supra* note 120, at 8.
[145] *See* The Detention Law, *supra* note 117; Weiss, *supra* note 120, at 11.
[146] The Prevention of Terrorism (Temporary Provisions) Act (1989) § 14(1).
[147] *Id.* at § 14(4), 14(5).
[148] *See* David R. Lowry, *supra* note 103, at 195-96.

occasion, supply this threat.[149] As in Israel, in Northern Ireland defense lawyers were prevented from having access to information connected to investigations, confessions given during interrogations, etc., in the name of safeguarding state security in the event that the allegation had substance.[150]

We have seen that in addition to the impact that the investigative process has on the suspect, the actual detention is also used as a tool against the suspect. Below, I shall examine the legal effect of confessions obtained during interrogations, and whether convictions based on these confessions are legitimate.

VI. CONVICTIONS BASED ON CONFESSIONS OBTAINED UNDER INTERROGATION

A. In Israel

With the passage of time, more and more defense counsel started arguing that the invalid measures occurred not at the time of obtaining the confession but at the earlier stage of the interrogation. This argument forced the GSS interrogators to testify in Court regarding the manner of interrogation. The GSS ensured the complete isolation of the activities of its operatives. Thus, nothing done by the GSS was public knowledge:

> Now, for the first time, the interrogators found themselves facing a difficult dilemma: positioned on the witness stand in Court they were asked many questions regarding interrogation methods, which they were required to answer under oath or caution. The law bound them, of course, like every witness testifying before the Court, to tell the whole truth and nothing but the truth. On the other hand,

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[149] *See id.* at 210-11, 213.

[150] Martin Flaherty, *Human Rights Violations against Defense Lawyers: The Case of Northern Ireland*, 7 HARV. HUM. RTS. J. 87, 106-07 (1994).

> true testimony would have violated the sacred rule of complete isolation which was implanted in and taught to every interrogator from the moment he was accepted into the service ... it follows that on the witness stand, the interrogator saw a dual danger in giving true testimony: both the exposure of investigative methods and the physical pressure and the invalidation of the confession and acquittal of the accused. From the point of view of the service, each of these outcomes was difficult and undesirable, when the GSS operatives were convinced, on the basis of credible information, that the man was guilty of what he was charged. The solution which the interrogators found for themselves to this dilemma was, from their point of view, the simplest and the easiest: they preferred the principle of complete isolation to the duty to tell the truth in Court, and on the witness stand they denied the employment of any physical pressure whatsoever on the suspect. Put more bluntly -- they simply lied....[151]

The Landau Commission Report points out that the principal reason GSS interrogators lied was because of the practical need to refrain from exposing investigative methods. A second reason for lying resulted from the fact that, generally, the trial would stand or fall on the admissibility of the confession. The GSS was faced with the situation where the accused, who the GSS believed to be guilty, would be released if they indeed revealed the method by which the confession had been extracted. The third reason was that it simply worked well. For years, judges had full confidence in the investigators and, therefore, no need arose to seek other methods.[152]

The Commission decided that this practice of giving false testimony before the Courts had to cease immediately. It held that the leadership of the GSS had failed to understand that its operatives were not above the law and that the essential task of the GSS was a task that justified some of the means, but not all of them, and certainly not the practice of giving false testimony. In addition, the Commission recommended a reconsideration of the issue of maintaining records of GSS interrogations. In the past, the practice was that after the interrogation, the investigator would record the matters that appeared relevant to him from the entire interrogation. No interrogation diary

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[151] *See* Landau Report, *supra* note 42, at 18-19 (Translated from Hebrew).

[152] *See id.* at 20-26.

was maintained during the interrogation or as part of the comprehensive documentation of the whole investigation. After submitting the summarizing report, the whole investigation file would be destroyed as a matter of routine.[153]

In contrast, there are those who justify the investigative methods of the GSS in general. The application of moderate physical pressure during interrogations has become an acceptable tool and is regarded as the only tool that can be used to prevent future attacks on innocent persons. Terrorism is compared, under this approach, to a war without rules.[154] Thus, the so-called torture performed by the GSS is not comparable at all to the torture employed on suspects in the Arab states. However, in a democratic state, there is no room for interrogations using moderate physical pressure of any degree, and this is true irrespective of the level of terrorism affecting that state. Accordingly, at the least it is necessary to arrange supervision over investigations and ensure that the line between moderate physical pressure and torture is preserved.[155]

There are those who contend that the approach sanctioning any measures whatsoever against the suspect in order to attain the truth is unacceptable in a democratic state. There is a price that a democratic society is unwilling to pay. Indeed, on occasion, democracy must fight arduously with one hand tied; however, without the preservation of the law and the rights of people, democracy will ultimately be harmed.[156]

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[153] *See id.* at 34-37.

[154] It should be noted that in a state of war, human rights are subject to more restrictions than is the case in a state of crisis in times of peace. *See* George J. Alexander, *The Illusory Protection of Human Rights by National Courts during Periods of Emergency*, 5(1) HUM. RTS. L.J. 1, 7 (1984).

[155] Editorials, *Moderate Torture*, NEW JERSEY L.J. (1997).

[156] J.R. Schmertz, *Citing International Human Rights Conventions, Supreme Court of Israel Bars Use of Several Interrogational Pressure Techniques Sometimes Used by the General Security Service When Questioning Terrorist Suspects Such as Vigorous Shaking and 'Shabach' Position*, INT'L L. UPDATE (2000).

B. In Britain

In Britain, there are no guidelines similar to those established in the United States granting rights to a detainee.[157] Insults directed at a suspect are likely to expose the police to civil compensation proceedings and the errant police officer to criminal or disciplinary proceedings. Most of the defenses existing at the time of the investigation are anchored in jurisprudence so that a detainee who is prevented from consulting his attorney has no statutory right to sue. At the same time, an investigation prior to any formal charges brought is permitted, notwithstanding that appropriate defenses are not afforded to the detained suspect. The guideline in interrogations is that every confession made during the course of the interrogation should be voluntary, and if it is not voluntary, it cannot comprise evidence admissible in Court. Today, a tendency may be seen in the British Police and Criminal Evidence Act, 1984, to clearly regulate what is permitted in interrogations and how to conduct an interrogation. Confessions made during an interrogation that is not conducted in accordance with these guidelines may be regarded as involuntary confessions.[158]

The problem is that, at least in the past, many of the confessions made by persons suspected of terrorist activities were not recorded but were made orally. Such confessions were regarded as admissible in Court, notwithstanding the sharp criticism they received.[159]

An additional problem arising from this situation is the problem of self-incrimination. A person suspected of a criminal offense generally possesses the right against self-incrimination. When a person is forced during the course of his interrogation to pass information that is likely to incriminate himself, a violation of his right against self-incrimination occurs. In Britain, this problem was solved in a partial manner. If a person holds information that is likely to incriminate

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[157] *See generally* Miranda v. Arizona 384 U.S 436 (1966), and Escobedo v. Illinois 378 U.S. 478 (1974) (establishing guidelines).

[158] *See, e.g.*, the regulations regarding the mode of interrogations by the police *in* The Police and Criminal Evidence Act (1984).

[159] *See* Lowry, *supra* note 103, at 194-96.

only himself, he has at least, *prima facie,* a right to remain silent. In contrast, if the information exposes other people in addition to himself, he is obliged to pass over this information.[160]

Since 1973, Britain has enacted a number of laws to fight terrorism. These laws are renewed from time to time or are anchored in new legislation. One such law is the Prevention of Terrorism (Temporary Provision) Act, 1974 (PTA), which is based on two preceding statutes -- the Northern Ireland (Emergency Provision) Act, 1973 (EPA) and the Prevention of Violence (Temporary Provisions) Act, 1939. Initially, the PTA was enacted for a period of six months, but it was extended every six months until replaced by the PTA of 1976. The anti-terrorist laws in Britain were intended to assist in the conviction of suspects on the basis of confessions made during the course of detention and intensive interrogation.[161]

The new Criminal Justice Terrorism and Conspiracy Act (CJTCA) of 1998 enables the following scenario:

A person is arrested on suspicion of membership in a terrorist organization. He is interrogated by the police, but for his own reasons he prefers to keep silent and not to answer the questions of his interrogators:

> At trial, the judge or jury hears a high-ranking police officer testify to your refusal to answer questions during interrogation and that in his professional opinion you are a member of a terrorist organization. On cross-examination, defense counsel asks the officer on what information he bases his opinion, but the officer declines to answer on the basis that disclosing such information would jeopardize national security or would be contrary to the public interest. You decide to maintain your right to silence at trial.

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[160] The Prevention of Terrorism (Temporary Provisions) Act (1989), § 18-18A, (establishing the non-provision of information as an offense in itself).

[161] Fionnuala N. Aolain, *Legal Developments: The Fortification of an Emergency Regime,* 59 ALB. L. REV. 1353, 1354-58 (1996). *See also* LAWYERS COMMITTEE FOR HUMAN RIGHTS, AT THE CROSSROADS -- HUMAN RIGHTS AND THE NORTHERN IRELAND PEACE PROCESS 6 (1996) [hereinafter AT THE CROSSROADS].

Based on the above evidence, the verdict comes back – "Guilty."[162]

This Act infringes the European Convention for the Protection of Human Rights of 1950, with regard to the right to silence. This Act continues the British tradition of negating a person's right to silence when he is suspected of terrorist activities or membership in a terrorist organization. In addition, this law enables the Court to draw conclusions from the silence of the person under interrogation, or from his refusal to testify without justification. A person suspected of a terrorist offense has no right under the CJTCA to have an attorney present during the course of his interrogation itself, but only to consult with an attorney prior to the interrogation, when, occasionally, the charge against the detainee is not known to either client or attorney. Under the PTA, suspects may be detained for a period of seven days without any specific charge.[163] In the first forty-eight hours, the detained suspect has no right to an attorney or to telephone calls. In October 2000, a new human rights act is due to come into effect, that will, in large part, be based on the European Convention of 1950, referred to above. In light of this, there is perhaps room to examine whether these statutes are contradictory. If the CJTCA is to be compatible with the Convention, it must be changed.[164] This law affords greater certainty of successful convictions of members of terrorist organizations.[165]

In the Northern Ireland terrorist trials, the accused were tried before judges, not juries. This form of trial was termed "Diplock trials." In these cases, confessions were occasionally held to be admissible notwithstanding that there was no objective way of determining whether the confessions had been given willingly or as a result of the use of one of the prohibited techniques that forced the

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[162] Kevin D. Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act 1998 be Reconciled with Its Human Rights Act?*, 33 VAND. J. TRANSNAT'L L. 221, 223 (2000).

[163] The Prevention of Terrorism (Temporary Provisions) Act. § 14 (1989) (Eng.).

[164] *See* Kent, *supra* note 162, at 224-25, 229-32, 239-41, 258-59.

[165] Jacqueline A. Carberry, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 IND. J. GLOBAL LEG. STUD. 685, 694 (1999).

accused to confess.[166] If a judge tries the case without a jury, and decides the fate of a person accused of a terrorist offense, he must record the basis for his decision and state whether he was influenced by the silence of the suspect. The law enables the conviction of a person in reliance on the evidence of a senior police officer and the silence of the suspect. However, a conviction may not be based solely on the silence itself, without any corroborative evidence or testimony. The problem is that whereas the evidence of the police officer will be admissible, the information on which it relies, were it to be put before the Court, would not be admissible.[167] The system of Diplock trials led to the conviction of many terrorists. It was primarily based on confessions, obtained during interrogations that were generally recognized as admissible. In cases in which a single judge sits, there is a greater likelihood of conviction because the fate of the accused is in the hands of one person, and not in the hands of twelve jurors, as is customary in ordinary criminal trials.[168]

The organization of Amnesty International claimed that the group that was suspected of causing the explosions in a Birmingham pub in 1974, was forced to confess during the course of interrogations, because of the torture employed against them; in other words, that the confessions were obtained by torture. As it was not possible to objectively examine the way in which the confessions had been obtained, the judges relied on a legal examiner, and on the basis of his evidence ultimately convicted the group. After a number of years that legal examiner admitted that he had lied in Court.[169]

Notwithstanding that the police officers gave false testimony under oath, the accused who had been convicted as a result of such testimony were not released:

> One of the most troublesome aspects of Northern Ireland judicial practice is the number of miscarriage of justice cases which remain

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[166] *See* Kopel & Olson, *supra* note 17, at 260.

[167] *See* Kent, *supra* note 162, at 240, 260, 263.

[168] David Bonner, *The Baker Review of the Northern Ireland (Emergency Provisions) Act 1978*, 1984 PUB. L. REV. 348, 362-64 (1984).

[169] K.D. Ewing & G.A. Gearty, FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN 18-19 (1990).

> unresolved.... In this case, the Court of Appeal considered a reference by the Secretary of State for Northern Ireland of the conviction in 1986 of four former soldiers for a murder which had taken place in November 1983. After a nine-year delay, three of the accused were acquitted. Despite a finding that police officers had lied under oath and altered written evidence, one of the original four defendants is still imprisoned.[170]

In contrast, there were also cases where confessions were not admissible, as they were proved to have been given unwillingly by accused persons who were suspected of terrorist activity.[171]

Together, the class of PTA and EPA laws created a body of convictions relying on confessions that were obtained over long and arduous periods of detention and interrogation. The person suspected of terrorist activity was forced to confess during the course of his detention and interrogation, forming the basis for his criminal conviction. The first PTA laws were enacted in 1974 as a response to the killing of twenty-one people in two Birmingham explosions. That law prohibited membership in a terrorist organization and, as already noted, permitted the arrest, detention and interrogation of individuals suspected of terrorist activity, for a period of seven days without requiring that they be brought before a tribunal. In addition, during the course of the interrogation, the interrogators would threaten that if the suspect failed to cooperate, they would, among other things, also harm his attorney, hinting that this was the course of action taken with the lawyer Patrick Finucane, one of the best defense counsel in Northern Ireland who was found dead.[172]

Indirect attempts are being used to prevent suspects from properly defending themselves by making the lives of their defense counsel difficult, threatening their careers, and harassing them. Before entering the detention centers, defense lawyers undergo a thorough body search while the lawyers acting for the prosecution enter without being searched. Similarly, the interrogators try to identify the defense counsel with his client, as if the former also supports the terrorist

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[170] *See* AT THE CROSSROADS, *supra* note 161, at 79.

[171] Alexander, *supra* note 154, at 37-38.

[172] *See* Flaherty, *supra* note 150, at 95-99.

activity.[173] Thus, fewer lawyers are likely to want to defend these suspects and thus lawyers are prevented, at the stage of the preliminary investigation, from obtaining relevant information such as confessions of the suspect -- all in the name of safeguarding state security. In every detention center, there are closed circuit cameras in interrogation rooms. While there is an official using the monitors to observe each of the interrogation rooms and report any inappropriate conduct occurring in these rooms, the fact that there is no record of these films, and that the official observes a number of monitors simultaneously, means that he cannot see all the inappropriate conduct, and therefore, much of it is not reported at all:[174]

> Currently the detention centers operate with a wholly inadequate closed circuit television system monitored by RUC itself.... In the past[,] the RUC has defended this system arguing that either audio or videotaping would make it easier for paramilitary groups to find out whether a detainee had turned informer. The Lawyers Committee previously concluded that the real reason preventing recording is that the present inadequate system allows exactly the type of harsh custodial interrogation that it is ostensibly designed to prevent.[175]

There is a prohibition on using pressure to adduce evidence; however, nothing in the law expressly prohibits the use of psychological pressure or reasonable pressure for this purpose. Only if it is proved that the person who confessed did so as a result of inhumane treatment, or, as a result of torture, will the confession be inadmissible.[176] Research has shown that about 80% of cases that were concerned with terrorist activities relied on confessions given by the accused during the course of their interrogation. This use of confessions made the right to silence worthless. If the accused refused

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[173] *Id.* at 98-101.

[174] *Id.* at 106-08. According to the article it may be understood that the detention centers include detainees who were not necessarily initially detained for criminal reasons.

[175] *See* AT THE CROSSROADS, *supra* note 161 at 124-25.

[176] *Id.* at 121-22.

to answer the questions of the interrogator, the silence was used to his disadvantage.[177]

Similarly, in the "supergrass" cases in which numerous Irish citizens were convicted of terrorist activities, most of the later decisions on appeal held that there was a miscarriage of justice and the convictions were overturned:

> The supergrass trials, which were widely criticized, violated the fair trial provisions.... The effects of the supergrass system spread far beyond the effects on the accused in the ten central trials, and cast a long shadow on the fairness of the legal system as a whole. In particular, it placed severe strain on the perception of judicial independence in both the nationalist and loyalist communities. The supergrass system ultimately collapsed under the weight of domestic and international criticism. Commendably, the Court of Appeal quashed all convictions except one, although it has repeatedly denied that "the procedures and rules of evidence applied in the 'supergrass' trials failed to guarantee the basic right to a fair trial."[178]

VII. THE NEED FOR AN ANTI-TERRORISM LAW AND FOR SPECIAL INVESTIGATIVE MEANS IN TIMES OF EMERGENCY

A debate is currently underway as to whether it is necessary to enact a law empowering the secret service to make use of lawful measures to eliminate terrorism or to leave the situation without regulation. Another specific issue arising from this is whether it is

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[177] *See* Flaherty, *supra* note 150, at 110-11.

[178] *See* AT THE CROSSROADS, *supra* note 161 at 70-71; *see also* 2 The Canadian Second Report, *supra* note 3, at 1035:

> WE RECOMMEND THAT the R.C.M.P develop reporting and review procedures both at the divisional and the national levels to enable an internal review of the following cases:
> (a) when a conviction is obtained even though the accused's confession is held inadmissible;
> (b) when counsel for the prosecution decides not to offer the confession because he feels that there would be little or no chance of its being held to be admissible, given the manner in which it had been obtained.

necessary to enact a law that will permit torture in case of need -- or whether a democratic state is prohibited from expressly legislating authorization of torture. Prior to coming to a conclusion on this matter, we shall examine a number of legal arrangements effective today which regulate the tools used in the fight against terrorism, alongside the problems ensuing from these arrangements concerning the breach of individual rights.

Terrorism today is a complex and global problem -- not necessarily a localized domestic one. Thus, the challenge of fighting terrorism has slowly become global. It is necessary for states to reach agreement with regard to terrorism. The growing mobility of terrorism illustrates the critical need for uniformity and for an integral approach to international cooperation.[179]

Alongside the view that there is no need for a law, or that it would be wrong to enact a law that permits the use of extraordinary measures during the course of an interrogation, there is a view that these matters should be anchored in law. Proponents of the latter approach argue that if all the permitted measures, however out of the ordinary, are anchored in statute, the boundaries of permitted behavior would be clearer and fixed. It would also be possible to oversee the activities of these bodies more easily in light of the permitted boundaries of activity. For this to happen, it would be necessary to arrange close scrutiny of these bodies by an independent, preferably judicial, body. This situation of a clear law is preferable to a situation in which the intelligence service is the one to decide, on the basis of its exclusive discretion, whether the conditions for acting in an exceptional manner have been satisfied. After the grant of limited statutory authorization it will be necessary to have the closest and most thorough oversight by an independent body, with the judicial authorities being the most appropriate bodies to carry out this task.[180]

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[179] *See* Carberry, *supra* note 165, at 685-87, 699-700, 712.

[180] *See* Leon Sheleff, *supra* note 15, at 196, 217. In the United States it has been argued that the powers given to the Federal authorities have not been accompanied by appropriate oversight provisions: "The exponential growth in federal law enforcement power has not been accompanied by systematic oversight or review of federal police practices. This has led to many cases of serious abuse." Nadine Strossen, *Criticism of Federal Counter-Terrorism Laws*, 20 HARV. J.L. & PUB. POL'Y 531, 533 (1997).

With regard to the question whether it is necessary to have legislation that will circumscribe the powers of the interrogators, make them subordinate to the law, and enable legal supervision of them, Professor Moore has commented:

> I conclude that there is no good reason to think that the subject of permissible torture must remain outside the reach of law. On the other hand, there are quite good reasons why such behavior should remain subject to court-enforced law. The main reason is obvious: without such legal restraint, the potential for abuse is enormous. The American experience with a like claim made by the Nixon Administration -- that national security placed government agents outside the laws against burglary and the Fourth Amendment -- underlines the obvious dangers of telling any governmental agency they are "beyond the law." It took Sir Thomas More, Lord Coke, and their common law brethren several centuries to convince the English kings that they too were subject to the law. It took a unanimous U.S. Supreme Court and much American travail to convince Richard Nixon that the same applied to him. It is not a lesson that should need repeating in Israel.[181]

In his view, it is necessary to enact a law that permits torture if this is what is wanted, as he puts it -- "a law of torture that means what it says." This law does not need to include conditions for various situations, as "the circumstances making torture of terrorists and others justifiable are too various to be captured by *'per se'* rules of justified torture."[182]

The question that arose in the United States was whether the army had to take part in enforcing the Antiterrorism and Death Penalty Act. Article I of the American Constitution guarantees that the army will be subject to civilian supervision; however, this Article does not contain any prohibition on using the army to enforce the law. On one hand, there are those who espouse the view that there should be a direct prohibition on the army being involved in enforcing counter-terrorism laws, save in exceptional cases such as nuclear terrorism. This is because there are experts in the army who have broad specialized

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[181] *See* Moore, *supra* note 40, 339-40.

[182] *Id.* at 342-43.

knowledge about nuclear weapons, whereas in state or local law enforcement, there are no such experts. In both proposed bills for a1996 law (the Dole Bill and Clinton Bill), a provision was inserted to the effect that in every situation where an activity is being carried out that is defined as terrorist, the Attorney General will be able to ask the army, marines or air force for assistance. An additional justification made in favor of intervention by the army against terrorism is to prevent a waste of resources.[183]

The Comprehensive Terrorism Prevention Act, 1995, focused on defenses against international terrorism. In 1995, the Oklahoma City explosion took place. This incident pressured Congress to renew the Terrorism Prevention Act. According to the new proposal, an alien identified as a member of an organization that has been declared by the Secretary of State to be a terrorist organization, or any person supporting the activities of such an organization, may have privileged evidence produced against him in Court.[184] The purpose of the privileged evidence is to draw a balance between two conflicting interests: one -- to refrain from endangering state security by not exposing secret information during the course of the trial, the other -- the right of the accused to confront the charges and evidentiary material gathered against him.[185] A person suspected of terrorist activity and of endangering national security is entitled to receive a summary of the file that the government holds against him, according to the proposed 1995 law. However, as the law does not make provision for the nature of the summary that must be provided to the accused, in effect, this protection that was created to assist the accused at his trial does not help him and is devoid of any real content.[186] Prior to preventing a person from accessing investigative material that is classified as privileged, it must be shown that the person living in the United States is a security risk and it is reasonable to assume the person will cause serious harm, injury or death to another person, and,

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[183] *See* Kopel & Olson, *supra* note 17, at 265-68.

[184] *See* O'Loughlin, *supra* note 108, at 105-06.

[185] *See* Kopel & Olson, *supra* note 17, at 333; *see also* O'Loughlin, *supra* note 108, at 106.

[186] Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism,* at www.law.indiana.edu/ilj/v73/no2/beall.html (last visited on Mar. 3, 2001).

in addition, that the documents that are the subject of the application for privilege are likely to endanger the security of the state if exposed. The damage that may arise from maintaining the secrecy of the evidence is not hypothetical or imaginary damage.[187] The classification by the Secretary of State of a certain organization as a terrorist organization, only because one of the members of the organization performed an act that was not lawful, is also likely to turn large groups of persons, who are classed as aliens, into terrorists, and thus expose them to the possibility of a trial facing privileged evidence.[188]

Review by the Court of anti-terrorism laws protects groups that are not terrorist. However, it should be remembered that according to the Antiterrorism and Effective Death Penalty Act, 1996, the penalty for offenses may reach ten years imprisonment and a fine of $50,000, and privileged evidence may be brought before the judge, evidence that is not disclosed to the accused who is trying to defend himself. Similarly, at the last moment, a provision was inserted in the law that confirms the possibility of freezing the assets of a person suspected of being a member of a terrorist organization.[189] Ultimately, the 1996 Act did not include the idea proposed in the Dole Bill, namely, that the financial support of terrorist organizations prohibited by law, could not include any material-humanist support such as financial support for orphans of the organization. Thus, a person donating money to an IRA orphanage, for example, would have been regarded as a federal offender and subject to the penalty provided by law -- ten years imprisonment. In addition, the same person would have been regarded as a "terrorist." Nearly all the offenses of violence against people or against property were defined as terrorist crimes and enabled the FBI to eavesdrop on telephone conversations for the purpose of

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[187] *See* O'Loughlin, *supra* note 108, 108-09. There have already been exceptional cases in which part of the evidence was recognized as privileged because of its secret content, and afterwards this was held to be unbased or not harmful to state security. *See* Beall, *supra* note 186.

[188] *See* O'Loughlin, *supra* note 108, at 114-15.

[189] *See* Kopel & Olson, *supra* note 17, at 278-80; *see also* Norman Dorsen, *Civil Liberties, National Security and Human Rights Treaties: A Snapshot in Context*, 3 U.C. DAVIS J. INT'L L. & POL'Y 143 (1997); Antiterrorism and Effective Death Penalty Act 1996 § 504(e)(3)(A), § 219(a)(2)(C), 8 U.S.C.A. § 1189.

investigation. According to the bill, it is permissible to eavesdrop on targets who are suspected of being terrorists, without a warrant. It should be recalled that nearly all the violent offenses are defined as terrorism offenses, so that in practice, this arrangement is likely to result in it being adopted in an ordinary criminal proceeding. The possibility of eavesdropping on terrorists already exists, and accordingly, it has been argued that the addition to the law is harmful to democracy and not to terrorism.[190]

The law also confers problematic investigative powers upon the FBI, such as the power to investigate acts protected by the First Amendment of the Constitution, without reasonable cause to believe that a criminal act has been committed.[191]

Thus, following the 1996 Act, criticism has also been voiced to the effect that the government made excessive concessions and sacrificed individual freedoms in order to find a quick solution to the problem of terrorism. The importance of the fight against terrorism is acknowledged, but the sacrifice of values such as freedom of expression or maintaining due process, is actually a surrender to terrorism and not a fight against it. There are also those who assert that had it not been for the explosion in Oklahoma, the Act would not have passed as easily as it did.[192] Even if there is no direct impact, in the sense of a breach of the right to due process for each citizen, society as a whole is harmed. The legitimacy that is accorded to the judicial process is subject to question when the right of due process is not available to the accused, even if the accused himself is an "alien." The alien too is protected by the Fifth Amendment and if it is desired to take from him his life, liberty or property, this must be done while

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[190] *See* Kopel & Olson, *supra* note 17, 311-13; *see also* Strossen, *supra* note 180, at 538-39:

> While the anti-terrorist measure does not add any necessary power to the already expansive federal arsenal, it violates freedom of speech and association, privacy, and due process rights of millions of innocent American. This law substitutes "guilt by association" for actual evidence of criminal wrongdoing. It allows government to monitor and prosecute expressive and associational activities that are at the heart of the First Amendment.... In short, the new anti-terrorist legislation does not make us more safe, ... only less free.

[191] *See also* Dorsen, *supra* note 189.

[192] Beall, *supra* note 186.

respecting his right to due process. The possibility of putting forward privileged evidence violates the accused's right to due process. The law indeed enables an accused to consult an attorney, and if he cannot afford an attorney, the state will appoint one for him; however, more important rights are taken away from him.[193]

The law facilitates eavesdropping on the telephone of a person suspected of terrorist activities more easily than in the case of a person suspected of other offenses. Accordingly, the right to privacy is also violated more easily than in respect to other offenses. The law carefully screens all the aliens wishing to enter the borders of the United States. Further, by virtue of enabling privileged evidence in these trials, a more summary form of trial has been created to remove illegal aliens.[194]

It has been argued that the laws that followed the Oklahoma tragedy, would not have prevented that tragedy. Further, it is claimed that the laws endanger traditional American freedoms. According to this view, it is also possible to prevent terrorism by claims for compensation brought by victims of terrorist actions against states that encourage and support terrorism.[195] The latter claim is difficult to accept. True, the terrorist organizations are dependent on the donations they received; however, claims for compensation against the states supporting terrorism will not necessarily lead to the closing of the "budgetary tap" for these organizations.

There have been a number of attempts to draft a general convention against terrorism. The New York Convention referred to the capture of terrorists in and out of the state through interstate collaboration on intelligence relating to the circumstances of the crime and the identity of the suspect, and administrative collaboration aimed at preventing terrorist attacks. Further, the Convention provided that all the states would have to transfer relevant evidence to assist in the

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[193] *See id.* For the rights which were violated in consequence of the new law – prohibition on humanitarian donations to terrorist organizations, making it easier to eavesdrop, possible charges merely because of an association with persons suspected of terrorist activities and prohibition on participating in such an organization, etc. *See also,* Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074 (1996).

[194] *See* Carberry, *supra* note 165, at 690, 700.

[195] *See* Kopel & Olson, *supra* note 17, 336-37.

criminal proceedings against the suspect, following his capture.[196] The Tokyo Convention transformed all the offenses based on taking control of airplanes into terrorist offenses; however, the precise definition of the hijacking of an airplane was not clear.[197] These conventions failed as a result of defective drafting and enforcement and because not all the states wished to declare terrorism to be a crime against humanity. Further, in the absence of a clear definition of terrorism, various states define terrorism differently. The distinction between a terrorist activity and an activity by a movement promoting any particular right may be complex and problematic. Moreover, there is a large lacuna in relation to legal proceedings. No determinations have been made in relation to legal standards, for example, regarding the mode of prosecution. The police forces around the world play a central role in the battle against international terrorism. In each member state, Interpol has a national supervisory unit that has the task of cooperating and liaising with the local police, and supplying the resulting communications to the central Interpol. The shift to the European Common Market weakens supervision of the borders of member states. Thus, the possibilities of engaging in various illegal activities have increased. As a result, Europol has been established with the task of frustrating and preventing offenses, including terrorist offenses.[198]

The U.S. Anti-Terrorism Act, 1987, prevented Americans from associating with members of the PLO. The law infringed the freedom to associate with a political organization because of its political goals, and the right to join an association and accept the political views espoused by that association. This was a gross violation of the right of a person to express his political views, so long as he did not harm those around him. By punishing a person breaching this law, Congress enacted a law that violated Constitutional rights. If it is desired to preserve democracy, it is necessary to ensure that persons

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[196] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T 1975, 1035 U.N.T.S 167 [hereinafter The New York Convention].

[197] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter The Tokyo Convention].

[198] *See* Carberry, *supra* note 165, at 701-08, 711.

are not deprived of their freedoms and that certain beliefs and ideas are not prohibited.[199]

The Antiterrorism and Effective Death Penalty Act of 1996 conferred new power to the government. It empowers the President to declare certain organizations to be terrorist, and in that context, issue search warrants of their property. Currently, there are about thirty organizations that have been declared to be terrorist organizations under the 1996 Act.[200]

The PTA and EPA laws in Britain conferred the power to take measures that were essential to preserve peace and security. These laws included the power to detain a person for the purpose of interrogation. However, the powers to implement the special measures were not expressly prescribed by statute. There are those who argue that the emergency situation in Northern Ireland justifies the use of extraordinary measures; however, the question that arises is which measures are required in a given situation.[201]

It has been argued that had it not been for the Birmingham bombings, the first Prevention of Terrorism Act would not have been enacted in Britain in 1974. That Act prohibited association with persons affiliated with a terrorist organization, or membership of such an organization. Thus, if a person organized or helped organize a meeting of three or more people, with the knowledge that the purpose of this gathering was to support a terrorist activity, that person could expect to be charged under the law. Moreover, there was a prohibition on wearing in a public place any item of a uniform identified with any terrorist organization. Similarly, there was a prohibition on marching with a group of people wearing an item of clothing identified with the uniform of a terrorist organization, and persons committing this offense were subject to a maximum of three months imprisonment and/or a fine of up to £200.[202]

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[199] Lance A. Harke, *The Anti-Terrorism Act of 1987 and American Freedoms: A Critical Review*, 43 U. MIAMI L. REV. 667, 672, 679, 712, 719 (1989).

[200] *U.S. makes Counter-Terrorism Initiatives*, INT'L ENFORCEMENT L. REP. (1998).

[201] Twining, *supra* note 30, at 408.

[202] Harry Street, *The Prevention of Terrorism (Temporary Provision) Act 1974*, 1975 CRIM. L. REV. 192, 192-93 (1975). *See also* Bernard Robertson, *Anti-Terrorism Legislation and Political Uniforms*, 2 JUD. REV. 250 (1991).

The British statutes violate, primarily, the right to due process. There are two advantages in making use of the criminal legal process in order to resolve internal crisis. First, there is a symbolic effect in that it is shown that it is possible to overcome the problem using ordinary legal procedures, and even though those procedures must be adapted to that situation, outwardly the situation appears normal. Second, there is greater legitimacy in using standard procedures as opposed to extraordinary measures. The renowned "Diplock trials" were intended to preserve due process. It was thought that a jury would not be able to come to an unprejudiced decision in cases involving terrorist activities and the result would be a violation of due process. Thus, trials before a single judge, without a jury, were intended to prevent this state of affairs. However, this trial format led to the opposite result. In addition to the fact that the fate of the accused became dependent on a single man, and not on twelve men, the laws enabled the degradation of the standard of evidence to obtain a conviction; for example, conviction on the basis of a confession, as explained earlier. In 1992, three convicted felons were acquitted because it was discovered that the police had forged the investigative reports and the police officers who had testified in Court had given false testimony under oath.[203]

In Britain, the right to silence has been impaired by Britain's policy of permitting the justice system to use a suspect's silence against him. It is a premise of criminal law that it is for the prosecution to prove the guilt of the accused beyond a reasonable doubt. By not granting the accused a right to silence, or by holding his silence against him, this principle is violated. The government argued that the change in the right would help the police to reach the truth, without making improper attempts to encourage the suspect to tell that truth. Thus, a person would want to reveal all the information known to him, without any particular investigative measures being used against him, as a result of knowing that if he failed to do so and maintained his right of silence, he might be convicted on the basis of that silence. However, there is no proof whatsoever that this contention is correct or of the alleged efficiency of breaching this

[203] Aolain, *supra* note 161, at 1376-80.

right. It should also be recalled that it was intended to make use of these laws only in exceptional cases and not as part of an accepted and daily norm.[204]

In addition, the reports and reviews prepared by human rights organizations do not state whether the statutory regime existing in Britain is proper and appropriate. Rather, they continually propose amending, broadening or adapting the law to the prevailing situation. Further, the British investigators who are appointed from time to time to examine the situation appear on the face of it to be neutral and objective, but in fact, they are appointed by the state. Thus, the state can choose favorable investigators, who support its policies, and not appoint those investigators who hold views that are incompatible with those of the state.[205]

The Intelligence Services Act of 1994 empowers the bodies carrying out the investigations in Britain to conduct investigations and gather vital information. The statute does not provide a clear definition of when a situation will be deemed to be a danger to national security, thereby requiring the investigative bodies to become engaged. The Court found that it was impossible to define national security in a precise manner. Thus, without a specific definition, the term has retained a flexibility that enables the state to declare each time anew what threat to national security must exist at the particular time. Section 7 of the above Act exempts persons from criminal or civil liability where those persons acted under the authority of the Secretary of State. This is an authority equivalent to the license to kill of James Bond. The Act does not circumscribe the situations in which it is permitted to use the power of the Secretary of State. Thus, the statute does not state whether it is permitted to make use of this power to bribe officials of another regime, or to use extortion, torture or force while implementing the power of the Secretary of State. Alongside the disadvantages of this law, lies the fact that this is the first time that the investigative bodies in Britain will be subject to the rule of law. Further, the law refers to the establishment of a commission that will

[204] *See id.* at 1379-86.
[205] *See id.* at 1370-74.

oversee the work and work methods of intelligence gathering and security services.[206]

In Canada too, there is a statute empowering the services to investigate when there is a threat to the security of the state, namely, the Canadian Security Intelligence Service Act, 1984. A threat to the security of Canada is defined as follows:

> In this Act ... "threats to the security of Canada" means:
>
> (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage;
>
> (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person;
>
> (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state; and
>
> (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,
>
> but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).[207]

It is known that there is a serious danger that the investigative bodies will make improper use of the law, and accordingly, it is vital that this danger be minimized, *inter alia*, by precise statutory definitions of the particular situations that will be regarded as justifying the intervention of investigatory bodies.[208]

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[206] John Wadham, *The Intelligence Service Act 1994*, 57 MOD. L. REV. 916, 918-20, 922-23, 926-27 (1994).

[207] Canadian Security Intelligence Act, R.S.C., ch. C-23, § 2 (1984).

[208] Peter Gill, *Defining Subversion: The Canadian Experience Since 1977*, 1989 PUB. L. 617, 620-21, 633-34 (1989).

The various primary laws were intended for a particular purpose, namely, to prevent the bodies responsible for the security of the state from using the power granted to them against persons exercising their rights.[209]

Today, in the age of the Internet, we are exposed to the old terror, which can communicate more easily with terrorist organizations throughout the world, as well as to a new type of terror. Only recently, the entire Internet network was "attacked" by deadly viruses (such as the virus known as "I love you"). Similarly, "flaming" or the swamping of sites by emails, which can lead to the collapse of a site, may be described as a new form of terrorism. Consideration should also be given to the prevention of this type of terrorism. In light of the trend of globalization that is sweeping the world, it would perhaps be appropriate to establish a number of laws or effective international conventions for this purpose. Although there is a view that it is not possible to "listen" or find the source of the terrorist harm and prevent it, in fact in this media, there are means of locating these sources relatively easily. From a technological point of view, it is possible to prevent terrorist activities on the Internet by swiftly identifying the problems and neutralizing them. The danger that has to be dealt with is that the "Internet police" will remove sites from the Internet merely because they do not approve of them, thereby violating freedom of expression. Accordingly, it is necessary to define precisely what will be regarded as a terrorist act in the medium of the Internet, how action should be taken against this terror, and the remedies which will be afforded to innocent sites that may be damaged by the activities of the "Internet police."

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[209] *See* Kopel & Olson, *supra* note 17, 318-20.

VIII. CONCLUSION

As we have seen, the definition of torture and the distinction between torture and degrading treatment, for example, is open to debate. Every person defines the term "torture" in accordance to his moral beliefs and the world of values in which he has been educated and nurtured. However, while in some cases it is uncertain whether from a conceptual point of view the situation falls within the definition, there are circumstances where there is no doubt that torture has been employed. It is almost undisputed that those clear cases of torture should be prohibited. The problem lies with the difficult cases where it is unclear whether the act is torture or inappropriate treatment. Further, it is of the utmost importance to place boundaries upon the definition of terror and determine clearly who is a terrorist.

Notwithstanding that this definition seems trivial, we have seen how easily governments can define legitimate political activities as terrorist activities if they so wish. A democratic state faces a great problem. On one hand, it cannot act like a totalitarian state and torture persons under investigation to extract important information. On the other hand, if it does not take exceptional action on occasion, it will not be able to prevent terrorist activities. On occasion, it seems that it is possible to justify the torture of a single person, where it is suspected that the information in his possession can save the lives of many other innocent persons. The problematic nature of this argument, and in particular the case of the "ticking bomb," has been discussed above. Likewise, we have seen that whereas there is a similarity between the investigative methods implemented in Britain and Israel respectively, there is a sharp difference between those methods and the investigative methods applied in Canada and the United States. Possibly, this difference arises from the difference in the problems faced by the various states. To the credit of Britain and Israel, these issues are subject to the scrutiny of the legal and academic systems, and are even part of the public discourse.

We have considered the problem of the admissibility of confessions obtained during the course of interrogations, where it is unclear whether the suspects gave them freely and voluntarily.

Finally, we saw that there is a division of opinion as to legislation which can help eliminate terrorism, and that even the existing legislation is permeated by numerous problems that must be considered in relation to the various violations of human rights. Furthermore, new problems have arisen such as terrorism by means of computers. Until the mid-1980s, there was no debate around GSS investigations. The debate followed the establishment of the Landau Commission. While the GSS has become the focus of suspicion, the importance of its role in the fight against terrorism has not diminished. The GSS has tried to learn the lessons of the past. GSS investigations raised the question of the balance between the genuine needs of security, when it is known that the particular suspect holds information that can save human life, and human rights and respect for human dignity. Thus, on one hand, boundaries must be set for the investigators, and on the other, they must be protected, if they acted in accordance with the rules.[210]

> Every government official must respect the law. This duty applies in times of calm and is also pertinent in times of emergency. "When the cannon shoots, the muses are quiet." However, even when the cannon shoots, it is necessary to preserve the rule of law. Society's fortitude in confronting its enemies is based on its recognition that it is fighting for values worth defending. The rule of law is a component of national security. The security services are creations of the law. They must respect the law. Security considerations may on occasion influence determinations relating to the content of the law. However, when this content is determined, the (formal) rule of law requires compliance with the law, without security considerations becoming justification for its breach.[211]

Democracy does indeed fight terrorism with "one hand tied behind its back," yet without a response to terrorism and the ability to investigate in order to prevent terrorist activities or attacks, democracy

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[210] Elyakim Rubinstein, *Security and Law: Trends*, 44(3) HAPRAKLIT 409, 413-14 (1999) (Translated from Hebrew).

[211] Aharon Barak, *The Rule of Law and the Supremacy of the Constitution*, 5(2) LAW & GOV'T 375, 381 (2000), (quoting H.C. 168/91 Murkus v. Minister of Defense and Others, 45(1) P.D. 467, 470) (Translated from Hebrew).

would not exist. At the same time, it should be remembered, "when the end justifies the means, the difference between terror and those fighting it, becomes increasingly indistinct."[212]

[212] *See Legislation Permitting Physical and Mental Pressure in GSS Interrogations, supra* note 101, at 19.