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Matthew G. Amand St.

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Cover Page Footnote

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Public Committee Against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained?

“The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding. Terrorist organizations have established as their goal Israel’s annihilation.”¹

I. Introduction

In Israel, between January 1, 1996 and May 14, 1998, one hundred twenty-one people died, and more than seven hundred were injured in terrorist attacks.² “A large number of those killed and injured were victims of harrowing suicide bombings in the heart[s]of Israeli cities.”³ The Israeli General Security Service (GSS), also known as the Shin Bet, is the security police body charged with investigating persons suspected of committing crimes against Israeli security.⁴ GSS investigations often result in interrogations of suspected terrorists.⁵ In the past, the GSS has routinely employed physical pressure during interrogations, particularly in instances where it sought to obtain information about pending terrorist bombing attacks.⁶

¹ H.C. 5100/94, Pub. Comm. Against Torture in Israel v. The State of Israel et al.; H.C. 4054/95, The Ass’n for Civil Rights in Israel v. Prime Minister et al; H.C. 5188/96, Wa’al al-Ka’ka and HaMoked: Ctr. for Defence of the Individual v. Gen. Security Service et al; HCJ 6536/96, Hatem Yusuf Abu Zaida (represented by Andre Rosenthal) v. Gen. Security Service; H.C. 7563/97, ‘Abd al-Rahman Ghaneimat and the Pub. Comm. Against Torture in Israel v. Minister of Defense et al; H.C. 7628/97, Fu’ad ‘Awad Quar’an and the Pub. Comm. Against Torture in Israel v. Minister of Defense et al., Introduction (visited Mar. 20, 2000) <<http://www.court.gov.il/mishpat/html/en/verdict/judgment.rtf>> [hereinafter Principal Case].

² See *id.* ¶ 1.

³ *Id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

Until recently, Israeli courts have declined to condemn the Shin Bet's use of "moderate" physical means during its investigations.⁷ In September of last year, however, the Israeli High Court of Justice (HCJ) handed down a surprising decision in which it held that the executive's methods of interrogation did not comport with the laws of Israel.⁸

On September 6, 1999, in *Public Committee Against Torture in Israel v. The State of Israel*,⁹ the HCJ unanimously held that several types of physical interrogation methods used by the GSS were illegal under current Israeli law. This was a surprising result given the same court's apparent reluctance to find the same or similar practices illegal in the past.¹⁰ In spite of this, the Court appears to have left the door wide open for the Knesset (the Israeli legislature) to pass a law legitimizing the very physical force that the High Court struck down.

This Note will analyze the Israeli Supreme Court decision under Israeli and international legal standards. Part II of the Note will set forth the procedural disposition and the facts of the case.¹¹ Part III of the Note will review relevant Israeli and international law, and discuss the binding or persuasive effects of each within the Israeli legal system.¹² Part IV of the Note will discuss the ramifications of the Israeli Supreme Court decision.¹³ Finally, the Note will conclude that the Israeli Supreme Court made the correct decision under both Israeli and international law, but that the decision may not be as landmark as it appears on first glance.¹⁴

II. Statement of the Case

A. Petitioners and Procedural Disposition

Between 1994 and 1999, several Palestinians and three

⁷ Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 *ISR. L. REV.* 259, 313 n.168 (1999).

⁸ See Principal Case, *supra* note 1.

⁹ *Id.*

¹⁰ See Mandel, *supra* note 7, at 313 n.168.

¹¹ See *infra* notes 15-54 and accompanying text.

¹² See *infra* notes 55-156 and accompanying text.

¹³ See *infra* notes 157-214 and accompanying text.

¹⁴ See *infra* notes 215-16 and accompanying text.

prominent Israeli human rights groups filed a total of seven applications with the HCJ challenging GSS interrogations and methods.¹⁵ The Palestinians claimed to have been subjected to various physical abuses while under interrogation by the GSS.¹⁶ The human rights organizations filed public applications.¹⁷ Taken together, the applicants alleged that, (1) the GSS did not have the necessary statutory authority to conduct any interrogations under Israeli law, and (2) various physical methods of interrogation used by the GSS were illegal under Israeli and international law.¹⁸

Between May, 1998 and May, 1999 the HCJ convened three hearings on the applicants' petitions.¹⁹ Pursuant to these hearings, the HCJ issued an order *nisi* with respect to the applicants' claim that physical interrogation is illegal.²⁰ The order presumably required the GSS to refrain from using the challenged physical interrogation techniques until the HCJ ruled on the legality or illegality thereof.²¹ On September 6, 1999, the HCJ issued its unanimous, yet controversial, decision, holding that the GSS had the power to conduct interrogations, but that it could not employ the challenged physical interrogation techniques.²²

B. HCJ Legal Basis of Decision

The applicants argued that the GSS could not conduct

¹⁵ See Court Ruling Banning Shin Bet Use of Force Draws Mixed Reviews, MIDEAST MIRROR, Sept. 7, 1999, available in 1999 WL 10277257.

¹⁶ See Principal Case, *supra* note 1, ¶¶ 3-7.

¹⁷ See *id.* ¶ 2; see also *infra* notes 56-57 and accompanying text (discussing standing to bring public application).

¹⁸ See *id.* ¶¶ 2-7.

¹⁹ See *Israel Violate Convention Against Torture* (visited Mar. 15, 2000) <<http://www.Btselem.org>>.

²⁰ See Principal Case, *supra* note 1, ¶ 40. An English translation of the hearing transcripts is unavailable, but it is evident from the principal case that the order *nisi* was granted with respect to the second claim, because in the principal case, the order was made permanent. See *id.* An order *nisi* is a temporary injunction that is repealed or becomes permanent upon final disposition of the case. See *infra* notes 58-59 and accompanying text.

²¹ No English translation of the actual order can be located, and the terms of the order are not discussed in the principal case.

²² See Principal Case, *supra* note 1, ¶¶ 20, 40. From a procedural standpoint, the HCJ simply made the temporary injunction on the use of physical force a permanent one. See *id.* ¶ 40.

interrogations because no statute granted the organization the authority.²³ The Court stated that an interrogation infringed on a suspect's freedom because it mandated detention, and pursuant to the Criminal Procedure Statute, "detentions and arrests [could] only be conducted by [statute] or by virtue of express statutory authorization"²⁴ The Court then found that the Criminal Procedure Statute that granted interrogation powers to the regular police also authorized the Minister of Justice to specify additional individuals who could conduct interrogations.²⁵ Because the Minister had, in at least one instance, issued a decree granting such power to several investigators within the GSS, the Court held that the GSS was "tantamount" to the police in the eyes of the law, and therefore the GSS as a whole had authority to conduct interrogations.²⁶ The Court then considered whether the scope of such interrogations "encompass[ed] the use of physical means."²⁷

Respondents (GSS investigators) conceded that during the course of interrogating the Palestinian applicants, they had employed physical means.²⁸ The investigators applied physical techniques pursuant to permanent GSS directives and senior GSS personnel authorization.²⁹ The authorized physical techniques included: violently shaking suspects, forcing suspects to crouch on the tips of their toes for long intervals, excessively tightening handcuffs, depriving suspects of sleep, and placing suspects in the "Shabach" position.³⁰ The shaking and the imposition of the Shabach position are particularly severe. Shaking involves "the forceful shaking of the suspect's upper torso, back and forth, repeatedly in a manner which causes the neck and head to dangle

²³ See *id.* ¶ 14. The HCJ's initial holding is of limited importance to this note because it is entirely the result of domestic statutory interpretation and as such has little relevance in international law. It will be given brief and final mention here.

²⁴ *Id.* ¶ 18 (quoting the Criminal Procedure Statute (Powers of Enforcement—Detention—1996) art. 1(a)).

²⁵ See *id.* ¶ 20 (citing Criminal Procedure Statute ([Testimony]—1944 as amended) art. 2(1)).

²⁶ See *id.*

²⁷ *Id.* ¶ 21.

²⁸ See *id.* ¶ 8.

²⁹ See *id.*

³⁰ See *id.* ¶¶ 9-13.

and vacillate rapidly.”³¹ A suspect in the “Shabach” position is forced to sit in a small, low chair that is tilted forward.³² The suspect’s hands are tied behind the chair, a hood is placed over the suspect’s head, and extremely loud music is blasted into the suspect’s ears.³³

Respondents claimed that the challenged interrogation methods were “indispensable to fighting and winning the war on terrorism.”³⁴ Respondents also argued that their methods were sanctioned by the Landau Commission of Inquiry Report, as grounded in the necessity doctrine which is codified as the “necessity defense” under the Israeli Penal Law.³⁵

The Court analyzed the legality of these physical techniques against two principles of the “law of interrogation.”³⁶ First, the HCJ pronounced that an interrogation must be “reasonable,”³⁷ and “necessarily . . . free of torture, . . . cruel, inhuman treatment . . . and any degrading handling [of the suspect] whatsoever.”³⁸ The HCJ stated that “[t]hese prohibitions are ‘absolute.’”³⁹ In contrast, the court also recognized that “a reasonable investigation is likely to cause discomfort”⁴⁰ The Court concluded that the challenged techniques violated these specific principles because they caused physical harm, mental suffering, and harm to dignity in excess of that allowed.⁴¹ The Court cited former Justice Landau for the proposition that “[t]he interrogation practices of the police in a given regime are indicative of a regime’s very character.”⁴²

Finally, the HCJ addressed whether the “necessity defense” provided a statutory justification for the use of these physical

³¹ *Id.* ¶ 9.

³² *See id.* ¶ 10.

³³ *See id.* Suspects sometimes remained in the “Shabach” position for several hours. *See id.* ¶ 27.

³⁴ *Id.* ¶ 9.

³⁵ *See id.* ¶ 15.

³⁶ *See id.* ¶ 23.

³⁷ *Id.* at 22.

³⁸ *Id.* ¶ 23.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.* ¶¶ 24-32.

⁴² *Id.* ¶ 22.

means, which the Court deemed otherwise illegal. The Court acknowledged that the “necessity defense” is available to everyone, including GSS interrogators, once they are indicted.⁴³ The Court explained that this defense might allow a GSS investigator to escape conviction for an improper interrogation, where it could be shown that the improper methods used against a suspect were necessary to save the investigator’s life, or the lives of others.⁴⁴ The defense condones an otherwise illegal act based upon an “after-the-fact” finding of necessity.⁴⁵ That, however, was not at issue in the present case.⁴⁶

The Court held that respondents could not rely on the necessity defense up front to “establish [and act on] permanent directives setting out the physical interrogation means that may be used under conditions of ‘necessity.’”⁴⁷ The defense cannot be the basis on which to define a code of normative behavior.⁴⁸ The Court also stated that the Landau Commission, while authorizing the use of “moderate” force against suspects, did not so authorize on the basis of the necessity defense, as respondents had suggested.⁴⁹ Rather, the Court stated that the proposed directives allowing for the use of force under the Landau Commission were based simply on the principle of employing a “lesser evil” to prevent a greater.⁵⁰

In its conclusion the court stressed that Israeli law prohibited the challenged physical methods of interrogation, because (1) they offended general notions of interrogation law, (2) they could not be justified upon the necessity defense, and (3) no statutory directive from the legislature to the executive authorized the use of such means.⁵¹ The Court stated that the legislature could pass a statute allowing the GSS to use physical interrogation methods, but no such grant could be inferred from existing law.⁵² Also, the

⁴³ See *id.* ¶ 34.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.* ¶ 35.

⁴⁷ *Id.*

⁴⁸ See *id.* ¶ 36.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.* ¶ 38.

⁵² See *id.* ¶¶ 37, 38.

Court felt that the appropriateness of allowing for physical means of interrogation, given Israel's security situation, "must be decided by the legislative branch which represents the people" and any debate should occur before the legislature.⁵³ The Court did warn, however, that any law passed by the legislature would have to conform to section 8 of the Basic Law: Human Dignity and Liberty.⁵⁴

III. Background

A. Background and Procedural Disposition of Case

The Supreme Court of Israel, sitting as the High Court of Justice, is the court of first and only instance on administrative matters in Israel.⁵⁵ Individuals and groups of citizens may petition the HCJ to challenge any government action or inaction.⁵⁶ Any applicant will have standing to petition the HCJ, whether a direct infringement of a personal interest can be shown or not, so long as the applicant can establish that "[an] issue [is] one of predominantly public nature, or of constitutional importance."⁵⁷

An individual challenging a government action must petition the HCJ to issue an order *nisi*, which is a temporary injunction that is repealed or becomes permanent upon final disposition of the case.⁵⁸ The order also serves as "a directive from the Court to the government requiring that it show cause for the Court to lift the temporary stay."⁵⁹ In the principal case, the injunction against the

⁵³ *Id.* ¶ 39.

⁵⁴ *See id.*

⁵⁵ *See* YAACOV S. ZEMOCH, POLITICAL QUESTIONS IN THE COURTS 22 (1976); INTRODUCTION TO THE LAW OF ISRAEL 34 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995). This power derives from section 15 of the Basic Law: Adjudication. *See* SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 383 (1994).

⁵⁶ *See* Kitty O. Cohen, *The Future of Jerusalem: A Symposium: Temple Mount Faithful—Amutah et. Al. v. Attorney—General Inspector—General of the Police Mayor of Jerusalem Minister of Education and Cultural Director of the Antiquities Muslim WAQF In the Supreme Court Sitting as the High Court of Justice [September 23, 1993]* M. Elon D.P., A. Barak J., and G. Bach J., 45 CATH. U. L. REV. 861, 862 (Spring 1996).

⁵⁷ Shetreet, *supra* note 55, at 384 (citing H.C. 910/86 Ressler v. Minister of Defence 42 (2) P.D. 441).

⁵⁸ *See* Principal Case, *supra* note 1, ¶ 40 (ordering that the order *nisi* be made permanent).

⁵⁹ Mark Allison, *Note and Comment: The Hamas Deportation: Israel's Response*

government became permanent upon the Court's finding that the challenged interrogation practices were illegal.⁶⁰ A decision by the HCJ is final and may not be appealed.⁶¹ However, most decisions by the HCJ can effectively be rendered moot by an act of the Knesset,⁶² so it is important to review the basics of Israeli judicial/legislative interaction.

The HCJ occupies an odd position as a "constitutional" court, because Israel does not have a true constitution.⁶³ The Knesset, pursuant to a directive in the Israeli Declaration of Independence, began to draft a constitution, but it resolved to do so "in a piecemeal fashion through [the drafting] of a series of basic laws."⁶⁴ Although the Knesset has passed a number of basic laws, these laws do not state that they are "normatively superior to ordinary legislation," and the HCJ has generally been reluctant to imply such superiority.⁶⁵ In fact, the Court has held that "in a clash between a special provision in ordinary Knesset legislation, and a general provision in a basic law, the former prevails."⁶⁶

The HCJ has also refused to recognize general principles in the Declaration of Independence as having constitutional status via their position in that declaration.⁶⁷ Principles such as basic rights, equality, and freedom of religion and conscience are recognized as judge-made or common law "soft rights," but in general, they alone cannot form the basis for invalidating legislative acts.⁶⁸

to Terrorism During the Middle East Peace Process, 10 AM. U. J. INT'L L. & POL'Y 397, 419 (Fall 1994).

⁶⁰ See Principal Case, *supra* note 1, ¶ 40.

⁶¹ See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 55, at 34.

⁶² See *id.* at 40.

⁶³ See *id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ ITZHAK ZAMIR AND ALLEN ZYSBLAT, PUBLIC LAW IN ISRAEL 144 (1996) (citing *Ngev .v State of Israel* (1974) 28 (1) PD 640).

⁶⁷ See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 55, at 39.

⁶⁸ See *id.* at 45-46; ZAMIR & ZYSBLAT, *supra* note 66, 142-143. Despite its reluctance to strike down ordinary Knesset legislation as contrary to the Basic Laws, the HCJ has a strong activist reputation as having developed "soft" rights, in the absence of a formal constitution, via "quasi-activist" interpretation of the basic laws. See, e.g., Yoav Dotan, *Judicial Rhetoric, Government Lawyers and Human Rights: The Case of Israeli High Court of Justice during the Intifada*, 33 L. & SOC'Y REV. 319, 322-324 (providing examples of quasi-activist decisions). The HCJ enjoys "a high degree of trust among the

Absent a formal constitution, or set of basic laws that serve as a yardstick against which to measure the legality of lesser "ordinary legislation," judicial review of legislative actions in Israel is virtually nonexistent.⁶⁹

There is, however, at least one exception to the HCJ's general inability to review the legality of legislation passed by the Knesset, and it is particularly relevant to a discussion of the principle case. In 1992, the Knesset enacted the Basic Law: Human Dignity and Liberty, and the Supreme Court subsequently declared it to have constitutional status.⁷⁰ The Supreme Court has stated that this particular basic law can be used to measure the legality of "lesser" ordinary legislation passed by the Knesset.⁷¹

B. The Basic Law: Human Dignity and Liberty

Although the Israeli Knesset has been trying for years to enact a general Bill of Rights, opposition from special interests to one measure or another has left the task unfinished.⁷² Two new basic laws passed in 1992, however, constitute grants of those not-so-controversial rights that would traditionally be part of a Bill of Rights.⁷³ The only one that is of concern here is the Basic Law: Human Dignity and Liberty.

The Basic Law: Human Dignity and Liberty protects individual rights in life, body, dignity,⁷⁴ property,⁷⁵ and privacy.⁷⁶ Section 11 of this basic law expressly provides "that all governmental authorities are bound to respect the rights protected

Jewish-Israeli public." *Id.* at 325 (citing approval statistics).

⁶⁹ See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 55, at 45. The Knesset considered but apparently declined to adopt a Basic Law: Legislature, which would have "grant[ed] entrenched status to all basic laws and [] grant[ed] the Supreme Court jurisdiction as a constitutional court." *Id.* at 57.

⁷⁰ See ZAMIR & ZYSBLAT, *supra* note 66, at 145-46 (citing United Mizrahi Bank Ltd. v. Migdal Co-operative Village (C.A. 6821/93, not yet reported)).

⁷¹ See *id.* Section 10 of the Basic Law: Human Dignity and Liberty provides that only laws passed after this basic law need be consistent with its provisions. See Basic Law: Human Dignity and Liberty (1992) § 10.

⁷² See ZAMIR & ZYSBLAT, *supra* note 66, at 141-42.

⁷³ See *id.*

⁷⁴ See Basic Law: Human Dignity and Liberty (1992) §§ 2, 4. The rights of life and body are also protected under these sections. See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

under the law."⁷⁷ Section 8 of the law states:

There shall be no violation of rights under this Basic Law except by a law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required or by such a law enacted with explicit authorization therein.⁷⁸

Taken together, sections 8 and 11 of this basic law suggest that it is designed to convey some degree of judicial oversight on the legislative power of the Knesset. In 1995, the Israeli Supreme Court announced the scope of that oversight in the civil case of *United Mizrahi Bank Ltd. v. Migdal Co-operative Village*.⁷⁹

In *United Mizrahi Bank*, pursuant to legislation passed after the Basic Law: Human Dignity and Liberty came into effect, certain creditors' rights against agricultural settlements were adversely affected.⁸⁰ The creditors argued that the new law violated their property rights under section 3 of the Basic Law: Human Dignity and Liberty, and that the law did not meet the requirements of section 8.⁸¹ The Court upheld the law, stating that while it did violate the creditors' section 3 rights, the law nevertheless complied with section 8.⁸² Although the Court could have stopped there, it continued to hold that the Basic Law: Human Dignity and Liberty is the equivalent of a formal constitutional law.⁸³ That being the case, the Court went on to declare that it could invalidate any legislation passed since this basic law came into effect on the grounds it violated a protected right and did not comply with section 8 of the law.⁸⁴

In concluding these remarks about the Basic Law: Human Dignity and Liberty, it should be noted that section 9 appears to indicate that Israeli police and defense forces cannot be held to violate individual rights under this basic law, at least not when

⁷⁷ *Id.* at § 3.

⁷⁸ *Id.* at § 7.

⁷⁹ See ZAMIR & ZYSBLAT, *supra* note 66, at 145 (citing *United Mizrahi Bank Ltd. v. Migdal Co-operative Village* (C.A. 6821/93)).

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*; see also Dotan, *supra* note 68, at 324 (discussing public approval for High Court activism in Israel).

⁸⁴ See ZAMIR & ZYSBLAT, *supra* note 66, at 146.

acting for the state.⁸⁵ Section 9 reads as follows:

There shall be no restriction of rights under this Basic Law held by persons serving in the Israeli Defence Forces, the Israel Police, the Prisons Service and other security organizations of the state⁸⁶

While there is virtually no commentary or apparent case law interpreting this provision, section 9 appears to exempt certain state actors, such as the GSS, from coverage under the Basic Law: Human Dignity and Liberty.

C. *The Landau Commission and The Defense of Necessity*

Pursuant to the Commissions of Inquiry Law of 1968, the President of the Israeli Supreme Court shall, at the request of the Israeli government, appoint commissions to “investigate major public controversies.”⁸⁷ The government defines the scope of a particular inquiry.⁸⁸ In 1987, such an official commission, headed by Justice Moshe Landau, was established and charged with investigating GSS investigation methods.⁸⁹ The results of its investigation were published in what is commonly referred to as the Landau Commission Report.⁹⁰

The Commission concluded that, “effective activity by the GSS to thwart terrorist acts is impossible without the use of the tool of the interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.”⁹¹ The Commission further concluded as follows:

[t]he effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of a person under interrogation that harm will befall him from his own organization, if he does reveal information The means of pressure [used in an interrogation] should

⁸⁵ See Basic Law: Human Dignity and Liberty (1992) § 9.

⁸⁶ *Id.*

⁸⁷ SHETREET, *supra* note 55, at 483.

⁸⁸ *See id.*

⁸⁹ *See id.* at 488.

⁹⁰ *See id.*

⁹¹ REPORT OF THE COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GSS REGARDING HOSTILE TERRORIST ACTIVITY (1987) 4.6, *excerpts reprinted in*, 23 ISR. L. REV. 146, 184 (Spring/Summer 1989) [hereinafter Landau Report].

principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided. GSS investigators should be guided by setting clear boundaries in this matter, in order to prevent the use of inordinate physical pressure arbitrarily administered by the interrogator.⁹²

The Commission went on to provide guidelines for the use of “moderate” force.⁹³ The government, and in particular the GSS, adopted the commission’s recommendations and guidelines in their entirety.⁹⁴

In an effort to justify the use of “moderate” force, the Commission sought to balance evils.⁹⁵ In an example of balancing, the Commission developed a hypothetical in which a bomb had been planted in an unknown public place.⁹⁶ The Commission asserted that it might constitute the lesser of two evils to torture a suspect in order to extract the location of the bomb, so lives could be saved.⁹⁷ The Commission concluded that whether the bomb had been set to go off in five minutes, or in five days should be considered immaterial given that the relevant inquiry is not a function of expediency, but rather a simple matter of weighing one evil against the other.⁹⁸ Israeli legal scholars heavily criticized this analysis, because it suggested that force beyond what is objectively moderate might be employed, and cut against another more specific justification for the use of force cited by the Committee—reliance on “necessity.”⁹⁹

⁹² *Id.* §§ 4.6-4.7, at 184-85.

⁹³ *See id.* (referencing guidelines set forth later in the document). Those guidelines were kept confidential. *See Aryeh Dayan, Features—The Slide Down the Slippery Slope*, HA'ARETZ, Jan. 18, 2000, available in 2000 WL 7217126.

⁹⁴ *See Landau Report, supra* note 91, § 4.13, at 186.

⁹⁵ *See id.* § 3.15, at 173.

⁹⁶ *See id.* at 174.

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *See Mordecai Kremnitzer, The Landau Report—Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?*, 23 ISR. L. REV. 216, 253 (Spring/Summer 1989). Expediency or immediacy had generally been a requisite for successful assertion of necessity. *See id.*

Although the Landau Report acknowledged that Israeli law had yet to address what it regarded as specific justifications for the use of torture during GSS interrogations, it attached “great importance” to the defense of “necessity.”¹⁰⁰ The defense of “necessity” is codified in article 34(1) of the Israeli Penal Code, and reads as follows:

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving life liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm.¹⁰¹

The Commission read this necessity defense as having codified its “balancing evils” approach.¹⁰² Legal critics, however, assaulted this interpretation on two grounds. The Commission relied on a “necessity” defense while rejecting the requirement that the danger be immediate.¹⁰³ This violates the statutory requirement that the threat of “serious harm” be “imminent,” and it flies in the face of the worldwide historical understanding of the defense.¹⁰⁴ The more significant criticism of the “necessity” defense as a justification for the use of physical interrogation methods is the one relied on by the HCJ in the principal case, namely that there is no generally existing situation of necessity such that the defense can serve as a basis for a grant of governmental authority.¹⁰⁵ It is argued that the necessity defense is “based on the unique, isolated and extraordinary character of a situation,” and applies ad hoc to justify an otherwise criminal response to dangerous circumstances, after the fact.¹⁰⁶ Despite the significant criticism of the Landau Report, it nevertheless governed GSS interrogation procedures

¹⁰⁰ Landau Report, *supra* note 91, § 3.8, at 167.

¹⁰¹ Principal Case, *supra* note 1, ¶ 33 (quoting Penal Code art. 34(1)).

¹⁰² See S. Z. Feller, *Not Actual “Necessity” But Possible “Justification”; Not “Moderate” Pressure But Either “Unlimited” or “None At All”*, 23 ISR. L. REV. 201, 204 (Spring/Summer 1989).

¹⁰³ See *supra* notes 101-02 and accompanying text.

¹⁰⁴ See Kremnitzer, *supra* note 100, at 244-45 (citing historical approaches to the defense including that advocated by Thomas Aquinas).

¹⁰⁵ See *supra* notes 47-50 and accompanying text; see also Kremnitzer, *supra* note 100, at 238.

¹⁰⁶ Kremnitzer, *supra* note 99, at 238-39.

prior to the HCJ decision in the principal case, and to some extent still does.

D. International Agreements and Cases

In the principal case, the HCJ did not need to reach the merits of the applicants' international law claims because the contested practices were found illegal under Israeli law. In spite of this, the validity of the challenged practices under international law appears to have been hotly contested by the parties in their briefs.¹⁰⁷ Customary international law, as defined in Article 38(1) of the Statute of the International Court of Justice, is automatically incorporated into Israeli law, "without need of any act of transformation" or ratification by the Knesset, unless that international law contradicts existing Israeli law.¹⁰⁸ If international law is in conflict with domestic law, the domestic law will trump.¹⁰⁹ Customary law is loosely defined as having to be "proven and accepted by an overwhelming majority of states."¹¹⁰

Despite the fact that Article 38(1)(a) of the Statute of the International Court of Justice approves reliance on "international conventions, whether general or particular,"¹¹¹ Israeli law automatically incorporates only those conventions which are declaratory of customary international law, and to which Israel is a signatory.¹¹² Barring legislative action to incorporate a conventional international law principle or treaty provision into a domestic law, such conventional international law is not

¹⁰⁷ See, e.g., B'TSELEM, DRAFT POSITION PAPER: LEGISLATION ALLOWING THE USE OF PHYSICAL FORCE AND MENTAL COERCION IN INTERROGATIONS BY THE GENERAL SECURITY SERVICE, 23 (citing international law arguments made by the state in its briefs) (last visited Mar. 20, 2000) <<http://www2.iol.co.il/communikit/html/articles/18/eposition>> [hereinafter Position Paper].

¹⁰⁸ Introduction to the Law of Israel, *supra* note 55, at 386. Article 38 sets forth the law to which the International Court of Justice may look to when adjudicating disputes. Statute of the International Court of Justice art. 38. <<http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>> (visited March 20, 2000).

¹⁰⁹ See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 55, at 386.

¹¹⁰ *Id.* at 386.

¹¹¹ Statute of the International Court of Justice art. 38(1)(a) <<http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>>

¹¹² See Eliahu Harnon & Alex Stein, *Israel*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 217, 219 (Craig M. Bradley ed. 1999).

technically Israeli law.¹¹³ Israeli legal scholars stress, however, that while Israeli courts are not bound to do so, they will typically invoke the presumption that the Knesset did not intend to violate the international obligations of the State of Israel.¹¹⁴ As a result, most international conventions to which Israel is a party “effectively become part of Israeli domestic law.”¹¹⁵ With this framework in mind, it is now necessary to discuss those treaties and international law principles that speak to the various forms of physical interrogation methods used by the GSS in the principal case.

The United Nations (UN) Declaration of Human Rights of 1948 prohibits the use of torture, and cruel or degrading treatment or punishment.¹¹⁶ Although not legally enforceable, the declaration has served as a springboard for several legally binding conventions.¹¹⁷ It should be remembered that even where Israel is a party to these conventions, they are not necessarily “declaratory of customary law,” and if not formally adopted into law by the Israeli legislature, they are not technically part of Israeli law.¹¹⁸

1. U.N. International Covenant on Civil and Political Rights

In 1991, Israel ratified the UN International Covenant on Civil and Political Rights, of 1966 (UN Covenant on Civil Rights).¹¹⁹ Article 7 of that covenant states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹²⁰ The UN Human Rights Committee, which is

¹¹³ See *id.* at 219.

¹¹⁴ See *id.* Even the Landau Report indicated that it “aimed to comply with the various international conventions to which Israel is a party.” See Landau Report, *supra* note 91, § 3.21.

¹¹⁵ Harnon & Stein, *supra* note 112, at 219.

¹¹⁶ See *Universal Declaration of Human Rights*, G.A. Res. 217 A(111) (visited May 14, 2000) <<http://www.unhchr.ch/udhr/lang/eng.htm>>; see also Position Paper, *supra* note 107, at 18.

¹¹⁷ See Position Paper, *supra* note 107, at 18.

¹¹⁸ See Harnon & Stein, *supra* note 112, at 219.

¹¹⁹ See Position Paper, *supra* note 107, at 18.

¹²⁰ *The International Covenant on Civil and Political Rights*, art. 1, 1966 U.N. Jurid. Y.B. U.N. Doc. ST/LEG/SER.C/4. The language of this article is borrowed in its entirety from article 5 of the UN Declaration of Human Rights. See Position Paper,

composed of international law specialists, and operates pursuant to the covenant, made the following remarks with respect to the scope of article 7:

[T]he text of article 7 allows of no limitation . . . even in situations of public emergency . . . no derogation from the provision of article 7 is allowed . . . no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons . . .¹²¹

Additional rules adopted by the UN serve to provide guidance in implementing article 7. For example, article 5 of the Code of Conduct for Law Enforcement Officials, adopted in 1979, forbids law enforcement personnel from inflicting or tolerating "torture, or other cruel, inhuman or degrading treatment" regardless of whether the personnel do so under orders from superiors or even under threat to national security.¹²² Pursuant to the UN Human Rights Committee's General Comment to article 7, the prohibition in the article "seeks to protect the physical and mental integrity of the individual . . . [and] relates not only to acts that cause physical pain but also to acts that cause mental suffering"¹²³ The Human Rights Committee once reviewed the physical interrogation practices of the Israeli GSS to measure compliance with the covenant.¹²⁴ In its 1998 compliance report, the committee stated that "the methods of handcuffing, hooding, shaking and sleep deprivation . . . used . . . either alone or in combination . . . violate[d] article 7 of the covenant."¹²⁵

2. *U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment*

Also in 1991, Israel ratified the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or

supra note 107, at 18.

¹²¹ See Position Paper, *supra* note 107, at 19 (quoting Human Rights Committee, *General Comment No. 20 (44) (art. 7)*, U.N. GAOR Supp. No. 40(A/47/40), Annex VI (1994)).

¹²² *Id.* (citing *Terrorism: Taking of Hostages*, December 17, 1979, Multilateral, T.I.A.S. No. 11081).

¹²³ *Id.* at 26 (quoting Human Rights Committee, *General Comment No. 20 (44) (art. 7)*, U.N. GAOR Sup. No. 40(A/47/40), Annex VI (1994)).

¹²⁴ See *id.* at 27.

¹²⁵ *Id.* at 27 (quoting Human Rights Committee, *Concluding Observations*, 1998, Israel).

Punishment (Convention against Torture), which had been adopted by the UN General Assembly in 1984.¹²⁶ Article 2(1) of the convention requires that “[e]ach state party take effective legislative, administrative, and judicial or other measures to prevent acts of torture under any territory under its jurisdiction.”¹²⁷ Article 2(2) and 2(3) work an absolute ban on the use of, or authorization of the use of torture by party states, even during war or national emergency.¹²⁸

The term “torture” is defined in article 1 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 . . . or intimidating him or a third person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity¹²⁹

The other, debatably lesser forms of treatment or punishment named in the title to the convention are not mentioned in article 1 of the convention.¹³⁰

The drafting parties to the convention failed to agree on whether or not to absolutely prohibit both torture and “other cruel, inhuman and degrading treatment or punishment.”¹³¹ The U.S. and Swiss delegations urged that one cannot draw a line between torture and other forms of cruel, inhuman or degrading acts, whereas the former Soviet Union argued that the two types of actions were legally distinct.¹³² The nations never resolved the conflict and the convention only expresses an absolute prohibition on the use of torture as defined in article 1.¹³³

This does not mean that the convention is silent as to all acts

¹²⁶ See *id.* at 19.

¹²⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., 93rd mtg., art. 2(1), U.N. Doc. A/Res/39/46 (1984) [hereinafter *Convention Against Torture*].

¹²⁸ See *id.* art. 2(2) and 2(3).

¹²⁹ *Id.* art. 1(1).

¹³⁰ See 51 AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 6 (1999).

¹³¹ *Id.* at 5.

¹³² See *id.*

¹³³ See *id.*

that do not rise to the level of torture, as defined in article 1. Article 16 requires that parties “undertake to prevent acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” when such acts are committed by the state.¹³⁴ “Cruel, inhuman or degrading treatment or punishment” is not defined in the convention.¹³⁵ There is also no corresponding prohibition on the use of these acts, as there is in article 2, with respect to acts that constitute torture.¹³⁶

Finally, article 17 of the Convention against Torture established the Committee Against Torture (CAT), which is charged with the administration of the convention’s enforcement mechanisms.¹³⁷ The CAT is composed of ten members elected by the party nations, who investigate and report on the extent to which the various party nations are in compliance with the terms of the convention.¹³⁸ On at least two occasions, the CAT reviewed the GSS physical interrogation methods allowed under the Landau Commission.¹³⁹ In each case, the methods of interrogation in question resembled those before the HCJ in *Public Committee Against Torture in Israel*.¹⁴⁰ In both instances, the CAT determined that the methods violated article 16 of the Convention Against Torture, as cruel, inhuman, or degrading, and that the methods rose to the level of torture under article 1.¹⁴¹ The CAT therefore rejected Israeli defenses based on “necessity” because article 2 of the convention allows for no defenses.¹⁴²

3. *Cases Under the European Convention on Human Rights and Fundamental Freedoms*

This section on international law and conventions will close

¹³⁴ Convention Against Torture, *supra* note 127, art. 16.

¹³⁵ Position Paper, *supra* note 107, at 24.

¹³⁶ See Convention against Torture, *supra* note 127, art. 16. This article incorporates articles 10-13 but not article 2, which bars torture in all cases. See *id.*

¹³⁷ See BOULESBAA, *supra* note 131, at 240, 252.

¹³⁸ See *id.* at 238, 252-54.

¹³⁹ See Position Paper, *supra* note 107, at 25-26.

¹⁴⁰ See *id.* Methods reviewed included violent shaking and the “Shabach” method. See *id.*

¹⁴¹ See *id.* at 26.

¹⁴² See *id.*

with a discussion of European human rights law. European human rights law is important, not because it is binding on Israel, but because the European system is “the most developed and effective in the world on this subject”¹⁴³ and it is based in large part on judicial interpretation of the European Convention on Human Rights and Fundamental Freedoms, which espouses protections very much akin to those set forth in the above mentioned international agreements, to which Israel is a party. European human rights law serves as the basis for certain portions of the Landau Report.¹⁴⁴

Article 3 of the European Convention on Human Rights and Fundamental Freedoms states that “no one shall be subjected to torture or inhuman or degrading treatment or punishment.”¹⁴⁵ The European Court of Human Rights (ECHR) has repeatedly interpreted this provision of the convention as working an absolute bar, not only on torture, but also on acts which amount to inhuman or degrading treatment or punishment.¹⁴⁶ The oft quoted statement of the rule in *Aksoy v. Turkey*, reads:

Article 3, . . . enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against organized terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment Article 3 makes no provision for exceptions and no derogation . . . even in the event of a public emergency threatening the life of the nation.¹⁴⁷

The question under the European Convention then becomes, what acts amount to “torture or inhuman or degrading treatment?”

In an obvious violation, the ECHR held in *Aydin v. Turkey* that

¹⁴³ *Id.* at 20.

¹⁴⁴ See also Landau Report, *supra* note 91, § 3.22, at 186. The Commission attempted to square the use of force with the prohibitions of torture and ill treatment under the international agreements to which Israel is a party by noting that the European Court of Human Rights, while holding that the combined practices of head bagging, sleep deprivation, and diet restriction constituted ill treatment, had not determined that each practice alone did so. See *id.*

¹⁴⁵ *European Convention on Human Rights and Fundamental Freedoms* art. 3 (September 1953).

¹⁴⁶ See Position Paper, *supra* note 107, at 21.

¹⁴⁷ *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. H.R. Rep. 553, 585 (1997); see also *Assenov and Others v. Bulgaria*, App. No. 24760/94, 28 Eur. H.R. Rep. 652, 699 (1999).

Turkish Security Police had tortured a teenaged Kurdish detainee when they raped, blindfolded, and beat her while in custody.¹⁴⁸ The ECHR further held that each of these actions alone would have amounted to torture.¹⁴⁹ The court noted that the "special stigma of 'torture' [attached] only to deliberate inhuman treatment causing very serious and cruel suffering."¹⁵⁰

In *Selcuk and Asker v. Turkey*, the ECHR held that ill treatment must rise to a certain level of severity to fall within the scope of "inhuman and degrading treatment or punishment" prohibited by article 3.¹⁵¹ That level of severity is to be based on the totality of the circumstances in a given case.¹⁵² The Court found a violation where Turkish Security Police detained several applicants and forced them to watch as their homes were deliberately burned to the ground.¹⁵³ A similar violation on grounds of ill treatment was found in *Assenov and Others v. Bulgaria*, where the facts were inconclusive as to whether a juvenile detainee had been beaten by the police or by his father, but where it was clear that the police had not sufficiently investigated the allegations against their own department.¹⁵⁴ Rough arm twisting during a difficult arrest that causes shoulder injury, or the imposition of solitary confinement and a restricted diet for short periods of time as a means of prisoner discipline, do not rise to the level of ill treatment prohibited by article 3.¹⁵⁵

IV. Significance of the Case

Despite its general reluctance to review legislative actions, the Israeli HCJ does enjoy an activist reputation when it comes to developing judge-made "soft" rights or freedoms, in the absence

¹⁴⁸ See *Aydin v. Turkey*, App. No. 23178/94, 25 Eur. H.R. Rep. 251, 295-96 (1997).

¹⁴⁹ See *id.* at 296.

¹⁵⁰ *Id.* at 295. Because both torture and ill-treatment are absolutely prohibited by article 3, the only reason to distinguish the two appears to be for purposes of setting remedies for the victim. See *id.*

¹⁵¹ *Selcuk and Asker v. Turkey*, 26 EHRR 477 (Decision) ¶ 76 (1998).

¹⁵² See *id.*

¹⁵³ See *id.* ¶¶ 77-83.

¹⁵⁴ *Assenov and Others v. Bulgaria*, App. No. 24760/94, 28 Eur. H.R. Rep. 652, 700-02 (1999).

¹⁵⁵ See *Klaas v. Germany*, App. No. 15473/89, 18 Eur. H.R. Rep. 305 (1994); see also *McFeeley v. United Kingdom*, App. No. 8317/78, 3 Eur. H.R. Rep. 161 (1981).

of a formal Bill of Rights.¹⁵⁶ The Court is highly trusted and regarded by the Israeli people, and it is “well known as an incorruptible and impartial arbiter between the Israeli government and its citizens.”¹⁵⁷ The Court’s decision in *Public Committee Against Torture in Israel* is significant on three levels.

First, the immediate effect of the decision has been to restrict the way the GSS conducts interrogations under current Israeli law.¹⁵⁸ Second, the decision has fostered widespread debate among the people of Israel and within its legislature as to whether the legislature should expressly legalize the use of force by GSS interrogators during interrogations.¹⁵⁹ Finally, the decision is significant as a very small step toward Israeli compliance with international law and Israeli obligations under its international agreements.¹⁶⁰ The significance of the case in each of these regards will be discussed in turn.¹⁶¹

A. Immediate Effects of the Decision

In *Public Committee Against Torture in Israel*, the HCJ held that the Israeli GSS has the same authority as regular police to conduct interrogations.¹⁶² The HCJ also held that various GSS interrogation practices, such as shaking and the imposition of the “Shabach” position, which were sanctioned under the Landau Report, are illegal because they violate ordinary law governing interrogations, and because no other existing law grants the authority to use such methods.¹⁶³ The HCJ also rejected any attempt to base directives allowing the use of physical interrogation techniques on the codified defense of “necessity.”¹⁶⁴ On its face, this decision seems to undermine the recommendations set forth in the Landau Report, as adopted by the Israeli government. The Landau Report may yet, however,

¹⁵⁶ See Dotan, *supra* note 68, at 322-24.

¹⁵⁷ Cohen, *supra* note 56, at 862.

¹⁵⁸ See *infra* notes 162-86 and accompanying text.

¹⁵⁹ See *infra* notes 187-193 and accompanying text.

¹⁶⁰ See *infra* notes 194-213 and accompanying text.

¹⁶¹ See *infra* notes 162-213 and accompanying text.

¹⁶² See *supra* notes 23-27 and accompanying text.

¹⁶³ See Principal Case, *supra* note 1, ¶¶ 9-13, 20-42.

¹⁶⁴ See *id.* ¶¶ 35-36.

have some procedural significance.

The HCJ only struck down the use of several specific physical interrogation techniques used by the GSS.¹⁶⁵ Also, in the Court's eyes, the Landau Report did not justify the use of force on the basis of "necessity."¹⁶⁶ Therefore, the Court's decision appears not to interfere with other physical interrogation practices that may continue under the Landau Commission guidelines, because they have yet to be challenged, and because they are not based on a defense that the court has already rejected. In other words, the GSS may continue to use force during interrogations, so long as it does not employ the particular methods that the HCJ held illegal. Barring the passage of a law authorizing the use of force, consistency dictates that other methods should be struck down.¹⁶⁷

Human rights groups trumpet the principal decision as a landmark victory—"a very important step."¹⁶⁸ In a sense, the decision is groundbreaking because it is the first time the Israeli HCJ has condemned any physical means of interrogation used by the GSS and, more significantly, the Court condemned practices recommended by the Landau Commission.¹⁶⁹ The Court, however, noticeably narrowed its holding. It declined to exercise the same judicial activism it exhibited in *United Mizrahi Bank*, where it held that the Basic Law: Human Dignity and Liberty was constitutional in stature, and as a result this decision is not as groundbreaking as it might have been.¹⁷⁰

The HCJ decision was further limited because it held only that the GSS physical interrogation methods were illegal under

¹⁶⁵ See *id.* ¶ 40. In dicta found in paragraph 39, the Court suggests that the decision serves to prohibit the use of force during interrogations. See *id.* The order *nisi*, however, is only made permanent with respect to the challenged methods of force. See *id.*

¹⁶⁶ See *id.* ¶ 36.

¹⁶⁷ See *supra* notes 36-42 and accompanying text (discussing ordinary interrogation law principles).

¹⁶⁸ *Israel—Court ruling banning Shin Bet Use of Torture Draws Mixed Reactions*, *supra* note 15 (discussing the liberal Israeli reaction to the decision and quoting the U.N. High Commissioner on Human Rights).

¹⁶⁹ See, e.g., Mandel, *supra* note 7, at 313 n.168.

¹⁷⁰ Recall *United Mizrahi Bank*, where the HCJ held that there was not violation of section 8 of the Basic Law: Human Dignity and Liberty. Nevertheless, the Court went on without prompting to state that the basic law was constitutional in stature. See ZAMIR & ZYSBLAT, *supra* note 66, at 145-46 (citing *United Mizrahi Bank Ltd. v. Migdal Co-operative Village* (C.A. 6821/93, not yet reported)).

ordinary Israeli law.¹⁷¹ The Court did not reach the legality of the methods under international law, although both parties argued that issue in their briefs.¹⁷² The Court also did not address the legality of the methods under the Basic Law: Human Dignity and Liberty, which is superior to the ordinary law.¹⁷³ It is true that section 9 of the Basic Law: Human Dignity and Liberty does not allow the Court to review the actual physical police practices under that law,¹⁷⁴ but because section 8 allows for judicial review of the grant of the power to use those practices,¹⁷⁵ the door was open for the Court to convey some parameters to the legislature—it declined to do so.

The Court invited the legislature to speak directly to the legality of the GSS interrogation methods, so long as any resulting law fit the values of the state of Israel, was designed for a proper purpose, and worked no greater infringement on human dignity than was necessary and authorized.¹⁷⁶ The Court had an opportunity to tell the legislature how it would gauge compliance with these section 8 requirements upon judicial review, but the Court remained silent. It is conceded that the Court has never been required to give the legislature such guidance.¹⁷⁷ The Court also has no duty to tell the legislature that certain physical methods of interrogation might always be “greater than necessary” and therefore violative of the Basic Law.¹⁷⁸ The Court did not have to instruct the legislature regarding conventional treaty

¹⁷¹ See Principal Case, *supra* note 1, ¶¶ 20, 38-40.

¹⁷² See, e.g., Position Paper, *supra* note 107, at 23 n.46-67 (discussing the State’s argument for a narrow interpretation of “torture” in international law); see also Principle Case, *supra* note 1, at ¶¶ 14-15.

¹⁷³ See Principle Case, *supra* note 1.

¹⁷⁴ See *supra* notes 85-86 and accompanying text.

¹⁷⁵ See *supra* notes 79-84 and accompanying text.

¹⁷⁶ See Principal Case, *supra* note 1, ¶ 39 (stating that any new legislation must comport with the requirements of section 8 of the Basic Law: Human Dignity and Liberty).

¹⁷⁷ See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 55, at 64-68 (discussing the fact that the scope of judicial review by HCJ is largely within the Court’s discretion, so it could elect to give or, one assumes, not give guidance to the legislature regarding possible future legislation).

¹⁷⁸ See *id.*; see also ZAMIR & ZYSBLAT, *supra* note 66, at 142-43.

obligations or even customary international law.¹⁷⁹ The Court could have taken this additional activist step just as it did in *United Mizrahi Bank*,¹⁸⁰ however, and had it done so, its opinion would have sent a stronger message to the legislature, condemning the use of force. As this narrow decision stands now, it has been criticized as an order to the legislature to legitimize torture rather than a decision condemning the practice.¹⁸¹

The opinion in the principle case has placed the final resolution of this issue within the hands of the legislature. The HCJ states that, whether or not GSS interrogators should be allowed to use force during interrogations is a political issue to be determined by the elected representatives of the Israeli people.¹⁸² Whether or not this is a sincere belief, or simply the Court shirking its responsibility on a difficult issue is debatable, given its reputation for activism,¹⁸³ and the willingness of other courts such as the European Court of Human Rights to decide similar types of cases.¹⁸⁴ Whatever the case, the HCJ has at least given the legislature an ultimatum—if the elected representatives want these physical interrogation practices to continue, and their use is in the best interest of the citizens and the state of Israel, then a law must be passed.¹⁸⁵ The HCJ reserved the right to review such a law as against the Basic Law: Human Dignity and Liberty.¹⁸⁶

B. In The News—Legislative Response to the Decision

On the heels of the HCJ decision in *Public Committee Against Torture in Israel* the GSS and several notable public figures called

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See Mandel, supra* note 7, at 313 n.168.

¹⁸² *See supra* note 53 and accompanying text.

¹⁸³ *See Dotan, supra* note 68, at 322-24. The HCJ has jurisdiction to deal with any public matter that comes before it, and pursuant to this wide grant of authority, “the doctrine of non-justiciability can only be a product of self-restraint.” Introduction to the Law of Israel, *supra* note 55, at 68.

¹⁸⁴ *See, e.g., supra* notes 143-55 and accompanying text (citing ECHR case law on this subject); *see also* Position Paper, *supra* note 107, at 20-22 (citing the same).

¹⁸⁵ *See* Principle Case, *supra* note 1, at 3. Presumably, the HCJ will find most forms of physical interrogation violative of at least ordinary law until the legislature passes a valid law stating otherwise. *See id.*

¹⁸⁶ *See* Principal Case, *supra* note 1, ¶ 39.

for the legislature to pass a law granting security police the authority to use physical methods of interrogation.¹⁸⁷ A draft bill of a law (called the "Shin Bet Law") that would allow GSS interrogators to employ physical means came before the legislature immediately after the HCJ handed down its decision, and Israeli Prime Minister Ehud Barak came out publicly in favor of such legislation.¹⁸⁸

By all accounts, the proposed Shin Bet Law mirrored the Landau Report recommendations, in that it established mechanisms to ensure that GSS interrogators did not exceed the powers granted to them, and it provided guidelines for prosecuting those who did exceed their grant.¹⁸⁹ The proposed law would have also restricted the types of detainees against whom physical means could be used, and required GSS interrogators to receive authorization from the attorney general, upon a showing that the interrogee was a "walking time bomb," before the use of force would be permitted.¹⁹⁰

Critics attacked the proposal on the same grounds as they attacked the Landau Report, because they feared that Israel would become "the only country in the world with a law permitting the use of torture."¹⁹¹ Fortunately, the proposal may have become less of an issue. Recent news reports indicate that on February 17, 2000, GSS chief Ami Ayalon withdrew his request for the passage of the Shin Bet legislation.¹⁹² Ayalon withdrew the request in exchange for additional funding that will enable the GSS to increase its staff, improve its facilities and upgrade technology.¹⁹³ Just because the GSS is no longer demanding the proposed legislation does not mean the legislature cannot pass it anyway, but for the time being, the "moderate" physical methods of interrogation, challenged in *Public Committee Against Torture in*

¹⁸⁷ See Position Paper, *supra* note 107, at 3.

¹⁸⁸ See Dayan, *supra* note 94.

¹⁸⁹ See *id.*; see also Akiva Eldar, *A ticking time bomb of a question*, HA'ARETZ, Feb. 16, 2000, available in 2000 WL 7218106.

¹⁹⁰ See Eldar, *supra* note 189; see also Dayan, *supra* note 94.

¹⁹¹ *Israel's Shin Bet drops demand for "torture law,"* DEUTSCHE-PRESS-AGENTUR, Feb. 17, 2000.

¹⁹² See *id.*

¹⁹³ See *id.*

Israel remain illegal.

C. International Concerns

Given that the Israeli legislature has essentially been given the green light to nullify the effect of the HCJ decision in the principal case, so long as it does not violate the Israeli Basic Law: Human Dignity and Liberty, this last substantive section of the Note will discuss how the international legal community might view such a move by the legislature. For purposes of this section, assume that any new legislation passed by the Israeli legislature would allow for the same "moderate" use of force as was recommended by the Landau Commission.

Recall that Israel signed and ratified both the UN International Covenant on Civil and Political Rights, of 1966 (UN Covenant on Civil Rights), and the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture).¹⁹⁴ The major developed democratic nations of the world are also parties to these agreements.¹⁹⁵ The European nations are additionally parties to their own European Convention on Human Rights and Fundamental Freedoms.¹⁹⁶ Each of the three agreements unconditionally prohibits torture, and the European Convention goes further and bans the employment of ill treatment.¹⁹⁷ According to the UN Human Rights Committee, article 7 of the UN Covenant on Civil Rights, which prohibits the use of torture and ill treatment, is not subject to limitation "even in situations of public emergency."¹⁹⁸ Only with regard to the Convention Against Torture is it arguable that the prohibition of ill treatment is not absolute, because the drafters themselves could not agree on that issue.¹⁹⁹ Even so, article 16 of that convention

¹⁹⁴ See *supra* notes 119-42 and accompanying text.

¹⁹⁵ See *The International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., (1966); see also *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., 93rd mtg., U.N. Doc. A/RES/39/46 (1984).

¹⁹⁶ See *Chart of Signatures & Ratifications*, (last updated Feb. 11, 1999) <<http://www.coe.fr/tablconv/5t.htm>>.

¹⁹⁷ See *supra* notes 119-36, 144-46 and accompanying text.

¹⁹⁸ Position Paper, *supra* note 108, at 19 (quoting U.N. GAOR, Hum. Rts. Comm., Supp. No. 40, Annex VI, U.N. Doc. A/47/40 (1994)).

¹⁹⁹ See *supra* notes 134-36 and accompanying text.

requires that parties take steps to prevent such acts.²⁰⁰ Given its international obligations, Israel has very little room to argue to the international community that it has any justification for passing a law that allows GSS interrogators to use even “moderate” force against any of its interrogees.

It is argued that the use of “moderate” force pursuant to supervisory approval and only when necessary to extract information regarding a threat to the general public might not rise to the level of torture or ill treatment.²⁰¹ Use shaking as an example of the allowable “moderate” force. If shaking, as employed by the GSS, causes “serious pain or suffering” it constitutes torture under the Convention Against Torture.²⁰² As the ECHR has held, however, the special “stigma” of torture applies only where action results in “very serious or cruel suffering.”²⁰³ Perhaps then, the shaking, as recommended by the Landau Report and criminalized by the HCJ, does not rise to the level of “torture.” Torture is not the only prohibited action under at least two of the three relevant international agreements, however. The more difficult, if not impossible, argument to make is that shaking does not constitute prohibited ill treatment.

Although “cruel or inhuman or degrading treatment or punishment” is not defined under the Convention Against Torture, article 16 of the convention requires that states “undertake to prevent such acts.”²⁰⁴ The ECHR has held such ill treatment is prohibited if it reaches a certain level of severity to be determined on the totality of the circumstances.²⁰⁵ The inquiry into the totality of the circumstances does not include consideration of the reason for the interrogation.²⁰⁶ The method of shaking which can cause

²⁰⁰ See *supra* notes 134-36 and accompanying text.

²⁰¹ See Principal Case, *supra* note 1, ¶ 15 (attorneys for the state make this argument). Remember, only under the Convention Against Torture is there even the possibility that the distinction between torture and ill treatment is relevant to the determination of whether a violation has taken place. See *supra* notes 126-136 and accompanying text.

²⁰² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., 93rd mtg., U.N. Doc. A/Res/39/46 (1984).

²⁰³ *Aydin v. Turkey*, 25 EHRR 251 (Decision) ¶ 82 (1997).

²⁰⁴ See *supra* note 134-45 and accompanying text.

²⁰⁵ See *Selcuk and Asker v. Turkey*, 26 EHRR 477 (Decision) ¶ 76 (1998).

²⁰⁶ The reason for an investigation would only be relevant to the extent that a valid

severe headaches and may cause the head and neck to dangle and vacillate would certainly constitute ill treatment under any of the three relevant international agreements, and would therefore be prohibited absolutely or at the very least condemned in a general sense.

Even if Israel is in violation of its duties as a party to these international agreements, the agreements, though ratified, have not been specifically adopted into Israeli law.²⁰⁷ These are considered conventional international agreements, and not agreements that simply declare customary international law principles. Even customary international law is only considered part of Israeli law to the extent that it does not contradict a law passed by the legislature.²⁰⁸ But if it is true that Israeli judges presume that the legislature does not intend to violate Israeli obligations internationally,²⁰⁹ then at the very least, the HCJ should consider the language of the international agreements, which the Israeli legislature has ratified, as consistent with the Basic Law: Human Dignity and Liberty, which the legislature passed, in the event that the Court is asked to weigh any subsequent legislation against the Basic Law.

The most compelling evidence that Israeli arguments to the international community would fall on deaf ears, should the Knesset pass legislation authorizing the GSS to use "moderate" force during interrogations, comes directly from the bodies that oversee party obligations under the relevant international agreements. In 1998, the UN Human Rights Committee reported that Israeli practices consistent with the Landau Report recommendations violated article 7 of the UN Covenant on Civil Rights.²¹⁰ In 1995 and again in 1997, the Committee Against

defense to the use of ill treatment existed. Because ill treatment is absolutely barred by the European Convention on Human Rights and Fundamental Freedoms, the reason for the interrogation becomes irrelevant. *See supra* notes 146-56 (discussing the absolute bar on ill treatment and various examples of what does or does not constitute such treatment).

²⁰⁷ *See supra* notes 111-15 and accompanying text.

²⁰⁸ *See id.*; *see also* HARNON & STEIN, *supra* note 112, at 218-19 (listing those international agreements that the Knesset Israel has ratified but not formally adopted as law).

²⁰⁹ *See id.* at 219.

²¹⁰ *See* Position Paper, *supra* note 107, at 27 (citing Human Rights Committee, Concluding Observations, 1998, Israel).

Torture (CAT) made the same findings with respect to the Convention against Torture.²¹¹ Among the practices that constituted violations in all instances included violent shaking, and imposition of the “Shabach” position.²¹² The CAT accompanied its 1997 findings with the following comment:

The Committee acknowledges the terrible dilemma Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before this committee exceptional circumstances as justifications for acts prohibited by article 1 of the Convention.²¹³

V. Conclusion

Human rights activists have vigorously applauded the decision in *Public Committee Against Torture in Israel*. In reality, however, the High Court’s decision is only a tiny step towards prohibiting the use of torture and ill treatment during GSS interrogations of suspected terrorists. Nevertheless, the Court noted the difficulty in taking that step.

We are aware that this decision does not ease dealing with [the] harsh reality [of terrorism]. This is the destiny of a democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand.²¹⁴

Presumably, if additional physical interrogation practices are challenged the Court will find them illegal as well, and on the same grounds as in the principal case. What is uncertain is whether the Israeli legislature will respond to the principal decision by passing a statute, and if so what the statute would authorize, and whether the HCJ would strike the statute upon review. So, not only does the decision represent just a small step towards Israeli compliance with its international agreements, but even that step appears subject to nullification by the legislature. If Israel passes a statute allowing for the use of force in interrogations, and if the statute is upheld, Israel will sit alone

²¹¹ See *id.* at 25-26.

²¹² See *id.* at 26-27.

²¹³ *Id.* at 26 (quoting Committee Against Torture, Special Report submitted by Israel, 1997, Concluding Observations, ¶¶ 4-6).

²¹⁴ Principal Case, *supra* note 1, ¶ 39.

among the democracies of the world as authorizing such practices.²¹⁵

MATTHEW G. ST. AMAND

²¹⁵ See *Israel's Shin Bet Drops Demand for "Torture Law," supra* note 191.