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Israel and the Recognition of Torture: Domestic and International Aspects[1]

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1 INTRODUCTION

THIS CHAPTER ADDRESSES a recent decision by the Israeli Supreme Court, in which it was held that the use of physical force by the General Security Service (GSS) in the course of its interrogations was illegal under Israeli law.[4] The Court ruled that, in the absence of explicit enabling legislation, the GSS investigators' general interrogation powers do not encompass the power to resort to these methods. At the same time, the Court asserted that in "ticking bomb" situations (as defined by the Court),[5] the defence of necessity was available to an investigator who employed such methods, provided that no other means were available to save human lives and that the pressure resorted to was no more than was necessary to extract the information needed to diffuse the bomb. As a consequence of this ruling, future applications for injunctions

[1] This chapter originated in papers presented by the authors in the constitutional roundtable at the Faculty of Law of the University of Toronto. The roundtable session focused on the limits of defensive democracy in the aftermath of the new Israeli Supreme Court ruling. The authors wish to thank the participants of the roundtable for their comments and remarks and Idan Erez for his editorial assistance. The responsibility over the content of this article lies, of course, with the authors. Section 2 was drafted by co-author Kahana; sections 3 to 5 were drafted by co-author Reichman and the arguments contained therein are further elaborated in A Reichman, "*When We Sit To Judge We Are Being Judged*: The Israeli *GSS* case, *Ex Parte Pinochet* and Domestic/Global Deliberation"; forthcoming in 9 *Cardozo J. Int'l & Comp. L.* (2001).

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[4] H.C. 5100/94 *Public Committee against Torture in Israel et al.* v. *The State of Israel and the General Security Service* [1999] [as yet unpublished] [hereinafter *GSS* case], para. 40. An English translation of the judgment can be found at: http://www.court.gov.il/mishpat/html/en/system/index.html. Our impression is that the translation, while a valuable contribution to the world of comparative law, raises some difficulties. Perhaps the most glaring is found in paragraph 17, where the Court, in the official Hebrew version, acknowledges that there have been occasions where it chose not to issue an injunction against the use of force by GSS investigators in interrogations. The English version omits this sentence, giving the impression that at no time in the past has the Court, even if by omission, sanctioned the use of force.

[5] See in paras. 15, 33 and 34.

against the use of force by GSS investigators will succeed in Israeli Courts in all circumstances. However, should an individual GSS investigator inflict pain and suffering (presumably before such an injunction, so as not to violate a Court order), the investigator will be sheltered from *criminal* liability under the defence of necessity if the conditions appropriate to the defence were present. The Court stated that, should the Knesset (the Israeli Legislature) wish to change this legal picture, it would have to address the issue through explicit legislation.

The *GSS* judgment is clearly an administrative law ruling. This emerges from the presentation of the question before the Court, in the analysis of its answer, and in the phrasing of its conclusion. The question in the case was presented in terms of the "legality"[6] of "directives"[7] and "practices",[8] rather than on the "constitutionality" of "legislation". The Court's analysis focused on the power of a governmental organ rather than on constitutional rights and their limits. The conclusion explicitly stated that if and when the legislature decides to act on the matter and to enact relevant legislation, then the legislation will have to be within the limits of Israel's Basic Law: Human Dignity and Liberty (BLH).[9] It is only at that point that this issue would become a constitutional issue. However, it is possible to read the ruling as signalling that such an enactment would be constitutionally futile because any legislative attempt to legitimise the use of physical force during GSS interrogations would fail constitutional muster.

Sections 2 and 3 of this chapter focus on the domestic arena. After describing the decision, the analysis examines the Court's suggestion that the legislature could, after appropriate consideration, enact legislation explicitly to authorize GSS interrogators to use physical force. The respective sections suggest two competing readings of this judicial advice. According to the first, the reading favoured by co-author Kahana, there are sufficient indications in the decision that even legislative acts explicitly authorising the use of physical force will be unconstitutional and will be struck down by the Court. The second interpretation, that favoured by co-author Reichman, contends that such enabling legislation is possible as long as it is carefully tailored to the matter of preventing terrorist attacks. It should be noted that the authors do not express any position regarding the desirability of such legislation, and restrict their analysis to the legal holdings of the *GSS* case.

For purposes of setting up the terms of ongoing post-*GSS* interpretive debate in Israel, the authors assume both of these two competing interpretations are reasonable readings and that the legal process in Israel has yet to clarify which is the preferred reading. It may be that the evolving nature of Israel's judicial

[6] *GSS* case, *supra* n. 4, at para. 1.
[7] *Ibid.*, at the introductory paragraph of the case (not numbered).
[8] *Ibid.*
[9] *Hok Yesod: Kevod HaAdam VeHeiruto* (*Basic Law: Human Dignity and Liberty*), Sefer HaHukim (S.H.) 150 (1992); *GSS* case, *supra* n. 4, at para. 39.

scrutiny of human rights violations in interrogations should be factored into the jurisdictional and choice of law analysis of foreign courts should one or more of them be faced with a tort action brought abroad against GSS officials for torture. Similarly, Israeli courts may well have to address which is the better reading of the *GSS* case should a foreign court award damages to a plaintiff and should that plaintiff then seek to have that award enforced in Israel. Thus, this chapter will move from the domestic arena to the international arena in Sections 4 and 5. Section 4 reflects on how the *GSS* judgment may be received by foreign and international institutions in light of recent developments in public international law, specifically international criminal law. Section 5 then considers the possible effect of diminished state immunity and expanded universal jurisdiction in domestic courts on the emerging global constitution and, in turn, on questions of private international law.

2 READING ONE: THE ISSUE HAS IN EFFECT BEEN DECIDED

The first plausible reading of the case that the authors suggest is that legislation that will make it legal for the GSS to use force during interrogations will be struck down since, by the Court's reasoning in *GSS*, it will necessarily stand in contradiction to the BLH.[10]

According to the BLH, constitutional scrutiny involves a two-stage process: the rights stage and the limits stage.[11] In the rights stage, the Court must ask whether the impugned measures infringe on a protected right. If such infringement is found, the Court must then decide whether the infringement is valid according to the limitation clause in section 8. That clause saves those infringements that are contained "in a statute befitting the values of the State of Israel, aimed at a proper purpose, and to an extent no greater than required, or by virtue of explicit authorisation in such a statute". In the *United Mizrahi Bank* decision, the Supreme Court ruled that an act is considered to infringe on a right "to an extent no greater than required" if that act satisfies three requirements. First, the act must be rationally connected to the purpose of the legislation. Second, the act must pursue its goal while minimally impairing the right. Third, the negative consequences of the act must be proportionate to the purpose that the act achieves.[12]

[10] The BLH does not include a supremacy clause according to which contradicting legislation is to be struck down. The Supreme Court of Israel, however, decided that despite this, the BLH is supreme. See C.A. 6821/93 *United Mizrahi Bank Ltd., et al.* v. *Migdal Cooperative Village, et. al.*, 49(4) PD 221 (1995).
[11] In this respect, the BLH follows the model created by section 1 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
[12] See *United Mizrahi Bank*, *supra* n. 10, at 436–7. The Court thus adopted the test developed by the Supreme Court of Canada in *R* v. *Oakes*, [1986]1 S.C.R. 103 at 138.

Suppose now that the Knesset enacts a statute that authorizes GSS interrogators to use force during interrogations (a hypothetical Use of Force Act).[13] This Act would undoubtedly be found to undermine the rights to dignity and to liberty of those being interrogated. Both of these rights are protected in sections 2, 4 and 5 of the BLH and, symbolically, both also appear in its very title. In the next stage of inquiry, the Court would look to section 8's limitation clause. Section 8's first requirement is that the infringement of the protected rights be contained within a statute. For the purposes of this analysis, the Use of Force Act is presumed to be a statute. The second and third requirements are that this statute befits "the values of the State of Israel" and that it be passed "for a proper purpose". Again, it is assumed that fighting terrorism indeed befits the values of the State of Israel and that this represents a proper purpose. On these assumptions, the Use of Force Act would therefore likely survive the first three requirements of the limitation clause.

From the language of the Court's decision in *GSS*, however, the Use of Force Act will fail to meet the fourth requirement of the limitation clause. Recall that this condition stipulates that the act infringe on the interrogation subjects' rights only "to an extent no greater than required". When the Court examined the impugned physical means of interrogation in the *GSS* case from an administrative law perspective, it asked whether these means fell within the powers of the GSS's interrogators. The central principle of Israeli administrative law is the principle of reasonableness. Correspondingly, the Court developed what it called "the rules of 'reasonable interrogation' ".[14] While discussing the principle of reasonableness, however, the Court explicitly discussed the issue of proportionality. The Court stated:

> "[A] democratic society, desirous of liberty seeks to fight crime and to that end is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided it is done for a proper purpose and that the harm does not exceed that which is necessary."[15]

The Court's conclusion is anchored in administrative law and not in constitutional law. That is, the Court refers to the powers of the GSS interrogators and

[13] A private member bill that authorises the GSS to use force during interrogations was indeed tabled in the Israeli legislatures and was supported by 47 (out of 120) Knesset members. See G. Allon, "47 MKs back "special tactics" for Shin Bet", *Haaretz* (24 October 1999). The Israeli Justice Minister did not support this bill (*ibid.*) Instead, the Israeli Prime Minister appointed a team in the Ministry of Justice to examine the legal regime regarding GSS interrogation following the *GSS* decision, and to suggest possible responses to the decision. The team's final report was not open to the public, but the media reported that the team failed to arrive at unanimous recommendations and was split in its approach to the matter. One approach supported legislation that would enable the use of "special means" in cases where "the agency is convinced that detainee holds information likely to prevent a clear and present danger posed to the state"; a second approach was to allow the GSS "to use certain methods only in special and exceptional circumstances and following strict legal guidelines"; a third approach opposed any legislation legitimising the use of force in GSS interrogation. See G. Alon, "Justice Ministry panel split on legalising Shin Bet 'torture' ", *Haaretz* (10 December 1999).

[14] *GSS* case, *supra* n. 4 at paras. 21–3.

[15] *Ibid.* at para. 22.

not to the constitutionality of any legislation. The Court's language, however, is obviously based on the text of the BLH. The Court mentioned "human dignity and liberty", which echoes both the name of this constitutional statute, as well as the specific rights for human dignity and liberty identified in sections 2, 3 and 5. In addition, the Court made reference to the "proper purpose" of the legislation, and to the infringements not "exceeding that which is necessary"; these are terms that appear in the section 8 limitation clause.

Similarly, when the Court moved from discussing the general standard for legality to discussing whether the specific physical means of interrogation met this standard, it followed the constitutional proportionality test set out in the *United Mizrahi Bank* case, notably the standards of rational connection and minimal impairment. Thus, when the Court disqualified the "frog crouch" because it "does not serve any purpose inherent to an investigation",[16] it was applying the rational connection test. When the Court found shaking to be illegal because it "surpasses that which is necessary",[17] the Court was addressing the standard of minimal impairment.[18] When the Court held that normal handcuffing techniques sufficiently ensure the interrogator's security without requiring recourse to handcuffing the suspect's hands behind his back or to restraining the suspect with small handcuffs, the Court is utilizing the concept of alternative means within a minimal impairment inquiry. When the Court found deliberate sleep deprivation to "harm the rights and dignity of the suspect in a manner surpassing that which is required",[19] the Court is applying the concept of necessity, again within the minimal impairment inquiry. In other words, although working under the administrative law's disguise of "reasonableness", the Court was in reality mounting an inquiry into rational connection and minimal impairment.

The Court, then, effectively ruled that the impugned physical techniques either were not rationally connected to the purpose of the interrogation or they were not the least drastic means with which to achieve their goal. It should be noted that the Court did not arrive at this conclusion due to the government's failure to submit evidence regarding these means; rather, the Court ruled positively that these means did not withstand a scrutiny according to a reasonableness standard that incorporates constitutional norms. It follows from this that a statute legalising the use of these or similar means in interrogations will be presumptively unconstitutional.

Nevertheless, the Court's address to the legislature implies that such legislation is possible. The Court said that, if it will "nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the

[16] *GSS* case, *supra* n. 4 at para. 25.

[17] *Ibid.* at para. 24.

[18] *Ibid.* at para. 26

[19] *Ibid.* at para. 31.

legislative branch which represents the people."[20] The Court made note of the fact that "various considerations must be weighed",[21] and that it should be the legislature's objective to ensure that such legislation falls within the protection of the limitation clause. In other words, the Court pointed out the topics for discussion, identified the factors to be weighed, and allowed for the possibility that physical means of interrogation could escape a finding of unconstitutionality under the limitation clause. Indeed, the Court wrote that it would not "take any stand on this matter *at this time*",[22] thereby implying that it would be willing to consider the question at a future date. Can the Court's advice be reconciled with the Court's reasoning? How could the impugned means of interrogation ever be adjudged to be rationally connected to their goal and minimally impairing of any impugned right simply by virtue of being adopted by the legislature?

One word contained within the Court's discussion can arguably resolve this difficulty: this is the word "ordinary". The Court implied that the physical means of interrogation were "unreasonable" in terms of "*ordinary* investigation rules". The legislature might enact these means by deciding that ordinary investigation rules are simply not sufficient for Israel. Even though physical means of interrogation do not survive the administrative law standard of "reasonableness" for ordinary interrogation rules, they still might survive the external constitutional law standard of proper purpose and minimal impairment should the legislature ground the statute in *extra*ordinary necessity. This dualism lines up with the idea of internal and external standards of scrutiny which is a familiar one in the rights-protection world. For example, it can be found in the Canadian framework of internal and external limitation mechanisms provided by sections 7 and 1 of the Canadian Charter of Rights and Freedoms.[23] Section 7 provides that the rights to life, liberty and security of the person can be deprived "in accordance with principles of fundamental justice", and section 1 provides that all *Charter* rights are subject to "reasonable limits".[24] Reading these two sections together suggests that it is possible, at least theoretically, to have some limits on the right to life, liberty, and security that might not be in accordance with the principles of fundamental justice but that would nevertheless still be considered "reasonable limits". Such limits would not survive section 7's internal limitation clause, but they would survive section 1's external limitation clause.[25] A similar structure can inform analysis of the situation at hand.

[20] *GSS case*, *supra* n. 4 at para. 39.

[21] *Ibid.*

[22] *Ibid.* (emphasis added).

[23] *Supra*, n. 11.

[24] The full text states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[25] In a very recent case, Canada's Federal Court of Appeal issued a judgment that followed this exact pattern of a violation of section 7 but a justification under section 1: see *Suresh* v. *Canada*, [1999] F.C.J. No. 865. Significantly, the case involved deportation of a person to a country where there was a substantial risk he would face torture.

But the analogy to section 7 of the Canadian Charter illustrates why this structure cannot explain the contradiction between the Court's granting of permission to the legislature to consider constitutionally permissible physical means of interrogation and the Court's finding that these means were not reasonable according to administrative law. The reason why section 1 can still protect a measure that section 7's own limitation clause does not protect is that the formulas prescribed by these clauses are not identical; specifically, a measure could fail to be "in accordance with principles of fundamental justice" (section 7), but could still be "demonstrably justified in a free and democratic society" (section 1). Imagine now, that at some point a Court rules that a certain measure is found not to have been done "in accordance with principles of fundamental justice" *because* this measure was not "demonstrably justified in a free and democratic society". In such a case, it would be impossible to hold that this measure could be saved by section 1, since it was in violating the substance of section 1 that it violated section 7. This is exactly the structure of the Court's analysis here. As we have indicated previously, *the very reason* why the Court found the impugned means of interrogation to be "unreasonable" in terms of administrative law was that they were not rationally connected to the goal of the interrogation or that they were not the least drastic means available. Once these were declared to be the reasons, it became impossible to hold that such means could ever be saved by section 8, the Israeli limitation clause. These means had already been judged to have failed the clause's requirements.[26]

Legally speaking, this reading of the case suggests that there is a tension between the Court's address to the legislature and the Court's normative finding. Politically speaking, it suggests that the Court put itself in a no-win situation that would arise should the legislation that it suggested the legislature consider in order to legitimise physical means of interrogation ever be challenged in the Courts. In such a situation, the Court would likely be harshly criticized regardless of its ruling. If it upheld the legislation, it would be admitting that it had allowed the legislature, simply by virtue of its being the legislature, to violate the limitation clause. This is the worst form of deference. If, on the

[26] In order to avoid confusion by the reader who is not familiar with the Israeli context, it should be emphasised that the second part of section 8's limitation does not empower the Knesset to override the BLH. Section 8 prescribes that rights infringements are valid only if they are contained "in a statute befitting the values of the State of Israel, aimed at a proper purpose, and to an extent no greater than required, or by virtue of explicit authorisation in such a statute." In other words, an explicit authorisation by the legislature to impinge on rights must conform to this substantive test. The purpose of the second part of section 8 ("or by virtue of explicit authorisation in such a statute") is not to provide for an exemption to the standards of justification prescribed in the first part of section 8, but to provide that a justified limit on a right can be also be exercised by executive regulation, and not only by direct provision in statutes. Comparing again with the Canadian limitation clause in Section 1 of the Charter (*supra* n. 11), what the Israeli provision stipulates is that limits on rights do not have to be written in a statute but merely "prescribed" by a statute. The idea behind both the Canadian and the Israeli authorisation for the non-legislative rights infringement is that, in the modern state, statutes cannot cover all areas of legislation and there is a need for administrative regulation. But, once limitation by regulation is expressly permitted, the idea is obviously not to then exempt this regulation from the burden of the limitation clause's standards of justification.

other hand, it struck down the legislation, it would be accused by the legislature of sending it to work on legislation that it knew or ought to have known was doomed to be struck down.

3 READING TWO: ALTHOUGH THE THRESHOLD IS HIGH, THE DOOR IS STILL OPEN

According to the reading advocated below, the Israeli parliament has not been precluded by the judicial analysis in the *GSS* case from empowering the GSS or its investigators to apply force, when the recourse to force is the only effective measure available to prevent loss of human lives in a terrorist attack. This reading attempts to reconcile the tension between the Court's analysis and its explicit statement that the legislature may seek to empower the GSS to apply force.

The legal starting point for the Court's analysis is the lack of any specific enabling legislation under which the GSS operates. As a result, the GSS, *as an organisation*, is not authorised to exercise state power or to deprive individuals of their liberty, a deprivation inherent in any non-voluntary interrogation. The Court found that the only legal basis for the exercise of state power by specific GSS investigators to interrogate a person can be found in an ordinance, dating from the British mandate, which authorises "a police officer or . . . any other officers generally or specially authorised by the [Justice Minister] to hold inquiries into the commission of offences".[27] The Justice Ministers throughout Israel's history have indeed named specific GSS officers to conduct interrogations with respect to crimes committed under the Penal Code as well as under specific legislation put in place to combat terrorism. Thus, "[b]y virtue of this authorisation, [named] GSS investigators are tantamount to police officers in the eyes of the law"[28] for the purposes of conducting interrogations. In other words, GSS investigators are not empowered to combat terrorism with arrows not in the quiver available to police forces in their investigations of any other crime.[29]

Does the general authorisation to conduct investigations, shared by the police and the named GSS investigators, include the legal power to use physical pressure methods or otherwise to inflict pain? The administrative law answer is in the negative, since according to administrative law principles any violation of human rights, such as the one incurred by harmed suspects, must be based upon

[27] Article 2(1) of the Criminal Procedure Statute [Testimony] as amended in 1944, as cited in *GSS* case, *supra* n. 4, at para. 20.

[28] Article 2(1) of the Criminal Procedure Statute, *supra* n. 27.

[29] "The power to interrogate given to the GSS investigator by law is the same interrogation power that the law bestows upon the ordinary police force investigator. It appears that the restrictions applicable to the police investigations are equally applicable to GSS investigations. There is no statutory instruction endowing a GSS investigator with special interrogating powers that are either different or more serious than those given to the police investigator." *GSS* case, *supra* n. 4, at para. 32.

an explicit authorisation; otherwise, the enabling statute is interpreted so as not to allow such state action.[30] Since the statute that empowers the Justice Minister to authorise GSS officers to conduct interrogations does not mention the use of force or other means that inflict physical pain or cause degrading psychological harm, such use is interpreted as being unauthorised, and is therefore *ultra vires*.

The state argued, however, that some methods that inflict physical or emotional harm are nonetheless ancillary to the conduct of ordinary investigations.[31] Accordingly, no specific authorisation by law was required since, in order to carry out its powers under the statute to interrogate, interrogators had to be able, legally, to resort to methods that are inherent to the conduct of interrogation as such. More specifically, the state argued that the tying of a suspect's hand to a chair is justified for the protection of the investigator; that the placing of a sack to cover the suspect's head is justified so as to prevent eye contact and communication between the suspects; that the playing of powerfully loud music is justified so as to prevent the suspects from verbally communicating with each other; and that the deprivation of sleep is derived from "the needs of the interrogation", such as the timetable of the investigators and the recognized need for a thorough and uninterrupted investigation.

It is with respect to these justifications (or legitimate purposes) that the Court found no rational connection, a failure to meet the least restrictive means requirement and disproportionality.[32] The Court did not engage other pairs of

[30] This presumption dates back to the landmark decision of *Kol Ha'am* (H.C. 73/53 *"Kol Ha'am" Company Limited* v. *Minister of the Interior*, 7 P.D. 871), and was reinforced by later jurisprudence, such as H.C. 2918/93 *The City of Kiryat Gatt* v. *The State of Israel and others*, 37 (5) P.D. 832, referred to by the Court in the *GSS* case, *supra* n. 4, at para. 19.

[31] It should be noted that the state did not try to justify all the methods used by GSS investigators as inherent to the conduct of an ordinary investigation. For example, the state did not argue that the physical shaking of a suspect is a method that every investigator (in the GSS or the police) is permitted to employ, nor that there is any justification one can put forward for using this method as part of an ordinary investigation. The Court, therefore, had no difficulties in finding that the use of such physical means "surpasses that which is necessary" [para. 24]; however, on the reading of the case advanced here, this finding does not necessarily curtail the use of this method—or others—should the state explicitly empower the GSS to use such methods in tandem with putting forward an alternative justification, such as the need to extract information from a suspect in a "ticking bomb" situation.

[32] The Court found that while handcuffing the suspect's hands is indeed included in the inherent powers of interrogation (and therefore can be resorted to by the GSS interrogators without specific authorisation in the empowering statute), the cuffing used by GSS "is unlike routine cuffing. The suspect is cuffed with his hands tied behind his back. One hand is placed inside the gaps between the chair's seat and back support, while the other is tied behind him, against the chair's back support. This is a distorted and unnatural position. The investigators' safety does not require it." (para. 26.) Moreover, the Court found no rational connection between the use of particularly small handcuffs and the safety of the interrogators (*ibid.*). Similarly, the Court accepted that "seating a man is inherent to the investigation", but stated that "this is not the case when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is sitting in this position for long hours. This sort of seating is not encompassed by the general power to interrogate" (para. 27). The Court accepted that means designed to prevent contact and communication between suspects are indeed inherent to the conduct of an interrogation. But since the specific method used by the GSS included covering the suspect's head with a long, opaque sack that caused the suspect to suffocate, the Court found those methods not rationally connected to the furtherance of the legitimate

means-justifications that go beyond the ambit of ordinary rules of investigation into ordinary crimes.[33] Such examination was not necessary, since the Court found that the GSS investigators have no statutory authority permitting them to exercise any measures beyond those that constitute an *ordinary* investigation (such as asking a suspect questions, handcuffing a suspect in order to prevent harm to the investigator and keeping the door to the suspect's cell closed to avoid an escape or eye-contact with other suspects).

In particular, the Court did not examine whether the desire to prevent bodily injuries and the loss of human lives by terrorist attacks may justify recourse to the use of force. According to this reading of the case, the Court found that these measures and this justification are not an inherent element of an investigation. Since the official state power invested in the police and the GSS investigators did not cover these means as designed to combat terrorism and save human lives, their use requires specific authorisation in law. The state offered one possible authorisation—the necessity defence—which was dealt with by the Court separately, and will be addressed below. At this point, suffice it to note that, since it was not necessary to its decision, the Court, in its analysis of the "reasonableness" of the methods used by GSS investigators, did not decide whether applying force to pressure a suspect to reveal information crucial to foil a terrorist attack is rationally connected to the prevention of the loss of human lives. Similarly, the Court did not rule on the availability of other less restrictive means capable of achieving this purpose, and it did not engage in a proportionality analysis between the harm inflicted by applying these means and the harm caused by frustrating such legislative purpose. Nor did the Court consider evidence on these points. Thus, these issues remain open; the state and the human rights organisation may be required in the future to bring forth evidence to

investigative purpose (para. 28). Given that the suspect is covered for long hours, the Court stressed that other means—less restrictive—are available, such as an eye cover (*ibid.*). The Court was also prepared to assume that precluding the suspect from hearing other suspects or "voices and sounds that, if heard by the suspect, risk impeding the interrogations' success" (para. 29) is an inherent part of an interrogation, and hence does not have to be explicitly authorized by the empowering statute. That being said, the Court found that being exposed to powerfully loud music for a long period of time is unreasonable and therefore *ultra vires*. In the same line of reasoning, the Court found that "a reasonable investigation is likely to cause discomfort; it may result in insufficient sleep", but "sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time-wise, may be deemed a use of an investigation method which surpasses the least restrictive means" (para. 23; see also para. 31) and hence unauthorised in law. The Court added that combining all of these methods is particularly problematic, given the cumulative harm inflicted; the use of each of these methods, and especially their use in combination, is therefore outside the current scope of the general powers of GSS investigators.

[33] According to the state, these methods could be used whether the purpose of the interrogation was to uncover past wrongdoing or to prevent future harm, and could be used regardless of the nature, magnitude and imminence of any such future harm. By casting these methods as inherent to an interrogation as such, the state implied that these means could be used by any police-person conducting any kind of interrogation for any kind of offence. This position, as the Court pointed out, contrasts with the rules governing ordinary interrogations, which reject the use of force (*GSS* case, *supra* n. 4, at para. 23).

support their positions, and the Court will have to determine, should the Knesset legislate, the normative and evidentiary aspects of such legislation.

The alternative legal ground for the use of extraordinary investigative methods (i.e., the use of force or the infliction of physical and emotional harm) put forward by the state was the necessity defence, found in the Penal Code. This ground, according to the state, justifies the use of force by GSS investigators in "ticking bomb" situations, defined by the Court as follows:

> "A given suspect is arrested by the GSS. He holds information respecting the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, however, the bomb may be diffused. If the bomb is not diffused, scores will be killed and maimed."[34]

According to the state, because the GSS is burdened with safeguarding the public against terrorist attacks, and because no other alternative is available in "ticking bomb" situations, the Penal Code section establishing the defence of necessity should be read as authorising GSS investigators to resort to shaking a suspect (or applying similar methods) in order to extract the information from him and thus save human lives.

The Court disagreed. While accepting that the defence of necessity could, in these extreme circumstances, be available to GSS investigators as individuals in *ex post facto* criminal investigations,[35] the Court found that this defence cannot serve as an *a priori* authorisation for government to use these methods.[36] The Court reasoned that the administrative power is based on establishing explicit, general, forward-looking criteria, whereas the necessity defence is engaged as an *ad hoc* reaction to an event: "It is the result of an improvisation given the unpredictable character of the events."[37] Since the statutory authority relied upon by the state—the necessity defence—failed to empower the executive to act in a manner violating human rights, and since rules of ordinary investigation did not include the authorisation to inflict pain and suffering, the state lacked an explicit authorisation in law to use force in interrogation aimed at extracting crucial information in "ticking bomb" situations. Consequently, an application to a court of law, on administrative law grounds, for an injunction against such use of force by the GSS will succeed.

Read as such, the decision suggests that the legislature is indeed not free to empower the GSS to use the methods above as inherent to any interrogation *qua* interrogation. Any attempt to enact into law the methods above as ancillary to an "ordinary" interrogation will likely fail the proportionality test imposed by

[34] *GSS* case, *supra* n. 4, at para. 33. It should be noted that the "ticking bomb" situation is broader than an actual ticking bomb. Under the necessity defence, the Court does not require the actual timing mechanism of a particular bomb to have been activated. The term "ticking bomb" is in essence a metaphor that stands for a terrorist attack that has been set in motion so that harm to human life is imminent unless the security forces intervene so as to foil the attack: *GSS* case, *supra* n. 4, at para. 34.

[35] *Ibid.*, at paras. 33–4.

[36] *Ibid.*, at para. 36.

[37] *Ibid.*

BLH in the same way that it failed the review under administrative law grounds. At the same time, this judgment does not foreclose the possibility that the legislature may empower the GSS to use force in "ticking bomb" situations, given the nature of the harm, its magnitude, its imminence and its character.[38] Such legislation would overturn the *GSS* case to the extent that it would allow the state to demonstrate a "ticking bomb" situation so as to avoid an injunction.

Should the legislature see fit to empower the GSS to use force or to inflict harm on suspects it interrogates, this legislation would be subjected to constitutional scrutiny under the BLH using legal formulae similar to those employed by the Court in *GSS* for its administrative law review. It seems, however, that the content poured into the different variables of the legal tests would be different. For example, the Court's proportionality analysis under the BLH will be different from the administrative analysis conducted in the *GSS* case because the purpose of the legislation in question will be different. Whereas the legislation that currently empowers the GSS incorporates ordinary rules of investigation, that is, authorises GSS investigators to employ only those means integral to any investigation as such, a specific statute could empower the GSS to combat "ticking bomb" situations by specifically outlining the harm the legislation seeks to prevent and the methods the GSS can use to prevent such harm, including methods that go beyond those integral to ordinary investigations. In other words, while the Court in the *GSS* case did resort to the language of the proportionality analysis under the BLH, it did not place at the centre of its analysis the variables that would be relevant in a constitutional review of an enabling statute.

Should the Knesset legislate, the Court will have to scrutinise very carefully whether such empowering legislation meets the constitutional requirements set out by the BLH. As the *GSS* case made clear, any such empowering legislation will amount to an infringement of liberty, and thus will prompt the Court to determine whether that infringement was prescribed by law, was part of a statute enacted for a proper purpose that befitted the values of the State of Israel, and whether the impugned statute infringed the right to an extent no greater than was required.[39] As part of its analysis of the "prescribed by law" requirement, the Court will have to examine whether the law is explicit, clear and precise enough so as to confine and to guide executive discretion. Further, the state will have to show exactly how each method prescribed directly advances the gathering of information necessary for the defusing of the ticking bomb, real or more metaphorical. Further, the state will have to show the absence of any other less restrictive means of avoiding the imminent deaths. Arguably (and hopefully), this would not be an easy burden to meet. It might very well be the case that the legislature, having read the current judgment, will be unable to defend in court the authorisation of playing loud music, or the cuffing of a prisoner in

[38] Acts of terror are aimed against the state as such, so as to terrorise its citizens as citizens, and thus may be seen as requiring means of collective self-defence.

[39] Section 8 of BLH.

the "Shabach" position, because the causal link between such methods and the gathering of information necessary for the diffusion of the ticking might be too remote, or there might be less restrictive means; however, under the reading of the *GSS* case suggested here, this inquiry has not yet been conducted by the Court.

In conclusion, this reading reconciles the Court's use of constitutional terminology in administrative garb with its explicit ruling that the legislature may respond and enact enabling legislation. Under this reading, the door is open, but the threshold is high; any legislation will likely give rise to another round of dialogue between the Court and the legislature so as to ensure deliberation and the assumption of shared responsibility by the three branches of government.

4 THE INTERNATIONAL PERSPECTIVE: THE *GSS* CASE AND *EX PARTE PINOCHET*

Having analysed the possible readings of the *GSS* case domestically, it is worthwhile to place the case in the international context, notably *vis-à-vis* the matter of Senator Pinochet. The common denominator of these cases is clear: they both deal with aspects of the prohibition against the infliction of severe pain and suffering by state officials.

The remainder of this chapter will deal with some aspects of the interaction between the domestic and the international arenas in light of *Ex Parte Pinochet*.[40] It will not fully canvass the emerging global *jus cogens* (hence constitutional)[41] norms as they relate to inflicting harm in interrogations. Nor will it delve into the intricacies of the three incarnations (to date) of the *Pinochet* case before the House of Lords.[42] Accordingly, we will not attempt in this chapter to develop a theoretical framework in which to place the interaction between the *GSS* case and *Ex Parte Pinochet*.[43] Rather, we will focus on a host of concrete legal questions, through which the possible ramifications of the *GSS* case can be assessed in the context of transnational adjudication.

[40] *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (House of Lords, 24 March 1999), published as *R* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3)*, [1999] 2 All *ER* 97 (*HL*) [hereinafter *Ex Parte Pinochet*].

[41] On *jus cogens*, see O Schachter, *International Law in Theory and Practice* (Dordrecht, Boston, M. Nijhoff Publishers; sold and distributed in the U.S.A. and Canada by Kluwer Academic Publishers, 1991) at 30–1; L Henkin, R C Pugh, O Shachter and H Smith, *International Law, Cases and Materials* 3rd ed.,(St. Paul, Minn., West Publication, 1993) at 92–4; I Brownlie, *Principles of Public International Law* 4th ed., (Oxford, Clarendon Press, 1990) at 512–15.

[42] *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (House of Lords, 25 November 1998) published as *R* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [1998] 4 All *ER* 897 (*HL*) (hereinafter *Pinochet No 1*); *In Re Pinochet* (15 January 1999) published as *R* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [1999] 1 All *ER* 577 (*HL*) (hereinafter *Pinochet No 3*); *Ex Parte Pinochet*, *supra* n. 40.

[43] For a fuller exposition of the argument and a possible matrix see A Reichman, "When We Sit to Judge We Are Being Judged: The Israeli *GSS* case, *Ex Parte Pinochet* and Domestic/Global Deliberation" *supra* n. 1.

Ex Parte Pinochet dealt with a request by the Spanish Government to extradite Senator Augusto Pinochet so that he could stand trial in Spain for offences that he allegedly committed—primarily in Chile—as Chile's Head of State. The alleged offences included torture, hostage taking, conspiracy to take hostages and conspiracy to commit murder, all in a large-scale, systematic manner. According to British law, for the request to succeed the alleged acts had to be criminal in the United Kingdom as well as in Spain. Since the acts were committed in Chile, the United Kingdom would have had to assume extraterritorial jurisdiction over the acts. This had been done, with respect to torture, by section 134(1) of the Criminal Justice Act 1988,[44] which incorporated the UN Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention).[45] It should be noted that article 1 of the Convention leaves little doubt as to its application to interrogations.[46]

Senator Pinochet advanced an immunity claim, enjoyed in international law by Heads of State, including former Heads of State, for acts conducted in their official capacity as such. This defence was rejected by the majority of their Lordships, for different reasons. The relevance to the Israeli case is clear: conceivably, Israeli officials—the Prime Minister, members of the GSS, and even Supreme Court justices who failed to prohibit the infliction of severe pain or suffering—could be subject, at least after leaving state service, to criminal liability in Britain and/or to extradition requests by third countries for torture committed after the enactment of the prohibition in the Criminal Justice Act 1988. It is pointless to speculate about whether the Israeli Court has acted so as to preempt such future liability, yet it seems reasonable to assume that, although *Ex Parte Pinochet* was not referred to specifically in the *GSS* case, the Court was well aware of its possible legal consequences. In any event, the legal result of the Israeli case minimises the possible friction between the British and Israeli legal regimes, given that the use of force in interrogation would cease to enjoy *a priori* judicial sanctioning.

In the aftermath of the *GSS* case and *Ex Parte Pinochet*, there remains the question of the necessity defence. First, on that point there is a discrepancy between the position of the Israeli Court and the Convention, and thus foreign

[44] Section 134(1) of the Criminal Justice Act 1988 provides: "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties." Section 134(3) of the Act provides that it is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.

[45] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985) (entered into force 26 June 1987), reprinted in (1984) 23 *I.L.M.* 1027.

[46] Article 1 of the Convention defines torture, for the purposes of the Convention, as "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 . . .".

courts will have to decide what legal weight the Israeli position should be accorded in criminal proceedings. Second, individual culpability under Israeli law is relevant to any foreign civil cases brought against GSS officials. Most notably, should necessity be recognised abroad as a defence to criminal liability, it may well speak to the justifiability of parallel recognition of such a defence in private law—for instance, by way of a comity doctrine or the act of state doctrine.[47] Here, it will be relevant to determine whether, or to what extent, Israeli law shields GSS officials from civil liability and not only from Penal Code culpability.[48] In the absence of such specific immunisation, a foreign court might well conclude that a necessity defence in Israeli *criminal law* cannot be given legal effect abroad in a *civil law* context until Israel itself has unambiguously legislated as such, or until the matter is so concluded by the Israeli Supreme Court. It would be understandable if a foreign judge reasoned that it is not his or her job to do the Israeli Knesset's work for it, or to otherwise preempt the Israeli legal process.

The question of transnational criminal law responsibility must first be addressed before returning to consider civil law analogies.[49] Would an Israeli GSS officer incur criminal liability under British law for inflicting severe pain

[47] See M Bühler, "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law", chapter 13 of this volume.

[48] The civil responsibility of individual GSS investigators or the state has not yet been fully resolved under Israeli law. In the aftermath of the *GSS* case a civil suit was filed by a Lebanese citizen, Mr. Dirani, who was allegedly tortured by GSS investigators after being kidnapped and brought to Israel. In another case, the state has agreed to settle and pay compensation to a Palestinian suspect who was tortured in a non-ticking-bomb situation, arguably in part in order to avoid judicial resolution of state responsibility. As a general matter, the issue is governed by Civil Wrongs Ordinance (New Version), 2 L.S.I. 5 (1972), and Civil Wrongs (Liability of the State) Law, 6 L.S.I. 147 (1951–52). Section 2 of Civil Wrongs (Liability of the State) establishes the general principle of state liability, which mirrors the liability of any other juridical personality. Section 3 exempts the state from tortious liability for any action committed under authority conferred by law, or under a *bona fide* mistaken belief of legal authority, but does not exempt state liability for a negligent action. Section 5 adds an exemption for any military action committed by the Israeli Defence Force. Section 7(b) extends the latter exemption to state agents or officials. However, the GSS and its investigators are not explicitly enumerated, and the court will have to decide whether that omission qualifies as a negative disposition of the matter. The Civil Wrongs Ordinance pertains to individual liability. Section 6 establishes a defence for any action or omission done pursuant to any statute or in accordance with its provisions. Section 7(a) establishes personal liability of state officials for any tortious liability, but exempts actions done pursuant to authority conferred by law, or a *bona fide* mistaken belief of legal authority. As with state liability, this exemption does not extend to negligence. Section 7(b) exempts state officials for actions done by other state officials, unless the principal explicitly authorised—*ex ante* or *ex post*—the tortious action of the agents. The emerging legal picture from the above sections suggests that, after the *GSS* case, it would be difficult for state officials, including GSS investigators, to avoid civil liability for the use of force in non-ticking bomb situations, since such use of force is unauthorised in law. The court will have to decide whether the necessity defence qualifies under "action pursuant to a statute or according to its provisions", as stated in section 6 referred to above. With respect to action committed prior to the *GSS* case, the courts will have to decide whether GSS investigators could successfully claim a *bona fide* mistaken belief regarding their authority to use force in "ticking bomb" situations. In any event, the court will have to decide whether the tort of negligence can be used in order to claim physical, psychological and dignitary damages from the state and individual GSS investigators.

[49] Transnational tort issues will be addressed *infra* in Section 5.

and suffering while interrogating a suspect in Israel in a "ticking bomb" situation? This question could arise presently, since the necessity defence remains valid following the *GSS* case, and the Attorney General of Israel is therefore not likely to press charges where she is satisfied that the requirements of the defence are present. It may also arise where a GSS investigator is tried in Israel and is found not guilty because the necessity defence applied, although prosecution of the same case abroad might add a "double jeopardy" element. Alternatively, the question may arise in both criminal and civil law contexts should the Israeli Knesset go beyond *ex post facto* relief from responsibility and explicitly empower the GSS to employ specified violent methods in "ticking bomb" situations. As mentioned in the presentation of the second reading of *GSS*, such legislation may pass constitutional judicial review, or it may involve amendments to the BLH so as to immunise it from judicial review.

The prohibition against torture, as defined in article 1 of the Convention, is absolute as a matter of international law. This was acknowledged by the Israeli Supreme Court[50] and by the House of Lords.[51] It is therefore not surprising that the Convention's Committee against Torture has rejected Israel's claim that exceptional circumstances are a justification under the treaty.[52] Should the English Attorney General press charges, or seek extradition against a former GSS officer who inflicted pain in a "ticking bomb" situation, a British court will have to determine whether to adopt the finding of the Committee that the methods used by the GSS fall under the prohibition embodied in article 1 of the Convention—and therefore are absolute under article 2 of the Convention—or whether they fall under the prohibition embodied in article 16, dealing with cruel and inhumane and degrading treatment—and therefore may be subject to justifications and excuses as a defence.[53] The Israeli Court chose not to engage

[50] *GSS* case, *supra* n. 4, at para. 23.

[51] See e.g. Lord Browne-Wilkinson *Ex Parte Pinochet* (*supra*, n. 40), citing *Prosecutor* v. *Furundzija*, Tribunal for Former Yugoslavia, Case No. 17-95-17/1.

[52] In para. 6 the Committee stressed that the prohibition against torture is absolute, as plainly expressed in article 2 (see *Summary Records of the Public Part of the 297th Meeting of the United Nations Committee against Torture* (Geneva, 9 May 1997): *Israel*, (CAT/C/SR.297/Add.1 (4 Sept 1997)).

[53] *Supra* n. 52, at para. 5. It should be noted, however, that the Committee is not a judicial organ, and its findings are therefore not legally binding, although they ought to form an important reference point in the interpretation of the Convention by a judicial organ. Moreover, Israel has reserved from article 20 of the Convention, which empowers the Committee to conduct investigations and issue findings. The Committee, apparently as part of its political efforts to promote the goals and purposes of the treaty under its guardianship, called upon Israel to withdraw this reservation. Thus, the Committee could be seen as part of the general enforcement mechanisms set in place by the Convention, so as to expose members that might be acting in violation of their treaty obligations. The Committee is not charged with other rules of international law, such as those prohibiting terrorism, and since it is not part of a structure of governance, as a judicial organ would be, it is not faced with a responsibility to the governed for its decisions. Under such a structure, a vigilant Committee can acknowledge the "terrible dilemma" (as the Committee put it) confronted by Israel in dealing with terrorist threats, but it cannot accept such a dilemma as a justification for deviating from the explicit rules of the Convention to which it owes its existence and the enforcement of which it must promote. A court, however, especially a national court, is in a different position. The Committee might have overreached somewhat, with respect to its finding regarding "using cold air

the matter at this stage, since it was not necessary to do so, but it is possible—given the Court's sanctioning of the necessity defence—that, should the Court be confronted with the question, it will decide to classify some interrogation methods as something less than torture, and thus, in effect, permit their use in "ticking bomb" situations under the flexibility offered by article 16. After deciding whether the methods fall under the first subsection of article 16 of the Convention, the British court will have to determine to what degree the absolute rejection of defences and justifications embodied in article 2 is part of British law on point.

This investigation is not unique to British law, since any legal system that incorporates universal jurisdiction to try infliction of severe pain and suffering by an official of a foreign state in a foreign territory will have to address whether the incorporation of the offence includes its absolute nature, or whether general defences are still applicable. In so doing, the court will have to decide whether the Israeli conclusion that necessity is indeed a defence is acceptable. Where there is no explicit statutory disposition of the matter, a foreign Anglo-American court will have to decide whether article 2 of the Convention, namely the rejection of any defence to torture, is a matter of treaty law or customary *jus cogens* so as to have been incorporated into domestic law, and whether article 2 or the custom conflicts with other international law instruments (contractual or customary). In the British case, this investigation seems unnecessary, given that section 134(4) of the Criminal Justice Act 1988 explicitly negates the proposition that British law is as absolute as the Convention by accepting "acting under lawful authority, justification or excuse" as a defence. Moreover, even if, under British law, resorting to the use of force in "ticking bomb" situations would not constitute a lawful defence, section 134(5) requires that the British court should apply "the law of the place where it was inflicted" in its determination of whether a GSS officer in Israel is acting under lawful authority, justification, or excuse. It may be observed that the UK's criminal law on torture has thus incorporated a choice of law approach to one of the issues going to culpability. The idea of applying foreign law is normally associated with private international law and not commonly associated with criminal law. The presence of section 134(5) will be a potentially powerful analogy in any tort case in which a defendant GSS official argues deference to, or application of, foreign (Israeli) law—either through a contended-for choice of law rule of *lex loci delicti* or by way of a version of the act of state doctrine.[54]

The *GSS* case makes it clear that the resort to violence outwith "ticking bomb" situations is unlawful and does not fall under the excuse of necessity. At

to chill". As the *GSS* case revealed, such a method apparently was not used by GSS investigators. Thus, the committee's finding that this method was used, and that its use amounted to torture, might have hurt the Committee's credibility, as was expressed in the Israeli reaction to the Committee's recommendations (see *supra* n. 52).

[54] On the current place of *lex loci delicti* in UK tort choice of law, see J Orange, "Torture, Tort Choice of Law and *Tolofson*", chapter 11 of this volume. On the shape of the Anglo-Canadian act of state doctrine, see Bühler, *supra* n. 47.

the same time, the Court in the *GSS* case reaffirmed its position that inflicting pain and suffering in "ticking bomb" situations could fall under the necessity excuse, provided that no other less restrictive means were available. Under this structure, an empowering Israeli statute might change little (assuming it will empower nothing but the application of force in "ticking bomb" situations). It is beyond the scope of this chapter to investigate British law further, including the possible effects of European Union law on this matter; however, it should be noted that the availability or unavailability of a lawful defence under British law (including its reference to "the law of the place") might have implications regarding extradition requests, given the requirement of double criminality. In that context, it should be recalled that Israel, as the state with arguably the most obvious jurisdiction under article 5(1) of the Convention, might request the extradition of its officials (or ex-officials) to stand trial in Israel should they confront an extradition request by a third country while in Britain. Or, Israel might seek to intervene to oppose extradition by pointing to the combined effect of the double criminality requirement and the section 134(5) *lex loci* rule.

As mentioned above, Senator Pinochet's argument for former Head of State immunity was rejected by the Court. The Law Lords were all aware of the tension between assuming universal jurisdiction (without an explicit waiver from the state whose official, or former official, is put on trial) and a principle of sovereignty that draws vitality from the concept of self-determination: since no one state society is supreme over another, the courts of one sovereign cannot judge the official acts of another. In facing such tension, some of the Lords chose to see a waiver of immunity in the signing of the Convention.[55] Others chose to analyse the scope of the immunity, finding that it did not extend to acts of torture since such acts cannot, as a matter of international law, be considered a part of the official function of any state official.[56]

It should be noted that before the Law Lords were allegations of systematic, state-sanctioned acts of infliction of severe pain and suffering, as part of a scheme designed to silence opposition and to thwart processes of self-government. In the terminology advanced above, the Law Lords saw *prima facie* evidence of a system failure, a collapse of the capacity or will—or both—of the internal Chilean legal process to check executive abuse of power through the

[55] The opinion of Lord Browne-Wilkinson ultimately rests on the Convention as establishing the missing link in constituting a fully effective international crime of torture, a crime which is incompatible with state immunity: *Ex Parte Pinochet*, *supra* n. 40, at 114f–15c. Therefore, his Lordship's opinion rests, in part, on the fact that Chile has ratified the Convention, thereby agreeing to the creation of the international crime, the logic of which rejects state immunity: *ibid.*, at 115d. The opinion of Lord Saville of Newdigate approaches the treaty as expressive enough to contain a waiver: *ibid.*, at 169f.

[56] Lord Millett was perhaps the clearest advocate of the proposition that state immunity cannot contradict *jus cogens*, (*Ex Parte Pinochet*, *supra* n. 40, at 179e–f) and that *jus cogens* against torture evolved as early as 1973 (*ibid.*, at 178b–c). The majority in the first decision of *Ex Parte Pinochet* based its decision on *jus cogens* norms against torture: *Pinochet No 1*, *supra* n. 42.

prosecution and punishment of offenders.[57] Under such circumstances, the Law Lords reached a conclusion that the international community, in this case through the agency of a British court acting in response to a Spanish magistrate, must step into the breach in view of the violations of the *jus cogens* against torture.

On this dimension, the Israeli Supreme Court's *GSS* case could stand for the proposition that the Israeli legal institutions, namely those governed by the legal process, have not abdicated their responsibility to maintain the rule of law. The Court explicitly stated that the use of force was not authorised under Israeli law, with the effect of distancing the state, and the legal process, from the condoning of such methods. As a result, the Israeli judicial system enjoins the executive from using such *ultra vires* methods. The Israeli Court expressly referred to the circumstances that can support the necessity defence, namely terror attacks against the Israeli civilian population, and narrowed the purpose that the infliction of pain and suffering by GSS interrogations must achieve before forming the subject of criminal prosecution *ex post facto*, namely, the saving of human lives. In declaring that the infliction of pain and suffering in all other circumstances is criminal, and likely to remain so given the presence of human rights constitutional legislation, the Israeli Court affirmed the availability of the

[57] Lord Hope of Craighead advanced a position according to which only in cases of large-scale, systematic torture does former Head of State immunity not apply, since such conduct cannot be part of the public function of Heads of State. In his Lordship's opinion, the alleged facts in *Pinochet* satisfied this requirement: "As a whole, the picture which is presented is of a conspiracy to commit widespread and systematic torture and murder in order to obtain control of the government and, having done so, to maintain control of government by those means for as long as might be necessary." Lord Browne-Wilkinson disagreed on the law, and found that a single act of torture merits the lifting of the immunity. Yet Lord Browne-Wilkinson was careful to point out the following:

> ". . . [T]he objective [of the Convention] was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed." (*Ex Parte Pinochet*, *supra* n. 40, at 109e).

In other words, Lord Browne-Wilkinson noted the "system-failure" component of the case. In light of that context, Lord Browne-Wilkinson rejected Lord Goff of Chieveley's dissenting position that states could be trusted to waive their immunity or prosecute the offenders themselves, given the political and moral pressure available in the international arena. For Lord Browne-Wilkinson such a structure will allow safe haven for torturers—Heads of States and all other officials alike—in cases where the legal system under which torture was committed failed to confront the problem. Lord Millett concurred that "[t]he evidence shows that other states were to be placed under an obligation to take action [under the Convention] precisely because the offending state could not be relied upon to do so". (*Ibid.*, at 179d). Lord Phillips of Worth Matravers noted that the nature of the *jus cogens* crimes, such as torture, is such "[t]hat they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not the state itself. In these circumstances, it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs". (*Ibid.*, at 188j).

internal legal process to curb the powers of the GSS—*in future*. Hence, the Israeli Court could be seen as addressing the British concern of system failure, so as to alleviate the need to pierce the veil of sovereignty inherent in the exercise of universal jurisdiction by a foreign court.

It remains to be seen whether the Court's reasoning—translated to English and put on the Internet as soon as the case was handed down—will have a forestalling effect on foreign courts. Or, will foreign jurisdictions in which the incorporation of the Convention leaves discretion regarding the availability of defences with the judiciary reject the necessity defence, or any other related defence such as collective self-defence, in favour of an absolute prohibition? Arguably, there could be jurisdictions that would proceed to prosecute former (or current) Israeli officials who were involved in inflicting pain and suffering in "ticking bomb" situations, as an absolute prohibition would demand. Such jurisdictions seemingly would even have to consider whether to view the Israeli judges themselves as accomplices, given the Court's refusal to withdraw the necessity defence (accorded to such conduct by the Court in earlier cases). By continuing to endorse this defence, the Court could be construed as participating, even if by omission, in the state practice of inflicting pain and suffering on suspects who hold life-saving information in "ticking bomb" situations. The stance of foreign courts could depend, at least in part, on which of the two readings of the Court's reasoning in *GSS*, advanced in sections 2 and 3, they find most persuasive.[58]

The Israeli Court did not have only international audiences in mind. In its reference to the rules of international laws that prohibit torture as well as cruel, inhuman and degrading treatment, the Court could be seen as reminding its local audiences—the GSS, the Parliament, the legal and academic communities and the general public—of the presence of the international and foreign legal machinery and of the concomitant possibility of legal interventions should Israel (the judiciary, the legislature or the executive) ignore the basic commitment of all nations to *jus cogens* norms of international law.[59] In so doing, the *GSS* case, by referring to the Convention without explicitly applying it, made sure that the Convention would be part of the public debate, so as to ensure meaningful deliberation.

5 TORT ACTIONS IN FOREIGN COURTS AGAINST GSS OFFICIALS

We turn now to another dimension of the intersection of international law, foreign jurisdictions and Israeli law, that which centres around the availability of

[58] Note also, in passing, that such jurisdictions will be subjected to the rule of reciprocity, under which their officials may be denied domestic defences if tried in a foreign court. This is provided such a denial of defences did not, in and of itself, amount to a violation of a pre-emptory norm. See Henkin *et al.*, *supra* n. 41, at 578–9.

[59] *GSS* case, *supra* n. 4, at para. 23.

civil actions against torts as well as the availability of immunity-like defences in such cases. As *dicta* in *Pinochet* suggests, under UK law sovereign immunity is accorded not only to the state but also to its officials. Such officials are thus protected from the exercise of jurisdiction by foreign courts with respect to their actions carried out while in public service after their service has ended. In 1978, the British Parliament enacted the State Immunity Act, modifying the immunity so as to allow litigation in some matters, primarily commercial, as an exception to the rule and at the same time removing the matter from the common law domain. In the realm of tortious harm to persons, the statute lifted foreign state immunity from personal injuries caused by act or omission of the foreign state in the United Kingdom, but not with respect to acts or omissions elsewhere.

In his analysis of state immunity in *Ex Parte Pinochet*, Lord Hutton concluded that, under international law, the state is responsible for acts of torture carried out by its former heads of state (or other officials) "but could claim state immunity if sued for damages for such acts in a court in the United Kingdom". As for Senator Pinochet, he "could also claim immunity if sued in civil proceedings for damages under the principle stated in *Jaffe* v. *Miller*".[60] Lord Hutton was satisfied that enjoyment by a state and its officials of state immunity in civil matters ("notwithstanding that the acts are performed in excess of [the officials'] proper function") is not inconsistent with the lack of immunity for former state officials in criminal matters.[61] In other words, according to Lord Hutton, the ruling of non-immunity in *Ex Parte Pinochet* did not affect immunity in civil proceedings. If so, *Pinochet* did not expose GSS investigators to new civil liability in Britain. For his part, Lord Millett agreed civil suits were still barred against officials for acts committed under the colour of their office. Finally, Lord Phillips of Worth Matravers acknowledged the "impressive, and

[60] *Jaffe* v. *Miller* (1993), 13 O.R. (3d) 745 (C.A.). In this case, Mr. Jaffe sued Florida state officials for their role in his abduction from Toronto, for their role in his unlawful incarceration in Florida and for their role in initiating criminal charges against him so that he would settle a civil suit. The court dismissed the claim, finding immunity. The court stated that the allegedly illegal and malicious nature of the acts complained of did not in themselves move those acts outside the scope of the official duties of the defendants so as to deprive them of the protection afforded to functionaries of the state of Florida. See the discussion of this case in Bühler, *supra* n. 47.

[61] In Lord Hutton's opinion, in civil matters, the state, as the principal, is responsible for the actions of its agent, the official, whether or not the official was indeed vested with the actual authority to commit the acts. As long as the actions are carried out by state agents in the "ostensible performance of their official functions", notwithstanding that the acts may be performed in excess of the officials' proper function, the state is responsible. Under such a legal regime, a suit against the agent is *de facto* a suit against the state, which cannot be entertained in a national court without the agreement of the foreign sovereign state. In criminal matters, both the state and the official are separately responsible; hence the agent can be held criminally liable as an individual, without implicating the state, and without reaching legal and factual conclusions that *ipso facto* affect the responsibility of the state. (*Ex Parte Pinochet*, *supra*, n. 40, at 155j, 156f and 157j). Lord Millett noted that the distinction between the criminal and the civil lies in the "official" nature of the crime of torture: "The very official or governmental character of the acts which is necessary to found a claim of immunity *ratione materiae*, and which still operates as a bar to the civil jurisdiction of national courts, was now to be the essential element which made the acts an international crime." The official character, it should be noted, is not dependent on actual authorisation by internal law to commit torture. (*Ibid.*, at 175a).

depressing" list of authorities for the proposition that even when the tortious act is also criminal, state immunity still stands.[62] This is also the case when a state is not involved in the litigation, but when the litigation instead turns on the validity or invalidity of the public acts of a foreign state[63] and *a fortiori* when an act was committed at the behest of the state[64].

These opinions, and the authorities relied upon therein,[65] are difficult to reconcile with the possibility of entertaining a tort claim in Britain against Israel or its officials for torture. It seems that GSS officers act in their official capacity when they inflict pain and suffering in the course of an interrogation, even if in so doing they act without Israel's "command or authorisation, or . . . in excess of their competence according to the internal law"[66] of Israel. For a tort claim in Britain to succeed in the current state of affairs as understood by at least some of the Lords, it seems that Israel would have to waive its immunity.

However, as Lord Phillips of Worth Matravers observed in the context of international criminal law, "this is an area where international law is on the move."[67] Therefore, it could very well be that, in the future, the relationship between state responsibility and individual responsibility in civil proceedings will mirror that in criminal ones. Arguably, if state-sponsored torture, no less than state-sponsored terrorism, contravenes *jus cogens* norms, such actions cannot qualify as official functions of state agents. Individual perpetrators could lose any immunity based on having acted on behalf of a foreign sovereign state—both in civil and in criminal proceedings. Such an approach would track the reasoning in *Pinochet* with respect to criminal law culpability and apply it to the realm of civil law accountability. Should this development occur, state immunity against civil claims of torture will be withdrawn, at least from *former* officials, regardless of the location where the torture was committed.

[62] *Saltany* v. *Reagan*, 702 F. Supp. 319 (1988), (claims of assassination and terrorism); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (1992), (claim of torture); *Princz* v. *Federal Republic of Germany* 26 F.3d 1166 (D.C. Cir. 1994) (claim in respect of the Holocaust); *Al-Adsani* v. *Government of Kuwait* (1996, British Court of Appeal) 107 I.L.R. 536 (claim of torture); *Sampson* v. *Federal Republic of Germany*, 975 F. Supp. 1108 (N.D. Ill. 1997) (claim in respect of the Holocaust); *Smith* v. *Libya*, 886 F. Supp. 406 (E.D.N.Y., 1995), 101 F. 3d 239 (2d Cir. 1996) (claim in respect of Lockerbie bombing); *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), (claim in relation to hostage-taking at the U.S. Embassy).

[63] Here, the doctrinal shield bears the name "act of state" doctrine. It is not state immunity as it can be pleaded by litigants with no connection, existing or former, to the foreign state. For classic statements of the doctrine in the US and the UK, respectively, see: *Underhill* v. *Hernandez* (1897) 168 U.S. 456; *Buck* v. *Att. Gen.*, [1965] Ch. 760, 1 All ER 882.

[64] See recently *Kuwait Airways Corporation* v. *Iraqi Airways Company and Republic of Iraq*, [1995] 2 Lloyd's Rep. 317, where the House of Lords found Iraqi Airways immune from suit from Kuwait Airways for removing KAC from Kuwait during the Gulf War at the behest of the Iraqi Government.

[65] *Al-Adsani* v. *Government of Kuwait* (*supra* n. 62); *Siderman de Blake* v. *Republic of Argentina* (*supra* n. 62); *Jaffe* v. *Miller* (*supra* n. 60); *Marcos and Marcos* v. *Federal Department of Police* (1989, Switzerland Federal Tribunal) 102 I.L.R. 198.

[66] R Jennings and A Watt, (eds.), *Oppenheim's International Law*, 9th ed. (Harlow, Essex, England, Longman, 1992), at 545, as cited by Lord Hutton, *Pinochet*, *supra* n. 40.

[67] *Ex Parte Pinochet*, *supra* n. 40, at 188h.

In accordance with the theme advanced in this chapter, it is suggested that this development may be justified when the state under whose regime torture was committed fails to hold its officials, or itself, responsible for the wrongs. Such responsibility can include civil liability and resultant monetary compensation, public admission of responsibility towards the victims (the Truth and Reconciliation process in South Africa is an example in point) or various other means. However, should the state choose to ignore its civil responsibility *in toto*, it cannot cry foul if confronted with a future development in civil proceedings similar to that in international criminal law and akin to the development represented by *Pinochet*.

In support of the just-stated hypothesis, we must consider the rationale behind the act of state doctrine, including possible supporting British authority on point. Part of the rationale behind the doctrine lies in the perceived need for judicial restraint in a court pronouncing on either the validity or the meaning of the foreign sovereign's laws.[68] However, after the validity of the state action and the content of the law in question have already been established via litigation in the foreign state (that is, by a judicial organ of the same nationality as the legislature or executive whose acts are challenged), this justification no longer applies. As is apparent from the *GSS* case, the Israeli Court has made clear that in non-"ticking bomb" situations, Israeli GSS officers act not only without any authorization in law, but in fact against the law. Therefore, there could be an argument that, in the absence of any enabling legislation requiring further interpretation, restraint *vis-à-vis* a foreign judicial system is no longer applicable when a non-Israeli court is confronted with the matter. The British court would not have to "pronounce upon the validity of a law of a foreign sovereign state within its own territory", because the Israeli Court has already done so.[69] Rather than conceiving the situation as one of confrontation between sovereigns, the initial position could be one of "full faith and credit", in which each jurisdiction takes the laws of other jurisdictions seriously. Thus, it could be argued that when force is applied in non-"ticking bomb" situations, the GSS officers act not merely "in excess of their competence" (which might still allow them to claim immunity), but in violation of both Israeli *and* international criminal law. Under both Israeli and international law, they may accordingly be viewed as stepping outside their "official function" altogether, so as to lose the benefit of state immunity. In such circumstances, future developments in Anglo-American jurisprudence, not necessarily dependent on amendments to the relevant state immunity statutes, could recognise civil liability even if the executive chose not to waive state immunity.

Turning to the use of force covered by the necessity defence, it should be recalled that the Israeli Court found, as a matter of positive law, that GSS

[68] See Lord Diplock in *Buck* v. *Att. Gen.*, *supra* n. 63, at 770.

[69] *Buck* v. *Att. Gen.*, *supra* n. 68. The *GSS* decision could be read as, in effect, pronouncing on the validity of secondary legislation, i.e. the directives issued by the Ministerial committee which authorized the use of force in "ticking bomb" situations.

investigators were *not* authorised by statute to use force in any circumstances, including in "ticking bomb" situations. In view of this, the civil liability, both domestic and international, of GSS investigators could theoretically be triggered by conduct that oversteps the investigators' administrative boundaries rather than only by the higher threshold of conduct overstepping criminal law boundaries. In other words, even if the necessity defence could shield GSS officers from criminal investigation, it is not clear, in the absence of explicit enabling legislation, that it could—or should—shield them from civil liability in Israel or abroad.

Of course, for the reverse comity rationale to apply in full, there would have to be an Israeli case regarding civil liability of GSS officers, whether acting in "ticking bomb" situations or not. It is beyond the scope of this chapter to examine the possible effect of the *GSS* case on the civil liability of the state and/or GSS investigators in Israel for acts committed outwith the authority conferred upon GSS investigators by law. However, to the extent civil liability is shown to be possible in Israel, there will be reason for foreign courts to decline jurisdiction in deference to Israeli courts on grounds of *forum non conveniens*.[70]

Similarly, in analysing the justifiability (and efficacy) of foreign civil proceedings, derivative matters should not be overlooked. One such important matter is the future possibility of enforcement in Israel (or elsewhere) of monetary damages awarded by a foreign judgment against a GSS investigator when the GSS investigator has pleaded state immunity and the government of Israel has not explicitly waived its immunity in foreign civil proceedings. It could be that for public policy reasons Israeli courts would refuse to recognise and enforce foreign court orders.[71] Where Israeli judges perceive the foreign court's role as confrontational rather than cooperative (that is, one that focuses on the struggle between sovereigns in lieu of full faith and credit between judicial systems), they might see the foreign judgment as an affront to sovereignty—a still-central pillar of international law, public and private—that should not be given legal effect in Israel. Such considerations speak in favour of allowing Israeli courts to establish the law regarding civil liability before accepting that the matter can (also) be addressed in foreign jurisdictions. In other words, comity would suggest allowing the Israeli legal process an opportunity to address the matter, before addressing it in foreign jurisdictions.

Comity considerations, however, should not be confused with full deference. In the *GSS* case, the Israeli Supreme Court could theoretically have taken the opposite position, one that deferred to the GSS in one way or another. Alternatively, the Israeli legislature could, theoretically, respond to the *GSS*

[70] *Forum non conveniens* arguments will, also be affected by the possible need to match a specific investigator to a specific suspect, or the availability of cross-claims by victims of terrorist activities.

[71] Enforcement of foreign judgments pertaining to civil matters is governed in Israel by the Foreign Judgments Enforcement Law, 1958, 12 L.S.I 82 (1957–8), which in section 8 lists contravention of public policy as an instance when the Court may declare a foreign judgment to be not enforceable in Israel.

judgment by fundamentally altering the legal landscape through an amendment to the BLH. Under either a counter-factual *GSS* result or the still-possible scenario of a problematic statutory response from the Knesset, the question of comity arises starkly: should foreign courts respect territorial acts by foreign states that themselves arguably constitute a severe and systematic violation of human rights? While the general principle may be that the content of foreign legislation is beyond the purview of common law domestic courts, there is House of Lords authority, albeit *obiter*, for the proposition that British courts would not recognise foreign law that is "unacceptably unfair, racial or barbaric",[72] or, in modern terminology, so repugnant to basic human rights protected by *jus cogens* that it cannot be recognised by members of the family of nations.[73]

In this spirit, the British House of Lords, in *Oppenheimer* v. *Cattermole*, indicated that it was not prepared to recognise a Nazi decree denying the German citizenship of Jews who left Germany.[74] It goes without saying that comparing Israeli legislation to Nazi decrees is problematic, not only given the historical context, but also the different, if not opposite, legislative purpose behind the two legislative schemes (one designed to racially discriminate, the other designed to minimise the loss of human lives). However, from a human rights perspective, should the Israeli legislature seek to authorise the use of force with only a loose connection to the harm sought to be prevented, or should the authorisation amount to legalising torture, such legislation might not merit recognition by foreign jurisdictions for the purposes of the act of state doctrine. Such legislation is tantamount to a failure scenario, in which one sovereign state

[72] Lord Denning M.R. in *Attorney-General of New Zealand* v. *Ortiz and Others*, [1984] A.C. 1 (HL) refers to *Oppenheimer* v. *Cattermole*, [1976] A.C. 249 (HL) for that proposition.

[73] See opinions of Lord Salmon and Lord Chelsea in *Oppenheimer*, *ibid.*

[74] *Oppenheimer*, *ibid.* It should be noted that the case itself involved a Jewish person, Mr. Oppenheimer, who received a stipend from Germany, and under a tax treaty was exempted from paying taxes on the remuneration if he held double citizenship. The legal fiction under which he was exempted by a lower court required that a Nazi decree, which stripped Jews (and only Jews) of German citizenship upon leaving Germany, be recognised as valid under German law and international law (so as to preclude the applicability of a 1913 German statute which would have stripped Oppenheimer of citizenship upon becoming a British citizen). At the same time, the fiction required that the Nazi decree be ignored under British law (which did not recognise the effect of foreign law pertaining to the citizenship of "enemy aliens" in times of war). The House of Lords rejected the fiction on the grounds that the German Basic Law, and not the Nazi decree, denied Mr. Oppenheimer his citizenship, by requiring presence in Germany for those who were denied citizenship by the Nazis (or a positive act to reaffirm German citizenship so as not to force German citizenship on those who were abroad and might not have wanted it). Thus, Mr. Oppenheimer ceased to be a citizen in 1949, after the hostilities were over, and the British doctrine regarding enemy aliens did not apply. In *obiter*, the Court proceeded to consider what the result would have been had the German Basic Law not had the aforementioned effect, and stated (Lord Chelsea and Lord Salmon, with Lord Hailsham of St. Marylebone and Lord Hodson concurring) that the Nazi decree would likely not be recognised in British courts, since Germany could deny German citizenship to a class of citizens it did not like, simply on racial grounds. In other words, the British Court would not give effect to a foreign statute that flagrantly violates basic human rights of citizens governed by that foreign statute. The somewhat ironic result is that the British Court, in the name of human rights, was prepared to ignore the position of a Jewish victim who still saw himself a German citizen despite the Nazi episode, and proceeded to tax him for compensation received from Germany for racial Nazi conduct.

chooses to ignore *in toto* its reciprocal duties as a member of the family of nations, and is thus arguably estopped from demanding sovereignty-based respect and recognition within the framework of private international law. It remains to be seen, of course, whether a narrower statute, the purpose of which would be to enable the GSS to inflict some pain and suffering in "ticking bomb" situations and only as the least restrictive means, would enjoy recognition by foreign judiciaries.

6 CONCLUSION

The political reaction to the GSS decision in Israel was, as one could have expected, mixed. On the one hand, human rights organizations hailed the decision as an important step forward, towards normalcy.[75] On the other hand, the GSS expressed concern that it could not adequately protect Israeli citizens against terrorist attacks, calling upon the government to present legislation to empower investigators to apply force in "ticking bomb" situations.[76] After reviewing possible legislative options presented by a special committee headed by a senior deputy in the Attorney General's office, and after several fierce debates, the Prime Minister reportedly decided to reserve judgment for the time being, and to examine the ability of the GSS to deal with terrorist threats under the structure laid out by the Court in the *GSS* case.[77] The Attorney General reiterated his commitment not to prosecute investigators who apply force in "ticking bomb" situations.[78] According to media reports, the desire to avoid international repercussions likely to follow legislation authorizing torture weighed heavily against explicitly empowering the GSS to use force in interrogations.[79]

It remains to be seen whether the *GSS* case will prove operable. Hopefully, GSS investigators will abide by the decision and refrain from using force, but still be able to foil terrorist attacks. Hopefully, the Court will abide by its own ruling and issue injunctions in real time against the use of force, including in a clear "ticking bomb" situation; the reader will recall that the Court's reasoning viewed the use of force as *ultra vires* current Israeli law in all circumstances. Other legal challenges may lie ahead: a possible review of an Attorney General's

[75] Cf. the reaction of B'tselem, www.betselem.org, under the topic "torture", and T Talmor, (ed.), *B'tselem Quarterly*, October 1999, at 1.

[76] See *supra*, n. 13 and G Allon, "The Likud initiates Special Session to Debate Freeze on Legislation Allowing GSS to Torture" *Ha'aretz*, 18 February 2000.

[77] Y Melman, "Shin Bet Drops Its Demand For 'Torture' Law" *Ha'aretz*, 17 February 2000. According to the report, a budget increase for more investigators and better electronic surveillance equipment helped secure the acquiescence of the GSS Chief. It should be noted, however, that the Prime Minister stated in response to a query in the Knesset that in principle he is in favour of providing an *a priori* authorisation for GSS investigators to apply force in "ticking bomb" situations. G Allon "PM Says Force Is Sometimes Needed", *Ha'aretz* (15 March 2000).

[78] *Ibid.*

[79] *Ibid.*

decision not to prosecute GSS investigators who used force in "ticking bomb" situations; the civil liability of the State and GSS investigators for using force in "ticking bomb" situations; and a possible suit by victims of terrorist attacks (should the dire circumstances arise) against the state and the GSS for not doing enough to prevent terrorism.

Similarly, it remains to be seen what position foreign courts will take regarding the *GSS* case should litigants seek to sue GSS officials abroad and especially should they invoke the *GSS* judgment as itself evidence of the practice of torture. In that context, the temporal, or prospective effect of the *GSS* ruling should be noted: torture alleged to have occurred prior to the ruling may be the most likely to be subject to suit, at least where a foreign court system's law on time limitations permits.[80]

In contrast to the absolute ban on use of force found in the Committee against Torture's interpretation of the Convention, the *GSS* case explicitly ruled that in "ticking bomb" situations GSS investigators will be sheltered from criminal liability through the defence of necessity, thus implying that the use of force in such circumstances does not carry the same moral blameworthiness as the use of force in other circumstances. Assume for present purposes that the courts extrapolate from the necessity defence in the Israeli Penal Code and find an analogous common law necessity defence in civil suits.[81] This Israeli law modification of the ban on use of force might create situations where an Israeli official acts in a way that is legal in Israel, but would be illegal in other states had the same conduct occurred there. In such cases, as in many cases of private and public international law, domestic courts will have to translate complicated and delicate issues of individual rights and collective interests into bottom lines of criminal responsibility and punishment, and of tortious liability and remedy. For example, former Prime Ministers of Israel or former GSS heads may, in the aftermath of *Pinochet*, be indicted or sued abroad. GSS investigators who apply force in "ticking bomb" situations may enjoy the necessity defence in Israel, but might find themselves exposed in foreign jurisdictions. Consequently, Israeli courts might find themselves having to assess the enforceability of civil judgments rendered in the foreign state, including judgments that may well cite the reasoning in *GSS* as a basis for finding tort liability.

Moving from transnational adjudication in municipal courts to international adjudication, or processes before international organs, Israel, or citizens of

[80] Contrast the ten-year limitation period in the US Torture Victims Protection Act to the recent ruling by an Ontario court that, *inter alia*, time had run out on a tort action brought against Canada by the family of a young Somali who had been tortured to death in Somalia by Canadian soldiers: see *Abukar Arone Rage and Dahabo Omar Samow by their Litigation Guardian Abdullahi Godah Barre* v. *The Attorney General of Canada* (unreported, 6 July 1999, Ontario Superior Court of Justice, Cunningham J).

[81] This extrapolation is by no means logically required given the different consequences of criminal responsibility (prison) and civil liability (monetary payment, indeed payment that would in all likelihood be underwritten by the state even when a GSS official is sued in his or her official capacity).

Israel, may be brought to trial before the International Criminal Court (ICC) or other supranational bodies for the use of force in "ticking bomb" situations, should such means of interrogation continue past the date on which the ICC Statute enters into force. Future developments may also include revisiting the domestic legislative option in Israel. The government or the opposition may seek to empower the GSS to use force after all. However, the current decision, to let the *GSS* case stand unmodified, may be seen as reflecting growth. From a country which has traditionally argued that the constant threat of terrorist attacks justifies special means which are unacceptable in other democracies, Israel is maturing and joining the group of nations which takes the rule of law—both the domestic rule of law and the international rule of law—seriously.

Part VI

On the Borders of Tort Theory