

The main opinion in these petitions was delivered by Barak J.P., who was joined by all eight remaining Justices, so that his opinion became the unanimous judgment of the Supreme Court.

Barak J.P. opened his extensive judgment by describing the background of the petitions in the following words:

From the very day of its founding, the State of Israel has been engaged in an unceasing struggle for its existence and security. Terrorist organizations have established its destruction as their goal, and they use for this goal the means of terrorist acts and the general disruption of ordinary life. They don't distinguish between civilian and military targets. They carry out terrorist attacks of mass murder in public places, public transportation, city squares and centers, cinemas and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy.⁴¹ ... According to data presented before this Court, one hundred twenty-one people were killed in terrorist attacks between 1.1.1996 and 14.5.1998. Seven hundred and seven people were wounded. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities.

XV. H.C. 5100/94, Public Committee Against Torture in Israel *et al.* v. Government of Israel *et al.*

53(4) *Piskei Din* 817.

Legality of the use of physical methods by the General Security Services in interrogation of suspects of hostile terrorist activities; source of the GSS interrogation authority and its scope - analogous to that of Police officers; need for explicit authorization in primary legislation to use physical means; in absence of authorizing primary legislation, government not possessing authority to allow the use of physical means infringing human rights; defence of "necessity" not a source of administrative power infringing human rights; nor a source of authority for the GSS investigators to use physical means; Kedmi J. - in situations of "ticking time bombs" the use of exceptional interrogation methods may be inferred from the natural right of a State to "self-defence".

The common question which arose in the seven united petitions concerned the authority of Israeli General Security Service (GSS) to conduct interrogations of individuals suspected of committing crimes against Israel's security on the basis of administrative directives regulating interrogation methods, which authorize investigators to apply physical means against suspects.

Barak J.P. continues presenting the background of the petitions by stating that many terrorist acts were prevented by measures taken by the authorities responsible for fighting these hostile terrorist activities on a daily basis. The main body responsible for fighting terrorism is the GSS. In order to fulfil this function, the GSS also investigates those suspected of hostile terrorist activities. The purpose of these interrogations is, *inter alia*, to gather information regarding terrorists and their organizing methods for the purpose of preventing them from carrying out terrorist attacks. In the course of these interrogations, GSS investigators also use physical means. The legality of the use of physical means is being examined by the Court in the present petitions.

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Then Barak J.P. turned to examination of the content of each petition, and stated that they all concern the interrogation methods of the GSS, described in the petitions themselves, such as: shaking forward and backward, holding in a "shabach" position, forcing into a "frog crouch", hooding, deprivation of sleep and subjection to loud music. In relation to all these methods experts

⁴¹ For a detailed description of this phenomenon the Court referred to the *Report of the Commission of Inquiry Regarding the GSS' Interrogation Practices with Respect to Hostile Terrorist Activities*, headed by (ret.) Justice M. Landau (1987), (hereinafter: "Commission of Inquiry Report"), published in 1 *The Landau Book* 269, 276 (1995).

opinions had been presented to the Court alleging that they are likely to cause severe physical and/or mental harm.

Next, Barak J.P. proceeded to the arguments submitted to the Court on behalf of the petitioners, on the one side, and of the State, on the other. The petitioning society claimed, among others, that the physical methods employed by the GSS constitute an infringement of human dignity, and that they even violate international law because of actually amounting to torture, which is prohibited by international law. The main justification for the use of physical means during interrogations of suspects connected to security offences, as presented on behalf of the State, was that they fall within the defence of "necessity" outlined in Section 34(1) of the Penal Law-1977.⁴² This Section formulates the defence of necessity in the following manner:

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

Relying on this Section, the State argued that if and when its conditions are met - meaning existence of a danger to life, liberty, body or property - the GSS investigators are entitled to use "moderate physical pressure" (as a last resort) in order to prevent a serious harm to human life.

Then Barak J.P. referred to a source invoked both by the petitioners and the State, namely to the Report of the Commission of Inquiry Regarding the GSS Interrogation Practices with Respect to Hostile Terrorist Activities (the "Report").⁴³ This Commission was set up by the Government under the Commissions of Inquiry Law-1968⁴⁴ in order to examine the GSS authority to employ particular interrogation methods, and the relevant law respecting these matters. After prolonged deliberations, the Commission concluded that the GSS is authorized to investigate those suspected of hostile terrorist acts, even in absence of an express statutory regulation of its activities. The Commission maintained that in cases where the saving of human lives requires obtaining certain information, the investigator is entitled to apply both psychological pressure and "a moderate degree of physical pressure". An investigator who, in the face of such danger, applies such degree of physical pressure, can avail himself of the "necessity" defence, in the face of

potential criminal liability. The Commission's recommendations have been approved by the Government of Israel.

Starting with the general question whether the GSS possesses an authority to interrogate suspects Barak J.P. opined as follows:

Every interrogation - even without physical means - inevitably infringes upon the suspect's freedom, and often on his dignity and privacy. Therefore, in a State based on the rule of law, an interrogation may be carried out only pursuant to an explicit statutory authorisation, made in primary or secondary legislation (the latter being lawfully ensuing from the former). ... Both kinds of legislation have to meet the conditions for infringement of human rights laid down in Section 8 of the Basic Law: Human Dignity and Freedom.⁴⁵ Any administrative body seeking to interrogate an individual, must point to the explicit statutory provision which legally empowers it. This is required by the rule of law and by the principle of administrative legality. If a governmental body cannot point to a law from which it derives its authority to perform a certain act, that act is *ultra vires* and illegal.

Applying this rule to the petition, Barak J.P. examined whether a legal provision authorizing GSS investigators to carry out interrogations exists. His answer was that "a specific provision, dealing with GSS interrogations does not exist", because the Service's status, its function and powers are not regulated in any statutory enactment. True, the GSS constitutes an integral part of the executive branch. But this fact does not by itself grant the GSS an authority to interrogate. Indeed, the Government does possess residual or prerogative powers, defined in Section 40 of the Basic Law: The Government⁴⁶ as follows:

The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority.

However, Barak J.P. held that an authority to interrogate cannot be deduced from this provision, because the power to investigate infringes on a person's individual freedom; and the Government's residual powers cannot constitute a source for an authority infringing an individual freedom. Infringement of an individual freedom requires a specific enactment. Such enactment was found

⁴² Penal Law-1977, *L.S.I. Special Volume*.

⁴³ *Supra* note 41.

⁴⁴ 20 *L.S.I.* 43.

⁴⁵ *Supra* note 35.

⁴⁶ 22 *L.S.I.* 257.

in Section 2(1) of the Criminal Procedure (Testimony) Ordinance, which provides (in its amended 1944 version) as follows:

A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold inquiries into the commission of offences, may examine orally any person suspected to be acquainted with the facts and circumstances of any offence....

It is by virtue of this provision that the Minister of Justice individually authorized each and every GSS investigator to conduct interrogations concerning the commission of hostile terrorist activities. Following this authorization, the position of GSS investigators in all that concerns interrogation of suspects actually becomes equalized in law to that of police officers. Hence, the question arises as to what is the scope of this interrogation authority, and whether it includes the permission to use physical means in general, and those used in GSS interrogations, in particular. Discussing this question, Barak J.P. opined as follows:

In formulating interrogation rules, two values or interests clash: the desire to reveal the truth, thereby fulfilling the public interest in exposing crimes and preventing them, on one hand; and the will to protect the dignity and freedom of the individual being interrogated, on the other. These interests and values are not absolute. A democratic, freedom-loving society does not accept that investigators may use any means for the purpose of discovering the truth. Justice Landau once noted that "the interrogation practices of the police in a given regime are indicative of the regime's entire nature". Sometimes, the price of truth is so high that a democratic society is not prepared to pay it. However, at the same time, a democratic society cherishing freedom also seeks to fight crime, and to this end is prepared to accept that an interrogation may infringe upon human dignity and liberty of a suspect, provided that this infringement is done for a worthy purpose and that the harm caused thereby does not exceed that which is necessary.

Consequently, the rules of a lawful interrogation must be the outcome of a balance between these conflicting interests and values. These rules should be based on preserving the "human image" of the interrogated suspect on the one hand, and the necessity to effectively fight criminality in general, and terrorist attacks particularly, on the other. These rules should reflect a "measure of reasonableness, straight thinking and fairness". In light of this

reasoning, Barak J.P. presented two fundamental principles applying to any interrogation:

1. First, a "reasonable interrogation" is one free of torture, free of cruel, inhuman treatment, and free of any degrading treatment whatsoever toward a suspect. There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation. Human dignity also includes the dignity of the interrogated suspect. This conclusion is compatible with conventional international law - to which Israel is a contracting Party - prohibiting torture, and cruel, inhuman or/and degrading treatment. These prohibitions are absolute - they are not subject to exceptions or balances. Violence directed at a suspect's body or spirit does not constitute a reasonable interrogation means.
2. Second, a reasonable interrogation may cause inconvenience, such as insufficient sleeping or holding the suspect in unpleasant conditions of life, but not resort to violence. It is permitted to resort to various manipulations and sophisticated acts which are nowadays commonly used by investigators. The legality of a given interrogation should be determined according to its worthy purpose and its proportionality. Consequently, deprivation of sleep for a long period without this being needed for the interrogation, constitutes a violation of the suspect's human rights beyond what is necessary, and is, therefore, illegal.

Barak J.P. proceeded by examining in light of these principles the legality of each of the interrogation methods raised in the petitions, whether they may be considered as reasonable and fair interrogation.. After a detailed analysis of each method, the harm it caused the suspect, the extent of its violation of his dignity, the extent to which it exceeded what is necessary, and whether it could reasonably be regarded as part of the general authority to conduct a fair and effective interrogation - Barak J.P. disqualified almost all the interrogation methods presented to the Court on behalf of the petitioners. In this context, he mentioned the judgment of the European Court of Human Rights in the *Northern Ireland* case of 1978, where it was ruled that although the five interrogation techniques used by the United Kingdom in Northern Ireland (wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink) did not amount to torture, they nonetheless constituted a practice of inhuman and degrading treatment.⁴⁷ He concluded that whereas an interrogation by the Police officers has to be conducted in a fair and reasonable manner; and whereas the interrogation power given to the GSS interrogator is in fact analogous to the one vested in police investigator - it follows that an interrogation by the GSS also has to be conducted in a fair

⁴⁷ [1978] E.C.H.R., Ser. A, No. 25.

and reasonable manner, which is not such a one if the physical methods described by the petitioners are used.

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Barak J.P. proceeded to consider the argument of the State claiming that the interrogation methods may lawfully be justified by the defence of "necessity" provided for in Section 34 of the Penal Law, as quoted above. According to the State's position, in virtue of this exception to criminal liability, the GSS interrogators may - in order to prevent a serious harm to human life and as a last resort - use physical force. In particular, the State relied on the instance where the person arrested by the GSS holds information about a "ticking time bombs", the explosion of which is likely to cause many casualties. In such circumstances, the defence of "necessity" authorizes the investigator to use force in order to obtain information about the site of the bomb, in order to prevent its explosion.

Barak J. P. rejected this theory and replied as follows:

Indeed, in appropriate circumstances - such as those of a "ticking bomb" - GSS investigators may avail themselves of the "necessity" defence, if criminally indicted on the charge of having used physical force against a suspect. But the question arising in the petition is not that of the eventual criminal liability of a GSS investigator who employed physical interrogation methods in circumstances of "necessity"; but rather that of whether it is possible to infer from the "necessity" defence an authority to permit in advance the use of physical interrogation means.

Barak J.P. answered this question in the negative, and held that the defence of "necessity" cannot serve as a basis for the authority of the Government to establish administrative directives regarding the use of physical means by GSS investigators; nor can it serve as a basis for authority for the investigators themselves to use physical means in the course of interrogation of suspects. The reason for this approach - as explained in detail by Barak J.P. - lies in the essence of the defence of "necessity" as one exempting a person from criminal liability, but not a one creating a source of an administrative power to infringe human rights. Consequently, Barak J.P. ruled that:

According to the present state of law, the Government or the heads of the GSS do not possess an authority to enact directives permitting the use of force against interrogated suspects of hostile terrorist activity, beyond what is allowed from the very essence of the concept of interrogation. Likewise, nor does the individual interrogator - whose position is analogous to that of a police officer - possess an authority to use physical

means against an interrogated suspect beyond those required by a "fair and reasonable" inquiry.

In his view, the principle of the rule of law requires that an infringement of human rights be based on a statutory provision authorizing the administration to do so. Therefore, if the State wishes to empower GSS investigators to use physical means in interrogations, it has to provide such an authorization in a primary legislation. Being inevitably an infringement of basic human rights, such legislation would have to meet the conditions for its validity laid down in Section 8 of the Basic Law: Human Dignity and Freedom, namely, being a legislation that befits the values of the State of Israel, being directed towards a worthy purpose, and not infringing the rights to an extent that exceeds what is necessary.

In his "final word" Barak J.P. noted as follows:

It is the fate of democracy, that not all means are lawful for it, and not all methods employed by its enemies are open before it. Sometimes a democracy fights with one hand tied behind its back. Nonetheless, it overcomes, because preservation of the rule of law and recognition of individual's liberty constitute important components in its concept of security.

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While concurring with Barak J.P. Kedmi J. expressed his feeling that it is hard for him to accept a state of affairs where due to the absence of explicit legislation, the State would be legally helpless in those rare emergencies defined as "ticking time bombs", because of lack of authority to order the use of exceptional interrogation methods. In his view, such an authority does exist in those circumstances, and it stems from the basic obligation of a State to defend its existence and to safeguard the lives of its citizens. In those circumstances, the State - as well as its agents - may avail itself of the natural right of "self-defence" in its broad meaning, namely, of its right to defend itself against terrorist organizations which seek its annihilation and extermination of its citizens.

The opinion of Barak J.P. was also joined by Deputy President S. Levin, and Justices Or, Matza, Cheshin, Zamir, Strasberg-Cohen and Dorner, so that the Court unanimously declared that the GSS does not possess a legal authority to use the interrogation techniques under discussion.