to fight for the future of humanity. However, this fight cannot take the form of a military operation targeting single organizations. One or two operations cannot eradicate the phenomenon of terrorism. The fight is much more complex: it is a hybrid comprising passive and active defense measures to ward off terrorist groups. The combination of the two should have sufficient deterrent effect to eliminate the terrorist threat hanging over democratic states.

Accordingly, the new convention should reflect the combination of diverse measures available to democratic states in their fight against terrorism, and should especially include an unequivocal authorization to use defensive force in order to obstruct future attacks, cooperation between the state parties in imposing multilateral economic sanctions on every state sponsoring terrorism, and intelligence and law enforcement cooperation among the contracting parties which will lead to freezing the bank accounts of terrorist organizations and to the arrest and extradition of terrorists to the appropriate state for trial.

The United States has undertaken to lead the "war" against terror. In order to succeed in this difficult task, it is essential not only to unite the world on the ways and means of achieving this goal but also to understand the roots and rationale of this human phenomenon. Only an informed understanding of the ideological roots of terrorism and its reasons together with a united international front can lead to a change in the current situation.

THREE

Interrogation of Terrorists

THE BOUNDARIES BETWEEN PERMITTED INTERROGATION AND FORBIDDEN TORTURE

EACH COUNTRY bears a moral and legal obligation to protect its citizens from domestic and foreign terrorist acts intended to provoke dread and fear among members of the public.

The security services fighting terrorism generally carry out their operations covertly, without unnecessarily exposing their work methods—for one reason, in order to prevent the terrorist organizations from circumventing them. However, the secrecy and dissimulation practiced by the security services also create the potential for these services to improperly exploit the powers at their disposal.

In recent decades, more and more states have suffered the heavy hand of terrorism on their own soil. Yet the many terrorist attacks that have actually been carried out are only a drop in the ocean compared to the attempted attacks and subversive operations that have been prevented by the various states in their struggle against terrorism. It is principally these states' security services that pursue the struggle against terrorism. Their function is not merely to capture the terrorists responsible for carrying out past attacks but, more important, to capture those currently involved in planning and executing attacks. One of the main tools used by these services is the interrogation of suspects with the aim of extracting information that may help frustrate future hostile activities.

Naturally, no offender is eager to impart information to his interrogators which might incriminate him. The terrorist, however, unlike an ordinary criminal, is not worried primarily about self-incrimination; his principal reason for refusing to cooperate with his interrogators is

his desire not to let his capture detract from his friends' chances of carrying out their terrorist ambitions. Accordingly, conventional interrogational techniques and positive or negative incentives that might lead an ordinary offender to reveal information are not effective with regard to terrorists.

In addition, clearly one cannot attribute the same degree of importance to the interrogation of a person who is suspected will be involved in a future criminal act because of motives of greed or vengeance and the interrogation of a person who is suspected will be involved in future criminal acts for ideological reasons. A failure in the first case could result in the failure to thwart a future criminal act, whereas a failure in the second could result in failure to thwart a future terrorist attack. As explained in chapter 1, even though it is feasible that both acts—criminal and nationalist—will be equally grave (or even that the criminal act will be more grave than the nationalist), in regards the manner in which they are carried out and the harm they cause, the terrorist act will inevitably be much more serious, since the gravity of the act is measured not merely by the concrete and immediate injury to the victim but primarily by the objective it seeks to achieve and its unique characteristics.

It follows that preventing the terrorist act is more important than preventing an ordinary criminal act, so that while it is possible in the case of suspects in future crimes to accept unquestionably the absolute prohibition on interrogation techniques that entail elements of torture, there is a dispute whether this should also be the position when the suspects being interrogated are terrorists who possess information that may allow future terrorist acts to be frustrated. Whereas on one side of the balance are basic human rights and freedoms owed to the terrorist by virtue of his being a human being—rights which express the democratic state's commitment to values it holds dear and in the name of which it fights terrorism—on the other side are the peace and safety of the citizens of the state as well as the exceptional importance of preventing terrorist acts. The result is a hugely difficult moral and legal question in the fight against terrorism: What are the limits of the physical and psychological pressure that the interrogators of the security forces may exert against persons suspected of holding information regarding future hostile activities? Is there an absolute prohibition on using interrogational techniques involving torture, or can circumstances exist in which such techniques are permitted? This morally and legally complex question is the subject of the present chapter.

What Is Torture?

Before turning to an examination of permitted means of interrogation, it is necessary to consider what is meant by torture. There is no clear and unequivocal definition of this term.

An examination of the international conventions dealing with this issue reveals that there is a distinction between acts that amount to torture and acts that are in the nature of cruel, inhuman, or degrading treatment. However, there are no criteria that clarify the distinctions between these categories.[1] The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted in 1984 and entered into force in 1987, defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[2]

Torture can therefore be either physical or psychological. While physical torture consists of causing deliberate and direct physical pain, psychological or mental torture injures the soul of a person.[3]

The majority opinion in the case of *The Republic of Ireland v. The United Kingdom*, in the European Court of Human Rights, held that the difference between torture and cruel, inhuman, or degrading treatment lay in the intensity of the suffering caused.[4] Torture is the deliberate use of inhumane treatment which causes severe and cruel pain and suffering.[5] In contrast, Judge Franz Matscher, in the minority, was of the opinion that the difference between the two does not ensue from the intensity of the suffering. In his opinion, "[T]orture is in no wise inhuman treatment raised to a greater degree. On the contrary, one can think of brutality causing much more painful bodily suffering but which does not thereby necessarily fall within the concept of torture."[6] He held that the distinction between the two categories lies in the fact that torture is calculated, routine, and deliberate and causes physical or mental suffering, all for the purpose of breaking the spirit of the suspect in order either to coerce him into performing an act or to cause him pain for another

reason, such as sadism per se. The judge did not reject the existence of a certain threshold, but in his opinion that was not the determinative test.[7]

A number of judges in the same case viewed the definition of torture in a different manner. Judge Zekia was of the opinion that it is necessary to examine whether torture is being practiced in particular circumstances using also a subjective and not just an objective test. Thus, in his opinion the definition of torture should take into account a number of additional criteria, such as the nature of the inhumane treatment; the means and practices entailed by it; the duration and repetitiveness of that treatment; the age, sex, and state of health of the person undergoing the treatment; and the likelihood that the treatment will cause psychological, mental, or physical pain to that person.[8] He explained his opinion with the example of "the case of an elderly sick man who is exposed to a harsh treatment—after being given several blows and beaten to the floor, is dragged and kicked on the floor for several hours. I would say without hesitation that the poor man has been tortured. If such treatment is applied to a wrestler or even a young athlete, I would hesitate a lot to describe it as an inhuman treatment and I might regard it as a mere rough handling."[9] Judge Sir Gerald Fitzmaurice in the same case held that the reason Article 3 of the European Convention would not be accorded a broad and precise interpretation was the desire to enable each case to be considered individually, on its merits, and to allow a decision to be made whether particular circumstances amounted to torture. Thus, the interpretation of this term had to be subjective. The judge pointed out that, nonetheless, there were a number of circumstances that, from an objective point of view, would always be regarded as torture, even though not all suffering was torture.[10]

The very application of the term "torture" to a particular case signifies the adoption of a negative moral stance in relation to it; in other words, it is an assertion that the particular act is prohibited. Accordingly, not every infliction of severe pain is torture; it may merely be the prohibited infliction of pain.[11]

From the foregoing it follows that the definition of the term "torture" is not unequivocal. Even those who proposed an objective test did not put forward a definitive definition. Determination was apparently left to discretion and common sense. Thus, the examples given in the judgment to illustrate the difference between "torture" and "pain and suffering" also turned to existing intuitions and did not assert clear boundaries.

Notwithstanding the lack of a clear definition, current theoretical research distinguishes among four different objectives of torture: torture for the purpose of extracting information or admissions from the suspect (interrogational torture); torture for the purpose of frightening the person, or indeed all the members of the group with which he is affiliated (known as "terrorist torture") in order to cause them to conduct themselves differently or to desist from performing a particular action; torture in order to punish a person for an act committed in the past; and torture in order to prevent a person from performing a future act.

There seems to be a general consensus on the absolute prohibition of torture for the purpose of provoking fright or as punishment, but views are divided on the question whether there may be circumstances that would permit torture for interrogational or preventive purposes.[12] The type of torture relevant to our discussion is, in practice, a combination of the last two, its purpose being to cause the suspect serious physical or mental pain in order to extract information from him which might help the security forces thwart future acts of terror.

The Defense of Necessity versus the Defense of Justification

As noted, there are a number of degrees of suffering which do not fall within the boundaries of torture, but rather within the boundaries of suffering or inhumane treatment. But in those cases where the suffering caused the suspect indeed amounts to torture, the question arises whether there are circumstances in which it may nonetheless be permitted, from both moral and legal points of view. If so, will those interrogators who have employed unacceptable interrogation techniques have a defense? What defenses?

When is Torture Morally Justified?

The very fact that the conventions referred to above do not contain any exceptions to the definition of torture—that is, that the moral obligation not to torture is absolute—does not mean that no situations exist in which one can find a balance between this obligation and another moral obligation equal to it in rank. However, if we start to qualify the absolute prohibition and draw a balance between conflicting obligations, we will detract from the significance of the absolute nature of the moral obligation.[13] But in contrast to the approach contending that moral obligations in general, and the obligation not to torture in particular, are absolute in nature, there is an approach that asserts that one should not make haste to attach the label "absolute" to moral obligations. Thus, although Kant was of the opinion that the duty to tell the truth is absolute even if a lie could save human life, Daniel Statman

argues that one should not declare a moral obligation to be absolute. As he states, "It seems that with regard to the majority of the moral duties, if not all of them, we have a strong intuition that, in extreme cases, certainly where the existence of the whole world depends on this, the duties may be overridden. Lying, treason, killing innocent people—are all prohibited and abhorrent acts but in respect of each one of them it is possible to think of an imaginary case where breach of the duty is essential for such an important purpose that it amounts to a duty."[14] One situation where it may be morally possible to justify torture is the classic case of the "ticking bomb."

The "Ticking Bomb" Situation

The phrase "ticking bomb" refers to a situation where there is no other choice, in the limited period of time available and in order to prevent damage which is anticipated, for example, as a result of a bomb which has been activated, but to interrogate a suspect using torture. The premise is that the suspect is thought to know, directly or indirectly, details that may assist in preventing the damage or at least minimizing it. There are those who see justification for the use of torture in the case of a "ticking bomb" as obviously necessary.[15] This term is not unique to the nationalist criminal context but refers to all criminal situations, including, for example, the interrogation of a person who knows the hiding place of a criminal who has kidnapped someone and intends to torture and murder the victim. However, in this chapter I shall refer only to the "ticking bomb" situation in the criminal-terrorist context.

There is a problem with the definition of the term, in that it is not clear when a particular situation will qualify as a "ticking bomb." Generally there is only information about an abstract intention to lay a bomb, and it is not known whether this intention is serious or immediate. The duration of the "ticking" may theoretically be very long, and on occasion only an empty threat has been voiced. The investigators dealing with the suspect do not know for certain how much time they have to extract relevant information from him. Further, they do not know for certain what the particular suspect knows.

The necessary details generally become known only post facto; at the time of the investigation, the interrogators can only make conjectures and assumptions about the case at hand, and use their discretion to decide whether it indeed requires the adoption of measures generally prohibited from a moral point of view. Following the Oklahoma City bombing in 1995, some Americans perceive all terrorist militias, indiscriminately, as ticking time bombs.[16] Thus, there is a danger that in times

of emergency or security alert, any person suspected of being a terrorist will be regarded as a "ticking bomb," without objective support. Accordingly, it is necessary to exercise caution and establish clearly and decisively the nature of the "ticking bomb" situation, as well as set clear limits to the duration of the "ticking" that would justify torture. It seems likely that a situation where a bomb may be set off after a year would not fall within this definition; however, a situation where a bomb will certainly be set off within twenty-four hours would almost certainly fall within it. It is possible to provide that, in cases of doubt, the determination whether it is permissible, in the absence of any other choice, to use torture will be subject to the review of higher-ranking authorities or the judicial system, which will make an immediate decision on the matter.[17]

A different problem relates to the rarity of "ticking bomb" situations. It is hardly ever known with great certainty whether the particular suspect being interrogated indeed possesses information that may frustrate the planned attack, or whether the attack against numerous people will indeed take place if the vital information is not extracted from the suspect. But despite the rarity of these circumstances, the appellation "ticking bomb" is attached to numerous situations that do not fall within the definition, in order to justify a particular style of interrogation.[18] By widening the terminology to situations where the danger is not certain or where there is no information that it can indeed be prevented, without any real possibility of supervising those situations where it is contended that a "ticking bomb" exists (since most of the details relating to those situations and suspects are not published and are shrouded in secrecy), there is the risk of creating a slippery slope, as well as the risk that the extraordinary situation will be divested of meaning, since all circumstances will fall within the boundaries of that definition.

An additional danger is that of falling into the trap of fixed ideas, that is, the situation in which interrogators are so convinced that the suspect holds the information they need that they lose the ability to assess contradicting indicators in an unprejudiced manner.[19] In other words, the moment the investigators decide that they are dealing with a man who possesses information that can prevent serious damage and that they have no choice but to torture him, nothing will prevent them from continuing to torture him until they are convinced that he has surrendered all the information they require. Even if he swears that he knows nothing, and this is the truth, they are not likely to believe him, and therefore they will continue to torture him fruitlessly until they are satisfied by a particular answer given to them.

Further, in order to enable justification of the torture from a moral

point of view, the means of interrogation must be proportional to the situation the interrogators are trying to prevent. Thus, if there is information about the existence of a bomb that may kill many people, it may be possible morally to justify the torture of a suspect, even to the point of death, in order to prevent the deaths of those people. However, if it is known that the explosion has been laid in a derelict place where it is unreasonable to assume that any loss of life will occur, it will not be possible to justify interrogations involving torture to the point of death.

Justification for torturing the suspect will also increase the greater and more direct the suspect's responsibility for the crime that is about to be committed. If, for example, the suspect only incidentally heard details of the crime and was threatened with death if he disclosed those details, there is little justification for interrogating him using torture. Another aspect of that justification is that it is solely up to the suspect himself to end the torture applied during his interrogation. If he delivers up the information he had hoped to conceal, there is an assumption that his torture will be terminated.[20]

According to the utilitarian moral approach, in order to preserve the maximum general good of society, the interrogator will on occasion also have to breach values that he regards as right. Michael S. Moore, who believes that it is forbidden to torture or harm innocents, even if the result of that activity is the saving of other lives,[21] points out that the proponents of the theory of utilitarianism will never be consistent in preserving a rule such as "never torture an innocent child." This moral tenet, in his view, has a place in academic debate but not as a rule of life, because of the drawbacks of this approach in certain circumstances:

> If the rightness of action is ultimately a function of achieving the maximally good consequences available to the agent in that situation—which is what *any* consequentialist believes—then sometimes an agent ought to violate what he himself admits is the right rule. Suppose, for example, a GSS [the Israeli General Security Service] interrogator was certain about the immediately relevant facts . . . —he knows there is a bomb, that it will kill innocents unless found and dismantled, that the only way to find it is to torture the child of the terrorist who planted it. Suppose further he is already in possession of this information, and the costs of calculating utility are thus already "sunk"; suppose further that he himself is about to die and that he can keep his action secret, so that the long-term bad consequences stemming from his own or other's corruption of character will be minimal. In such a case, adhering to the best rule will not be best, on consequentialist ground.[22]

Moore poses the example of the torture of a family member of the terrorist, in particular torture of his child, in order to break the terrorist and cause him to disclose information in relation to the terrorist activity thereby preventing harm to many others. He indicates that if one continues with the line of thought of the pure theory of utilitarianism, then in such a situation, according to that theory, one is not entitled but actually obliged to torture the child. However, in Moore's view, it is wrong to justify the torture of an innocent child, even if that torture would lead to favorable results, such as the saving of other innocent lives.[23]

Necessity or Justification?

On May 31, 1987, the government of Israel decided, in consequence of two cases, to establish a commission of inquiry to examine the methods used by the GSS at times of terrorist activity. The first case concerned Izat Nafsu, a lieutenant in the Israeli Defense Forces who was accused of treason and espionage and was convicted on the basis of his confession, obtained by GSS investigators. Following his conviction, he contended that his confession had been coerced through torture. The second case related to the incident known as the Bus 300 affair. In that incident a bus was hijacked by terrorists. GSS agents gained control of the bus and were seen to capture two terrorists alive. Some time later it was announced that these terrorists had been killed. How did these terrorists die, if they were captured alive?

Because this was an issue of such great public importance, a commission of inquiry was established under the chairmanship of a former president of the Supreme Court, Justice Moshe Landau, charged with examining the investigative procedures of the GSS in cases of terrorist activities, and the related matter of giving false testimony in court about these investigations. The commission held forty-three hearings during which it examined forty-two witnesses, including prime ministers; GSS personnel, from the heads of the service to field officers; members of the legal, civilian, and military services; and other public servants. Similarly, experts in different fields were examined, as were persons who had been investigated by GSS interrogators. The commission also visited GSS interrogation centers.[24] One of the conclusions of the commission was that even if the interrogation methods of the GSS interrogators entailed torture, those interrogators could avail themselves of the criminal law defense of necessity.[25] This determination has been the subject of extensive criticism.

The Defense of Necessity

During the process of enacting any law, and in particular a criminal law, it is not possible to predict all the situations in which a breach of the law might be justified, since every punitive norm represents the typical abstract situation it is intended to prevent. As a result, the law contains a number of defenses, such as the defense of necessity, which allow a person to be discharged from criminal liability in cases where he has committed an offense but there are strong moral and social justifications for performing the act.

The uniqueness of the defense of necessity ensues from its amorphousness and broadness in relation to the question of when it will be justified to breach the law, thus making the defense compatible with the concept underlying it—taking the best possible step in the circumstances of the case.[26] The defense of necessity is applicable when a situation is forced on a person whereby, in order to prevent a real danger, his only recourse is to impair the protected interest of another—subject to the condition that there is no other way of preventing that danger and that the preventative measure causes less damage than the act prevented. This is the concept underlying the defense: enabling the prevention of a great wrong by performing a lesser wrong.

With regard to the level of difference required between the wrong preferred and the wrong to be prevented, there are two basic approaches. One requires a *clear* difference. The logic behind this demand is to reduce mistakes in the choice. In other words, since the defense relates to emergency situations that have not been foreseen or are unclear, it is desirable to prevent the possibility of an error being made when balancing the alternatives (i.e., the act to be prevented vis-à-vis the act to be performed). The second approach demands a *great* difference. The rationale behind this demand relates to the typical situation giving rise to the defense. If there is a great discrepancy between the act to be prevented (e.g., the killing of a large number of people) compared to the prohibited act (e.g., damage to property), it is clear that we would want to apply the defense. However, if the rationale behind the defense is the prevention of mistakes, we would also want the defense to apply in a situation where the discrepancy is clear but is not necessarily great.[27]

In the past there was no requirement that the emergency situation be imminent for a defense of necessity. The commission's final report (the Landau report), too, stated that there was no need whatsoever for the requirement of imminence in terms of the defense of necessity, a statement that has given rise to extensive criticism. To illustrate its contention, the commission put forward an example given by Paul H. Robinson in his monograph on criminal law defenses. The example involves a ship with a small hole in its hull. The ship is still safely anchored at harbor when the small hole is discovered. Accordingly, the commission contended, the situation is not one of imminent danger; moreover, the hole is a small one. Imminent danger will arise only in the open sea, but then it will be too late to take action and the ship will sink. Therefore, the preventative step must be taken while the vessel is still at port, when the danger is not yet imminent.[28] S. Z. Feller disputes the commission's determination, stating: "Every drop of water that enters the ship's hull at the beginning forms part of the flood that will capsize her in the end; the water's 'attack' begins with the very first drop. . . . Every advance out to sea takes time and retreat to shore will require at least equal time, if not more. . . . There is no better example than this to demonstrate and define the 'immediacy' condition inherent to 'necessity.'"[29]

In the case of the "ticking bomb" as well, there is an element of imminence, and the interrogator may have available to him the defense of necessity, whether the timer is set for an hour later or a day later. So long as the interrogator does not know with certainty how much time he has at his disposal to neutralize the bomb, he must act as if the danger will come to pass at any moment. Today, the requirement of imminence has been incorporated into the law itself.

The Defense of Justification

In contrast to the defense of necessity, which applies to situations that cannot be anticipated in advance, the defense of justification is available when a person acts in a manner contrary to the provisions of the penal code, but he does so for some justified reason given to him before the commission of the offense. Such justification can be, for example, a statutory provision, or a provision in a statutory regulation.[30] The rationale behind this defense is to enable people to act in accordance with the provisions of various laws, the implementation of which they oversee, or, in certain cases which may be anticipated, without fear that they will be put on trial for such activity. Thus, a predetermined defense is given to a certain act that is deemed to be worthwhile and beneficial to society, since it is considered desirable for people not to fear to perform it. In the case of justification, certain advance authorization is given to take a particular action in particular circumstances; in contrast, in the case of necessity, the situation is not anticipated in advance, and it is only possible retroactively to authorize the action taken. The defense of justification will apply if other conditions of the law have been met,

whereas the defense of necessity will apply if the conditions of the defense itself have been met. The defense of justification ensues from the provisions of existing law, whereas the defense of necessity ensues from given facts, which are not preestablished.

Which is More Appropriate, Necessity or Justification?

Following a finding that torture had been employed during GSS interrogations, the Landau report recognized the defense of necessity as an appropriate defense for GSS interrogators. However, is it actually the defense of necessity that is appropriate in this situation? The answer seems to be—not inevitably.

The commission itself called for the enactment of legislation that would authorize and justify the activities of the GSS in general, and the form of interrogations by the GSS in particular. Reference here is to recurrent and foreseeable situations. Accordingly, in practice, the most appropriate defense in these cases is not the defense of necessity, as was asserted, but rather the defense of justification. Since it is possible to foresee a broad range of possible situations that may arise during the course of interrogations, it is possible to reduce them to writing and subject them to a particular standard, which will determine when the defense will arise. In contrast, necessity is not given to standardization, as the situations falling within this category cannot be foreseen.[31]

A criminal defense that is available to every citizen, including public servants, cannot also provide a source of authorization for certain activities. Thus, only when a person is subject to the pressure of the moment, without prior preparation for the situation he has encountered, is he likely to act out of necessity otherwise than in accordance with the law—in order, for example, to save a number of people. The position is different if the same person attempts to act in a situation that could have been foreseen, relying on authorization available to him by virtue of the defense of necessity. The defense of necessity was not created for these situations. The defense of necessity is tested in the light of a particular situation, whereas an empowering statute confers authorization to act in advance and not retroactively. In addition, the power is granted for a general and not a particular situation. An additional danger inherent in the defense of necessity ensues from the lack of clarity as to when a situation is in the nature of a "necessity." Every interrogator will interpret "necessity" in a different manner, and this lack of uniformity is also problematic. In a democratic state where the rule of law prevails, and within the principle of legality, it is necessary to specify clearly in statute the boundaries of individual rights that the government should not infringe.

If it is desired to enable certain exceptions that would make possible the infringement of individual rights, then these too must be prescribed by statute, as must be the identity of those entitled to infringe them.[32]

The contentions raised against statutory regulation of the activities of the GSS, in order that the defense of justification become available to the interrogators, include, inter alia, the contention that in order to preserve the effectiveness of the interrogation it is necessary to maintain the element of uncertainty. Among the factors influencing the suspect being interrogated is his lack of knowledge of the boundaries of the interrogation and what he may expect as it proceeds. But if these matters become entrenched in a public law or even in privileged internal guidelines, it will not be difficult for terrorist organizations to identify the limits of the interrogational pressure to which their members would be exposed upon capture (one way would be by debriefing persons interrogated and subsequently released). This would allow them to prepare and anticipate future actions and would lead the element of fear and uncertainty to disappear. If the suspect does not know whether the next stage of the interrogation will be more painful, it is likely that he will break earlier. In contrast, if no predetermined definition exists as to what is deemed to amount to moderate physical pressure, the danger of the slippery slope again arises. Interrogators are likely to regard every interrogatory measure as a measure falling within this definition.

In choosing one of these two possibilities, Feller has commented:

> The necessary conclusion is that we must choose between two alternatives: either to *prohibit any pressure*, as moderate pressure confined to present limits cannot be effective, or to *permit, by law, the use of unlimited pressure to an extent not formally predetermined* as shall be necessary to break the suspect and cause him to divulge the information sought; the only limit being that beyond which no suspect remains, physically or psychologically, to be interrogated. Only pressure thus limited, or more precisely, only pressure not formally limited can be effective.
>
> In our opinion . . . the first is absolutely preferable.[33]

To present the full picture, it should be pointed out that, countering the contention that interrogations are not foreseeable, it is possible to document them to some extent. Today, many interrogation practices are known, whether because they are documented in the case law itself or because they are attested to by persons who were subjected to interrogations. Further, persons who have been interrogated once are likely to be interrogated again, so that they will know more or less what is in store for them, and will know how to prepare mentally for the interro-

gation. Accordingly, the contention that it is necessary to preserve the secrecy of interrogation practices so that the suspects will not know where they stand and what they may expect is partially weakened.

An additional ground for asserting that there is no room for statutory regulation of interrogation practices is that whereas possibly, from a moral point of view, there are circumstances in which use can be made of extreme measures against a person, it is not customary for a democratic state to proclaim the same in a statute. The legal scholar Sanford H. Kadish has pointed out, "While it is morally permissible to use cruel measures against a person if the gains in moral goods are great enough, it is not acceptable for the state to proclaim this in its law."[34] In his view, it is wrong to declare in a law that a state is permitted to make use of cruel measures under certain conditions. A single interrogator, on the other hand, may decide, as an individual, to make use of these measures, a decision that may later be held to be justified from a moral point of view.[35]

In addition, even if there is a statutory provision prohibiting the use of cruel measures under any conditions, the interrogator will still retain discretion, according to the approach of utilitarian morality, whether or not to use them.[36] Thus, a statute that prohibits the use of these measures will in practice raise a greater obstacle against which each situation will be tested, but it will not completely prohibit the use of these measures. In contrast, a statute that permits the use of these measures in particular circumstances will fail to educate people to follow a desirable morally conscientious line, and the hoped-for result will not be achieved. Legislation that permits the adoption of these tactics and regulates the answers to such questions as, in which situations is it permitted to make use of these measures? for how long is it possible to deprive a person of sleep? will only lead to a worsening of the existing situation, such as occurred in the Middle Ages, when torture was regulated by law.[37]

The state cannot justify the activities of the GSS and enable a person to be injured in order to achieve social good. Such an outcome is not consistent with the respect that a state accords human rights. In opposition, the view has been voiced that the power to authorize this form of conduct in interrogations should not be left in the hands of individual interrogators, but rather these decisions should be directed to and addressed by an authorized body—a body such as a security committee.

Further, following the Landau report, which authorized the use of moderate physical pressure on suspects, criticism was raised that this determination turned the suspect into a mere object containing information. A suspect subject to interrogation before the report was issued was subject to physical pressure and was powerless and defenseless in the face of the force exerted by his interrogators. From the moment this situation was given normative backing by the commission, the suspect would feel even more powerless, since the law, which generally safeguarded and granted strong protection to the rights of the individual, would no longer be available to him. Thus, the commission unknowingly created a form of "law" authorizing torture, contrary to its primary intention—the prevention of torture. There is another possible danger ensuing from the authorization of moderate physical pressure. Psychologically, lowering the threshold slightly may lead to its complete disappearance—the danger of the slippery slope. Moreover, a situation may arise in which the development of sophisticated investigative methods will be brushed aside, to the extent that the use of force becomes a legitimate and acceptable work practice. This criticism will become even more valid if legislation is enacted that permits this GSS activity.

Until the enactment of a possible law, which will only see the light after public debates in which diverse views can be exchanged, interrogators must receive separate authorization for each activity from those overseeing them. In this way, in practice the defense of justification will be available to them, whether through an order of their superiors or as a matter of statutory authorization. Currently, no express written provision exists that permits the torture of a suspect under certain conditions. In contrast, the defense of necessity is not available in interrogations that have been conducted in routine situations where a suspect refuses to cooperate in an amicable manner.[38] These factors are contrary to the situation where the defense of necessity arises, as explained above.

Recently, this issue was discussed in the GSS interrogation case, where it was stated:

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

basis for rules regarding an interrogation. It cannot constitute a source of authority which the individual investigator can rely on for the purpose of applying physical means in an investigation.[39]

One of the judges in this case, Justice Yaakov Kedmi, proposed that the effectiveness of the judgment be deferred for a year, in order to enable the state to adapt to the new state of affairs established by the court, and out of a desire to ensure that in a genuine case of a "ticking bomb" the state would be able to cope. During the course of the proposed year, GSS interrogators would be prohibited from utilizing extraordinary interrogation methods except in rare cases of suspects defined as "ticking bombs," and even then it would be necessary to obtain the express consent of the attorney general.[40]

The Process of Interrogation: Permitted and Prohibited Practices

Israel

An investigation, by its very nature, places the suspect in a strenuous position. Every investigation is a "battle of wits" in which the investigator attempts to uncover the greatest number of details about the suspect. Not all measures are legitimate in this battle. It is necessary to determine which investigative procedures are permitted and which prohibited. In crystallizing the rules of investigation, a balance must be drawn between two interests. On one side lies the public interest in uncovering the truth by exposing offenses and preventing them; on the other is the wish to protect the dignity and liberty of the suspect. Indeed, a "democratic, freedom-loving society does not accept that investigators may use any means for the purpose of uncovering the truth. . . . To the same extent, however, a democratic society, desirous of liberty, seeks to fight crime and, to that end, is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided that it is done for a proper purpose and that the harm does not exceed that which is necessary."[41]

In addition to the conditions of imprisonment and detention, which themselves have an enormous impact on the mental state of the suspect, during the course of interrogation of a person suspected of terrorist activities, the GSS on occasion uses of interrogation methods that have recently been held by the High Court of Justice to be prohibited.[42] These methods of interrogation include a number of techniques.[43] The first is the practice known as "Shabach," described as follows:

> "Shabach" is a combination of means of sense deprivation, pain and sleep deprivation, which are conducted over a long period of time. "Regular Shabach" includes tightly cuffing the hands and legs of the suspect while he is seated on a small and low chair, whose seat is tilted forward, towards the ground, so that the suspect's seat is not stable. The suspect's head is covered by a sack, which is generally opaque, and powerful loud music is played ceaselessly, through loudspeakers. The suspect is not allowed to sleep throughout the course of the "Shabach." The sleep deprivation is carried out through the above measures, as well as in an active manner, with the guards shaking all who try to doze.[44]

There are variations of the "Shabach" position. In one, known as the "freezer," an air conditioner blows cold air directly on to the suspect, generally while he is in the interrogation room. Another variation is "standing Shabach," in which the suspect stands with his hands cuffed to a pipe attached to the wall behind him; the pipe is either on the same level as his hands or his hands are pulled upward and his body inclined forward.

The second method is essentially psychological. During the interrogation the interrogators curse and threaten the suspect. The threats include threats of murder, with the ability to kill illustrated by references to persons who were killed while in detention or under interrogation; threats are also directed at members of the suspect's family.

The third method, known as "Kasa'at a-tawlah," uses a table and direct pressure to painfully stretch the suspect's body:

> The measure, which combines a painful posture and application of direct violence by the interrogator, is practiced during the interrogation itself. The interrogator forces the suspect to crouch or to sit (on the floor or on the "Shabach" chair) in front of a table, with the back of the suspect to the table. The interrogator places the arms of the suspect, cuffed and stretched backwards, on the table . . . part of the time, the interrogator sits on the table, trampling with his feet on the shoulders of the suspect and pushing him forwards, so that his arms are stretched even further backwards, or he pulls the legs of the suspect, and thereby achieves the same effect.[45]

Another method is the "frog crouch." The suspect is forced to crouch on tiptoe, with his hands tied behind his back. If he falls or tries to sit, he is forced to resume his crouching position.

A fifth method applied during interrogations takes the form of vio-

lent shaking. The interrogator holds the suspect, either seated or standing, by the edges of his clothes and shakes him violently, his fists striking the suspect's chest. The suspect's head is thrown backward and forward. This direct violence may lead to death.

A sixth interrogational method involves the use of various violent practices, including slapping, hitting, kicking, and ratcheting up handcuffs. These methods are generally accompanied by measures, not directly physical, which are intended primarily to increase the impact of the violent techniques. These include depriving the suspect of sleep, washing, and food and drink for long periods of time, or locking him up in a small cell in which he cannot lie down or stand, in full darkness, without ventilation. From time to time, the above methods are renewed and changed.

The state attempted to contend that some of the practices described above were necessary in the circumstances and were not designed to torture or cause suffering to the suspect. The "Shabach" position, it asserted, was an integral part of the interrogation itself and was carried out in order to ensure the safety of the interrogation facility, and to prevent the suspect from attacking the interrogators, as had happened in the past. The sealed sack was intended to prevent him from making eye contact with his interrogators or with other people in the interrogation facility, including other detainees, for fear that identification would impair the interrogations and cause other security damage. Shackling with handcuffs was for the security of the interrogators. Isolating the suspects and playing loud music was not done out of a desire to ill-treat the suspect but to prevent any possibility of communication between various suspects, which could endanger the success of the interrogation. Sleep deprivation was required, according to the state, because of the need for intensive interrogation and for no other reason.[46]

Until the judgment in the GSS interrogation case in September 1999, the court had refrained from making decisions of principle on such issues. Rather, it had judged each case on its merits, leaving the decisions of principle to be decided at a later stage. The rule in the GSS judgment, however, prohibited torture or degrading treatment during interrogations. In addition, the court held that, for the purpose of conducting investigations, GSS interrogators possessed the same powers as police officers and enjoyed no additional special powers:

> [A] reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation. . . . Human dignity also includes the dignity of the suspect being interrogated. . . . This conclusion is in accord with international 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.[47]

The court was willing to partially accept the explanations proffered by the state for the rationale underlying these methods of interrogation, but not the explanations in their entirety.[48] Thus, sitting is indeed an integral part of interrogation, but not sitting in the "Shabach" position on a low chair inclined forward for long hours. Merely sitting on a low chair could perhaps have been seen as a legitimate part of the power play involved in interrogation, that is, the imposition of legitimate psychological pressure on the suspect. However, inclining the chair was an unfair and unreasonable interrogation method. This measure injured the bodily integrity, rights, and dignity of the suspect beyond what was necessary. The contention that blindfolding was required for security reasons, to prevent eye contact, could have been accepted had it been a matter of blindfolding only, and not a long sack down to the suspect's shoulders, which made breathing difficult. Such a measure, even if a better ventilated sack is used, is not an integral part of the interrogation. Similarly, handcuffing for protection is acceptable, but not handcuffing to cause additional pain and suffering to the suspect by excessive tightening. Playing loud music with the intention of causing the isolation of the suspect is not legitimate, since very loud music for long periods of time also causes undue suffering. Depriving the suspect of sleep is within the power of the interrogators. A person undergoing investigation cannot sleep in the same manner as a person not being investigated. However, sleep deprivation with the intention of breaking the suspect's spirit is not a fair and reasonable use of this measure; it impairs the dignity and rights of the suspect beyond what is necessary. Accordingly, use of all the measures referred to above was prohibited so long as the intention was to break the suspect by degrading him or infringing his rights.

The GSS refrains from fully documenting its interrogations. The interrogators maintain a "memo book" in which they record the course of the interrogation. These writings only contain general information relating to the conditions in which the suspect is held. There, one may learn of interrogation schedules, eating schedules, and so on, but the memo books do not document the means employed against the suspect during the course of the interrogation itself and during the waiting

period. Thus, an attempt to reconstruct the course of the interrogation itself is difficult and complex, and it is necessary to rely on "subjective evidence," namely, a the suspect's description of the situation versus that of the interrogator.

Those asserting that GSS methods must be permitted contend that the only way to safeguard the security of the state is to extract essential information from suspects. Only in this way is it possible to prevent the various types of terrorist attacks and activities. The extraction of this essential information is only possible through the use of these techniques entailing the use of physical pressure. Similarly, following the High Court of Justice case that held that these investigation methods were prohibited, security officials stated that this decision would prevent them from conducting their work efficiently, since they had been left without efficient investigative methods for preventing future terrorist attacks. In the opposing camp, there are those who contend that until this decision was delivered, the GSS had focused on the impact of interrogation measures and not on applying clever and sophisticated tactics. There were numerous legal ways of achieving the information that the GSS was accustomed to obtaining by causing suffering to suspects, and the judgment did not prevent the efficient handling of terrorist threats but only compelled the interrogators to act in legal ways, which might be more complicated to implement but which were certainly more consistent with the activities of a democratic regime that aspired to protect human rights.

The United Kingdom

Investigations conducted by the security services in the United Kingdom are not very different from those carried out in Israel. In consequence of the increase in the number of terrorist attacks committed by the Irish Republican Army (IRA) in the beginning of the 1970s, which caused the death of hundreds and the injury of thousands more, persons suspected of involvement in the activities of the organization were interrogated with the help of extraordinary investigative measures. As a result, a complaint was filed against the United Kingdom in the European Court of Human Rights.

The ensuing judgment dealt with five investigative measures, which were termed "the five techniques." A description of these methods appears in the judgment of the European Court:

> (a) *wall-standing:* forcing the detainee to remain for periods of hours in a "stress position," described by those who underwent it as being "spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
> (b) *hooding:* putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
> (c) *subjection to noise:* pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
> (d) *deprivation of sleep:* pending their interrogations, depriving the detainees of sleep;
> (e) *deprivation of food and drink:* subjecting the detainees to reduced diet during their stay at the centre and pending interrogations.[49]

The investigators of the Royal Ulster Constabulary (RUC) were taught these interrogation methods as part of their training in a seminar conducted in 1971. In a commission chaired by Sir Edmond Compton, appointed in 1971, it was found that these techniques entailed an improper use of investigative powers but that they were not brutal. This conclusion drew sharp criticism, and it was decided to set up a new commission, chaired by Lord Parker of Waddington. This second commission issued its report in 1972. The majority opinion found that it was not necessary to "rule out" the implementation of these techniques on moral grounds. However, Lord Gardiner, who represented the minority opinion, asserted that, from a moral point of view, even in "emergency terrorist situations" these interrogation methods were not justified. Both majority and minority views held that the techniques were illegal in terms of domestic law prevailing at the time. Concurrently with the publication of the report, the former prime minister declared in Parliament that no further use would be made of these techniques in security service interrogations.[50]

The interrogators who applied these interrogation techniques were not subjected to disciplinary trials or criminal proceedings, and indeed no steps were taken against them whatsoever. Special guidelines setting out appropriate measures for use by RUC interrogators were not available until 1972, when the Parker commission report was issued. Initially, ordinary directives provided that humane treatment had to be meted out and that violence should not be used. In consequence of the Parker commission report, the five techniques were specifically prohibited, and the security service was required to maintain medical files for

the suspects and immediately report complaints of ill-treatment. In April 1972 army instructions in the form of RUC Force Order 64/72 were issued prohibiting the use of massive force in all circumstances. The instructions clearly prohibited inhumane conduct, violence, use of the five techniques, threats, and insults. The crown prosecutor also took care to clarify that anyone infringing the prohibition in the order would be subject to prosecution. In 1973 new regulations in relation to detention by the army emphasized the need for appropriate conduct.[51]

By majority opinion the European Court held that while the majority of the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 are not absolute and exceptions exist, Article 3 of the convention, which prohibits torture and inhuman and degrading treatment, leaves no room for exceptions even in cases of emergency where there is a danger to the security of the state. With regard to the inhuman treatment referred to in Article 3, it was held that there is a certain minimum level of conduct which must not be passed, and beyond which the conduct will fall within the definition of inhuman treatment. This minimum level is relative and is determined by the length of time involved, circumstances of the case, physical and mental repercussions, and on occasion even the gender of the suspect, age, state of health, and the like. The court held that whereas the five techniques detailed above are regarded as inhuman treatment included in Article 3 of the 1950 convention, they are not in the nature of torture, in light of the distinction between the term "torture" and the term "inhuman treatment."[52]

Opposing this view, the minority judge Sir Gerald Fitzmaurice held that the five techniques did not even fall within the definition of "inhuman treatment":

> To many people, several of the techniques would not cause "suffering" properly so called at all, and certainly not "intense" suffering. Even the wall-standing would give rise to something more in the nature of strain, aches, and pains. . . . The sort of epithets that would in my view be justified to describe the treatment involved . . . would be "unpleasant," "harsh," "tough," "severe" and others of that order, but to call it "barbarous," "savage," "brutal" or "cruel," which is the least that is necessary if the notion of the inhuman is to be attained . . . should be kept for much worse things.[53]

A fortiori, in his view, the techniques could not be classified as torture. If the five techniques were to be classified as torture, he noted, he would not know how to classify such acts as extracting nails or propelling a stick into the suspect's rectum. Would they be classified only as torture, equivalent to the five techniques, or as more serious torture than the latter?[54]

In contrast, the minority judge Evrigenis was of the opinion that the five techniques were not in the nature of inhuman acts but amounted to torture proper. In his view, if the court failed to hold these acts to be torture, it would miss the purpose and language of the article and deprive the 1950 convention of meaning.[55]

In conclusion, sixteen judges against one reached the conclusion that the five techniques reached the degree of inhuman or degrading treatment. Thirteen judges to four held that these five techniques did not amount to torture.[56] Unanimously, it was decided that it was not within the jurisdiction of the European Court of Human Rights to order the United Kingdom to institute criminal or disciplinary proceedings against security service investigators who infringed the provisions of Article 3 of the convention.[57]

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

There are a number of common denominators between the situations prevailing in the United Kingdom and in Israel, although there are also a number of distinctions. The British methods of interrogation, insofar as they are known by virtue of the judgment of the European Court of Human Rights, did not include direct physical violence such as violent shaking or unnecessary tightening of handcuffs. Another difference is the length and persistence of the use of unusual interrogation methods. While the British techniques were applied for four to five days, the GSS measures could continue for a number of weeks. Similarly, the wall-standing technique in the United Kingdom was applied for thirty hours at the most, with occasional rest breaks, whereas it was argued that on occasion the GSS implemented its painful measures for as long as sixty hours, without breaks. The British sleep deprivation technique was carried out for a period of up to four to five days with breaks, whereas the GSS prevented the suspect from sleeping for longer periods.

Terrorism did not end in the United Kingdom in the 1970s. However, since then continuous improvement has taken place in the respect shown for the rights of persons suspected of involvement in terrorist activities. In light of the recommendations of a commission chaired by Lord Bennet, the right of a person suspected of terrorist activities to

meet his attorney within forty-eight hours of his detention has been anchored in statute. Similarly, interrogations are documented on video, and consequently there has been a decline in the number of complaints by detainees of cruelty and torture. In 1992 a senior lawyer was appointed on behalf of the state as an external ombudsman for the prison and interrogation facilities. He was given the power to conduct surprise visits in these facilities and to be present during interrogations of suspects and to interview them about the conditions of their detention and the interrogations they were subjected to. In 1998 video cameras were introduced into three interrogation facilities in Northern Ireland.[58]

In contrast, there have been cases where persons remained in custody for seven days—the period permitted under the old law without being required to bring the detainee before a judge—even though they were known to be innocent. The investigators were aware that there was no new information these people could disclose; however, they preferred to draw out the interrogation to the end. In addition, the fear felt by suspects, deriving from the very fact of their detention and conditions of confinement, is exploited by the interrogators. It is also known that, in general, suspects are prevented from having access to attorneys. Transferring suspects from one police station to another in order to prevent them from identifying their location and thereby undermining their self-confidence is an accepted practice. There is also evidence that various interrogation techniques are used, such as dirty cells and sleep deprivation, in order to humiliate the suspects and break their spirit. Testimony also exists relating to the use of physical force during the interrogation of persons suspected of terrorist activities,[59] although this has not been proven.

In contrast, according to the report of the European Commission for the Prevention of Terrorism, which visited the United Kingdom in 1994, there were no accounts of cases of torture and almost no accounts of cases of brutality directed against persons arrested and interrogated.[60] Accordingly, it is perhaps possible to conclude that interrogation practices degrading and torturing suspects have lessened since the 1970s. After September 11, 2001, however, the United Kingdom's approach toward the issue has become somewhat ambiguous. In August 2004 the UK Court of Appeal held in a majority opinion that evidence obtained through torture outside the United Kingdom by agencies of third countries may be used to indefinitely detain foreign terrorist suspects in the United Kingdom under Part 4 of the Anti-terrorism, Crime and Security Act (ATCSA), 2001, provided that the British government has neither procured the torture nor connived at it.[61] In December 2005,

this ruling was reversed by the House of Lords, which, in light of the imperative not to countenance the use of torture, stated that no court in England should admit any evidence that was extracted by torture, regardless of the place it was obtained.[62]

Part 4 of the ATCSA has been replaced by the Prevention of Terrorism Act, 2005, which imposes more-severe restrictions on detention without trial of suspected terrorists.[63] However, Britain's position in this matter remains problematical. Following the atrocities of September 11, the United States engaged in a controversial practice of extralegal renditions—that is, the transfer of suspected terrorists (without going through formal extradition proceedings) to countries that abide by lesser interrogational restraints, with the intent to use the products of the investigations. Britain's cooperation with this practice has been ambiguous. On the one hand, the British government emphasized that it does not condone the use of torture by third parties, while on the other hand, detainees, defense attorneys, and human rights activists have argued that the British government knew about the renditions of suspected terrorists who resided in Britain by the United States authorities to countries with records of practicing torture, but did nothing to prevent it.[64]

It should be stressed that the practice of renditions employed by the United States, as well as the alleged passive cooperation by the British government, should constitute a practice as equally abhorrent as direct torture. From the moral and legal point of view, there is no difference between a country that employs interrogational techniques that amount to torture and a country that prima facie abides by the norms that prohibit torture but in fact enables the torture and enjoys its products.

The United States

In contrast to the extensive description of the variety of interrogational techniques applied to terrorists in the United Kingdom, there is no similar description available in the United States.

The prohibition on torture is entrenched in the Eighth Amendment to the Constitution, which prohibits the infliction of "cruel and unusual punishments." This prohibition originates in the historical perception of the drafters of the Constitution that a democratic society aspiring to safeguard the values it holds supreme cannot permit itself to punish the perpetrators of even the most heinous crimes in ways that amount to torture.[65] At the same time, the Eighth Amendment—as interpreted in the judgments of the Supreme Court—only spreads its net over punishments imposed in criminal proceedings and does not apply to situations

in which punishment is used to extract information from a suspect concerning crimes to be committed in the future.[66]

The United States also contends with extensive terrorist activities. However, the FBI does not have the authority to apply physical pressure during interrogations of persons suspected of terrorist activities, or to deprive the suspect of his right to meet an attorney. Thus, even at the time of the bombing in Oklahoma in 1995, when Timothy McVeigh was caught and it was suspected that he had accomplices, no physical pressure whatsoever was applied to him, and none of the techniques referred to above was used on him. Moreover, after his arrest he was permitted to meet his attorney, and that attorney was present during each interrogation session. A retired senior FBI official has asserted that the GSS interrogation methods are in effect a shortcut. In his view, it is not a smart move to bring a person to interrogation and try to extract information from him with blows. The smarter step is find information through sophisticated methods—laboratory work, eavesdropping, surveillance, advanced technology, and infrared cameras. In most cases, he says, the GSS does not obtain usable or credible information by the use of violent interrogation methods.[67]

The power of the FBI is derived from the power of the attorney general to appoint people to investigate crimes committed against the United States, to help safeguard the president, and to conduct investigations concerning official matters under the supervision of the Justice Ministry and the State Department.[68] Often in the past, when the FBI implemented its wide powers, injustice was committed on the grounds of state security. Ultimately, in 1976, when this injustice was acknowledged, internal security guidelines were set for the FBI which provided particular standards and investigation procedures to prevent infringements of the rights of innocent persons. These guidelines were revised in 1983.[69] The guidelines circumscribe the boundaries of activities of the FBI, but they are not binding in court. Although these general guidelines do not have direct legal ramifications, they have a central function in protecting the constitutional rights of the citizen in the face of improper state investigations.

Some of the guidelines have not been publicized but remain under wraps. For example, the guidelines concerning how to investigate international terrorist activities have been kept secret. Executive Order 12,333 empowers the FBI to investigate such terrorist activities under the terms of these secret guidelines.[70] According to the guidelines, it is permitted to initiate an investigation on the basis of a person's words or declarations alone where these create a reasonable fear that the persons

uttering them are involved or connected in some way to terrorist activity. Likewise, where there is reasonable cause for believing that two or more people have organized a group with the aim of achieving a political purpose in a manner that will breach the criminal law or make use of violence, it is possible to open a security or terrorist investigation against them.[71]

In order to open a full investigation, which can continue for a long period of time and violate a greater number of civilian rights than would an ordinary investigation, a number of requirements must be met. Only the heads of the FBI can authorize such investigations, and such investigations will be allowed only in cases where there is evidence that the persons suspected are involved, or will be involved, in violent activities contrary to federal laws. There are four additional factors that must be weighed: the damage anticipated from the violent activity, the likelihood that the activity will in fact take place, the immediacy of the threat, and the danger to freedom of speech and privacy from the implementation of the full inquiry.

With regard to the initiation of investigations before the actual commission of a crime, the guidelines (both old and new) are not conclusive. It is not clear whether certain circumstances or certain facts that meet the standards of an enterprise to commit terrorist acts also afford sufficient evidence that a criminal conspiracy exists, which enables the initiation of an investigation. It is possible that investigations of future crimes, in relation to groups that are still only suspected of being terrorist, must be based on a firmer suspicion that criminal activity will indeed be carried out. The length of time of an investigation relating to security or terrorist activity would be proportionate to the violent history of the suspected group. The investigation can continue even if at the time of the investigation the group has not been active for some time.[72]

In contrast to the policy in the United Kingdom and Israel, in the United States the credo followed until September 11, 2001, was one of professional, thorough, and comprehensive intelligence investigations, without use of any violent interrogation techniques. The attacks of September 11 were a watershed in terms of this traditional concept. In addition to the practice of renditions, described above, memorandums prepared by the Justice Department's Office of Legal Counsel and by the Defense Department during 2002–3—memorandums whose legal quality attracted broad and unusually sharp criticism—provided that the president, as commander in chief, possessed the power to permit the use of a wide range of coercive interrogation methods during the interro-

gation of persons suspecting of having knowledge of future terrorist attacks, without this constituting a breach of international law or of Section 2340 of Title 18, the federal law that prohibits causing severe physical or mental pain or suffering.[73]

On the basis of the groundwork laid in these memorandums, the government announced that neither Taliban nor Al Qaeda combatants detained at Guantánamo Bay were entitled to the status of prisoners of war. However, it also determined that as a matter of policy the detainees would not be subjected to physical or mental abuse or cruel treatment and would receive much of the treatment and privileges afforded to prisoners of war by the Third Geneva Convention.[74] The importance of the latter determination should not be overestimated, however, in light of the narrow interpretation given in these memos to the type of measures that amount to forbidden torture. For example, it was concluded that measures that cause the suspect severe physical pain and would therefore qualify as torture were limited to measures that might lead to his death or other serious bodily harm. A similar narrow interpretation was given to the type of measures that might amount to severe mental pain. For example, it has been held that no use can be made of drugs that profoundly disrupt the sense or the personality of the suspect, although use can be made of mind-altering drugs that do not completely disrupt a suspect's mind or cognitive abilities.[75]

On December 30, 2005, President Bush signed the Detainee Treatment Act of 2005, initiated by Senator John McCain, which prohibits any use of cruel, inhumane, or degrading treatment of detainees in custody or under physical control of the U.S. government. Nonetheless, after signing the bill, the president clarified that he still retains the executive popwer to enforce the act according to the needs of the war against terrorism.[76] Although administration officials deny that the president has ever authorized the torture of suspected terrorists, evidence that this was not exactly the state of affairs might be found in the use of a number of harsh interrogation techniques against the Guantánamo Bay detainees, including stress positions, isolation for up to thirty days, removal of clothing, and the use of unmuzzled guard dogs. The army spread these practices to other U.S. detention facilities in Afghanistan and Iraq as well, but the abuse at Abu Ghraib prison in Iraq took the permissive interrogation standards one step further. U.S. military police officers used to, among other things, force Iraqi prisoners to stand in mock sexual positions, in naked human pyramids, or in other humiliating positions. Although the government firmly denied that any official policy allowed the above practices, and asserted that a group of undisciplined soldiers had taken advantage of leadership failings in the prison, I believe that the government carries, at least, moral responsibility for the creation of an atmosphere that condoned occasional deviations from the international laws of war, from the strict adherence to the rule of law, and from the traditional military culture of moral warfare.[77]

As noted, the full implications of September 11 on the U.S. policy of interrogation are not yet fully known, but the initial indications, as described above, are not too promising.

Conclusion

International law absolutely prohibits the use of interrogational measures that cause the interrogatee serious physical or mental pain and suffering. Article 7 of the Covenant on Civil and Political Rights entrenches the absolute prohibition on torture and on cruel, inhuman, or degrading treatment or punishment. Article 4 clarifies that even though in time of public emergency member states "may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation," there are a number of basic rights, including the right not to be tortured, that cannot be derogated from.[78] Likewise, Article 75(2)(a)(ii) of Protocol I Additional to the Geneva Conventions places an absolute general prohibition on the parties to an armed conflict to torture persons who are in the power of a party to the conflict, and Article 12 of the First and Second Geneva Conventions emphasizes the prohibition on torturing wounded, sick, or shipwrecked combatants.[79] Article 17 of the Third Geneva Convention emphasizes the prohibition on torturing prisoners of war, and Article 32 of the Fourth Geneva Convention emphasizes the prohibition on torturing civilians.[80] Furthermore, international law perceives the absolute prohibition on torture as *jus cogens*, that is, an inviolable basic norm that supersedes contradictory international treaty and customary norms.[81] This perception is consistent with the basic principles of a democratic society in regard to its obligation to respect the rights and freedoms of the individual. At the same time, the war against terror causes the state to face situations in which, if it adheres to the principle of respect for the rights of suspects under detention and refrains from exerting physical and psychological pressure against them, it will become unable to frustrate murderous terrorist attacks leading to the death and injury of innocent civilians, who too have basic rights.

Accordingly, there are those who believe that in circumstances in which a person suspected of hostile terrorist activities refuses to reveal

information to his interrogators concerning future attacks, and there is no other way to obtain the information needed to frustrate those attacks, it is justified to torture the suspect in order to prevent the occurrence of a more injurious event. The appropriate solution is therefore in the nature of a necessary evil, which a state committed to protecting the safety of its civilians has no choice but to implement.

However, like every dilemma, the issues here are not black and white. On the one hand, it is possible to understand the fears of those who completely reject the use of extraordinary investigative means on the grounds that by opening a legal chink—however small and qualified—enabling "preventive torture," that is, the torture of a person suspected of involvement in future terrorist activities, the path will be paved for enabling the torture of persons involved in security offenses that have already been committed and perhaps even of persons merely engaged in criminal activity. It is also contended that terrorists whose belief in their ideological goals is so strong that they are willing to sacrifice their lives for them will not break under interrogation, however hard and intensive, and therefore that these means can only have an impact on innocents who were mistakenly suspected and who will say anything in order to put an end to their suffering. On the other hand, it is possible to understand the special difficulties that interrogators of the security forces have to cope with when conducting interrogations of people suspected of possessing information about future terrorist strikes, difficulties that are completely unlike those encountered in the interrogation of persons suspected of ordinary criminal activities.

Neither the advocates nor the opponents of torture dispute that war against terrorism is a just war. They also do not dispute that this war often leads to situations that are more difficult and complex than those faced in other wars, both from the moral and from the legal point of view. At the same time, the war against terror—like other wars—is not waged in a vacuum, in the sense that its just purpose does not justify all means that might prove effective in its success. Every government authority—including the security branches—is obliged to respect the law. As Aharon Barak has written,

> This duty applies in times of peace and also in times of emergency. "When the cannons roar, the muses fall quiet." However, even when the cannons roar, it is necessary to preserve the rule of law. Society's strength when facing its enemies is based on its recognition that it is fighting for values which are worth protecting. The rule of law is one of these values. Indeed, there is no security without law. The rule of law is a component in national security—the security services are creatures of the law. They must respect the law. Security considerations may occasionally influence a determination of the contents of the law. However, when these contents are decided, the (formal) rule of law requires that the law be complied with, without the security considerations providing justification for its breach.[82]

Accordingly, we can only conclude that the appropriate answer to the dilemma lies between the two aforesaid approaches. It is not practicable to prevent the security services from making use of measures that occasionally are irreplaceable, since otherwise the democratic state will not be able to meet its commitment to protect the security of its citizens and instead will be compelled to abandon them in favor of the safety of the very terrorists who seek to murder them. At the same time, in view of the great importance and far-reaching ramifications of the power to make use of drastic and extraordinary interrogational measures, the conditions for exercising that power cannot be left to internal directives of the security organizations. Rather, they should be set out in statute.

The public debate that will naturally ensue during the course of formulating the statute,[83] and the pluralism of views that will be voiced at that time, will lead to the drafting of a law that will indeed allow exceptions to conventional interrogation laws but will concurrently clearly set out the circumstances that enable such exceptions, the upper limit of the physical or psychological pressure allowed (without specifying, of course, the range of interrogational devices—a matter best left for internal operational guidelines) as well as the nature of the supervisory and control mechanisms over the exercise of those powers. Such a mechanism should be independent and autonomous, that is, it should not be enough to merely provide reports to an oversight committee answerable to the executive branch concerning the manner in which the powers are exercised, but it should also be necessary to obtain a judicial warrant prior to exercising the extraordinary measures against a suspect. In cases where the urgency of the interrogation does not permit a delay, subsequent judicial oversight should be required immediately after the disappearance of the circumstances that prevented it from taking place in advance.

I am of the opinion that public recognition of the right of a state to make use of unusual interrogational means subject to stringent normative restrictions provides a proportional balance from a legal point of view and a justifiable one from a moral point of view.