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**Legitimizing Official Brutality:
Can the War against Terror Justify Torture ?***

By: Miriam Gur -Arye**

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Introduction

In the aftermath of September 11, the United States is confronted with dilemmas endemic to any democratic regime faced with hostile terrorist attacks – dilemmas concerning the appropriate balance between human rights and national security. One such dilemma has to do with the method of interrogation of terror suspects. Detainees suspected to have links with the al-Qaeda network refused to answer questions and reveal information. Their silence “led to a debate in the media about the possible need for torture, ‘truth serums’ or sending the detainees to countries where harsher interrogation tactics were common.”¹ Just after September 11, Newsweek published a column under the headline “Time to Think about Torture”.² Harvard Law Professor Alan Dershowitz published a commentary in the Los Angeles Times, referring to a “ticking bomb situation” “in which a captured terrorist who knows of an imminent large-scale threat refuses to disclose it”. According to him, there is “no doubt that if an actual ticking bomb situation were to arise, our law enforcement authorities would torture. The real debate is whether such torture should take place outside of our legal system or within it. The answer to this

¹Human Rights Watch World Report 2002: United States (New York, 2002). See also: Harold Hongu Koh, *The Spirit of the Law* 43 HARV. INT’L L.J. 23, at 35–39 (2002); Juan Mendez, *Respondent: Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS L.J. 377, at 382–385 (2002).

²Jonathan Alter, *Time to Think about Torture*, NEWSWEEK, November 5, 2001, at 45.

seems clear: If we are to have torture, it should be authorized by law.”³ A CNN’s commentators said, “Torture is bad [but] keep in mind, some things are worse. And under certain circumstances it may be the lesser of two evils. Because some evils are pretty evil.”⁴ In January 2002 the television program 60 Minutes reported that “while FBI official policy strongly prohibits the practice, some FBI agents are getting so frustrated [with interrogations of al-Qaeda suspects] they have begun thinking about what until now had been unthinkable: torture.”⁵ According to the Guardian Report from March 12, 2002 “The US has been secretly sending prisoners suspected of al-Qaeda connections to countries where torture during interrogation is legal.”⁶

³ Alan M. Dershowitz, *Is there a Torturous Road to Justice?* LOS ANGELES TIMES, November 8, 2001, at Part II p. 19. For a response see Susan Gilman, *Enduring and Empowering: The Bills of Rights in the Third Millennium: The First Amendment in a Time that Tries a Man’s Souls* 65 LAW & CONTEMP. PROB. 87, at 96-97 (2002).

⁴ Tucker Carlson, on CNN’s “Crossfire”, cited by Jim Rutenberg, *Torture Seeps into Discussion by News Media* THE NEW YORK TIMES, November 5, 2001.

⁵ Martin Edwin Andersen, *Is Torture an Option in War on Terror?* INSIGHT ON THE NEWS, May 27, 2002. See also, Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, THE WASHINGTON POST, October 21, 2002. Anthony Sampson, *Terror must not Lead to Torture* GUARDIAN UNLIMITED, November 9, 2001.

⁶ Duncan Campbell, *US Sends Suspect to Face Torture*, GUARDIAN UNLIMITED SPECIAL REPORTS, March 12, 2002. More recent reports will be discussed at the concluding remarks. See also Philip B. Heyman, *Civil Liberties and Human Rights in the Aftermath of September 11* 25 HARV. J. L. & PUB. POL’Y 441 at 453-456 (2002). Heyman believes that in the United

Security services in various democratic regimes confronted with terror in the late twentieth century did, in fact, use extraordinary methods in interrogating terror suspects. Physical and psychological pressures were used in the 1950's by the French security services in Algeria interrogating FLN (*Fronte Liberation Nationale*) suspects,⁷ and in the 1970's by British security services interrogating IRA (Irish Republican Army) suspects.⁸ In the 1980's the public in Israel found out that the Israeli General Security Services (hereinafter - GSS) had used force in interrogating Palestinians suspects of "hostile terrorist activity".⁹

States there are strong protections against using force in the course of interrogation.

Therefore,

...[t]orture will not return to the United States. But these protections are often not available in anything like the same measure in states where terrorists are likely to seek haven. Those countries' internal structure and police are likely to be far less constrained if activated by the CIA on behalf of America. The United States can reap the benefits of these activities, forbidden by international human rights conventions, when the activities are directed at an individual abroad planning terrorism against the United States.

⁷ MALCOLM D. EVANS & ROD MORGAN, PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND IN HUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 27 *J. INT'L L. & AFF.* 27-28 (1998).

⁸ App No 5310/71 Republic of Ireland v. United Kingdom, 2 *EUR. H.R. REP.* 25, (1978).
See also EVANS & MORGAN, *Ibid.* at 32-41.

⁹ See *Expert Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 *ISR. L. REV.* 146, at

The possible justification for using force in interrogation was subject to official debate in Israel. In 1987, a commission of inquiry chaired by former Supreme Court President Moshe Landau (hereinafter the Landau commission), held that the use of moderate force by the GSS in interrogating terrorist's suspects is permissible by virtue of the criminal law defense of necessity.¹⁰ In 1999 the Israeli Supreme Court ruled that the coercive methods used by the GSS following the Landau Commission's recommendations are illegal.¹¹

The debate in the US media in the aftermath of September 11 resembles the debate invoked by the Israeli experience. The legal debate in Israel, described in **Part I** of the article, therefore, provides a useful framework for dealing with the dilemma faced by the US regarding the use of force in interrogating terror suspects.

Though they focus on the use of force in interrogations, the arguments advanced in this article have wider implications. They touch upon the issue of official power vs. criminal law defenses, and of necessity vs. self-defense.

Part II suggests two unique limitations that arise in applying criminal law defenses to officials who used force in interrogation. It argues that

149-154 (1989) (hereinafter "*Experts of the Report*"). See also EVANS & MORGAN, *supra* note 7, at 41-43.

¹⁰ *Ibid.* at 167-176.

¹¹ H.C. 5100/94 Public Committee against Torture in Israel and Others v. The State of Israel, The General Security Services and Others, 53(4) PD 817 (1999) (hereinafter, the Judgment), English translation can be found at <http://www.court.gov.il/mishpat/html/en/system/index.html>.

excuses, as opposed to justifications, should not apply to officials in carrying out their duty; and that the message underlies a criminal law defense applied to officials should not be acoustically separated.

Part III assumes that criminal law justifications apply to officials, and offers a distinction between official empowerment and justifications applied to officials. It argues that the State ought never to empower officials to use force in interrogations. In rare situations a criminal law justification may apply, requiring that the individual interrogator deliberate, before acting, on whether the circumstances are so powerful as to justify the use of interrogational force.

Part IV discusses a possible criminal law justification for the use of force in interrogation. It argues that the justification is to be based on a criminal law defense analogous to self-defense, rather than necessity.

The Concluding Remarks address the claim recently voiced in the U.S. following the capture of a high-ranking member of El-Qaida, Kalod Shaikh Mohammed, that the use of force in interrogation is a justified self-defense tool in fighting terror.¹²

Before we commence, a terminological clarification is necessary. The use of force during interrogation is designed to break the suspect's refusal to reveal information. It violates the suspect's autonomy and human dignity by coercing her to act against her will. Pain inflicted for such purpose may be

¹² See note 143 *infra*.

classified as **torture**.¹³ However, under international law, there are conflicting views as to what constitutes torture.¹⁴ According to one view, torture is an aggravated form of “cruel, inhuman or degrading treatment”¹⁵. Since both torture and other forms of cruel, inhuman or degrading treatment are banned under international law, differences in the degrees of interrogational force have only moral significance. To reflect its moral significance, and in light of the

¹³Torture, according to its various definitions (notes 14 - 18 *infra*) “is not just a issue of pain itself. It is an issue of who is doing it and for what purpose”. The pain is inflicted “to break a person’s will for the purpose of the captor” - Nigel S. Rodley, *The Prohibition of Torture and How to Make it Effective*, in The Center for Human Rights, The Hebrew University of Jerusalem, Symposium on Israel and International Human Rights Law: The Issue of Torture, (1995), at <http://humrts.huji.ac.il/rodley.htm> at p. 3.

¹⁴For in-depth analysis of “what constitutes torture” under international law, see: NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, 75 - 106 (1999). See also Eyal Benvenisti, *The Role of National Courts in Preventing Torture of Suspected Terrorists*, 8 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 596, at 603 - 606 (1997); Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance between the Right of a Democracy to Defend Itself and the Protection of Human Rights* 6 *UCLA JOURNAL OF INTERNATIONAL & FOREIGN AFFAIRS* 89, at 94-97 (2001). See also notes 15 - 18 *infra*.

¹⁵Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations General Assembly 39/46 of December 10, 1984). Similar formulations are to be found in various international conventions. See RODLEY, *Ibid.* at 46 - 74. The view that torture is a aggravated form of the other ill - treatments was first held by the European Commission of Human Rights in its report on the Greek case - 12 *YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1969). For an elaborated analysis of that case, see: RODLEY, *Ibid.*, at 77 - 90.

special stigma attached to torture, torture is limited to “deliberate inhuman treatment causing very serious and cruel suffering.”¹⁶ According to another view, there should be no hierarchy between torture and other cruel, inhuman or degrading treatment.¹⁷ Torture should not be limited to severe suffering, but should rather apply to “physical or mental pain or suffering ... [intentionally]

¹⁶“...it was the intention that the [European] Convention [of Human Rights], with its distinction between ‘torture’ and ‘inhuman or degrading treatment’ should by the first of these terms attach a **special stigma** to deliberate inhuman treatment causing **very serious and cruel suffering**” (emphases and clarifications added) – Ireland v. United Kingdom, *supra* note 8, para. 168 (the majority). See discussion of that case at: RODELY, *Ibid.*, at 91–95; Benvenisti, *supra* note 14, at 604–605; Gross, *supra* note 14, at 94–95. Similarly, Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 15, restricts torture to “severe pain or suffering”. The Article states:

For the purpose of this convention, the term “torture” means any act by which **severe** pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information... when such pain or suffering is inflicted by... [a] person acting in official capacity. (emphasis added)

For further limiting that definition of torture by the US senate upon ratification of the Convention see Sanford Levinson, “Precommitment and Postcommitment”: *The ban on Torture in the Wake of September 11* to be published at 82 TEXAS L. REV. at 24–26 (2003)

¹⁷RODELY, *Ibid.* at 92–93, 98–100

inflicted on person for purpose of criminal investigation” (clarification added).¹⁸

The arguments advanced in this article apply to the use of any force in interrogation irrespective of whether the use of such force is to be classified as “torture” or only as other “cruel, inhuman or degrading treatment or punishment.” I shall, therefore, avoid taking a stand on the terminological issue.

I. Background - The Legal Debate Invoked by the Israeli Experience

1. The Landau commission’s holding and its responses

As previously mentioned, the Landau commission held that the use of moderate force in interrogating suspects of hostile activities is permissible by virtue of the criminal law defense of necessity.¹⁹ The main assumptions that led to that conclusion were as follows:

a. Interrogating suspects of terrorist activities is not primarily designed to elicit confession and secure convictions; the primary goal is rather “to protect the very existence of society and the

¹⁸ Article 2 of the International American Convention to Prevent and Punish Torture (December 9, 1985). The Article states:

For the purpose of this convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purpose of criminal investigation...

¹⁹ *Supra* note 10.

State against terrorist acts directed against citizens, to collect information about terrorists and their modes of organization and to thwart and prevent preparation of terrorist acts whilst they are still in a state of incubation.”²⁰

b. It is impossible to achieve that goal “without the use of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information”.²¹

c. The necessity defense is based on the concept of lesser evil. “The decisive factor is not the element of time”; i.e. it does not depend on the immediacy of the danger to be prevented. The decisive factor is rather “the comparison between...the evil of contravening the law as opposed to the evil which will occur sooner or later.”²²

d. In balancing the interests involved in the use of force in interrogating suspects of terrorist activities “[t]he alternative is: are we to accept the offense of assault entailed in slapping a suspect’s face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in

²⁰Experts of the Report *supra* note 9 at 157.

²¹ *Ibid.*, at 184.

²² At 174.

carrying out an act of mass terror against civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.”²³

Scholars of law and philosophy, both within and without Israel, criticized the conclusion of the Landau commission and the assumptions that led to it. ²⁴It was argued that the commission should have focused on “general strategy in the fight against terrorism and the alternative means of...information-gathering” rather than on “individual suspects and alternative means of extracting information from **them**”²⁵ (the first assumption). In waiving the need for immediacy from the necessity defense (the third assumption), the Landau commission ignored the unique nature of the defense

²³ *Ibid.*

²⁴ The Israel Law Review devoted an issue to a written international academics symposium on the Landau commission report. See: 23 LSR.L.REV., (1989). See also: The Center for Human Rights, The Hebrew University of Jerusalem, *supra* note 13; Leon Shleff, *On the Lesser Evil – On the Landau Committee Report* 1 PLILIM [ISR.J.OFCRIM.JUST.] 185 (1999) (in Hebrew); Daniel Statman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 MISHPATU - MIMSHAL [LAW & GOV’ TINISR.] 161 (1997) (In Hebrew); Mordechai Kremnitzer & Re’em Segev, *Using Force During Investigations by the General Security Service – The Lesser Evil?* 4 MISHPATU - MMISHAL [LAW & GOV’ TINISR.] 667 (1998) (in Hebrew); EVANS & MORGAN, *supra* note 7 at 41–52; Gross, *supra* note 14. And see notes 25–33 *infra*.

²⁵ Mordechai Kremnitzer, *The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?* 23 LSR.L.REV. 216 at 229 (1989).

as an emergency measure aimed at preventing concrete and actual danger.²⁶ In balancing the interests at stake (the fourth assumption) “one must take into account the special weight assigned to individual autonomy and human dignity”,²⁷ as well as the danger to the whole legal system which would result from “the precedent” of permitting the use of force in the course of interrogations.²⁸ To limit this latter danger the commission should have imposed a ban on using the confession obtained by coercive methods in criminal proceedings²⁹ (in the light of its first assumption).

The main criticism of the Landau commission focused on its conclusion. By its very nature, it was argued, necessity cannot serve as a source for governmental authority. It is an ad hoc defense applied to an individual confronted with imminent danger;³⁰ it is not a basis “for weighing policy by

²⁶ Alan M. Dershowitz, *Is It Necessary to Apply “Physical Pressure” to Terrorists – and to Lie About It?* 23 ISR.L.REV.192, at 198 (1989); S.Z. Feller, *Not Actual “Necessity” but Possible “Justification”; Not “Moderate” Pressure, but either “Unlimited” or “None At All”*, 23 ISR.L.REV.201 at 205 (1989); Kremnitzer, *Ibid.* at 243–247.

²⁷ Kremnitzer, *Ibid.*, at 248.

²⁸ Paul H. Robinson, *Letter to the Editor* 23 ISR.L.REV.189 (1989); Kremnitzer, *Ibid.*, at 261.

²⁹ Adrian A.S. Zuckerman, *Coercion and the Judicial Ascertainment of Truth* 23 ISR.L.REV.357, at 363–369 (1989).

³⁰ See sources at note 26 *supra*. See also Arnold Enker *The Use of Physical Force in Interrogations and the Necessity Defense*, The Center for Human Rights, The Hebrew University of Jerusalem, *supra* note 13, at 3–7.

state agency faced with long-term systemic problems.”³¹ In a democratic state it is the legislature who should decide on the methods of conducting intelligence interrogations in the war against terrorism.³²

Some went further, arguing that even if morally there are rare cases in which the use of force in interrogation might be justified as the lesser of two evils; legally there should be an absolute ban on using force in the course of interrogations.³³

In the classified section of its report, the Landau commission “formulated a code of guidelines for GSS interrogators.”³⁴ The commission recommended presenting the guidelines “annually for reappraisal before a small Ministerial Committee”.³⁵

In the years to follow, the GSS employed coercive methods of interrogation established by the special Ministerial Committee. The main methods were as follows:³⁶ “**shaking** of the suspect’s support torso”; “**[w]aiting in the ‘shabach’ position**” in which the suspect is seated on a small and low

³¹Dershowitz, *supra* note 26, at 198.

³²Enker, *supra* note 30 at 6; Robinson, *supra* note 28, at 190; Kremnitzer, *supra* note 25, at 171.

³³Sanford H. Kadish, *Torture the State and the Individual* 23 ISR.L.REV. 345 at 351-355 (1989); Rodley, *supra* note 13, at 14; Statman, *supra* note 24, at 195.

³⁴ *Experts of the Report*, *supra* note 9, at 185.

³⁵ *Ibid.*

³⁶The description of the methods is to be found at the Judgment, *supra* note 11, paras. 8-11 (Barak P.).

chair, the seat of which is tilted forward, his hands are tied, his head is covered by an opaque sack, and powerfully loud music is played in the room; **the ‘Frog Crouch’** on the tips of one’s toes; **excessive tightening of hand or leg cuffs;** and **sleep deprivation.**

Petitions challenging the legality of these methods were consistently brought before the Israeli Supreme Court. The Court rejected the petitions without taking an explicit stand on the legality of the methods of interrogation.³⁷ It was only in 1999 that the Supreme Court changed its attitude, took a stand on the merit, and ruled that the coercive methods used by the GSS are illegal.

2. The Supreme Court ruling ³⁸

Three different premises underlie the Supreme Court ruling that states that the coercive methods used by the GSS in interrogating suspects of terrorist activities are illegal.³⁹

³⁷ See description at Mordechai Kremnitzer & Re’em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?* 34 ISR.L.REV. 509, at 510-516 (2000); Benvenisti, *supra* note 14, at 596-600.

³⁸ *Supra* note 11.

³⁹ For a detailed analysis of the judgment, see Kremnitzer and Segev, *supra* note 37, at 516-527. For alternative possible readings of the judgment, see Amnon Reichman and Tsvi Kahana, *Israel and the Recognition of Torture: Domestic and International Aspects* in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 631 (C. Scotford, ed., 2001).

The first premise relates to the GSS general power to interrogate. According to the Court, the GSS has a power to interrogate suspects of terrorist activities similar to that of the “ordinary police force”.⁴⁰ The interrogation, which necessarily causes discomfort to the suspect, ought to be fair and reasonable. The methods used by the GSS were unfair and unreasonable, and therefore are not included within the general power to interrogate.⁴¹

⁴⁰The Judgment, *supra* note 11, para. 32.

⁴¹It should be noted that the Court avoided classifying the methods used by the GSS explicitly as “torture” or as “cruel and human treatment”. Such a classification was, however, implicit in the Court’s ruling. The Court clarified that

“[A] reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever... This conclusion is in perfect accord with (various) International Law treaties – to which Israel is a signatory – which prohibit the use of torture, “cruel, inhuman treatment” and “degrading treatment”... These prohibitions are “absolute”. There are no exceptions to them and there is no room for balancing. **Indeed, violence directed at a suspect’s body or spirit** does not constitute a reasonable investigation practice. (emphasis added)

(*Ibid.* para. 23)

In ruling that the various methods used by the GSS “do not fall within the sphere of a ‘fair’ interrogations” the Court in fact described the various methods in a manner that meets the characteristics of torture or at least “cruel inhuman and degrading treatment” being “violence directed at a suspect’s body or spirit”. According to the Court, the various methods used by the GSS were unreasonable and unfair because “[Used] in a manner that applies **pressure and cause pain**... [t]hey impinge upon the **suspect’s dignity, his bodily integrity and his basic rights in an excessive manner**”. (emphases and clarification added) (at para 27)

The second premise focuses on the need for an explicit legislative authorization to use force in interrogations. Following the arguments criticizing the Landau commission for failing to assign special weight both to human dignity and to the rule of law in a democracy, the Court held that

Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latter's dignity and liberty, raise basic questions of law and society, of ethics and policy, and of the rule of law and security. The legislative branch must determine these questions and the corresponding answers. This is required by the principle of the separation of powers and the rule of law, under our very understanding of democracy.⁴²

In contrast to the Landau commission, and in the light of the arguments against the commission's conclusion, the Court went on to hold that

[t]he necessity defense does not constitute a source of authority, allowing GSS investigators to make use physical means during the course of interrogation...

Similarly, "if the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out **'breaking' him** – it shall not fall within the scope of a fair and reasonable investigation. Such means **harm the rights and dignity of the suspect**". (emphasis added) (para 31)

⁴²Para 37.

The very fact that a particular act does not constitute a criminal act (due to the necessity defense) does not itself authorize the administration to carry out this deed and in doing so infringe upon human rights.⁴³

The distinction between the administration's authority and criminal law defenses will become clearer in discussion of the third premise. Here it should be noted that the second premise was crucial to the Court's ruling. The coercive methods used by the GSS were declared illegal due to a lack of explicit authority: the Israeli legislature did not authorize the use of such methods. However, the Court did not impose a general ban on using force during interrogations. The Court instead left it to the legislature to decide whether or not to legitimize the use of interrogational force:

If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties, to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch, which represents the people.

We do not take any stand on this matter at this time.⁴⁴

The third premise touches upon the criminal law defense of necessity. The Court left room for the necessity defense by distinguishing between two issues: the authority of the GSS to use force in interrogation and criminal

⁴³Para 36.

⁴⁴Para 39.

proceedings against an individual interrogator who in fact used force in the interrogation. Within the criminal proceedings the necessity defense may apply.

Just as the existence of the “necessity” defense does not bestow authority, so too the lack of authority does not negate the applicability of the necessity defense or that of other defenses from criminal liability.⁴⁵

The Court did not, however, clarify under what conditions necessity might apply within the criminal proceedings, but rather left it to the Attorney General to decide.⁴⁶

Reactions to the Supreme Court’s judgment varied. Some praised it; some thought that it did not go far enough, arguing that the Court should have ruled out the necessity defense and imposed an absolute ban on using force in

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⁴⁵Para 38.

⁴⁶“The Attorney General can instruct himself regarding the circumstances in which investigators shall not stand trial if they claim to have acted from a feeling of necessity” (*Ibid.*).

⁴⁷Dan Izenberg & Ben Lynfield, *Human-Rights Groups Applaud GSS Ruling*, JERUSALEM POST, September 7, 1999 at 2. See also –Johan T. Parry, *Judicial Restraint on Illegal State Violence: Israel and the United States* 35 VAND. J. TRANS’LL. 74 (2002), stating:

Recognizing its responsibility for past failure to stop torture, the Supreme Court of Israel used administrative law to stop GSS’ pervasive violations of human rights. From this decision, U.S. Courts can draw a lesson in doctrine but also, and more importantly, a recognition of their inevitable responsibility for protecting individuals from illegal state violence. (*Ibid.* at 148)

interrogation rather than leaving it to the legislature to decide whether to legalize the use of force in interrogations.⁴⁸

The arguments advanced in the following parts of the article do not aim to evaluate the Supreme Court's ruling directly. They touch upon wider issues relating to criminal law defenses as applied to official and official empowerment, and to the distinction between necessity and self-defense. However, these arguments will support a conclusion different from that of the Supreme Court's. The conclusion will be that the legislature ought never to empower officials to use force in interrogation, although in rare situations the use of force may be justified by self-defense rather than necessity.

II. Applying Criminal Law Defenses to Officials

When applied to officials, our focus on the use of force in interrogation as an example, this section suggests unique limitations upon criminal law

⁴⁸Kremnitzer & Segev, *supra* note 37, at 528-558; Reichman and Kahana, *supra* note 39, at 638-643; Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 *ISR.L. REV.* 259, at footnote 168; Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories* 12 *IND. INT'L & COMP. L. REV.* 75 (2001); B'Tselem, *Legislation Allowing the Use of Physical Force and Mental Coercion in Interrogations by the General Security Service* POSITION PAPER, (Jerusalem, January 2000), an English version can be found at <http://www.btselem.org>. For a somewhat milder reaction to the Supreme Court ruling see ALAN M. DERSHOWITZ, *SHOUTING FIRE*, at 476-477 (2002)

defenses. Two main theoretical notions will be discussed: “excuses” and “acoustic separation”. With regard to the first, my argument will be that excuses, as opposed to justifications, should not apply to individual officials in carrying out their duty. As to “acoustic separation”, my argument will be that no separation should be made with regard to criminal law defenses applied to officials.

1. Excuses

Criminal law defenses may be classified as either justifications or excuses.⁴⁹ Justifications negate the wrongfulness of the conduct, whereas excuses negate only the culpability of the actor for her wrongful conduct. Excuses are personal. They are granted because it would be unfair to blame the actor for her wrongful conduct, for example because she was insane or because she acted under extreme psychological pressure (duress). The defense of necessity, available according to the Israeli Supreme Court to an individual interrogator, can also be classified as either a justification or an excuse.⁵⁰

⁴⁹The distinction between justifications and excuses was originally developed in German law.

See Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in JUSTIFICATION AND EXCUSE, COMPARATIVE PERSPECTIVES, 17 (Albin Eser, George Fletcher eds., 1987); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW, 759-875 (2000). I discussed the significance of the distinction at some length elsewhere, see M. Gur-Arye, *Should a Criminal Code Distinguish between Justification and Excuse*, V(2) THE CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 215 (1992).

⁵⁰The German Penal Code, 1975 distinguishes between necessity as a justification defined in sec. 34 and necessity as an excuse defined in sec. 35 [For an English translation, see 28 THE

On the face of it, the notion of excuse in the context of force in interrogation is attractive. It enables us to declare that the use of force in interrogations is wrong and yet to release the individual interrogator from criminal liability on the ground that it would be unfair to blame an interrogator who, under a pressure to prevent a terrorist attack, has used force in interrogating those whom might have useful information.

The argument that, if necessity is to apply to the use of force in interrogating suspects of terrorist activities it should be in the form of an excuse rather than that of a justification, was indeed voiced, although with no elaboration, by Dershowitz⁵¹ and Robinson⁵² in response to the Landau commission's conclusion. The same view can be found in the Israeli Supreme Court's stating that "the necessity defense has the effect of allowing one who acts under the circumstances of necessity to escape criminal liability. The necessity defense does not possess any additional normative value."⁵³ By denying necessity normative value, the Court rejected the notion of necessity as a justification.⁵⁴ The Court rather emphasized the personal nature of the

AMERICAN SERIES OF FOREIGN PENAL CODES (1987) [I have elaborated on that distinction elsewhere see Miriam Gur-Arye, *Should a Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?* 102 L.Q.R. EV.71 (1986).

⁵¹Dershowitz, *supra* note 26, at 200.

⁵²Robinson, *supra* note 28, at 190.

⁵³The judgment, *supra* note 11 at para. 36.

⁵⁴The court's statement in this regard aimed at rejecting the State's argument that necessity gives rise to a moral duty (strongest sense of justification):

necessity, as in the notion of excuse, by ruling that the necessity defense might apply to individual investigators who “claim to have acted from **a feeling of necessity** (emphasized).”⁵⁵

Below I shall argue that excuses should not be granted to governmental officials in carrying out their duty ; i.e. in their capacity as governmental officials.

As previously noted, one of the main arguments in the debate invoked by Israeli experience rests on the Rule of Law requiring that the legislator be the one to strike the balance between security needs on the one hand and the individual’s autonomy and human dignity on the other.⁵⁶ The Rule of Law similarly requires that officials carry out their duty according to the balance struck by the legislator. The assumption underlying excuses, however, is that the balance struck by an individual is wrong and contradicts the appropriate

...an act committed under conditions of “necessity” ... [is] a deed that society has an interest in encouraging, as it is deemed proper in the circumstances. It is choosing the less evil. Not only is it legitimately permitted to engage in the fighting of terrorism, it is our moral duty to employ the necessary means for this purpose. This duty is particularly incumbent on the state authorities – and for our purpose, on the GSS investigators – who carry the burden of safeguarding the public peace (para. 33).

⁵⁵ Para 38. Leaving it to the Attorney General to instruct himself as to the conditions of necessity is also consistent with the notion of an excuse rather than a justification. See the discussion of acoustic separation in the next section and note 59 there.

⁵⁶ See the second premise of the Israeli Supreme Court ruling and the text at note 42 *supra*. See also the text at note 32 *supra* and the references there.

social choices embodied in the law. Therefore, officials who **wrongfully** infringe upon individuals' rights should bear the responsibility for that wrong.

To clarify this point let me focus on the issue before us of whether necessity as an excuse may apply to an individual interrogator who has used force in interrogating terror suspects. The rationale of necessity as an excuse is that, due to the pressure stemming from imminent danger and in view of the need for self-preservation, it would be unfair to require an individual to avoid protecting her interests by sacrificing those of another person, even when the sacrifice of the other person's interests is wrong. From governmental officials, on the other hand, we can and should demand that they overcome pressures and avoid committing wrongs while carrying out their duty. Once society is committed in its law to the view that it is wrong to use force in interrogations in order to reveal information necessary to prevent terrorist attacks, the interrogators should be required to overcome the pressure to use such force and to turn to other techniques of information gathering.

Governmental officials themselves are entitled to be offered appropriate means of dealing with the pressures inherent in their duty. The denial of excuses from officials will force society to take an explicit legal stand on means of dealing with pressures inherent in the execution of public duty without reliance on excuses to guarantee fairness to individual officials. In the context of our discussion, society should take a stand on the ways in which security services should be expected to tackle terror and whether the use of force in interrogating terror suspects may ever be justified.

The conclusion that excuses ought not to apply to officials executing their duties is further supported by next section's discussion of the notion of "acoustic separation" which is relevant mainly to excuses.

2. Acoustic separation

The notion of "acoustic separation" developed by Dan -Cohen⁵⁷ relates to a separation between two sets of messages contained in the law:

One set is directed at the general public and provides guidelines for conduct. These guidelines are... conduct rules. The other set of messages is directed at the officials and provides guidelines for their decisions. These are decision rules⁵⁸

According to Dan -Cohen, in an imaginary world in which the two sets of rules can acoustically be separated, criminal law excuses⁵⁹ should not be "included among the conduct rules of the system".⁶⁰ The message transmitted to the public will thus be that the law does not "relax its demands that the individual make the socially correct choices... even when external pressures impel her

⁵⁷MEIR DAN -COHEN, HARMFUL THOUGHTS, ESSAY ON LAW, SELF, AND MORALITY, 37-93 (2002).

⁵⁸ *Ibid.* at 41.

⁵⁹Dan -Cohen focuses on duress as an example (*Ibid.* at 42-44). However, he believes that the same analysis may apply to necessity, usually classified as a justification, where it is in the "actor's self-interest" to break "the law in order to avert an allegedly greater evil to himself" (at 47). The necessity we are talking about does not fall within that category – the use of force in interrogation is aimed at preventing evil to others.

⁶⁰ *Ibid.* at 43.

toward crime.”⁶¹ Excuses should be used as “a decision rule – an instruction to the judge that... [it would be unfair to punish] a person for succumbing to pressure to which even his judgment might have yielded” (clarification added).⁶² In the real world, conduct rules cannot be acoustically separated from decision rules. Nonetheless, “actual legal systems may in fact avail themselves of the benefits of acoustic separation by engaging in *selective transmission* – that is, the transmission of different normative messages to decision makers and to the general public”.⁶³

According to Dan –Cohen, one of the means for selective transmission in a real legal system is vagueness.⁶⁴ “The failure of the rules to communicate to the public a clear and precise normative message”⁶⁵ as to a criminal law excuse is akin to the elimination of the excuse from conduct rules in the imaginary world of acoustic separation. The vagueness of the conduct rule with regard to the excuse will prevent the public from relying on that excuse and will leave it within the decision rules granting judges discretion to interpret the conditions of that excuse.

In fact, the Israeli Supreme Court has engaged in a similar “selective transmission”. The Court did not clarify the conditions under which necessity might apply in criminal proceedings against an individual interrogator who

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ At 45.

⁶⁴ At 48.

⁶⁵ *Ibid.*

used force in interrogation. ⁶⁶ The Court thus eliminated necessity from the conduct rules addressed to the interrogators. The Court included necessity only in the decision rules addressed to the Attorney General, inviting him to “instruct himself regarding the circumstances in which investigators shall not stand trial if they claim to have acted from a feeling of necessity.” ⁶⁷

The separation between the conduct rules addressed to the interrogators and decision rules addressed to the Attorney General in this context may prove a useful tool, minimizing the slippery slope syndrome that might otherwise have led to the use of force in routine criminal investigations. ⁶⁸ Interrogators, who do not clearly know whether or not criminal liability will be imposed when they use force in interrogation, will tend to avoid using such force in order to escape the risk of being criminally indicted. In exceptional cases in which force is nonetheless used in interrogating suspects of terrorist activities, fairness to the individual interrogator, who under the pressure to prevent terrorist attack used the force, will be guaranteed by the decision rule addressed to the Attorney General that leaves him to decide whether or not necessity should negate the interrogator’s criminal liability.

⁶⁶The Judgment, *supra* note 11, at para. 38.

⁶⁷ *Ibid.*

⁶⁸“If ill-treatment were to become legal in combating terrorism, how long would it take for pressure to develop to extend its use to other contexts where it could also be thought that much was at stake?” Kadish, *supra* note 33, at 353. See also Kremnitzer, *supra* note 25, at 260-264.

However, as in the context of excuses, here too I believe that no separation between conduct rules addressed to governmental officials (the interrogators) and decision rules addressed to the decision makers (the Attorney-General) should be made. In this context it is important to note that there is a significant difference between the conduct rules analyzed by Dan Cohen and the conduct rules addressed to governmental officials.⁶⁹

According to Dan Cohen, the separation between decision and conduct rules is made possible by the differing rule of law considerations applied to each set of rules. Decision rules directed at officials should enable the controlling of officials' power and the limiting of their discretion.⁷⁰ Conduct rules addressed to the public should secure individual expectations necessary to increase "individual liberty and express respect for individual autonomy".⁷¹

When the officials are the addressees of conduct rules, the rule of law considerations that are applied to decision rules should also apply to the conduct rules. These considerations require that conduct rules addressed to officials be clear and known not only to the officials but also to the public at large. To be able to control the power of officials and to ensure that this power is not wrongfully exercised, the public has a right to know what the conduct rules directed at officials are. In the context of our discussion, the public should

⁶⁹There is also –according to Dan Cohen– a difference between the decision rules addressed mainly to judges, and the decision rule addressed to the Attorney General. For the purpose of the present arguments such a difference is irrelevant.

⁷⁰DAN COHEN, *supra* note 57, at 69.

⁷¹*Ibid.* at 71

know under what condition the defense of necessity may apply to the use of force in interrogation in order to ensure that the use of such force will remain within the boundaries of the necessity defense. The Israeli experience, described in Part I of this article, demonstrates the impact that public opinion can have on the control of official power, even in the case of security services. It was because the public in Israel discovered that the GSS had been using force in interrogating Palestinians suspected of terrorist activities that the Landau commission was established (in 1987),⁷² and the ongoing criticism and protests against their use of force in interrogation following the Landau commission's recommendations⁷³ were, no doubt, among the reasons that forced the Israeli Supreme Court to take a stand on the issue in 1999 and to rule that the coercive methods used by the GSS are illegal.⁷⁴

Moreover, conduct rules, although addressed to officials, have an impact on both the expectations and the autonomy of individuals who might find themselves under interrogation. Individuals have the right to know in advance when force may be used against them in interrogation.

Two possible reservations might deter concurrence with my conclusion that both the officials and the public at large should know in advance under what conditions the necessity defense may apply to the use of force in interrogation. The first has already been mentioned: clarification might bring

⁷² See *supra* note 9.

⁷³ *Supra* note 24.

⁷⁴ *Supra* note 11

about the slippery slope syndrome, leading to the use of force in routine investigations. I do not underestimate the slippery slope danger. However, taking into account the strong national and institutional motivations of security services to prevent terrorist attacks, it is doubtful that vagueness will minimize that danger. We may assume that in organization like security services a secret “operational code” that is “more susceptible to the dangers of the slippery slope”⁷⁵ will emerge.

Thesecond reservation has to do with interrogation’s effectiveness:

... secrecy and uncertainty are fundamental to the effectiveness of interrogation methods, particularly those involving the application of pressure: the suspect never knows what awaits him at the next stage and fears the unknown.⁷⁶

Clarifying the conditions under which the necessity defense will apply to the use of force in interrogation, however, does not require specifying the specific methods of interrogation. The conditions to be clarified have to do with the goal of using the force (e.g. to elicit information regarding a terrorist attack), the need for such use due to the immediacy of the danger (e.g. the information is needed to defuse a bomb set to explode), the balance of interests, and similar conditions as will be analyzed in **Part IV** below.

⁷⁵Benvenisti, *supra* note 14, at 602.

⁷⁶Kremnitzer, *supra* note 25 at 255.

III. Official Power and Justifications

Unlike excuses, criminal law justifications simply that, under the specific circumstances, performing the conduct was right.⁷⁷ On the face of it, there is no reason to deny justifications, as opposed to excuses, from officials who have made the “right” choice. Can justifications serve, therefore, as a source of official power?

In arguing before the Israeli Supreme Court, the State emphasized the nature of necessity as a justification in order to make it possible to derive from this justification the GSS’ power to use force in interrogation.⁷⁸ Holding that necessity is not a source of governmental power, the Court rejected the State’s argument by treating necessity more like an excuse.⁷⁹ However, if we assume that in rare circumstances the use of force in interrogation might be justified by a criminal law justification (I shall discuss this assumption in Part IV), can such a justification be a source of power? Or more generally, can justifications be a source of official power?⁸⁰

⁷⁷ See references at note 49 *supra*.

⁷⁸ The Judgment, *supra* note 11, at para. 33.

⁷⁹ See the analysis at the text between notes 52 - 55 *supra* and the references there.

⁸⁰ For the considerations “against conferring on every governmental authority the general power to perform act that it considered justified,” see Kremnitzer & Segev, *supra* note 37, at 537-543. However, Kremnitzer & Segev conclude, “despite the force of these considerations it is not always easy to accept the conclusion that a governmental authority does not have the power to perform a justified act absent specific authorization”. (*Ibid.* at 538)

Below I shall offer a distinction between official empowerment and justifications applied to officials and argue that, although justification may apply to officials, it should not serve as a source of power. I shall then further support my conclusion through the notion of “role distance”.

1. The distinction between empowerment and justifications

When the legislature empowers governmental officials to carry out certain duties, the individual official is relieved of the need to deliberate each time she performs her duty upon whether or not carrying out that duty is right. The legislature weighed the conflicting policies/interests and struck a balance between them, and the officials are entitled to assume that the balance struck was the right one.⁸¹ All they have to do is ensure that the conditions for doing their duty exist in each individual case. Granting such power for handling routine tasks is necessary in order to relieve individual officials from deliberating daily on the justifications underlying that routine. That conclusion is simply a reflection of the rule of law consideration that the legislature must be the one to decide on long-term policies.

Justifications provide reasons for doing what would otherwise have been breaking the law.⁸² Based on that function, it has already been argued that

⁸¹ For the purpose of this argument we may ignore immoral laws.

⁸² GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW*, 78 (1998). The term “justification” is sometimes used to describe the specific criminal law defense of “execution of public duty”. The unique meaning of “justification” with regard to that defense will be discussed below. See the text between notes 87-94.

justifications require awareness of the justifying circumstances.⁸³ An actor, ignorant of the justifying circumstances, does not have a good reason to break the law, and therefore her conduct is not justified. Here I would like to suggest that we go one step further. Because we are dealing with exceptional circumstances that give rise to reasons for breaking the law, the actor should not only be aware of the factual circumstances but should also be required to deliberate, before acting, upon whether those concrete circumstances indeed provide a good reason for “breaking the law” in the specific situation. By defining justifications the legislator provides only a framework for when “breaking the law” might be justified by clarifying guidance for the balance of the interests involved. To justify her concrete conduct the individual must deliberate on the concrete balance. She is required “to know what sorts of things are worse than others”,⁸⁴ and to balance the beneficial and harmful results of breaking the law in the concrete circumstances. Allowing justifications to apply to official conduct is, therefore, necessary in those exceptional cases where the values at stake are crucially important and it is therefore in society’s interest that the individual official be particularly cautious. The official should not rely solely on the abstract balance struck by the legislator in defining justifications; she should rather deliberate before

⁸³George Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson* 23 U.C.L.A.L.REV.253(1975); J.C.SMITH, JUSTIFICATIONS AND EXCUSES IN THE CRIMINAL LAW, 28 *—*44(1989); Comment, *The Impact of the Model Penal Code on Statutory Reform*, 75 COL.L.REV.914 at 917 *—*18(1975).

⁸⁴Michael S. Moore, *Torture and the Balance of Evils* 23 ISR.L.REV.280 at 86(1989).

acting whether in the concrete circumstances the balance indeed justify breaking the law.

To clarify the distinction between official empowerment and justifications offered above, take the example of a prison guard. The guard has the power to keep convicts in prison, and to see to it that they behave according to prison rules. She does not have to deliberate as to the justifications of holding convicts in prison, nor as to the justification of prison rules (provided that those rules were laid down by an authorized body). Let us now assume that one of the convicts succeeds in getting a knife and threatens to kill another convict. In such a case, the prison guard may be justified in using deadly force to defend the other convict by virtue of “self-defense”.⁸⁵ We may and should, however, expect her to deliberate before using the deadly force as to whether in the circumstances killing the convict is indeed justified. She should not use the force unless she has reason to believe that the convict is indeed able to kill the other convict with the knife; that there is no other less harmful way to stop the convict from using the knife; and that stopping the convict from using the knife will not have worse results. The deliberation upon the last issue requires “moral knowledge”.⁸⁶ She must consider what the right balance between the potential harms involved is.

⁸⁵The term “self-defense” usually applies to the use of force to protect both oneself and others. The Model Penal Code, however, distinguishes between “use of force in self-protection” (section 3.04) and “use of force for the protection of other persons” (section 3.05).

⁸⁶Moore *supra* note 84 .

In this context it is interesting to note how we would describe the guard's actions. We would probably say that the guard has the **power** to enforce prison rules and ensure that the convicts remain in prison. We would not say that in the circumstances she also had the power to kill, but rather that in the circumstances she was **justified** in killing the convict that threatened the life of the other convict.

At this point it is important to note that the distinction between official empowerment and justifications of force offered above is not explicitly supported by the terminology used in classifying criminal law defenses. Under the title of "justifications" one can find, in addition to defenses like necessity (choice of evils) and self-defense, the defense of "execution of public duty".⁸⁷ Applying that terminology to the example of the prison guard discussed above will result in granting her justification not only with regard to the use of deadly force (self-defense) but also with regard to holding the convicts in prison (with her power): she will not be criminally charged with false imprisonment due to the justification of "execution of public duty".

However, the justification in "executing of public duty" is not a real criminal law defense. "It is, basically, simply the criminal law's reflection of... grants of authority that exist elsewhere in the law".⁸⁸ Using the term "justification" to reflect empowerment is misleading.⁸⁹ Nonetheless, one can

⁸⁷MODEL PENAL CODE, sec. 3.03. For its full version see *infra* note 90.

⁸⁸Enker, *supra* note 30 at 5.

⁸⁹In the same spirit, see Dan-Cohen, *supra* note 57 at 233-234.

find support for the unique character of “execution of public duty” as opposed to “real” criminal law defenses in the manner in which the various criminal law justifications are being codified. Thus, section 3.03 of the Model Penal Code defining “execution of public duty” distinguishes between conduct which is “justifiable when it is **required or authorized** by...the law defining the duties or functions of public officers” [subsection (1)] and “ **the use of force** ” in executing public duties [subsection (2)]. ⁹⁰The use of force in executing public duty is not considered part of the conduct “ **required or authorized by law**”; i.e.

⁹⁰This section states:

3.03 Execution of Public Duty

(1) Except as provided in Subsection (2) of this Section, conduct is justifiable when it is required or authorized by:

- (a) the law defining the duties or functions of a public officer...
- (b) the law governing the execution of legal process; or
- (c) the judgment or order of a competent court or tribunal; or
- (d) the law governing the armed services...
- (e) any other provision of law imposing a public duty.

(2) The other sections of this Article apply to

- (a) the use of force upon or toward the person of another for any of the purposes dealt with in such sections; and
- (b) the use of deadly force for any purpose, unless the use of force is otherwise expressly authorized by law or occurs in the lawful conduct of war....

it is not within the official power. ⁹¹The use of such force may only be justified by the criminal law's real defenses specified in other sections of Article 3 such as "choice of evils", ⁹²"use of force in self -protection"⁹³ and "use of force in law enforcement" ⁹⁴. The justification embodied in these real defenses applied to the use of force by both public officials in execution of their duties and private individuals.

It follows that, despite the terminology, the distinction under the Model Penal Code between conduct "required or authorized by the law defining the duties or functions of public officers" and other "justifications" applied to the use of force by both public officials and private individuals does in fact support the distinction I have offered above. To demonstrate it let me go back to the example of the prison guard and apply this time the Model Penal Code **distinction** in this regard. The prison guard will not be criminally charged with false imprisonment because she was "**authorized by law**" to keep the convicts in prison [section 3.03(1)(a)]; she will not be charged with killing because the use of deadly force was "justified" by the **justification of "use of force for the**

⁹¹Unless it "is otherwise expressly authorized by law", as stated in sec. 3.03(2)(b) *Ibid.* An executioner can serve as an example for a case when an explicit authorization by law to use deadly force is needed. The distinction between empowering the executioner and justifying the self -defender will be discussed in the next section of the article.

⁹²MODEL PENAL CODE, sec. 3.02.

⁹³*Ibid.* sec. 3.04.

⁹⁴ *Ibid.* sec. 3.07.

protection of other persons” [section 3.05, applied to public official by section 3.03(2)(b)].

The distinction between official power and justifications offered in this section can further be developed by the concept of “role distance” suggested by Dan-Cohen⁹⁵.

2. Role distance

According to Dan-Cohen, public officials may maintain a “role distance”. To clarify this point, Dan-Cohen compares a killer in self-defense and an executioner.

By interposing a justification defense, the self-defender concedes his responsibility for the killing. It is precisely because of his responsibility that the self-defender must demonstrate that the killing was justified. ... [T]he executioner... may deny being a killer altogether. He may attempt to avoid his personal responsibility for the killing.⁹⁶

The executioner will achieve that goal through “role distance”, which diminishes official personal responsibility as well as their vulnerability. Things can be done and said by official and to them without engaging them personally and thus without the costs such engagement might sometimes carry.⁹⁷

⁹⁵DAN-COHEN, *supra* note 57, at 234.

⁹⁶ *Ibid.* at 234.

⁹⁷ *Ibid.* at 256.

For Dan -Cohen the notion of “role distance” serves as an example for the dynamic relationship between the law and the self. “By recognizing official duty as barring responsibility, the law codifies a specific conception of the self”.⁹⁸ According to that conception “[t]he self can assume a detached and instrumental attitude toward a particular role and can perform it in an alienated fashion.”⁹⁹ Dan Cohen notes that the detached self codified by the law does not apply to all of ficial duties: “not all public officials maintain role distance”.¹⁰⁰

I would like to suggest that whether or not an official may maintain a role distance in carrying out her duties should be decided by the legal system through the distinction elaborated above between official empowerment and justifications applied to officials. By empowering officials the legal system enables them to maintain role distance, diminishing their personal responsibility. We have seen that empowering officials (enabling them to maintain role distance) is required of routine tasks. Now we can add that empowering is necessary even in exceptional cases in which there are good reasons to diminish the officials’ personal responsibility by enabling them to maintain a role distance. Thus, even in a legal system that imposes the death penalty only rarely, an official should be explicitly empowered as executioner

⁹⁸ At 235.

⁹⁹ At 234..

¹⁰⁰ At 235.

in order to enable her to maintain role distance and to avoid assuming personal responsibility for killing.

As opposed to the executioner, the legal system should not enable the self-defender to escape personal responsibility through the concept of role distance, even if she uses the deadly force in her official capacity (the prisoner guard in the example I brought above). Assuming personal responsibility for the use of deadly force in self-defense would force officials to be particularly cautious when human lives are at stake.¹⁰¹

The legal system can therefore use the distinction between power and justifications as a means of determining when officials should be able to maintain role distance. Empowering officials will enable role distance, whereas justifications applied to official will prevent this distance. Preventing the official from maintaining role distance through the notion of “justifications” would guarantee additional caution in considering whether the concrete circumstances justify infringing upon crucially important values.

The distinction between power and justifications offered in the two sections above provides us with a useful legal tool for dealing with the use of force in interrogation. To demonstrate this let me discuss the view that even if

¹⁰¹The distinction between the executioner and the self-defender finds support in the Model Penal Code’s distinction between conduct “required or authorized by the law defining the duties or functions of public officers” and the justification of “use of force for the protection of other persons” applied to public officials. See discussion at the text between notes 87-94 *supra* and the clarification at note 91.

the use of force in interrogation may be morally justified in rare situations, legally there should be an absolute ban on using such force.¹⁰² According to Shue,

An act of torture ought to remain illegal so that anyone who sincerely believes such an act to be the least available evil is placed in a position of needing to justify his or her act morally in order to defend himself or herself legally.¹⁰³

A somewhat similar view led Kadish to distinguish “between what is morally permitted for a state to do officially and to proclaim by its law, and what is morally permitted for an individual to do.”¹⁰⁴ According to him:

Individuals, even individuals who happen to be state officials, may take it upon themselves to use such [coercive] methods, and they may turn out to have been morally justified. But the state itself in what it legally authorizes, in contrast to what individual officials may take upon themselves to do, may not... (clarification added)¹⁰⁵

¹⁰²Such a view was argued in response to the Landau commission, *see supra* note 33. *See also* notes 103 -104 *infra*.

¹⁰³Henry Shue, *Torture* 7 PHIL. & PUB. AFF., 124, at 143 (1978).

¹⁰⁴Kadish, *supra* note 33, at 354.

¹⁰⁵*Ibid.*

The individual official would have to make his own decision whether the circumstances are so utterly powerful in their moral weight that even legal and moral ban must give. ¹⁰⁶

The same considerations that led me to conclude that a acoustic separation ought not to apply to officials, lead me to believe that legal systems should make clear in their laws whether, and under what conditions, officials are legally justified in using force in interrogation. The distinction between official empowerment and justifications applied to officials, offered above, enables us to preserve a distinction similar to that offered by Kadish and Shue **within the legal system.**

In contrast to the Israeli Supreme Court's assumption, and in a similar spirit to that of Kadish, I believe that the State ought never to empower officials to use force in interrogations. The absence of such power will prevent the use of force as a matter of routine. Even limited power to use force in interrogation in exceptional situations ought not to be granted: individual officials should not be able to maintain a role distance relieving them of the burden of deliberating on the justification of using force in a specific case. However, for exceptional situations in which the use of force is **morally** justified, a criminal law justification may apply. Making justification available will not relieve the individual official from the burden, "to make his own decision whether the circumstances are so utterly powerful" (Kadish's

¹⁰⁶ *Ibid.* at 355.

words)¹⁰⁷ as to justify the use of force in interrogation. Justifications, based on moral evaluation, will (to quote Shue) place the individual official “in a position of needing to justify his or her act morally in order to defend himself or herself legally”.¹⁰⁸

The possible justification of the use of interrogational force is discussed in Part IV.

IV. Necessity v. Self -defense

The criminal law defense of necessity has been the focus of the debate invoked in Israel following the Landau commission report. The discussion in this Part, however, does not deal with most of the arguments made in that context.¹⁰⁹ This Part is rather limited to the issue of whether necessity is the appropriate justification for those exceptional situations in which the use of force may be justified in interrogation. I suggest that necessity is too broad of a justification, and that the use of force in interrogation may only be justified under the more limited boundaries of self -defense.

1. Necessity as a justification¹¹⁰

¹⁰⁷ *Ibid.*

¹⁰⁸ *Supra* note 103.

¹⁰⁹ The arguments relating to whether necessity can serve as a source of governmental power were discussed in the Part III section 3 *supra*. For additional arguments *see* notes 26 -28, 30 - 31 *supra*; *see also* Moore, *supra* note 84.

¹¹⁰ I have elaborated on necessity as justification elsewhere. *See* Miriam Gur -Arye, *supra* note 50. *See also* references at note 49 *supra*.

Necessity as a justification derives from consequential moral theories, according to which wrongful actions may be morally deemed by the goodness of their consequences.¹¹¹ It justifies the sacrifice of legitimate interests to protect other interests of substantially higher value. It does not grant the individual “a license to determine social utility”.¹¹² It is rather limited to emergency cases in which there is an imminent and concrete danger to an interest recognized by the legal system. In the context of the four discussions such an emergency exists in the “**ticking bomb**”¹¹³ situation in which a bomb has been set to explode imminently and innocent people are likely to be killed.¹¹⁴

¹¹¹For the various moral theories underlying necessity, see Moore *supra* note 84.

¹¹²As was suggested by David Cohen, *Development of the Modern Doctrine of Necessity* in JUSTIFICATION AND EXCUSE, COMPARATIVE PERSPECTIVES, *supra* note 49, at 991. Cohen does not discuss the use of force in interrogation. However, others utilized his approach to support the argument that necessity should not apply to the use of force in interrogation. See, for example Kremnitzer, *supra* note 25, at footnote 43 p. 245

¹¹³The term “ticking bomb” is a metaphor for all cases “in which a captured terrorist who knows of an imminent large-scale threat refuse to disclose it” (Dershowitz, *supra* note 3). For an example of a “ticking bomb” situation in which there was no “bomb” (this occurred in Israel), see Benvenisti, *supra* note 14, at 600.

¹¹⁴“Ticking bomb” situations were discussed by the Landau commission, relying on the example brought by Adrian A. S. Zuckerman, *The Right against Self-Incrimination: An Obstacle to the Supervision of Interrogation* 102 L.Q. REV. 45 (1986). The Landau commission, however, extended the ticking bomb situations by waiving the need of immediacy. See: *Experts of the Reports supra* note 9 at 174. For arguments against such an extension, see Feller, *supra* note 26, at 207; Kremnitzer & Segev, *supra* note 24 at 523-524;

The only hope for saving their lives is to get information about the location of the bomb in order to defuse it. Should necessity justify the use of force in an attempt to coerce the person under interrogation to reveal such information?

Below I would argue that necessity is too broad a justification for ticking bomb situations.

The justification of necessity rests on the balance between interests of **innocent** persons. The sacrifice of an innocent person's interests is justified when necessary to save those of another, when that other person's interests have a higher value. Therefore, if necessity is to apply to ticking bomb situations it will justify the use of interrogational force against the **innocent**.

Taken to an extreme, necessity might *prima facie* justify the use of force against a terrorist's child in order to force the terrorist to reveal the information about the location of a bomb he has planted.¹¹⁵ Even to consequentialists the use of force against the child might seem "morally repugnant. No one should

Statman, *supra* note 24, at 174-176. The Supreme Court did not take a stand on the debate in this context. See the Judgment, *supra* note 11, para. 34. For further discussion of ticking bomb situations see: Kremnitzer & Segev, *supra* note 37, at 548-551; Enker, *supra* note 30, at 12; Gross, *supra* note 14, at 102-105; Shue, *supra* note 103, at 141-142; George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View* 48 DUKE L.J. 975, at 1031-1034 (1999); Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law* 48 AM. J. COMP. L. 661, at 662 (2000).

¹¹⁵The example is discussed by Moore, *supra* note 84, at 291-294.

torture innocent children – even when done to produce a sizeable gain in aggregate welfare.”¹¹⁶

To rule out necessity in the case of the terrorist’s child we can introduce a limitation into necessity, similar to that in the German Penal Code, according to which necessity “applies only if the act is an appropriate means to avert the danger.”¹¹⁷ However, since the basic premise of necessity is that it is justified to sacrifice an innocent person’s interests of a lesser value, necessity will not rule out the use of force against the innocent in less extreme situations; i.e. when force is used in interrogating a bystander who happens to have the necessary information about the location of the bomb.¹¹⁸

¹¹⁶ *Ibid.*, at 292.

¹¹⁷ Section 34 of the German Penal Code, 1975 defining necessity as justification, in its English translation (*supra* note 50) is as follows:

Whoever commits an act in order to avert an imminent and otherwise unavoidable danger to the life, limb, liberty, honor, property or other legal interest of himself or of another does not act unlawfully, taking into consideration all the conflicting interests, in particular the legal ones, and the degree of danger involved, the interest protected by him significantly outweighs the interest which he harms. **This rule applies only if the act is an appropriate means to avert the danger.**” (emphasis added)

¹¹⁸ For the view that it may be justified to use force in interrogating bystanders *see* Moore *supra* note 84. Moore’s view in this context will be discussed *infra* (text between notes 124 - 133). It should, however, be noted that in most discussions of ticking bombs situations the assumption is that “the interrogee is, in some way, responsible for the creation of the danger

The argument that the use of force in interrogating bystanders is justified may rest on the moral principle that prohibits attacking the defenseless.¹¹⁹ Unlike the terrorist's child, who is indeed defenseless, the bystander who knows of the location of the bomb may escape the use of force by compliance: she can reveal the information concerning the location of the bomb.

The very nature of the use of force in interrogation makes the above claim unrealistic.¹²⁰ In the real world, it is doubtful whether "the interrogators 'know' with any reasonable degree of certainty that the suspect being questioned has accurate and reliable information that is immediately useful".¹²¹ The person under interrogation might have only partial information. Even when she reveals all the information she has under interrogation, the interrogator might not be persuaded that she does not hold more useful details. In such cases there is nothing she can do to avoid using force against her. She is defenseless, and is entirely at the interrogator's mercy.

itself (and not only has the information regarding the way to prevent the realization of this danger)", Kremnitzer & Segev, *supra* note 37 at 549.

¹¹⁹ See the discussion of that principle in the context of torture, at Shue, *supra* note 103, at 127-137.

¹²⁰ Shue, *Ibid.* at 134 -137. For a more general view that ticking bomb examples are "artificial" see Kremnitzer & Segev, *supra* note 37, at 549 -551; Gross, *supra* note 14, 99; Statman, *supra* note 24, at 172 -174.

¹²¹ Enker, *supra* note 30, at 13

The one person who is not defenseless in ticking bomb situations is the terrorist who has planted the bomb. He has full information, and the interrogators, having him in their hands, can know with reasonable certainty that he indeed holds the necessary information required for defusing the bomb.¹²² It is true that, even with regard to the terrorist, we cannot always expect a high degree of certainty: the interrogators may not be certain that the suspect in their hands is indeed the terrorist. However, there is a significant difference between the uncertainties involved.

When a bystander, suspected of having useful information, is under interrogation, the uncertainty focuses on the suspect's inner world. Even when there is reasonable cause to believe that she has been at the scene or that she is related to a terrorist, one cannot draw conclusions from those external events regarding the extent of her knowledge: does she hold useful information? has she revealed the full information she holds to her interrogators? When the person under interrogation is suspected to be the terrorist, on the other hand, the uncertainty has to do with his external acts: is he indeed the one who has planted a bomb? Once a reasonable degree of certainty is obtained with regard to the suspect being the terrorist who has planted the bomb, we may assume, with a high degree of certainty, that he has the full information regarding the location of the bomb. Inquiring whether or not one holds information (the

¹²²Enker, *Ibid.* at 13. Kremnitzer & Sege

v, *supra* note 37, at 551

bystander) is more intrusive than inquiring what has one done (a terrorist planting a bomb).

Moreover, the intrusion inherent in inquiring whether the suspect is a terrorist who has been planted a bomb rests on stronger justification than those involved in inquiring whether a bystander has information about a location of a bomb. If the suspect is indeed the terrorist who has endangered innocent people lives, fairness dictates that he will be the one to pay the costs for dealing with that danger;¹²³ i.e. he is the one to be coerced to reveal the information necessary to defuse the bomb and save the lives of innocent people. Fairness, however, does not justify coercing a innocent bystander who happens to have the necessary information to reveal that information. To demonstrate why, let me discuss Moore's contrasting view.¹²⁴

According to Moore, fairness justifies coercing both a terrorist who has planted the bomb and a bystander who happens to know of the location of the bomb, to reveal the information necessary to defuse the bomb. The bystander who refuses, for no good reason,¹²⁵ to reveal the information is a Bad Samaritan. The Bad Samaritan "becomes part of the threat to be defended against, and should be treated accordingly".¹²⁶

¹²³ Moore, *supra* note 84 at 322, Kremnitzer & Segev, *supra* note 37 at 54-8.

¹²⁴ Moore *ibid.*, at 324-325.

¹²⁵ A good reason not to speak, according to Moore, might be "a death threat by the terrorist organization". (*Ibid.* footnote 106 at 325)

¹²⁶ At 325.

Moore, however, does not take into account the significance attached by legal systems to the distinction between act and omission. As a rule, the criminal law proscribes acts that are harmful to others; imposing criminal liability for refraining from acting to save others from harm – omission – requires justification.¹²⁷ Special justification is primarily required with regard to Good Samaritan laws imposing a duty upon bystanders to come to the aid of endangered persons.¹²⁸

There might be good reasons to treat everyone who happens to know of the location of a bomb in a ticking bomb situation and refuses to reveal the information as a Bad Samaritan. Such reasons can justify imposing a **legal** duty to reveal the information¹²⁹ either within the general Good Samaritan duty to come to the aid of endangered persons (imposed in only few states at the US,¹³⁰ or as a more limited duty to inform the authorities of the location of the bomb (which will require creating a specific legal duty). Violating this duty will result in criminal liability imposed upon proving that the defendant indeed

¹²⁷ See the comparative overview I have elaborated upon elsewhere: Miraim Gur -Arye A *Failure to Prevent Crime – Should it be Criminal?* 20 CRIM. JUST. ETHICS 3, at 5 (2001). See also references at next note.

¹²⁸ In addition to the comparative overview *ibid.*, see JOEL FIENBERG, HARM TO OTHERS, 126-86 (1984); Philip B. Heyman, *Foundation of the Duty to Rescue* 47 VAND. L. REV. 673 (1994).

¹²⁹ I have elaborated on a similar issue in Miraim Gur -Arye, *A Failure to Prevent Crime – Should it be Criminal?* *supra* note 127.

¹³⁰ *Supra* note 127.

knew of the location of the bomb and refused to reveal it. Being a Bad Samaritan, violating a criminal law duty does not, however, justify the use of force against her in the course of interrogation. We have seen that the very nature of the interrogational force may turn the use of such force against bystander who happens to know of the location of the bomb into an attack on the defenseless.¹³¹ Here it is important to note, that even in legal systems imposing a Good Samaritan legal duty (mainly in Europe),¹³² the Bad Samaritan who violates the duty by failing to come to the aid of an endangered person is not held liable for the consequences that she could have prevented.¹³³ Unlike Moore, those legal systems do not see the Bad Samaritan as part of the threat to the person endangered.

To ensure that in ticking bomb situations force will be used only against the terrorist who planted the bomb where it may turn to another possible justification, i.e. that of self-defense.¹³⁴

2. Self -Defense¹³⁵

¹³¹ *Supra*, text at note 120.

¹³² See the overview, *supra* note 127.

¹³³ *Ibid.* at 3. See also the German case law discussed by George P. Fletcher, *On the Moral Irrelevance of Bodily Movement* 142 U.PENN.L.REV. 1443 (1994).

¹³⁴ For a similar conclusion see Enker *supra* note 30 at 13-14; Benvenisti *supra* note 14 at 606-608. See also the discussion in the next section.

¹³⁵ For the nature of self-defense, see FLETCHER, *supra* note 49, at 855-875; PAUL ROBINSON, 1 CRIMINAL LAW DEFENSES, 164-169 (1984); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law* 64 CAL.L.REV. 871 at 876-877 (1976);

Self-defense justifies the use of force against an unlawful attack. Self defense is not limited to defending one's own self; it applies also when third parties are being attacked.¹³⁶ Like necessity, the use of force seeks to prevent an imminent danger to legitimate interests. Unlike necessity, preventing the danger in cases of self-defense does not involve the sacrifice of innocent people's interests. The self-defender repels the attack by using force - at times even deadly force - against the attacker who has unlawfully created the danger. The moral basis for self-defense is, therefore, stronger than that of necessity.¹³⁷ The use of force is not directed at the defenseless, but rather at the person who has unlawfully created the danger and is able to avoid the need to sacrifice her interests by ceasing the attack.

Strictly speaking, the use of force in interrogation does not fall within the justification of self-defense.¹³⁸ The question is whether it is close enough to the typical version of self-defense to justify extending self-defense to include the use of interrogational force.¹³⁹ To clarify this matter let me invoke the

Moore, *supra* note 84, at 321-322; Klaus Bernsman, *Private Self-Defense & Necessity in German Penal Law & in the Penal Law Proposal - Some Remarks* 30 *ISR.L.REV.* 171 at 171-179 (1996). *See also* the referent *supra* note 49 *supra*.

¹³⁶ *See* note 85 *supra*.

¹³⁷ For elaboration on the various rationales for distinguishing between self-defense and necessity *see* referent *supra* note 49 *supra*.

¹³⁸ Moore, *supra* note 84 at 323.

¹³⁹ For an affirmative answer to that question, although without elaboration, *see* Enker *supra* note 30, at 14. *See also* Moore *Ibid.* at 325.

following example. A law enforcement agent using deadly force to prevent a terrorist from planting a bomb set to explode is justified by virtue of self-defense. Let us now assume that the terrorist is captured only after planting the bomb (a ticking bomb situation). May the official agent (the interrogator) use force in order to coerce the terrorist to reveal information required for defusing the bomb?

As noted, in cases of self-defense the attacker - who unlawfully has created the danger - is not defenseless: he can avoid the need to sacrifice his interests by ceasing the attack. In both versions of our example the terrorist can indeed avoid the use of force against him. However, the **way** to avoid it is different. In the typical version of self-defense the terrorist can cease the attack and refrain from planting the bomb; whereas in the second version of the example he can reveal the information necessary for defusing the bomb. The difference is like that between act and omission. In the typical version of self-defense the force is used against the attacker because his **act** (planting the bomb) creates the danger to other people's lives; in the second version the force is used because the terrorist refrains from revealing the information **omission**.

As already noted the difference between act and omission within legal systems is indeed significant; imposing criminal liability for omission requires justification.¹⁴⁰ However, unlike Good Samaritan legal duties requiring special justification to demand that a bystander come to the aid of endangered

¹⁴⁰ See notes 127-128 *supra*.

strangers, being linked to the dangerous situation provides a more common justification.¹⁴¹ Most legal systems tend to treat equally those whose acts have harmed other persons and those whose acts have created only a danger of harm but who later refrained from intervening to save other persons from being harmed.¹⁴² Similarly, legal systems may treat equally the two versions of our example: self-defense will justify the use of force both against a terrorist who did not refrain from planting the bomb (and thereby created the danger) and a terrorist who refused to reveal the information necessary to defuse the bomb that he had planted (did not intervene to avoid the danger he had created).

Another difference between the two versions of the example discussed above can be articulated as follows. In the typical version of self-defense, the aggressor is the source of the danger – to prevent the danger the use of force has to be directed at him personally. Thus, in the first version of our example, the only way to prevent the terrorist from planting the bomb is by using deadly force against **him**. In the second version of our example the danger remains as long as the bomb has not been defused. However, the source of that danger –

¹⁴¹ See Andrew Ashworth, *The Scope of Criminal Liability for Omissions* 105 L.Q.REV.424 (1989); Glanvil Williams, *Criminal Omissions – The Conventional View* 107 L.Q.REV.86 (1991). See also next note.

¹⁴² Even in the US, where Good Samaritan legal duties are rarely imposed, it was rhetorically asked, “Can it be doubtful that one who by his own overpowering criminal act has put another in danger of drawing has the duty to preserve her life?” – *Jones v. State* 43 N.E.2d.1017, at 1018 (1947). See also J.C.Smith, *Liability for Omissions in Criminal Law* 14 LEG.STUD. 88 at 94 (1984).

the bomb that already has been planted - is distinct from the terrorist himself.

Using force to coerce the terrorist to reveal information concerning the location of the bomb is only a means of defusing the bomb.

To bridge the above difference between the typical version of self - defense and the use of force against the terrorist in ticking bomb situations, we can view the bomb as being held by the terrorist's **long arm**.¹⁴³ Such a view enables us to analyze the second version of our example in a spirit close to the typical version of self - defense (the first version of the example). The analysis would go as follows: as long as the bomb is not defused the terrorist himself continues the unlawful attack by holding the bomb in his long arm. The only way to prevent that attack is by coercing the terrorist to defuse the bomb. It is immaterial whether the coercion aims at forcing the terrorist himself to defuse the bomb or at forcing him to reveal the information needed for defusing the bomb.

Concluding Remarks

To conclude, let me discuss the claim recently voiced in the U.S . that the use of force in interrogation is a justified self - defense tool in fighting

¹⁴³ The idea of an actor's long arm is not new to the legal system. The doctrine of an innocent agent - attaching criminal liability to an actor - who has sent an innocent agent to commit an offense rests on the same idea. The innocent agent is seen as the sender's long arm, enabling us to see the sender herself as she who committed the offense. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in Interpretation of Doctrine*, 73 CAL.L.REV. 323, 369-391 (1985).

terror. According to the New York Times¹⁴⁴ following the capture of a top member of El-Qaida - Kalid Shaikh Mohammed, who was taken to an unknown place outside US soil - American officials said

...that they expected the Central Intelligence Agency to use every means at its disposal, short of what it considers outright torture, to try to crack him...

There are a lot of ways short of torturing someone to get information from a subject... Keep in mind this is a guy who was not only the mastermind of 9/11, but was also actively involved in plotting future and ongoing planned terrorist operations. This is a guy who potentially has information about planned operations that could save American lives. Everyone would understand the wisdom of finding whatever information we can from him.

The interrogational means that the American officials probably had in mind are the techniques that, according to officials familiar with interrogations, are being used in interrogations of high-ranking El-Qaida suspects. The techniques include "...sleep and light deprivation and the temporary withholding of food, water, access to sunlight and medical attention... covering suspects' heads with black hoods for hours at a time and forcing them to stand or kneel in

¹⁴⁴Eric Lichtblau & Adam Liptak, *Questioning of Accused Expected to Be Humane, Legal and Aggressive*, NEW YORK TIMES, March 4 2003, at A13.

uncomfortable positions in extreme cold or heat”.¹⁴⁵ These techniques resemble those used by the GSS following the Landau commission recommendations, which later were declared illegal by the Israeli Supreme Court.¹⁴⁶

Indeed, the view attributed to “American officials” in this context rests on reasoning similar to that of the Landau commission: the use of moderate interrogational force is permissible, when needed “to protect the very existence of society and the State against terrorist acts directed against citizens, to collect information about terrorists and their modes of organization and to thwart and prevent preparation of terrorist acts whilst they are still in a state of incubation.”¹⁴⁷

As previously suggested in response to the Landau commission report, security services should develop “a general strategy in the fight against terrorism and alternative means of...information-gathering”.¹⁴⁸ The use of force in interrogation is aimed at breaking the suspect’s refusal to reveal information and it severely violates the suspect’s autonomy and human dignity. The violation of human dignity and autonomy may only be justified in cases of an imminent threat of a concrete terrorist attack – ticking bomb situations - when it is impossible to turn to more general means of collecting

¹⁴⁵ Don Van Natta, *Questioning Terror Suspects in a Dark and Surreal World*, NEW YORK TIMES, March 9, 2003. See also the description at Levinson, *supra* note 16, at 13-16

¹⁴⁶ See the description of the methods used by the GSS at the text following note 36 *supra*.

¹⁴⁷ *Experts of the Report*, *supra* note 9 at 17.

¹⁴⁸ Kremnitzer, *supra* note 25.

information. Only in such cases can self-defense, the right to repel an unlawful concrete attack, justify the use of interrogational force. A pre-emptive use of force, as well as the use of force in the aftermath of the attack, cannot be justified by self-defense¹⁴⁹ or by any other justification; nor should the use of force be used against a bystander who happens to know the location of the bomb. In this context, let me give the “final word”¹⁵⁰ to the president of the Israeli Supreme Court, Aharon Barak:

This is the destiny of democracy, as not all the 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. Preserving the rule of law and recognition of an individual’s liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome difficulties.¹⁵¹

¹⁴⁹ Bernsmann, *supra* note 133, at 172.

¹⁵⁰ The term is that of Barak P, Judgment, *supra* note 11 para 39.

¹⁵¹ *Ibid.*