

The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987 - 2009†

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Introduction: From the Body of the Detainee to a Portrait of the Regime

Above all else, of course, was the principal rationalization of “no alternative.”

The Landau Report, 1987

Ten years have passed since *Public Committee Against Torture in Israel v. State of Israel*.¹ The opinion (“*Public Committee*”), drafted by former President of the Israel Supreme Court (“ISC”), Aharon Barak, is still invoked by many in the United States and abroad as a bold prohibition of torture. In the wake of the current American debate on torture, it is revisited even more often.² The fact that an *Israeli* Justice laid out such a categorical defense of individual rights endowed the decision with an immensely important role for many anti-torture advocates internationally. Ostensibly asserting the supremacy of the rule of law in the face of the exigencies of the most severe security risks, the opinion glows with an aura of heroism. One expression of its lofty stature can be found in Justice Richard Goldstone’s emphatically titled *Combating Terrorism: Zero Tolerance for Torture*. Part of a vast literature on terror, torture and law “post 9/11,” the article opens with Barak’s decision. Goldstone characterizes the decision as “uncompromising”:

Few countries have suffered more at the hands of terror attacks than Israel. The response of the Israel Supreme Court to torture has, however, remained uncompromising. It was put as follows by President Barak:

‘While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. I discussed this in one case, in which our court held that violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impending terrorist acts’.³

Barak’s position should not be taken for granted. On one interpretation, it can be seen as simply a restatement of international law, according to which torture has been subject to an absolute prohibition.⁴ However, the status of torture is not so simple.

¹ HCJ 5100/94 Public Committee against Torture v. State of Israel [1999] IsrSC 53(4), 817.

² See, e.g., PAUL KAHN, SACRED VIOLENCE 19 (University of Michigan Press 2008); Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism”*, 1 J. NAT’L SEC. L. & POL’Y 285, 290 (2005); Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L. J. 1145, 1164 (2006).

³ Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 CASE W. RES. J. INT’L L. 343, 343 (2005 – 2006).

⁴ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which Israel has signed), 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

Recent years have produced a vast literature grappling with the philosophical justification for the absolute prohibition on torture.⁵ If only a few decades ago authorizing torture seemed just as unthinkable as authorizing slavery⁶ or genocide,⁷ the efficacy and moral status of torture is currently hotly debated, as evidence of torture conducted under the Bush administration, often times with the collaboration of other countries as well as private actors, continues to accumulate. It is now well known that under President Bush, top-ranking officials permitted acts of torture on the authorization of leading lawyers' expert opinions, including security threats of terror to justify such actions.

When compared to these policies, the decision's pristine logic reads as a powerful vindication of the rule of law, seemingly creating real checks on executive power. Its authority is derived from the Israeli constitutional Right to Dignity,⁸ as well as from international norms, primarily the Convention Against Torture. But is it really as uncompromising as it claims to be? Information collected in the ten years since the decision by various Israeli and Palestinian organizations, journalists, lawyers and defendants, has shown quite clearly that despite the decision, torture has not actually stopped. What are the legal and political conditions that allow such a gap between the elegant rhetoric of rights and the banality of an institutionalized practice of torture?

This incongruity raises important questions about the current status of the rule of law in Israel. Similar concerns are raised by other politically charged judicial decisions, which have not been enforced by the executive branch.⁹ However, contrary

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." Several other international instruments prohibit torture and have other definitions of torture, e.g. the Universal Declaration of Human Rights, the Declaration on the Protection from Torture, and the Rome Statute. This prohibition is widely considered as customary international law and as *Jus Cogens*.

⁵ For only a few examples, see, e.g., Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE. W. J. INT'L L. 231 (2005 – 2006); Jeff McMahan, *Torture, Morality and Law*, 37 CASE W. RES. J. INT'L L. 241 (2005 – 2006); David Sussman, *What's Wrong with Torture?* 33 PHIL. & PUB. AFF. 1 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); David Luban, *Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV., 1425 (2005).

⁶ In the opening of his classic 1978 essay *Torture*, philosopher Henry Shue writes: "Torture is indeed contrary to every relevant international law, including the laws of war. No other practice except slavery is so universally and unanimously condemned in law and human convention." Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 2 (1978).

⁷ Lisa Hajjar, *Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective* 5 ANNU. REV. LAW SOC. SCI. 311, 312 (2009).

⁸ Basic Law: Human Dignity and Liberty (1992) (Isr.).

⁹ Israel's leading human rights group, The Association for Civil Rights in Israel, emphasized this in a recent report. "Another dangerous phenomenon is the State's blatant disregard of rulings by the High Court of Justice and the Administrative Courts. It is difficult to fathom—a court of law in Israel makes a clear legal decision and the State ignores it, as if it never happened. Even petitions to hold the State in contempt have not always improved

to the decisions on the Separation Wall¹⁰ or on unequal public funding for education¹¹—which in large part remain unenforced—the situation here did not simply remain *unchanged*. The Israeli administration took the decision into account, set up new administrative procedures—and continued to torture. The active response to the decision, reorganizing practice according to a professional understanding of *opinio juris*, is all the more disquieting; the embrace of the decision’s language and its transformation into a torture policy raises questions concerning the application of law, relations between different but coexisting legal orders, and their respective effectiveness in a single polity. Finally, it casts doubt on the celebrated ruling itself.

matters, to the extent that chief Justice Dorit Beinisch recently had to remind the State that “a ruling of the court is not a recommendation.” The state’s disregard of judicial oversight in a democracy based on checks and balances is a recipe for the crumbling of democracy, the violation of rights, and the tyranny of the majority through the executive and legislative branches of government.” THE ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, THE STATE OF HUMAN RIGHTS IN ISRAEL AND THE OCCUPIED TERRITORIES 71 (2009).

¹⁰ See HCJ 2732/05 Hasin v. the Government of Israel [2009]. Available at <http://elyon1.court.gov.il/files/05/320/027/n18/05027320.n18.htm> (Hebrew, accessed Oct. 31, 2010). The Association for Civil Rights in Israel (“ACRI”) reports (*id.* at 72):

Despite a court ruling from June 2006, which explicitly determined that the separation Barrier in this area must be removed as quickly as possible, the State dragged its feet for more than three years, only beginning to remove the barrier after a contempt of court petition was submitted. In a harshly worded decision from 5 October 2009, the court criticized the government for delaying the implementation for three years, accusing it of taking the law into its own hands and treating court rulings as ‘recommendations only.’

See also HCJ 8414/05 Yasin v. Government of Israel [2007]. Available at <http://elyon1.court.gov.il/Files/05/140/084/n25/05084140.n25.HTM> (Hebrew, accessed Oct. 31, 2010).

¹¹ HCJ 11163/03 Higher Arab Monitoring Committee v. Prime Minister of Israel [2004]. Available at <http://elyon1.court.gov.il/files/03/630/111/A18/03111630.a18.htm> (Hebrew, accessed Oct. 31, 2010). ACRI summarizes the proceedings as follows:

In February 2006, an expanded Supreme Court panel of seven justices rules that the government decision to assign national priority status to certain regions for the allocation of educational resources was illegal and discriminatory against Israel’s Arab citizens. The court gave the states twelve months to cancel this decision. Only after the twelve months had passed, did the State submit a request to postpone implementation of the court’s ruling by an additional six months, so that it could anchor in legislation the authority to establish national priority areas. Later, the State asked for an additional five-year extension to complete the complex task of setting alternative criteria for the allocation of Ministry of Education resources. In June 2007, the court granted the State a one-year extension to complete the complex task of setting alternative criteria for the allocation of Ministry of Education resources. When this was not accomplished, the original petitioners submitted a request that the State be held in contempt, and the court responded by pushing back the deadline for implementation to 1 September 2009. As of November 2009, there are still no indications that the government is preparing to carry out the Court ruling.

In this essay, we will suggest that the decision, which has been understood to stand for robust protections for human rights, has not operated that way;¹² while it *may* have reduced torture for a while, its main result has been to strengthen governmental impunity for torture—while silencing its victims.¹³ We will characterize the regime of security investigations that emerged after *Public Committee* as one in which torture became more solidly centralized, organized, and managed from above. At the same time, the decision creates the false impression of “zero tolerance for torture.” Hence, the prohibition of torture cannot be understood as the real shift following *Public Committee*. As has famously been shown by the Landau Commission (1987),¹⁴ some form of torture has been systematic in Israel since the occupation of the West Bank and Gaza in 1967.¹⁵ In the last ten years, what is truly new is the administrative structure in which torture is *managed*, through a certain understanding of “necessity.” We thus label the regime that ensued post *Public Committee* a regime of *necessity management*.

From a contemporary, global perspective, the strategy of evading accountability that followed *Public Committee* does not stand alone. The world which the decision foreshadows is a paradoxical one; torture is manifestly illegal, but at the same time the victims of torture are almost invariably deemed to lack a legal remedy. They remain voiceless, without the evidentiary means to articulate and prove what was done to them. Compensation is almost always unavailable; the mutilation of bodies and spirits remains unrecognized, and perpetrators consistently—in one way or another—go unpunished.¹⁶ If political power says anything to its victims, it is almost always an apology on behalf of torture; never do we hear an apology to its victims.¹⁷

¹² We thus adopt what Scheppelle describes as a “sociological” approach to the legal and moral questions torture raises. See Scheppelle, *supra* note 2, at 292: “By arguing from sociology, I can address the question: *Are coercive interrogation techniques in fact being used in the sorts of situations that have been invoked hypothetically to persuade people that such techniques are necessary?* . . . The normative force that seems to emanate from the hypothetical case of the nuclear terrorist cannot be invoked as a justification for actual policy to engage in torture and other abusive interrogation if the hypothetical does not track the real-world problems.”

¹³ Previous accounts have often emphasized that the decision left the door open for the legislator to reintroduce torture. From a contemporary perspective, whether that is true is utterly unimportant. Indeed, our argument is that after the decision there was no real need for legislation in order to continue with at least some of the old practices. Once that was realized, legislation became highly improbable and in fact did not occur. See Matthew Amand, *Public Committee Against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained?*, NCJ INT’L L. & COM. REG. 655, 656 (2000); Ardi Imseis, “Moderate” Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods, 19 BERKELEY J. INT’L L. 328 (2001); Nimer Sultany, *The Legacy of Justice Aharon Barak: A Critical Review*, HARV. INT’L L. J. ONLINE (2007), available at www.harvardilj.org/attach.php?id=112 (last visited Oct. 31, 2010).

¹⁴ *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 146 (1989) [hereinafter *The Landau Report*].

¹⁵ *Id.*, at 158, 160-161.

¹⁶ The moral significance of this position was described by French philosopher Jean-François Lyotard with the term “Differend.” See JEAN-FRANÇOIS LYOTARD, *THE DIFFEREND*:

Going back ten years to *Public Committee*, or twenty years to The Landau Commission Report, provides a rich context in which to understand the present situation. We will argue that *Public Committee* foreshadows impunity¹⁸ as a central characteristic of the legal regimes in “The West” at this moment.¹⁹

Although some very disturbing testimonies have been collected in Israel, the available evidence does not point to the kind of horror that leaked into the public sphere following investigations conducted by the US authorities in the aftermath of 9/11. In large part, they are signs of “torture lite.”²⁰ But even the less extreme testimonies we will be discussing fit squarely into the framework of practices banned by the ISC.²¹

To a large extent, the contemporary debate on torture has taken the shape of a struggle over the very definition of the term.²² For the purposes of this essay, torture is defined in Article 1 of the Convention against Torture.²³ While this definition may be

PHRASES IN DISPUTE (Georges Van Den Abbeele trans., 6th ed. 2002) (1988). See also Adi Ophir, *Shifting the Moral Domain in Lyotard's Le Differend*, 4(2) CONSTELLATIONS, 189 (2002).

¹⁷ On apologies see Thomas P. Crocker, *Torture, With Apologies*, 86 TEX. L. REV. 569 (2007-2008).

¹⁸ The Landau Commission's recommendations authorizing "moderate physical pressure" were confirmed by the government, and in effect were binding law until they were struck down with *Public Committee*.

¹⁹ Thus, we think of our inquiry as a kind of "history of the present," in Michel Foucault's terms. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977). On the importance of history in the post 9/11 discussion on torture, see Neil Macmaster, *Torture: From Algiers to Abu Ghreïb*, 46 RACE CLASS 1, 4 (2004).

²⁰ Ardi Imseis ironically labels the practice "moderate torture," in a paraphrase on the "moderate physical pressure," the term the Landau Commission used for the physical methods of interrogation that it approved. See Imseis, *supra* note 13.

²¹ There may be other practices which are designed to humiliate and deject “Security Prisoners.” These are to be found in various stages of the criminal procedure—not only in interrogation but often time in detention and incarceration. Although important and morally questionable, these are outside of the scope of the current research. A more general view of torture would have to take them into account.

²² This is illustrated starkly and amusingly by John Stewart's interview with John Yoo on The Daily Show, <http://www.thedailyshow.com/watch/mon-january-11-2010/john-yoo-pt-1> (last visited Oct. 31, 2010).

²³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter *Torture Convention*], available at http://www.unhcr.ch/html/menu3/b/h_cat39.htm.

For the purposes of this Convention, 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 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

less than clear, we can only assume a certain transparency of the text of the convention. Some may think that labeling the practices employed by Israeli security forces "torture" is a partisan, rather than a descriptive statement. Others have echoed this opinion, in response to the physical abuse of suspects that American security forces secretly flew to offshore prisons. For the purposes of this essay, however, it is unnecessary to develop an analytic definition of torture of our own. As Justice Barak's decision aligns itself with international law and appeals to the Convention against Torture, so will we.

Because much of the relevant material remains classified, the available evidence sometimes does not point directly to torture. What it does show very clearly, however, is a framework of agreement between the executive and courts by which some forms of torture are protected. As opposed to discovering evidence of torture, identifying this pattern does not require painstaking investigation; it merely calls for attention to the relevant public statements made by Israeli authorities. Particularly, a *necessity procedure* has been designed by Israeli administrators, in a logical self-contradiction conflating exception and the norm.²⁴ Judges in trial courts as well as in the ISC remain receptive to this paradoxical category.

The unavailability of direct evidence of torture is not extraneous to the problem we will be discussing. Rather, it is both tortures' condition of possibility and one of its most salient moral shortcomings. Under this regime, the torture victim is required to testify as to a trauma, the evidence of which has been destroyed, obliterated, or otherwise made unavailable.²⁵ For this reason, we focus on the mechanisms that regulate torture, on its administrative structure, rather than on particular instances. In themselves, these mechanisms provide compelling evidence for the use of torture. After having been injured by the act of torture, the mechanisms that erase torture from the public sphere harm its victims once again. However, this additional harm cannot be analytically differentiated from the physical pain inflicted. The co-appearance of these two harms reflects their mutual dependency as essential parts of contemporary practices of torture. How does *law* partake in this silencing of victims?

These mechanisms of regulation also shed light on the nature of security and governmentality in Israel in the last decade. In a 1986 essay, eight years before the end of apartheid, South African novelist J.M. Coetzee aptly wrote "relations in the torture room provide a metaphor, bare and extreme, for relations between

acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

On some of the interpretive problems with this definition under U.S. law, see Scheppelle, *supra* note 2, at 289 – 299, 303 – 304.

²⁴ For a philosophical analysis of this juridical formation see GIORGIO AGAMBEN, *HOMO SACER* 15-29 (Daniel Heller-Roazen trans., Stanford University Press, 1998). Alan Dershowitz, who espoused a limited legalization of torture, recognizes this cannot be done through the category of necessity, which in his words is "a state of nature defense." He thus rejects the validity of what he considers as a conflation of emergency and norm. Alan M. Dershowitz, *Is it Necessary to Apply "Physical Pressure" to Terrorists – And Lie About it?*, 23 *ISR. L. REV.* 192, 196 – 197 (1989).

²⁵ See LYOTARD, *supra* note 16, at 57.

authoritarianism and its victims.”²⁶ One year later, the Landau Commission inadvertently reiterated this metaphor. While endorsing “moderate physical pressure” on detainees, it proclaimed “methods of police interrogation which are employed in any given regime are a faithful mirror of the character of the entire regime.”²⁷ In *Public Committee*, Justice Barak recites it yet again, while explaining that the methods that the Landau Commission had authorized are illegal.²⁸ The three texts envision power through a visceral relationship between the torturer and the suffering victim. Since we are denied access to this relationship, looking at the *regulatory* environment in which torture comes into being will provide an illuminating substitute.

What is truly perplexing about *Public Committee* is that its complicity with torture cannot simply be reduced to the conclusion that the decision is in error. As we will show, its self-defeating nature demands an attention to its *rhetoric*. To be sure, the last ten years have made impunity even more conspicuous. Particular attention will be given in this respect to a decision the current President of the Israeli Supreme Court, Justice Dorit Beinisch, issued relatively recently, on a motion challenging the continued abuse of detainees.²⁹

This essay consists of three parts. Part I is a close reading of *Public Committee* in the context of the administrative reality it had created since it was issued. Our objective here is to lay out the anatomy of *necessity management*. This regime cannot be understood without revisiting the earlier history of torture in Israel, since 1967. Part II, a reading of the Landau Commission Report, will provide the necessary historical background. This Commission was formed in the wake of growing public concerns that torture has become a normalized practice in ensuring Israel’s control over the Palestinians. The Commission found that torture was indeed systemic, and recommended legalizing a “moderate” form of torture. We examine the continuities and discontinuities between the Commission’s recommendations, the reasoning in *Public Committee* which ostensibly struck them down, and the current reality of “security” investigations.

Part III will present the theoretical assumptions of the regime of *necessity management*. We will discuss the regime in light of a newfound transnational sovereign immunity (“*un-prosecution*”), of which the Israeli strategy of *necessity management* is merely

²⁶ J.M Coetzee, *Into the Dark Chamber: The Ovelist and South Africa*, N.Y. TIMES, Jan. 12, 1986, available at <http://www.nytimes.com/books/97/11/02/home/coetzee-chamber.html> (accessed 10.31.10). Today, it’s no longer analytically (and politically) feasible to separate the “temporary” authoritarian control of the West Bank and Gaza from the “democracy” in Israel proper. The distinction between “authoritarian” and “democratic” in Coetzee’s words is therefore not useful. For several different explanations of this conclusion, see the essays in *THE POWER OF INCLUSIVE EXCLUSION: ANATOMY OF ISRAELI RULE IN THE OCCUPIED PALESTINIAN TERRITORIES* (Adi Ophir, Michal Givoni and Sari Hanafi eds., 2009). Coetzee’s metaphor nevertheless pertains to any regime that chooses to torture. Calling to attention the particularities of torture, it illuminates the variations political violence can take.

²⁷ *Supra* note 14, at 182.

²⁸ *Public Committee*, *supra* note 1, at paragraph 22.

²⁹ HCJ 5100/94 *Public Committee v. State of Israel* [2009], (Hebrew, available through www.takdin.co.il).

a harbinger, and which has been applied to U.S. torture as well. Finally, we will also offer some preliminary reflections on the legal responses that can be adopted if torture is to be seriously (and politically) fought.

Part I: From Criminal Exception to Administrative Management

1. "Necessity" as Autonomous Judgment

Public Committee brought an end to procedures in seven different petitions, the earliest of which was submitted to the ISC in 1994. Several NGOs,³⁰ alongside individuals who claimed to have been tortured,³¹ appealed in separate petitions which were joined by the court. During the hearing it became clear that torture had ceased. And yet, the court did not declare the issue moot, but decided to issue a principled decision. Was this ruling really given as a remedy for other detainees and defendants who presumably might be tortured? Politically, the times were turbulent. Justice Barak himself points to the heated state of the Israeli-Palestinian conflict in the very opening of the opinion.³² However, we do not refer to the narrative of the Israeli-Palestinian struggle simply to emphasize the continued vulnerability of (potential) victims of torture. The five years it took to hand down the ruling cast a doubt on the effectiveness of any decision.

Justice Barak's opinion discusses several methods of torture. These include shaking, various contorted sitting positions—typically tilted, handcuffed, head-covered or blindfolded with loud music—and sleep deprivation.³³ While the decision discusses these in some length, it prohibits torture *at large*:³⁴

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. The use of violence

³⁰ The Association of Civil Rights in Israel, Center for Defense of the Individual, Public Committee Against Torture in Israel.

³¹ Hatem Abu Zayda, Wa'al Al Kaaqua, Ibramim Abdallah Ganimat, Abd Al Rahman Ismail Ganimat, Fuoad Awad Quran, Issa Ali Batat.

³² Public Committee, *supra* note 1, at paragraph 1.

³³ For a more detailed description of the means of interrogation *see id.*, para. 9-13.

³⁴ Others have argued that the decision only applies to the particular methods of interrogation that were discussed. We do not think such a reading reflects the text of the decision. *See, e.g.*, Amand, *supra* note 13.

during investigations can potentially lead to the investigator being held criminally liable.³⁵

An interrogation, writes Justice Barak, *can* be made uncomfortable in various ways in order to increase the pressure on the suspect to reveal information. Importantly, General Security Service (“GSS”) standards of interrogation cannot authorize such pressure in a way that would exceed the pressure permitted in police interrogations.³⁶ A reasonable interrogation, he continues, “may result in insufficient sleep.” However, “sleep deprivation for a prolonged period...may be deemed a use of an investigation method which surpasses the least restrictive means.”³⁷

The most interesting part of the decision deals with the defense of necessity. Seemingly a mere *obiter dictum*, it unwittingly spells out the avenues the executive took in order to shield practices of torture from public scrutiny. But before this can be demonstrated, certain attention must be given to Justice Barak’s reasoning.

Justice Barak’s opinion allows an interrogator, under particular circumstances, protection from criminal liability. This protection is granted under the doctrine of necessity, when the crime is *justified*. The now iconic image of the ticking bomb,³⁸ which emerged in the French-Algerian anti-colonial struggle,³⁹ is re-contextualized in a way that will later be massively reproduced in the U.S. context.⁴⁰ In this scenario, the interrogator is presumably justified in his act of torture, precisely because he reasonably believes that he’s saving lives.⁴¹ Justice Barak aligns torture with any other ordinary criminal activity in this respect. If the interrogator *knows*—with the required immediacy and certainty—that the crime he will be committing in torture will save numerous lives, he is permitted *ex post facto* to break the law. As commentators have emphasized, the form of justification here is the same as in paradigm cases of self-defense.⁴²

As Justice Barak was careful to clarify, such a decision is to be made in the context of action. The interrogator then takes full responsibility for his crime: just like any other defendant, he may raise the issue of necessity as a defense.⁴³ The

³⁵ Interestingly, Justice Barak includes not only “torture” but “cruel, inhuman treatment” and “degrading treatment” as well, categories that later will be central in the efforts by US lawyers to legalize some forms of detainee abuse. Public Committee, *supra* note 1 at para. 15.

³⁶ Public Committee, *supra* note 1 at para. 20.

³⁷ *Id.*, at para. 23.

³⁸ For compelling critiques of this popular thought experiment see Scheppele, *supra* note 2 and Shue and Luban, *supra* note 5.

³⁹ Macmaster, *supra* note 19, at 4.

⁴⁰ See, e.g., Scheppele, *supra* note 2; Luban *supra* note 5.

⁴¹ There has been considerable academic debate over this point in the last few years, in which we will briefly intervene below.

⁴² See McMahan, *supra* note 19, 244, 241-248. For use of deadly force comparison see Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661.

⁴³ This position is very similar to the “civil disobedience” argument Darius Rejali attributes to Bowden. See DARIUS REJALI, *TORTURE AND DEMOCRACY* 533 (2009).

administration, on the other hand, is not authorized to judge in advance which actions are to be protected under the doctrine of necessity. Just as it is impossible to authorize the act of homicide under this doctrine, it is impossible to authorize torture under necessity; such an authorization would misguidedly turn the crime of torture into an exceptional crime, a position that Justice Barak painstakingly rejects.⁴⁴

Special attention should be given to how notions of *temporality* and *experience* are construed in the judgment of torture. The two related principles are: (1) whether a perpetrator of the crime of torture is protected or not can only be determined after the fact (“*the temporality condition*”); (2) this determination can only be made regarding the experience of an individual perpetrator, in respect to the particular set of circumstances that were given at the event (“*the experience condition*”). This casuistic justification requires that the individual interrogator make an *autonomous* judgment call and *break the law*. Whether the breach was in accordance with a publicly recognizable morality is determined after the fact. Barak emphasizes that necessity does not have normative value as such, and is not a source of authority.

Such a judgment call is arguably an excruciatingly difficult one, particularly for the interrogators who are daily exposed to extreme situations. On the other hand, they are precisely those most likely to abuse the prohibition (not every profession has this problematic potential of turning torture into an easy shortcut). According to this understanding, only the cumbersome burden on the individual interrogator protects the absolute prohibition on torture from being watered down. In the normative world that Justice Barak has created there is a seemingly strong disincentive to torture, which neatly unites the commanding purpose of the prohibition and the way in which

⁴⁴ See Public Committee, *supra* note 1, at para. 34:

In the Court’s opinion, a general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the “necessity” defense. The “necessity” defense does not constitute a source of authority, allowing GSS investigators to make use of physical means during the course of interrogations. The reasoning underlying our position is anchored in *the nature of the “necessity” defense*. This defense deals with *deciding those cases involving an individual reacting to a given set of facts; it is an ad hoc endeavor, in reaction to an event. It is the result of an improvisation given the unpredictable character of the events* (See Feller, *ibid.* at 209). Thus, the very nature of the defense does not allow it to serve as the source of a general administrative power. The administrative power is based on establishing general, forward looking criteria, as noted by Professor Enker:

Necessity is an *after-the-fact judgment* based on a narrow set of considerations in which we are concerned with the immediate consequences not far-reaching and long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values . . . The defence of Necessity does not define a code of primary normative behaviour. Necessity is certainly not a basis for establishing a broad detailed code of behaviour such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like (Enker, *The Use of Physical Force in Interrogations and the Necessity Defense*, in ISRAEL AND INTERNATIONAL HUMAN RIGHTS LAW: THE ISSUE OF TORTURE 61,62 (1995)). (Emphases added).

it shapes behavior, precisely the deterrence effect presumably provided by the criminal sanction *in general*.⁴⁵

On the rare occasions when torture must be used, the interrogator is portrayed as a hero, putting himself on the line for the wellbeing of the community. The extraordinary circumstances in which torture might actually be effective put him between a rock and a hard place.⁴⁶ On the one hand he can torture, in which case he risks his own freedom: in such a situation he may be exposed not only to a criminal conviction, but also presumably to public denigration and perhaps a prison sentence (he has broken an enshrined prohibition). On the other hand, if he doesn't choose such heroism he may be betraying his professional obligation to go the extra mile to defend the lives of others. In the circumstances of emergency, state violence *first becomes visible* and only *later* is subject to justification. Justice is no longer relieved of responsibility, as Michel Foucault may have put it.⁴⁷

2. *The Application Clause*

The problem with the decision begins in the nexus connecting this legal theory and the actual practices of the security services.⁴⁸ Justice Barak does not say much about the application of the prohibition, and generally remains on the rather abstracted level of principle. Therefore, threads connecting his decision to the practices that have developed since 1999 must be discerned from the single clause in which he touches upon day-to-day administrative behavior ("*the application clause*"):

⁴⁵ Compare REJALI, *supra* note 43, at 533.

⁴⁶ Scheppelle explains how extraordinary these circumstances actually are. Indeed, she concludes that their rarified nature makes them an "irresponsible hypothetical." See Scheppelle *supra* note 2, at 337. Alon Harel and Assaf Sharon, on the other hand, offer a philosophical explanation to the prohibition on torture, which nevertheless recognizes that in some circumstances, which must remain undefined, torture may be justifiably performed. I take their suggestion can also be understood as an illuminating explication of the operation of these two conditions. See Alon Harel & Assaf Sharon, *What is really Wrong with Torture?*, 6 J. OF INT'L CRIM. JUST. 241 (2008).

⁴⁷ See FOUCAULT, *supra* note 19, at 10.

⁴⁸ This emphasis on actual application can be found in Scheppelle, *supra* note 2. In his lecture "Power and Glory" (January 11, 2007), Giorgio Agamben explained how the separation between *law* and its *application*, is a central condition for the violence of democratic regimes. Building upon a genealogy of the separation between the ecclesiastical realms of the father, the son and the Holy Ghost, he explains the democratic separation of power to three branches (the separation of *power* from *glory*). In the movement of law from the celestial realm to terrestrial (from the father to the Son, or—for example—from the judiciary to the police) there is always an excess of violence that is created. In liberal theory, that remainder is often denied, or thought of as an unintended accident: "collateral damage". However, such a position cannot explain the way in which the very separation of power structurally reproduces that excess of violence, as a central technique of the reproduction of power. The lecture is available at <http://www.youtube.com/watch?v=jz7dxeVH7Rs> (accessed Oct. 31, 2001).

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. *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.”* (Emphasis added).⁴⁹

What is the nature of this “self-instruction?” Although *Public Committee* prohibits torture, these short lines effectively created a space of impunity for state officials to commit crimes within the so-called “necessity procedure.”

But before discussing the procedure, it is important to analyze the details of the quote above. Is Barak’s vision of his decision’s application consistent with the other (more high-minded) parts of it? First we get the formulation of “just as [X] so too [Y].” The two are weighed against each other, like two additive inverses the sum of which is zero. Now notice the emphasized sentence. Justice Barak quite manifestly does not require the protection of “necessity” to be argued in open court. Rather, he points to the Attorney General’s (“AG”) own discretion in that matter. Crucially, the text signals to the AG that when hearing an interrogator’s claim he *is not required to ascertain if the protection of “necessity” applies*; hence, he is not understood as replacing the judge that would hear the case in court. A much lower bar of a mere *claim* to a *feeling* of action from “necessity” is set. This is totally different from deciding on “necessity” (as the legal doctrine explained in other parts of the decision); the latter of course demands that the conditions of experience and temporality be met. Put differently, “necessity” is not a determination of the mental state of the perpetrator alone (“*did he feel he is acting from necessity?*”), it is a determination of whether the *objective* circumstances reasonably required the prohibited action. The allusion to a “feeling of necessity” here is a confusing one, which positions the AG’s determination a far cry from the narrow test of “necessity.” This choice of words cannot be a mistake.

In such a capacity, the AG does not acquit the interrogator, and is not required to declare if his action was legal. He is simply deciding whether to issue an indictment. Justice Barak could easily have written that the AG would have to make a legally binding determination, using his professional judgment and finding that the protection of necessity actually *applies*. That would doubtlessly narrow the set of cases that could remain unprosecuted, or at least widen the grounds for judicial review of the AG’s decision. The AG would of course still have the power, in “genuine” cases of necessity, not to prosecute.⁵⁰

3. *Be Careful, but Don’t Worry*

Compared with the time it took the judiciary to issue its decision, the Israeli administration was far more efficient in responding to the issue of torture. One month after the decision was published, AG Elyakim Rubinstein (who has since been

⁴⁹ See Public Committee, *supra* note 1, at paragraph 38.

⁵⁰ Once again, such a power is objectionable and hotly debated.

appointed Justice of the Supreme Court), issued a document reflecting the state's new position. The memo, dated October 28, 1999, was both addressed to the AG and signed by him, mirroring Barak's rather oblique formulation of the AG "instructing himself." Citing the application clause, Rubinstein enumerates the circumstances in which he will "consider" not pressing charges against an interrogator.⁵¹

Several facets of this memo make it a blueprint for *necessity management*. But before looking into the text itself, it is useful to ask once again: what does it mean for an AG to "instruct *himself*?" One reasonable reading is that a policy would be laid out for the exercise of discretion when deciding whether to press charges against individuals suspected of torture-related crimes. Such guidelines could either be restricted to internal use, or circulated to GSS interrogators. While the former might be problematic in terms of transparency, the latter would doubtlessly have an effect on the level of deterrence *Public Committee* would create; as the tendency to prosecute decreases, so does the disincentive to torture; the incentive to lubricate the workings of security with coercion rises correspondingly.

To be sure, the mere circulation of such instructions invariably *reduces* the deterrence effect. That is probably what AG Rubinstein intended. Indeed, that's the message that comes across from Article 4 of the memo, which without the right context would seem quite vague. Its circuitous language instructs the interrogators to "always note the rule of law and the rights of suspects; but while acting within the limits of law, they should not ignore their own need for proper protection in their work."⁵² We read this language to have a simple meaning: "be careful, but don't worry." For an instruction that avowedly aims at increasing "legal certainty", such a message seems decidedly ineffective, unless is it to be understood as increasing the certainty of *immunity*.

But there is a more important aspect of these instructions. They point to the procedures that will now be performed, *before* committing the crime of torture, inside the GSS. Thus, they effectively overturn the way necessity was construed in *Public Committee*—eliminating the conditions of experience and temporality. Rubinstein explains that the AG will decide whether to press charges, among other things, according to (1) the *level* of the officials who were consulted in performing the act of torture; (2) their involvement in the decision to torture; (3) the degree to which it was regulated. These instructions redesign the interrogator's behavior so as to increase the supervision of high-ranking executives and the government. They make the GSS interrogator consult with officials above him, and spread responsibility up the administrative ladder. In effect, the interrogator turns to a mere organ of a top executive—a cog in the machine. His potential *mens rea* is diluted by extending it to people who are not in the interrogation room and possibly out of the political reach of the prosecution. This effect of centralizing power is not implicit in Justice Barak's decision—which merely *allows* for it to happen.

Notice that the memo reconstructs the role of the GSS interrogator in a way that is very different from the heroic defender of society that Barak had envisioned (where

⁵¹ Motion on behalf of the petitioners in HCJ 5100/94 [2009] (Hebrew), app. 11.

⁵² *Id.*

the interrogator is a proto-revolutionary).⁵³ Here the paradigmatic interrogator is a well trained follower of rules. He affixes his ear to the body of a detainee and rattles it just a little. Does he hear the ticking of the bomb? He responds as a meticulous watchmaker, following the manual that has been prepared for him by his supervisors,⁵⁴ a manual that simply directs him back to ask them what to do. But such a manual is exactly what the conditions of experience and temporality seem to prohibit (remember the emphasis on "improvisation"). However, as it turns out, the application clause functioned as an invitation for the executive to implement and design such a manual. Article 7(2)(b)(4) of Rubenstein's memo points directly to these practices:

The GSS should have *internal guidelines*, inter alia, on the *system of consultations and confirmations* within the organization which are needed for the matter. (emphases added).⁵⁵

The machinations of the system of "consultations and confirmations," which came to be known as "the necessity procedure," have not been published and are unknown to us. This "internal" nature of the system is grounded in Rubenstein's memo—ironically reproducing the self-referential logic and instructing the GSS once again to "instruct itself." This time the instructions would not be circulated to the public. Thus, Rubenstein decided to organize the guidelines on torture in a way that would reestablish the incentive to torture: both a scenario in which the guidelines remain for the internal use of the AG office (without GSS involvement), and the scenario of *publicly* published guidelines, would contradict the conditions of experience and temporality. Either of them, on their own, would have created a greater disincentive to torture than the combination that Rubenstein chose.

Lacking access to the language of the "necessity procedure", we will try to show how it works in practice.

4. *Confirmations, Consultations and the Necessity Procedure*

What we now have before us is a precarious legal scheme made of three different tiers representing three levels of transparency and public accountability: (1) a Supreme Court decision banning torture, with criminal law exceptions for unexpected out-of-the-ordinary circumstances; (2) an administrative "instruction,"

⁵³ See, e.g., Henry Shue's classic 1978 paper: "essentially . . . torture would be like an act of civil disobedience at least in the respect that the conscientious torturer would willingly submit to charges and trial. If the torture had demonstrably prevented the end of the world, the charges would presumably be dropped or the sentence suspended." *Torture*, 7 PHIL. & PUB. AFF., 124 (1978). Shue elaborates this in his 2006 essay, *supra* note 5, at 236.

⁵⁴ The image of the "meticulous watchmaker" is taken from FOUCAULT, *supra* note 19, at 13.

⁵⁵ Motion on behalf of the petitioners, *supra* note 51.

authorizing the GSS to *formulate* when such circumstances arise, while pointing to a *system of consultations and confirmations*; (3) A *classified* document of guidelines indicating what the GSS interrogator should do when he actually sees fit to torture, and how.

The first norm is public, and a grand triumph for human rights; the second is circulated to Israeli government officials only and is underspecified; the third authorizes torture and is exposed only to those “in the business.” What is the logic linking the three? Which is the Kelsenian “higher” norm? Perhaps instead of thinking, with the twentieth century German jurist, of a towering *normative pyramid*, we should be thinking of an onion to be peeled from the visible outside to its invisible heart.

It is perhaps not surprising that actions consistent with the legal scheme’s innermost norms are sometimes exposed. On November 8, 2006 *Haaretz* published an article titled “Complaints: GSS Interrogators Tear Off Beards and Sodomize Detainees.”⁵⁶ The article reports the return of the GSS to the “old interrogation methods” that were expressly banned in *Public Committee*. It is based on new testimonies that The Public Committee Against Torture had collected. These have been put in affidavit form and filed as criminal complaints. The organization estimated that since *Public Committee* about 500 such complaints have been filed, none of which resulted in a criminal prosecution.⁵⁷

Alongside the old methods that have supposedly been abolished, *Haaretz* describes new methods that had previously been unknown. One detainee, Assam Rashed from the city of Tulkarem, described how his beard was torn off. Aaref Tabajna of Nablus said that he was tied from the ceiling with his head down, while the interrogators hit his testicles with hands and a cloth-covered rod. The most disturbing complaint came from a detainee who remained anonymous. His affidavit describes an interrogator who called himself “Captain Daniel.” Captain Daniel threatened the detainee with sodomy and then proceeded to insert objects into the complainant’s rectum.⁵⁸

Perhaps even more revealing than the information on torture is the state’s response to the article. When confronted with the total lack of criminal investigations against GSS interrogators, the GSS spokesman replied that “disciplinary measures were taken.”⁵⁹ But disciplinary measures are simply irrelevant; if anything, they are a cover-up technique. The very decision to take measures is evidence that criminal conduct was actually found. Disciplinary measures can therefore only be secondary to a criminal procedure.

The AG office’s response to the article seems more to the point:

⁵⁶ Nir Hasson, *Complaints: GSS Interrogators Tear Off Beards and Sodomize Detainees*, HAARETZ, Nov. 8, 2006, (Hebrew), available at <http://www.haaretz.co.il> (Haaretz archive article no. 130636) (accessed Oct. 31, 2010).

⁵⁷ Nir Hasson, *Rights Groups: Shin Bet Torturing Jailed Palestinians*, HAARETZ, May 6, 2007, available at <http://www.haaretz.com/hasen/spages/856142.html> (accessed Oct. 31, 2010).

⁵⁸ *Complaints*, *supra* note 56.

⁵⁸ *Id.*

⁵⁹ *Id.*

There are cases in *which examination brings about amendments in procedures* or similar changes. In exceptional cases, when we find that indeed there was a *deviation from procedure*, we decide upon a disciplinary or criminal procedure.⁶⁰ (Emphases added).

Notice the unique relation between exception and the norm. It is not exception that "brings about amendments" in the norm; fluctuation is embedded in the norm itself. Interrogators are thus expected to work according to moving guidelines; exception or deviation is understood as uncoordinated movement. And if, as the AG suggested, this deviation is not a criminal offense but rather the breach of an administrative procedure, it seems quite natural to stop at disciplinary measures.

The GSS response does, however, shed a little light on the content of this dynamic procedure: "The confirmation to use force in interrogations is given at the least from the head of the interrogation team, and at times comes from the head of the GSS himself."⁶¹ Two days after the publication of the article, on November 10, the GSS published a "clarification": "the confirmation to use special means in interrogation can be given only by the head of GSS."⁶²

In May 2007, the Public Committee against Torture published a new report titled "Ticking Bomb."⁶³ Rather than focusing on a large number of cases, this report was organized around relatively few, detailed accounts. Hence, the stories of nine detainees who were severely tortured are unfolded—from arrest, through interrogation, trial, and (failed) attempts to ignite criminal prosecutions against interrogators. For our purposes, the most relevant aspect of the report is the way the administrative practices surrounding torture are revealed. We thus get another peek through the keyhole at the third and innermost tier of regulation, into secret procedures that function as norms, which determine the decision to torture.

In the discussion of Bahjat Yaman's case, an extremely interesting memo is brought to the readers' attention. Yaman claimed he was subject to various kinds of physical and mental torture, including hearing his own screams recorded while he was given rest. This memo is the only document that corroborates Yaman's testimony. It reads:

Regarding Bahjat Yaman. Urgency in obtaining information for prevention of terrorist attack. Interrogated from 5.20.04 21:15 to 5.22.04 02:40 *under the defense of necessity* and means were alternately used.⁶⁴ (Emphasis added).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Clarification*, HAARETZ, Nov. 10, 2006, (Hebrew), available at <http://haaretz.co.il> (Haaretz archive article no. 1306904) (accessed Oct. 31, 2010).

⁶³ Available at <http://www.stoptorture.org.il/en/node/69> (accessed Oct. 31, 2010).

⁶⁴ Motion on behalf of the petitioners, *supra* note 51, app. 5 and 6 (the document and an affidavit submitted to the Israeli High Court of Justice by Yaman's attorney, Mr. Labib Habib). It is very important to emphasize that the original document was never obtained by Yaman's defense lawyer, Labib Habib. When Habib came to receive the evidence material for this case, he was not allowed to make a copy of this document, and was instructed to make a handwritten copy. He later gave an affidavit concerning the document. The content of the

The simple mechanism of “the necessity procedure” becomes visible by juxtaposing this memo with the GSS and AG responses to the *Haaretz* article. When the interrogator tortures (the state did not deny that “means” here refers to “physical” interrogation), he *already knows* that he is protected by the “defense of necessity.” Again we see the temporality condition reversed. The interrogators’ confidence that they will not be prosecuted is provided by the fact that the *very highest official in the GSS* has authorized torture *a priori*. Any prosecution would have to include him as a co-conspirator, a highly unlikely result: “*Be careful, but don’t worry.*”⁶⁵

As shown above, former AG Elyakim Rubinstein was the one to suggest a pattern of “consultations and confirmations;” hence the causal connection between this system of authorizations and the AG’s instructions, allowing the GSS to practice torture as an internal procedure. This connection has also been pointed out by former Israeli Prime Minister Ehud Olmert. In a letter to Avigdor Feldman, counsel for the Public Committee Against Torture (17 October 2007), Olmert’s office wrote:

On the basis of this assertion by the Attorney General, *internal guidelines* have been prepared by the GSS, which state how *consultations* with senior GSS officials will be conducted when the circumstances of a particular interrogation fulfill the requirements of the necessity qualification...⁶⁶ (Emphases added).

Again, we see that the guidelines allow the protection of necessity to be decided upon before the act of torture. The paradoxical nature of the Prime Minister’s statement, which mirrors the nature of the idea of a necessity procedure, is reproduced once again; only a few paragraphs before the text quoted above, in the first clause of the letter, we find a reiteration of the (manifest) holding of *Public Committee*: “The government and the heads of GSS do not have the authority to set guidelines regarding the use of physical means in the interrogation of suspects.”⁶⁷ To try and dispel the confusion, the Public Committee asked to receive a copy of the guidelines (1 November 2007). “Naturally,” wrote the government representative, it is impossible to reveal these guidelines which “detail, inter alia, the officials who partake in the procedure of consultation, the ways in which such consultation is documented, and such issues that in essence are internal guidelines.”⁶⁸

document is undisputed. Netan’el Benishu, vice president of the Ofer court-martial, wrote in his decision in Yaman’s case: “The fact that special means of interrogation was not concealed from the defense. It has obtained a document that can prove the use of such methods.” *Id.*

⁶⁵ Compare with Dershowitz’s suggestion to issue torture warrants. See ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 110, 252 (2003); Alan Dershowitz, *Torture Without Visibility and Accountability is Worse Than With It*, U. PA. J. CONST. L. 326 (2003); Alan Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, NYL SCH. L. REV., 275 (2003 – 2004).

⁶⁶ Motion on behalf of petitioners, *supra* note 51, app. 16 (copy of the letter).

⁶⁷ *Id.*

⁶⁸ *Id.*, app. 17.

This impossibility, the government explains, stems from the fact the guidelines are classified. Below, we will show that the judiciary has also embraced this paradox, and reflect on where it comes from. We will argue that it has very clear historical roots in the military control of the West Bank and Gaza. But before that, another short intervention: even though they were not discussed in *Public Committee*, the way evidence is organized in security-related criminal procedures and the way criminal complaints about torture are handled are both essential parts of *managing necessity*.

5. The Structure of “Covering Up”

When discussing how torture was kept from public scrutiny following *Public Committee*, it is useful to return to the decision. As Justice Barak explained, the decision is not based on the full information on physical means of interrogation in Israel. Rather, its factual basis was limited to the materials that the petitioners provided—without full disclosure by the state.⁶⁹ Two bodies of information were missing. One was a comprehensive catalogue of the methods of torture. The State agreed to expose this information to the court only *ex-parte*. As the petitioner did not approve of such a course of action, only the methods that the petitioners knew about (a very carnal knowledge) were discussed.

The other body of unavailable evidence was the guidelines that outlined when the State would use torture. Here again, the State refused to expose this evidence in open court. The Court did, however, have a general idea what the guidelines looked like. As we will explain below, these were an early prototype of the Rubinstein guidelines, which were discussed many years earlier by the Landau Commission.

The earlier guidelines, which were deemed illegal, are strikingly similar to the contemporary ones. This is how the ISC describes the guidelines:

The decision to utilize physical means in a particular instance is based on internal regulations, which requires obtaining permission from the higher ranks of the GSS. The regulations themselves were approved by a special Ministerial Committee on GSS interrogations. Among other guidelines, the committee set forth directives regarding the rank required of an officer who was to authorize such interrogation practices. These directives were not examined by this Court.⁷⁰

Of course, we may pose the question of whether the ISC could (and should) have provided the petitioners with a remedy that would allow a procedure in which both sides could inspect *all* the relevant material. But regardless of whether the court could have done that, from the present point of view what must be emphasized is that such disclosure was never achieved. Thus, there was no fresh start, after which state efforts to “cover up” practices of torture would have to begin anew. Even publicly known and relevant methods of information control did not come under review.

One practice that may have come under review in a fuller examination of the administrative mechanism fostering torture would have been the way evidence is

⁶⁹ *Public Committee*, *supra* note 1, at paragraph 8.

⁷⁰ *Id.*

organized in Israeli Military Courts. The manner in which we discussed the memo from the evidence in Bahjat Yaman's case may have created the false impression that evidence of torture is readily available for defendants and defense attorneys. The original memo indicating the *necessity procedure* was indeed obtained from Yaman's attorney, Mr. Labib Habib. Yet, Mr. Habib did not have a copy of this memo. When he requested one, he was only permitted to make a handwritten reproduction in the prosecutor's office.⁷¹

In order to understand the context in which a defense attorney confronts such a Kafkaesque demand, one must first understand the nature of the Military Court, the venue in which many of the "security" cases are heard in Israel.⁷² Located on the margins of the West Bank, these courts are military institutions, constituted by the power of the Emergency Ordinance (1946) inherited by Israel from the end of the British colonial period. Palestinians are tried there by soldiers for "security" crimes, which are defined quite broadly. Although most, if not all, of the crimes adjudicated in these courts are part of a national struggle for independence, the people tried there are not recognized as prisoners of war, but as common law defendants detained under special "security prisoner" status. A minority of cases are associated with terrorist bombings of civilian targets within Israel. Others include, for example, quasi-military actions in which Palestinian soldiers resisted the entry of the Israeli military into Palestinian cities; shootings and attempted shootings of settlers; arms trade on behalf of the Palestinian Authority, without permission from the Israeli government; and often times misdemeanors of minors such as throwing stones at Israeli soldiers.

These procedures were historically the most tainted with torture, as shown by the Landau Commission (see below). The December 2007 report on the military courts published by the Israeli NGO Yesh Din reflects some of the serious concerns regarding their protection of the right to due process.⁷³ Perhaps the most injurious aspect of these military procedures pertains to Mr. Habib's difficulties obtaining evidence of torture. The report notes that "[i]n case of a defendant under interrogation by the GSS, the investigation material in many cases will not include the notes of the GSS interrogation."⁷⁴ But from our perspective, what is even more disturbing is that defense lawyers have to tolerate such notes at all. These are not

⁷¹ The state never denied that Yaman was tortured; when writing his verdict, the military judge specified that information regarding "special interrogation methods" was brought to the defense's knowledge in due form. BS JS 3029/05 Bahjat Fathi Youssef Yaman v. The Military Prosecutor (Petition for discovery of the information having to do with the interrogation of the petitioner and the main witness against him. The petition was denied. This material, which is a decision in a motion in a military court, remains unpublished and may be very difficult to obtain).

⁷² For an ethnographic study of this venue see LISA HAJJAR, *COURTING CONFLICT* (2005); For a report on procedural rights granted (and violated) in military courts see Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (2007), available at www.yesh-din.org/site/images/BackyardProceedingsEng.pdf (last visited Oct. 31, 2010).

⁷³ Yesh Din, *Backyard Proceedings*, *supra* note 72.

⁷⁴ *Id.*, at 116.

records of the interrogation; there is no statute specifying what must be included in them; they are written in shorthand and after the interrogation is over, as is completely clear reading the memo on Bahjat Yaman. They would surely not pass muster as police documentation, requiring word-per-word records signed by detainees, and sometimes visual and/or auditory records of interrogations. Thus, they obstruct the ability of defense lawyers to prove the abuse of their clients. In the case of Bahjat Yaman, for example, we do not get any idea what exactly has been done to him. If there is any documentation lying in closed drawers, defense lawyers have not been able to find out.

In a scene from *The Battle of Algiers*, a scrawny young man sits stooped in a room crowded with French troops, his bare torso shiny with perspiration. "Now tell us what you told us before," demands one of the Frenchmen, sticking a microphone in the Algerian's face. The man sputters out his rank and position in the *Front de Libération Nationale*, the Algerian insurgent group the French military is trying to defeat. "Okay, that's enough," responds the French soldier, and moves away quickly with the documented confession. The viewer easily fills the gap: confessions are first extracted by force; only after that, they are repeated and recorded, so as to be used in a trial. Meanwhile on the screen, the camera moves to the torture room. Belts and ropes tie male bodies askew.

The similarity between the illicit practice portrayed in the classic war film and the procedure in Israel's military courts is considerable, even if we don't have the shot from the interrogation room. After the suspect is interrogated by the GSS, the officer fills in his shorthand memo of the interrogation. The detainee is then given over for a police interrogation, where he is ordered to repeat the statement he gave to the GSS officer.⁷⁵ The police interrogator is equipped not only with his documentation devices, but also with the memo the GSS interrogator had written behind closed doors. What the Yesh Din report criticizes is that the GSS memos are often not included in the evidence material. But even when the memos are given to defense lawyers, they are designed to make it almost impossible to find real accounts of the stories their clients tell them.

The division of labor between GSS interrogators and police documenters is not the only way administration is designed for impunity. Apart from criminal procedures in which the validity of confessions is disputed, information on torture might have come to light in the context of criminal complaints against GSS interrogators. As quoted above, the last available numbers that we know of recorded around 500 such criminal complaints since *Public Committee*. These did not yield one criminal indictment, or even one criminal interrogation. Only two interrogators were subject to disciplinary sanctions.⁷⁶

⁷⁵ Motion on behalf of the petitioners *supra* note 51, at para. 113-120, and also app. 20, which is an affidavit by attorney Lea Tsemel describing the separate evidence materials. I've learned about this separation of evidence from first-hand practical experience.

⁷⁶ *Id.* at para. 130, and app. 22-23, which are copies of letters from the Israeli Ministry of Justice, in reply of a freedom of information inquiry about this issue.

Even if, as some have suggested, many complaints were unwarranted, it seems highly implausible that none of the 500 amount to criminal *suspitions*. The real reason for these statistics seems to lie in the compromised independence of the prosecution. When a victim of torture files a criminal complaint, it is passed to “*the reviewer of complaints filed by people interrogated by the GSS.*” This is the official in charge of deciding on a possible indictment. The position is held by a senior GSS interrogator, who is given instructions by the AG office, but who *continues to work under the GSS.*⁷⁷ The Israeli NGO B’Tselem has been extremely critical of this administrative structure, claiming among other things that it results in a substantively decreased number of complaints.⁷⁸

6. *Judicial Complicity after Public Committee*

The central tenets of *necessity management* have been called into question in courts in two contexts. The first was in the area of criminal procedures, in which the admissibility of confessions was contested. The second was a contempt motion filed at the ISC to declare that the administrative use of a “necessity procedure” violates the holding of *Public Committee*. In both contexts, courts have refrained from intervening in the procedure.

The existence of a procedure is rarely dealt with in criminal cases, even when the admissibility of confessions is challenged. However, in at least two such cases in the Jerusalem district court, the procedure came up and was upheld. One case in which this procedure left visible footprints is *State of Israel v. Amro Al Aziz*. Justice Segal expressly stated that:

[The interrogators] implemented in the case of Ahmad an interrogation procedure, that is supposed to grant immunity by virtue of the necessity defense according to paragraph 34(11) of the Penal Law 5737(1977), which the G.S.S. interrogators call the “necessity interrogation” procedure. In court, Ahmad detailed the interrogatory means implemented against him, including physical pressure and threats (pp 113, 114–135), and in the primary examination and the cross examination, the interrogators even clarified the import of the means implemented including physical pressure (testimony labeled “Dotan” on pp. 142, 143, and 157).⁷⁹

⁷⁷ B’TSELEM, *UTTERLY FORBIDDEN* 74-75 (2007). Available at: http://www.btselem.org/English/Publications/Summaries/200705_Utterly_Forbidden.asp (last visited Oct. 31, 2010)

⁷⁸ *Id.* at 76. “Against the background of the substantive defects inherent in this ‘investigative’ mechanism, it may be held that the State of Israel is violating its obligation under international law to investigate suspected cases of torture and, where necessary, to prosecute the offenders. Moreover, this mechanism sends . . . a clear message that the likelihood action will be taken against their abusers is negligible. The traces of this message are seen in the refusal . . . to file complaints, despite the legal advice . . . Of the nine persons whom the organizations have contacted to date, four have refused the suggestion because of their total lack of faith in the investigative system.”

⁷⁹ TPH 775/04 *State of Israel v. Amro Al Aziz* (10.29.05, unpublished), at 59. *See also id.*, 7.

Although “granting immunity” is seemingly contradictory to Justice Barak’s holding, the procedure was upheld and the statement in question was deemed admissible. Justice Noam, who also presided over the case, concurred on this point: “the interrogators viewed the means that they implemented, which they called ‘necessity interrogation,’ as protected by virtue of the necessity defense according to paragraph 34(11) of the Penal Code.”⁸⁰

In November 2008 the *necessity procedure* was submitted for the review of the Israeli Supreme Court. Almost ten years after Justice Barak’s grand decision, the Public Committee Against Torture again challenged state practices of interrogation. Following Justice Barak’s decision in *Public Committee*, the organization filed the challenge as a motion for contempt. The claim was a very simple one: the very existence of a *procedure* negates the criminal protection of necessity and turns it into an authorization in advance.

Justice Dorit Beynish, the current President of the ISC, based her summary dismissal of the motion on two propositions: (1) a motion for contempt was not the right procedure; (2) the plaintiff has not laid out a sufficient factual basis for “the severe claim that has been raised.” In light of the considerable evidence presented above, the decision seems to ignore well substantiated facts. This is particularly significant because the State did not dispute the existence of the procedure but contended that it was in line with *Public Committee*.

Justice Beynish, however, found that a decision allowing institutionalized torture is a reasonable interpretation of *Public Committee*. As she explained, the motion for contempt was the wrong procedural avenue, precisely because deciding on this issue demands an *interpretation* of *Public Committee*, and is not simply an issue of *applying* the decision. The decisive paragraph in *Public Committee* Justice Beynish invokes includes the following statement: “we do not exclude the possibility that the protection of ‘necessity’ will be awarded to a GSS interrogator, *through the discretion of the AG in his decision if to prosecute*, or, if he stands trial, through the discretion of the court.”⁸¹ (emphasis added). Hence, it seems that the ISC is well aware of the function the application clause has fulfilled in reality, and deems it acceptable.

⁸⁰ See also, from the Sayd case: “From what was said it emerges that there was justification for holding the interrogation for many hours and even during the nighttime hours in terms of the importance and urgency of the matter. In the course of the interrogation, the accused was not deprived of sleep intentionally, for a period of time, as an end unto itself, and when the ‘necessity interrogation’ ended the accused was allowed time to rest, with the purpose of not wearing him down” TPH 775/04 State of Israel v. Al Sayd (9.22.05, unpublished) (emphasis added).

⁸¹ HCJ 5100/94 Public Committee against Torture v. State of Israel [2009] available at - <http://elyon1.court.gov.il/files/94/000/051/n15/94051000.n15.htm>

Part II: The Landau Commission and Necessity Management

1. Torture as Reasonably Foreseeable

Given Justice Barak's choice of words in *Public Committee*, continued torture can only be deemed reasonably foreseeable. Such predictability can also be demonstrated through a discussion of the historical context in which the decision was written. In Part I, the *application clause* was in the center of our textual argument supporting this unhappy conclusion regarding *Public Committee*. As indicated towards the end of Part I, this realization is supported by a relatively recent ruling by the current ISC President, Justice Dorit Beynish.⁸² Building upon the fact of continued torture, this section will engage in a kind of reverse engineering of the decision, reflecting upon the historical conditions in which it became possible.

An understanding that torture is particularly difficult to eradicate from institutional settings underlies the argument in our previous section. We hinted at this difficulty in the introduction, where we briefly discussed the incentive structure implied in *Public Committee*. Much of the existing literature on torture supports the assertion that torture has this "addictive" characteristic.⁸³ Revisiting his classic 1978 essay *Torture*, Henry Shue vividly describes this particular aspect of torture. Shue argues that the expectation that a state will follow norms requiring that torture be applied only in extreme situations is analogous to an expectation that an alcoholic would *drink lightly*; everyone knows that such a requirement is impossible, he explains.⁸⁴

Shue writes about post 9/11 America. In this environment, torture had returned, and its academic understanding has (perhaps) become more thorough. However, the presiding judges in *Public Committee* also recognized the potential slippery slope when they decided the case. The same idea is formulated very lucidly in the concluding part of the Landau Commission Report—which *Public Committee* rejected.⁸⁵

In 1987, the Landau Commission published a detailed report on the use of "physical pressure" in the GSS.⁸⁶ This report is the obvious and most fundamental basis for any kind of historical contextualization of *Public Committee*. Its reasoning is rich, if sometimes baffling. Its arguments provide the intellectual source for the *necessity procedure*, and are early precursors of American attempts to legalize torture.

In a discussion that recalls Shue's image of the drunkard, the Commission describes an institutional dependency of the GSS on methods of torture.⁸⁷ These

⁸² *Id.*

⁸³ See Scheppelle, *supra* note 2; Shue, *supra* note 5.

⁸⁴ Shue, *supra* note 5, at 234.

⁸⁵ *The Landau Report*, *supra* note 14, at 182.

⁸⁶ On the statutory framework pursuant to which the commission was created, *see id.* at 146.

⁸⁷ *Id.* at 184:

We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of the tool of interrogation of suspects, in order to extract from them vital

claims of dependency by state officials required that the ISC give extra attention not only to the legal prohibition on torture, but also to the possible problems in applying the decision. However, such a prudential sensitivity does not exist in the application clause, which as we have shown was counterproductive to helping Israel recover from its habit.

The Landau Commission Report doesn't leave much room to doubt that a reasonable judge could have foreseen that the mere discussion of the question of necessity would open the way to physical abuse. Whether the protection of necessity should be available for interrogators is a longstanding debate.⁸⁸ Pragmatically, the choice to discuss the question had quite identifiable probable results. Judicial decisions are (and should be) drafted not only in an application of the relevant norm to a set of facts, but also with view to the consequences of their promulgation and enforcement.⁸⁹ To be sure, in order to decide on the merits, there was no need to reach a decision on the issue of necessity;⁹⁰ the decision could easily have been written while leaving this contested issue to be argued in an actual criminal procedure against an interrogator who would be suspected or charged with a crime related to torture. Furthermore, if the court had taken seriously the foreseeable problems in administering its judgment, the procedural instruments would have been readily available. These could take the form of various injunctions, which could result in no less than restructuring practices of interrogation in the GSS.⁹¹

It may very well be that the basic flaw in the argument from "necessity" in *Public Committee* is that it paints an imaginary representation, which has no existence in

information known only to them and unobtainable by other methods. The effective interrogation of terrorist suspects is impossible without use of means 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. Interrogation of this kind is permissible under law, as we interpreted it above, and we think that a confession thus obtained is admissible in a criminal trial, under the existing rulings of the Supreme Court.

⁸⁸ This debate is hardly new. The language of the Lieber Code, one of the first codes of international crime, rejects torture under "military necessity:" "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions". Notably, there is no mention of "interrogational torture" (Henry Shue's term), which is considered to be the most prevalent variety today (with a few reservations that we shall present). For a normative argument against the recognition of such a protection see, e.g., McMahan, *supra* note 5 at 241-248.

⁸⁹ *Id.* at 242.

⁹⁰ Justice Dieter Grimm of the German Constitutional Court, in a conversation at Yale Law School, made an interesting comparison with a German case, in which the Constitutional Court struck down a law permitting firing on an airplane overtaken by terrorists. As Grimm explained, the German court would not discuss whether shooting in such circumstances would provide for a defense of necessity. Rather, it decided to defer this question to when such an argument will actually come up.

⁹¹ For a classical discussion of such remedies in the American context, see OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

reality. Regardless of its conceptual validity, and regardless of the further step Justice Barak makes with the application clause, this argument must also be understood as inviting a slippery slope. Scheppelle makes this point discussing the “ticking bomb” scenario as a hypothetical assuming “that you . . . and the terrorist are *alone in the world*.” (recall the *condition of experience*):

The question, therefore, is not whether “you” as an individual should torture, but instead whether a nation should have a policy approving the use of torture – a very different moral matter. As a result, the question should be framed not [as] a matter of personal choice, but instead as a decision made by a professional interrogator who is following institutional rules.⁹²

Looking back at Israeli history, we find that in the rare instances when the question was framed in such an institutional manner, the answer was to authorize torture. This happened with Rubinstein’s memo, but before that—and very importantly—in the Landau Commission Report. These two documents suggest that the shift in interrogation procedures was actually a very minor one. On a high level of generality, the mechanism of managing torture that appeared after *Public Committee* is the very mechanism the Landau Commission proposed: instead of open admission and perhaps even legislation (like the Commission suggested), it found its place in the inner workings of security bureaucracies.

Although it does not use the word torture in describing Israeli practices, the Landau Report was the first official Israeli document to show that physical pressure was systematically used against detainees. Allegations of torture of Palestinian detainees were voiced before the report was published, but this was doubtlessly the deepest and fullest examination of such practices to date.⁹³ Justifiably or not, the Commission’s composition and its motivations lent it undisputed credibility. The fact that the report dates the beginning of torture to the occupation of the West Bank and Gaza intimately ties this practice to the form of military control that had developed in these areas. And the fact that the report was published just before the first *Intifada* shows that torture was practiced *before* the Palestinian population rose against Israeli control. This, of course, raises doubts about the traditional framing of the torture issue as emerging in the face of insurgency or popular resistance, and suggests that it may have been a regular strategy of control.

Two public scandals implicating the GSS in illicit treatment of detainees led to the decision to establish the Commission, headed by former ISC Justice Moshe Landau. One involved the torture of Izat Nafsu, a Circassian Israeli military officer, who had been convicted of treason.⁹⁴ The other involved the murder of two Palestinian detainees who hijacked a bus—and the subsequent cover-up of the story.⁹⁵

⁹² Scheppelle, *supra* note 2, at 294.

⁹³ Hajjar, *supra* note 72 at 68 – 70.

⁹⁴ See CA 124/87 Izat Nafsu v. Chief Military Prosecutor [1987] IsrSC 51(2) 631.

⁹⁵ See *The Landau Report*, *supra* note 14 at 148; Hajjar, *supra* note 72, at 70.

The report harshly condemned the scandals, emphasizing the disastrous damage they caused to the public image of the GSS as a law-abiding security service.⁹⁶ While the report reflects an “understanding” of the need to use “moderate physical pressure,” it expresses moralistic alarm at what it describes as a practice of systematic perjury by GSS interrogators who testify on the interrogation of Palestinian detainees:

The revelation of this method increased the crisis of confidence in the GSS’s moral fiber, which had begun earlier, and it is undermining the sense of self-confidence and self respect of every GSS officer. This evil must be eradicated, for it is a matter of life and death for us all, in the full sense of the term.⁹⁷

After providing no less than an “essential catharsis”⁹⁸ purging the GSS from the former practices of perjury, the report recommends a framework for the legalization of “moderate physical pressure.”⁹⁹

Reading the report from a contemporary perspective helps explain where the three central aspects of *necessity management* had come from: (1) the scheme of “confirmations and consultations,” (2) the idea that the criminal doctrine of necessity can be applied within an administrative procedure to be outlined in a document, and (3) the mechanisms for covering up the evidence of torture. All of these did not appear out of thin air. Long before Rubinstein could write his memo on Justice Barak’s application clause, the basic tenets of the *necessity procedure* were well in place.

2. *Historical Continuities: Confirmations and Consultations*

Although in its conclusion the report does recommend legalizing torture, it is far from endorsing arbitrary violence against detainees. The report recognizes that violence has been systematically deployed against Palestinian detainees, and asserts that such violence is irreplaceable by other means of interrogation. It is thus an early example of a highly creative project, one that later gained substantive momentum in the U.S. under the Bush administration: a project of containing torture within the rule of law. “Physical pressure,” writes the commission, was generally kept to the minimum necessary level; recognizing it legally is understood as a safeguard for keeping it that way.

In line with its particular concern with the development of regularized perjury, the Commission was truly concerned with uncontrolled, spontaneous violence inflicted on detainees by individual interrogators in a sporadic manner. “Strict care must be taken, lest a breach of the structure of prohibitions of the criminal law bring about a loosening of the reins,”¹⁰⁰ it warns. The two public scandals that preceded the decision to establish the Commission were understood as such eruptions of chaotic

⁹⁶ *The Landau Report*, *supra* note 14, at 148.

⁹⁷ *Id.* at 148 – 149.

⁹⁸ *Id.* at 149.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 174.

and localized violence. The obstructions of attempts to investigate these events are thus interpreted as direct and natural extensions of this kind of truly abhorrent violence against detainees and as their embodiment in the public sphere.

A fascinating aspect of this aversion towards unregulated violence is the way it is fraught with allusions to totalitarian regimes in which such violence prevails.¹⁰¹ This is particularly astonishing when contrasted with an alternative understanding of totalitarianism, which tends to emphasize uncompromising rule-following as its central facet. Hannah Arendt famously demonstrates such an understanding in her account of the Eichmann trial in which she portrays the defendant as the paradigmatic follower of orders from above.¹⁰²

It is reasonable to believe that the Commission was intimately acquainted with such a view of totalitarianism. The head of the Commission, former Justice Landau, was the same Justice Landau who presided over the court in the Eichmann trial, the same Justice Landau who, as Arendt noted, had “led his colleagues to use their German Mother tongue with Eichmann.”¹⁰³ Again, *The Battle of Algiers* provides an illuminating illustration of what’s at stake. Recall the French protagonist of the film, Lieutenant-Colonel Mathieu. When asked about torture in a press conference, Mathieu provides an explanation of why the black letter of the law sometimes should not be followed. The officer recalls his previous career fighting Nazis, presumably the most salient example of the dangers of strict rule-following. On one thing, however, he is in agreement not only with Justices Landau and Barak, but also with contemporary US official discourse: “we do not use the word torture.”¹⁰⁴

The Commission’s political logic, however, demanded that the State not only take responsibility for violence (a result which Justice Barak lays on the shoulders of an individual like Mathieu), but also establish a more solid monopoly on violence. Such a monopoly is understood as a trope of democracy (against totalitarianism).

¹⁰¹ See, e.g., *id.* at 163. For a discussion of comparable attempts judges in the US had made to distinguish themselves from totalitarianism, see Judith Resnik, *Detention, The War on Terror and the Federal Courts: An Essay in Honor of Henry Monaghan*, COLUM. L. REV., 149 (forthcoming).

¹⁰² HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Viking Press 1971) (1963).

¹⁰³ *Id.* at 4.

¹⁰⁴ Years later, John Yoo made use of this omission of the word torture in his analysis of Public Committee, Jay Bybee, Memorandum for A. Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A (Dep’t of Justice August 1, 2002):

While the Israeli Supreme Court concluded that these acts amounted to cruel and inhuman treatment, the court did not expressly find that they amounted to torture. To be sure, such a conclusion was unnecessary because even if the acts amounted only to cruel and inhuman treatment the GSS lacked authority to use the five methods. Nonetheless, the decision is still best read as indicating that the acts at issue did not constitute torture. The court’s description of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture. While its descriptions discuss necessity, dignity, degradation, and pain, the court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture.

Like *Public Committee*, the Landau Report also paints Israeli interrogation procedures in heroic colors. Here, however, the heroism is quite different. Instead of the revolutionary GSS interrogator working single-handedly to defend society, risking not only life and limb, but also personal reputation, we get the heroism of the State.¹⁰⁵ This is an impersonal order of power which can be reduced to the pure enforcement of the law.¹⁰⁶ When the Commission strikes dramatic chords with expressions such as “eradicating evil,” or the “life and death for us all,” it speaks in the name of what is perceived to be a united polity, for which enforcement is not merely a question of security, but also an expression of values. Where Justice Barak later positioned an individual who is forced to act immediately in the face of a nerve-racking moral dilemma, the Commission posits *the nation*.¹⁰⁷ Such a vision of unity is in considerable tension with the fact that the *victims* of torture are as a general rule not members of the polity. This high-ground of moral rhetoric at the expense of non-citizens is symptomatic of colonial regimes. The unquestionable faith in “the rule of law” provided the justification for state violence against “others.”¹⁰⁸ As we will show below, the Commission had to grapple with this problem in its assessment of torture; however, it didn’t go so far as to discuss the contradiction between the identity of the tortured and its image of unity.

Individual interrogators, on the other hand, are for the Commission first and foremost hard workers and devoted public servants. “The investigation staff of the GSS is characterized by professionalism, devotion to duty, readiness to undergo exhausting working conditions at all hours of the day and night and to confront physical danger, but above all by high inner motivation to serve the nation . . .”¹⁰⁹ Their perjury and cover-ups are understood as the faltering behavior of a good boy, who has gone ahead and done something that he should have asked permission for.¹¹⁰

At the same time, interrogators are thought of as post-traumatic patients who deserve sympathy for their abandonment by the polity and by law. This abandonment is what made them resort to lying. The Commission’s reasoning for adopting interrogation procedures that will openly employ torture is thus couched in a therapeutic language. It is formulated so that GSS interrogators “may be able to

¹⁰⁵ Whereas life and limb can be translated into (celebrated) sacrifice, willingness to risk personal reputation is precisely the willingness to risk that potential. For a phenomenology of sacrifice in the “War on Terror,” see Kahn, *supra* note 2, 101–119.

¹⁰⁶ Paul Kahn considers Justice Barak’s decision (and not the Landau Commission Report) precisely as such a reduction of power to law enforcement. But which of the two positions engages in such a reduction? Perhaps both do, although in different ways. *Supra* note 3, at 19.

¹⁰⁷ In this respect, the commission’s vision seems to be more realistic. See Scheppelle, *supra* note 2, at 294, 307.

¹⁰⁸ For a comparison with the French/Algerian context, see MacMaster, *supra* note 19, at 6.

¹⁰⁹ *The Landau Report*, *supra* note 14, at 148.

¹¹⁰ *Id.*: “It is all the more painful and tragic that a group of persons like this failed severely in its behavior as individuals and as a group. In saying this we are not referring to the methods of interrogation they employed – which are largely to be defended, both morally and legally . . . but to the method of giving false testimony in court, a method which has now been exposed for all to see and which deserves utter condemnation.”

overcome the feelings of distress and anxiety due to the burden of the past that weighs on them.”¹¹¹

Rubinstein’s implementation of the application clause, based on *consultations* and *confirmations* grows from this logic, which juxtaposes the unity of a polity defending its life with the need to embrace interrogators in legal assurances. Spreading *mens rea* up the administrative ladder is conditioned upon understandings of the state and of the interrogator which are first articulated not in *Public Committee*, but that already appear the Landau Commission Report. This is the main historical continuity that connects the whole period in question, from 1987 to 2009.

However, the Commission does not invent these categories. Its reasoning flows from the needs of military control that developed in the West Bank and Gaza after their occupation by Israel in 1967. Once again, the particularities of how confirmations and consultations took place in the GSS since 1967 remain classified. They are described in the second part of the report, which was not published, and which has not been revealed. But regardless of the specificities, the report doesn’t conceal the fact that such norms were at work since the military control began. The reader learns that since 1967 “permissions” were given “from time to time to employ means of pressure;”¹¹² these were juxtaposed with consultations, which are described as a “constant examination of the effectiveness of such methods, as against their necessity.”¹¹³ The regulations are mutable, reminding us of the dynamic nature of norms under the *necessity procedure*. “Permitted methods” were in place, even if admittedly there were some “deviations” from them;¹¹⁴ and finally, they were all subject to review from above.¹¹⁵ The following paragraph encapsulates many of the important features of the normative model inherited from the reality described by the Landau Report. Hierarchy, secrecy, mutability, and the relation of these to the occupation of the West Bank and Gaza are all discussed very frankly:

GSS interrogators should be guided by setting clear boundaries in this matter, in order to prevent the use of inordinate physical pressure arbitrarily administered by the interrogator. As is set out in detail in the second part of this Report, guidelines concerning such boundaries have existed in the service ever since the scope of investigation of HTA [“Hostile Terrorist Activity”] was expanded, as required by the new situation following the Six Days War. These guidelines underwent occasional changes, generally in the directions of restrictions on the use of physical force, which were imposed from time to time at the initiative of the political echelon, until today the

¹¹¹ *Id.* at 149: “We regard our principal function as being to guide the essential process of rehabilitation and healing with regard to the GSS activity on HTA, by integrating this vital activity into the framework of the values of the rule of law which the state of Israel espouses.”

¹¹² *Id.* at 158.

¹¹³ *Id.* at 158; Notice how close the language is to that of Prime Minister Olmert’s letter quoted above.

¹¹⁴ *Id.* at 159

¹¹⁵ *Id.*

authorization of physical contact with the person under interrogation is extremely limited.¹¹⁶

The Landau Commission Report, *Public Committee*, and the current regime of *necessity management* have important commonalities. At all three junctures, Israel admitted the existence of guidelines but concealed their content. At all three points in time we are told that torture, when applied, is being implemented through a structure of rule-following. The Landau Commission derives this structure from the custom of interrogators under military control in the West Bank. From there it morphed onto Rubinstein's conceptualization of "confirmations and consultations." From 1967 onwards, we are presented with an asymptotic curve measuring the amount of torture applied. The triumphant, enlightened narrative in the excerpt above from the Landau Report is that of the ongoing gravitation towards a measure of zero torture. But importantly, this curve will never touch zero; it is not meant to touch zero, and it logically cannot.

German Jurist Karl Von Savigny famously argued that "[l]aw comes into being through custom and popular acceptance, through internal, silently working forces and not through the arbitrariness of the law giver."¹¹⁷ Paraphrasing his maxim, we now find a normative system that came from the internal, silently working forces of the law giver himself.

3. *Historical Discontinuities: Necessity as Law*

As emphasized above, the *necessity procedure* and the analysis of the doctrine of necessity in *Public Committee* are seemingly incongruent, or even contradictory. Whereas Justice Barak reiterates the conditions of experience and temporality, the procedure utilizes the application clause in order to introduce a *forward-looking* version of necessity; we thus saw that according to the Israeli government's current position, torture can be authorized ex-ante by high-ranking officials. Yet it remains an illegal, even if un-prosecuted, practice.

While it is clear why the executive took into account the application clause in order to create a bureaucratic mechanism for such authorization, it is less clear why the concept of "necessity" is reintroduced. This is especially curious since the application clause does not require the AG to make any findings on necessity in his expansive prosecutorial discretion. A procedure that would not allude to "necessity" at all would suffice for the government to declare that "guidelines have been followed." Why use terminology that accentuates the contradiction between the actual practices and Justice Barak's formulation of necessity as a judgment that can be made only after the fact?

Here too, the executive has reverted back to ideas that were established by the Landau Commission well before *Public Committee*. As we have shown, the general point is not that torture should be stopped, but that it should be applied as little as possible.

¹¹⁶ *Id.* at 184–5.

¹¹⁷ KARL VON SAVIGNY, THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE, 30 (Abraham Hayward trans., 2007)(1831).

Contrary to the consultations scheme, which according to the Landau Commission is as old as the occupation itself, some original statutory interpretation which the commission undertook comes into play here. A considerable portion of the report is devoted to statutory analysis of section 22 (at the time) of the Israeli Penal Code, which formulated the protection of necessity under Israeli criminal law. The Commission's own understanding is that its analysis is of groundbreaking (and implicitly international) importance in the field of anti-terrorism law.¹¹⁸

Relying on what is essentially a proportionality analysis, the Commission reaches the conclusion that the prohibition on torture is not absolute, but rather relative.¹¹⁹ Indeed this brand of legal reasoning is reflected in the very euphemism the Commission coined for torture: "moderate physical pressure." As the Commission explains, applying such pressure requires three conditions:¹²⁰ (1) action has been taken to prevent grievous harm to the detainee, his "honor,"¹²¹ a third party, or property; (2) it is impossible to prevent an anticipated harm in any other way; and (3) no more than reasonably necessary pressure was applied.

A fourth condition, which is rejected by the Commission, is that of immediacy. Under this condition, "the defence of necessity is not applicable except when, because of the time factor, the danger is liable to be realized immediately, and therefore it is essential to get the information immediately from the suspect." This, however, "is not our opinion," writes the Commission, explaining that "the section itself makes no mention of such qualification; rather, it is built entirely upon the idea of 'the concept of lesser evil.'" Thus, "the harm done by violating a provision of the law during an interrogation must be weighed against the harm to the life or person of others which could occur sooner or LATER"(upper-case in the original).¹²² Note the close relation between Justice Barak's conditions of experience and temporality and the condition of immediacy, which was rejected by the Commission.

Only after eliminating this concept, and reiterating its replacement by "the concept of lesser evil," does the Commission move to the legal analysis of prerequisites for applying "moderate physical pressure." It therefore seems that the concept of lesser evil remains the most important one, while all the others are merely reformulations or subsets of it.¹²³ As Neil MacMaster has shown, this reasoning has a

¹¹⁸ *The Landau Report*, *supra* note 14, at 167: "In our opinion, great importance attaches to the defence . . . of "necessity" in sec. 22 of the Penal Law, where the GSS investigator's criminal responsibility is concerned. The significance of this defence in the special context of activities designed to foil terrorist acts has not yet been considered in an Israeli court ruling. In other judicial systems, in the common law world outside it, we found a discussion of it in legal literature, but there, too, the Courts have not yet expressed their opinion on it in this context, as far as we know. . . ."

¹¹⁹ On the problems with proportionality analysis in this context, *see* Scheppelle, *supra* note 2, at 313.

¹²⁰ *The Landau Report*, *supra* note 14, at 169.

¹²¹ This would normally be translated to English as "dignity."

¹²² *The Landau Report*, *supra* note 14, at 171.

¹²³ Arendt argued against the idea of *the lesser evil*, which she argues can make ordinary people participate in evil policies. As she puts it, "those who chose the lesser evil forgot very

very particular genealogy in the context of torture; like the ticking bomb scenario, it originates from the French-Algerian colonial context.¹²⁴

This conclusion is in conflict with Justice Barak's emphasis on the need for immediacy, as well as with other popular understandings based on the iconic "ticking time bomb" scenario. Lieutenant-Colonel Mathieu, who can now be consulted yet a third time, explains that the need for the (unmentioned) torture is based on the fact that the *Front de Libération Nationale* instructs its people not to talk for 24 hours.¹²⁵ During this time, the organization makes internal changes in order to render obsolete any information that might have been revealed. Torture and time are thus linked not only through the image of the ticking bomb, but also because of the dynamic nature of insurgency. That is not the case for the Landau Commission, which views torture from a disembodied god's eye and relocates temporally disparate events, placing them on opposite sides of a utilitarian formula. This formula, in turn, is conceptualized as an incarnation of the values of honesty and decency:

The deciding factor is not the element of time, but the comparison between the gravity of the two evils—the evil of contravening the law as opposed to the evil which will occur sooner or later; and as was stated above, weighing these two evils, one against the other, must be performed according to the concepts of morality implanted in the heart of any decent and honest person.¹²⁶

As opposed to the hierarchy of permits described in the report, which was adapted quite straightforwardly by the contemporary management regime, the traces of this doctrinaire analysis are more difficult to find. This is not surprising, as it is a corollary of the conception of torture as illegal but merely unprosecuted. The decision not to indict, however, uses the Commission's recommendations as derived from its proportionality analysis: as long as torture is "lite," it is possible to use disciplinary instead of criminal sanctions. As we have seen, disciplinary sanctions have come to displace criminal sanctions as the most severe sanctions applied in these cases.

4. *The History of Covering Up*

Tracing the history of the displacement of criminal sanctions for disciplinary ones, we have already gained insight into two of the mechanisms of "covering up." One is the Attorney General's failure to investigate complaints, which is conditioned upon internal, disciplinary sanctions. The other is the consistent pattern of guidelines and methods of torture remaining covert. But if torture was always so "lite," why are its methods not revealed? Perhaps the regime constituted by torture does not truly depend on actual contact with the detainee's body, but primarily on imagination. When the real currency exchanged in the give and take of the interrogation room is

quickly that they chose evil." HANNAH ARENDT, *RESPONSIBILITY AND JUDGMENT* 36-37 (2005).

¹²⁴ MacMaster, *supra* note 19, at 8.

¹²⁵ Rejali describes this historical context, *supra* note 43, at 480 – 486.

¹²⁶ *The Landau Report*, *supra* note 14, at 174.

not of pain but of emotion—terror—making torture work demands the active fantasy of what might be coming next.¹²⁷ This is the logic underlying the assertion of “the impossibility of employing these methods in the future, once they have been made known to the adversary,” which may explain the interconnectedness between the logic of proportionality and the need to keep secrets; with intensified fear it may also be possible to apply relatively lesser pain.¹²⁸ The utilization and manipulation of such fear is thus another aspect of torture that has been ubiquitous at least since 1987.

The Landau Commission Report also sheds light on the emergence of the exceptional practice of undocumented GSS interrogations. Whereas the Commission lays blame on the GSS for committing regularized perjury, the interrogators’ awareness of the need for *true* confessions is presented as a redeeming factor.¹²⁹ The interrogators that the Commission interviewed did not fail to impress it with their meticulousness in preventing false confessions:

The GSS personnel declared to us, with a hint of pride, that they had been extremely scrupulous in ensuring that any confession presented to the Court would be a truthful one, whatever the means used in obtaining it. Never, they explained to us, was such a confession brought before the court before it was examined and verified by other intelligence sources, including sources that could not be brought before the court.¹³⁰

The Commission did not find these statements by GSS interrogators to be merely persuasive. Alongside the strict conduct guidelines set from above, they are understood by the Commission as the very thing that separates, “as far as East from West,” GSS methods from “the notorious methods of the secret police in certain totalitarian states.”¹³¹ GSS interrogations seem to be understood as a quasi-court, even better than the real thing. They provide the judge with a ready-made truth.¹³² The niceties of evidence rules, which limit the court’s ability to probe and reach the

¹²⁷ The fact the methods of torture remain secret can have a terrorizing effect both on the detainee and on his group of affinity, as the worse method is always perceived as something that is yet to come. David Luban writes that “a practice that exists to make it easier to subdue and tyrannize people is fundamentally hostile to liberals’ political philosophy.” But concealing the methods of torture brings torture practiced in liberal democracies close in function (even if not in intensity) to torture practiced in despotic regimes. See Luban, *supra* note 2, 1433.

¹²⁸ *The Landau Report*, *supra* note 14, at 22.

¹²⁹ The following analysis of the way the GSS elicited confessions in interrogations employing torture sheds a different light on previous accounts, which tended to underemphasize confessions, assuming that torture was employed predominantly in the context of forward-looking interrogations aimed to extract intelligence. Compare, e.g., with Amand, *supra* note 13, at 656.

¹³⁰ *The Landau Report*, *supra* note 14, at 163.

¹³¹ *Id.*

¹³² Foucault writes about a very different historical context, but along similar lines: “The magistrate constituted, in solitary omnipotence, a truth by which he invested the accused; and the judges received this truth ready made, in the form of documents and written statements; for them, these factors alone were proof; they met the accused only once in order to question him before passing sentence.” FOUCAULT, *supra* note 19, at 35.

truth, are circumvented; truth-producing mechanisms that cannot be introduced in court—and in fact cannot even be mentioned straightforwardly—can be utilized. Thus, the Commission is led to believe that this did not yield false convictions (or perhaps decides to simply leave that possibility unmentioned): “there were cases where investigators had full confessions of persons under interrogation which were not presented in court, because the interrogators were uncertain about their veracity. Never, one of the investigators testified before us, did I feel that I was putting an innocent person into prison.”¹³³

Instead of accepting these assertions of the truth of the outcomes of interrogations as a defense for the GSS interrogators, the Commission could doubtlessly have seen them as part of the problem. For as much as it is a defense, it is in the same breath an annulment of the most fundamental principles of due process. The suspect does not have a right to present a defense, and no kind of separation of powers is observed. Grotesquely, the suspect is expected to simply rely on those who have tortured him to prevent his wrongful conviction.

After *Public Committee*, the GSS interrogators’ statements may seem irrelevant; after all, the conclusions of the Commission were rejected. But the evidentiary system, in which the defense is expected to believe the interrogator that he will enumerate in his shorthand memo all the illicit means of interrogation he had performed, preserves the same underlying assumptions.

Furthermore, the GSS’s purported goal of preventing false convictions is in irreducible tension with other statements in the report reflecting modes of operation that by no means emphasize truth finding. Hence, the Commission explains that as opposed to the police, who prioritize investigating crimes, the GSS considers this merely a secondary objective, which it was unwittingly assigned after the military occupation began.¹³⁴ For the GSS, the main objective is not backward-looking investigation of crimes already committed, but forward-looking: the foiling of terrorist plots. The Commission realizes the tension between foiling terrorism and the requirements of a trial. It therefore explains that the GSS has an independent interest in trials, which can also be considered victories when they prevent the next attack. One of the interrogators explained how this works: “From our point of view, obviously, the fact that the accused is convicted and jailed is part of the foiling process. The foiling element takes the form of the offender being ‘neutralized’ for the X years of his imprisonment. That is definitely foiling . . .”¹³⁵

It is not difficult to see, however, how such reasoning could increase the risk of false convictions. If the prison sentence is understood as serving the purpose of punishment, it is important to convict the person who committed the crime. Sentences cannot exceed legal limitations, which ostensibly reflect societal understandings of the gravity of the crime. These boundaries are unclear when the prison sentence is instead a form of forward-looking preventive detention; here, the objective is to put the defendant behind bars, regardless of punishment

¹³³ *The Landau Report*, *supra* note 14, at 162.

¹³⁴ *Id.* at 156.

¹³⁵ *Id.* at 156.

considerations. Clearly, a procedure in which interrogation methods are undocumented would make such a result more probable.¹³⁶

The Commission addresses quite straightforwardly the way evidence is organized so as to conceal the initial interrogation, in which the suspect's version first emerges. This practice, it explains, is entrenched in the traditions of the GSS from time immemorial. Again, it is presented as a byproduct of the same subordination of criminal justice to security. Notice that the *police* officer is expected to take the suspect's *confession*, rather than question or interrogate him.

GSS personnel have never engaged in taking down such confessions. They interrogate the accused in their interrogation premises, when the main effort is directed toward inducing the accused to show readiness to give information and in the process to admit to the acts attributed to him. Once this stage has been completed successfully and the suspect is actually ready to confess, he is handed over to a police investigator who takes down his confession in accordance with the law. This confession is subsequently presented in court by the policeman who took it down, and who appears as witness for the prosecution.¹³⁷

As shown above, this method of interrogation has remained unchanged in the regime of *necessity management* following *Public Committee*, and is in place to this day. While it would arguably be objectionable for a judge to simply strike down this well-established division of labor, the decision could have taken this into account somehow. As the report shows, it has been an essential part of the legal conditions for systematized abuse of detainees since the beginning of the occupation; thus, it must also be considered as an essential part of the prudential considerations on how to do away with such abuse. Ignoring this division of labor, on the other hand, has allowed the world the Commission described to remain very much a part of the Israeli criminal justice system.

Just how deep the separation between security and normal police realities runs can be seen in the importance the Commission attaches to the confessions obtained by GSS interrogators.¹³⁸ Whereas in criminal investigations, the police normally will

¹³⁶ Dershowitz accepts uncritically the proposition that there were no false convictions. Dershowitz, *supra* note 24, at 194.

¹³⁷ *The Landau Report*, *supra* note 14, at 159.

¹³⁸ The Israel Supreme Court has often struggled with the separation between "criminal" law and "security" law, often demanding a modicum of autonomy for the criminal procedure from security procedures. As Justice Rivlin recently stated:

We are dealing here with interrogations of *criminal* suspects. The framework in which detention is demanded is a *criminal framework*. Granted, these are special materials that present special challenges, but that does not mean that we are to ignore the fact that the suspect is interrogated about *his own* involvement in security crimes. During the interrogation he may be asked forward-looking questions on possible future terrorist activities. However, the meaning of this is not that this is merely a 'foiling detention,' because the interrogation and the detention depend on grounds that relate to his own involvement in security crimes. For this matter, he is a suspect. His rights as a criminal suspect must therefore be observed.

have access to a variety of sources of evidence, the Commission explains that under military control the only available source of evidence is the suspect. Whereas law abiding citizens generally perceive the solving of crimes to be in their interests, the GSS operates in hostile terrain:

[E]ye witnesses to acts of terrorism, such as the murder of a Jew in an Arab area, are unwilling to assist the investigators and generally even provide cover for the perpetrators because of the local population's sympathy for and fear of the terrorists. Only rarely is the perpetrator of a terrorist act caught red-handed.¹³⁹

Here the confession is not a truth-producing mechanism, and it is not applied, as it were, as an instrument of producing disciplined subjects.¹⁴⁰ The suspect is expected to confess, but there is no expectation of an expression of remorse or of an internalization of the values of the polity; individual responsibility, which is normally at center stage in criminal trials, is not at all what is put to question. The criminal is not expected to reenter the community that judged him. As John Langbein shows, torture used to be indispensable in the common law criminal justice system, as there was no other way to establish a conviction without multiple eye witnesses.¹⁴¹ Torture seems to have come back to that predominant position, as once again, confessions have become the only way to solve a case.

The Commission does not tackle the possible problems this may cause for enunciations in the name of a united polity "eradicating evil:" such enunciations may be voiced in the name of the *citizens*, but they cannot be ascribed to the *subjects* of this system of criminal law.¹⁴² The "security" the commission is speaking of is related more to the friend/enemy distinction than to a discourse on membership and public deliberation.¹⁴³ The justice system remains afflicted by the distinctions between us

See BSP 8823/07 Unidentified v. State of Israel [2010], available at <http://elyon1.court.gov.il/files/07/230/088/p25/07088230.p25.htm> (Hebrew, accessed Oct. 31, 2010).

¹³⁹ *The Landau Report*, *supra* note 14, at 157

¹⁴⁰ The terminology is taken from FOUCAULT, *supra* note 19.

¹⁴¹ John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978 – 1979). See also Luban, *supra* note 2, at 1435.

¹⁴² For the meaning of the differentiation between these two terms in the post-colonial context, see generally MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996).

¹⁴³ This is an allusion to Carl Schmitt's conceptualization of the friend/enemy distinction: "The distinction of friend and enemy denotes the utmost intensity of a union or separation, of an association or dissociation . . . [the enemy] is, in a specially intense way, existentially something different and alien, so that in extreme cases conflicts with him are possible." See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (trans. George Schwab, 1996) (1932). For a contemporary reading of this classic work of political theory see PAUL KAHN, *THE CONCEPT OF SOVEREIGNTY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (forthcoming).

and them—while each group’s security is the other group’s risk.¹⁴⁴ And justice becomes the extension of war—by other means.¹⁴⁵

In such a world, the moral repugnance often expressed regarding torture—which is sometimes imagined to be anchored in a more general moral principle of not harming the helpless—seems to take a totally different form.¹⁴⁶ The suspect is merely an extension of a greater group, which, at the moment of interrogation, is waging bitter war. Alan Dershowitz identified this belligerent conceptualization. While accepting the Commission’s conclusion that torture should be brought into the realm of law, he strongly rejected its reliance on the doctrine of necessity.¹⁴⁷ Evoking a particularly vivid image for this war, he aptly asks: “what if a suspected terrorist decides to resist the ‘physical pressures’ of his interrogators by physical countermeasures designed to protect his honor or person—i.e., what if he fights back? Could he defend himself against assault charges by invoking ‘necessity?’”¹⁴⁸

Does this kind of lawfare follow through to the contemporary regime of *necessity management*? First, it must be noted that the duality of functions at play in the report, which skips between intelligence interrogation and criminal investigation, is still very much present. The two kinds of interrogation are undifferentiated when leading to the courtrooms in the West Bank, and they are undifferentiated for detainees who are kept in custody by American forces but cannot be tried because they were too severely tortured. Even if, as David Luban argues, liberal democracies will only agree to consider torture for intelligence purposes,¹⁴⁹ when they do employ torture they will unavoidably have to cope with confessions as well. Thus, in the contemporary *necessity management* regime, courts indeed function as direct extensions of “security.”¹⁵⁰

This is a reality in which torture is prohibited and maybe reduced but not abolished; in which all the administrative instruments of torture are in place; in which defendants are systematically denied GSS interrogation evidence; and in which despite all of these concerns, international public opinion celebrates the Israeli

¹⁴⁴ As Paul Kahn writes about Nazi Germany, what we see here is “administration” that was “made to serve the ends of the political”. *Id.*

¹⁴⁵ “It is quite possible that war is the continuation of politics by other means, but isn’t politics itself a continuation of war by other means?” writes Michel Foucault, inverting a famous assertion by war historian Carl Von Clausewitz. MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED:” LECTURES AT THE COLLÈGE DE FRANCE 1975 – 1976, 48 (trans. David Macey, 2003).

¹⁴⁶ For an explication of the moral prohibition on torture along these lines see Shue, *supra* note 6, at 125.

¹⁴⁷ See Dershowitz, *supra* note 24.

¹⁴⁸ *Id.* at 198. Dershowitz, however, does not differentiate between “terrorists” and “rock throwers” in this context.

¹⁴⁹ Luban, *supra* note 5, at 1436.

¹⁵⁰ Recently, the Israeli government reiterated the argument that security investigators have access to fewer sources of evidence, and therefore should be allowed to use tougher means of investigation. See discussion in BSP 8823/07 Unidentified v. State of Israel, *supra* note 137.

rejection of torture. Such a reality can only be conceived of as an embodiment of warfare.

Part III: The Political Structure of Un-prosecution

1. Secret Norms

In a study of torture during the military control of the West Bank, Lisa Hajjar writes that after *Public Committee*, torture in Israel did not stop. Nevertheless, she writes, “the decision deprived practitioners of the cover of law.”¹⁵¹ It now seems that this is only partially true. Even if pushing torture outside the legal order has reduced the incidence of torture, it has simultaneously pushed any remedies further outside the reach of the victims. As much as it deprived the practitioners of the cover of law, it deprived torture victims of the protection of the justice system.

A system of authorization very similar to the one proposed by the Landau Commission was established in Israel. However, contrary to the Commission’s recommendations, it was not based on statute, but on a very particular kind of administrative regulation that remains classified. The well-known democratic shortcomings of administrative regulations can tell only a small part of the story. An exceptional space was created: an area recognized as one of state criminality, but protected from state enforcement. We have tried to show that this strange space often reflects (and affects) the precarious legal status not only of the victims of torture, but of Palestinians from the West Bank or Gaza at large; people who are not citizens but nevertheless are effectively subjects of enduring Israeli military control.¹⁵²

Paul Kahn takes Justice Barak’s decision in *Public Committee* as a quintessential example of the displacement of politics by law.¹⁵³ Contrary to what we may have seemed to suggest, we do not mean to make the opposite assertion, reducing law to politics (or war). Such an inversion is impossible, precisely because these distinctions may no longer be workable—particularly in the context of military control over a civilian population. What we find is a legal pluralism in which legislation, case law, and stealthy regulations, apparently in contradiction with one another, are woven together with “chains built on complicity between legal and illegal practice.”¹⁵⁴ Even if predominantly so, these instruments of power are not exclusive to the state. Apparent contradictions between different norms provide a variety of positions from which members of civil society can address power, strategically intervening in this

¹⁵¹ Lisa Hajjar, *supra* note 7.

¹⁵² Emphasizing the common interests of citizens and non-citizens who are effectively subjects of the same regime, Ariela Azoulay has suggested replacing the discussion of citizens with a discussion of “the governed.” See particularly in the first chapter of ARIELLA AZOULAY, *THE CIVIL CONTRACT OF PHOTOGRAPHY* (2008)

¹⁵³ Kahn, *supra* note 2, at 19.

¹⁵⁴ John and Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW AND DISORDER IN THE POSTCOLONY* 1, 18 (John & Jean Comaroff eds., 2006).

legal-political nexus. So far, the success of such interventions in stopping torture has been limited. This, however, is not a *necessary* result.

Whereas such channels of intervention are open, in principle, both to Israeli citizens and Palestinian non-citizens, for the latter they are much harder to access. Even though Palestinians are (almost) the only victims of torture, the bureaucracy is designed to repress the complaints they file and criminal procedure is designed to look away. Even with all the historical shifts we have discussed, the vulnerability of non-citizens remains constant over time. Indeed, it is the political condition of torture since antiquity. In the ancient Greek *polis*, confessions were coerced only from the bodies of slaves and non-citizens; in recent centuries, torture has been practiced almost exclusively on the bodies of slaves, and, later colonized populations.¹⁵⁵

As Darius Rejali has explained, the emergence of human rights discourse and other norms of public accountability have not resulted in an abolishment of torture in democracies.¹⁵⁶ Rather, democracies have continuously adopted and elaborated clandestine techniques of torture. Israel is not unique in this. What is unique, to our knowledge, is the emergence of legal structures endorsing practices of torture.

Whereas initially the Landau Commission constituted a regime of impunity based on legalizing “moderate physical pressure,” *Public Committee* brought about a structural shift in impunity. This newfound impunity, which we have labeled *un-prosecution*, now seems to be expanding, particularly to the United States, but to other parts of “The West” as well. *Un-prosecution* does not necessarily employ all the legal mechanisms and rhetorical strategies of (Israeli) *necessity management* that we have discussed; *necessity management* may be thought of as a subcategory of *un-prosecution*. This is a regime that does not allow for a legalization of torture but nevertheless makes remedies unavailable. It originates not from democracy, as does stealthy torture, but from a unique mixture of democratic institutions and an enduring undemocratic control of (Palestinian) civil society.

2. *The Position of the Victims*

This political structure is immoral. Today, the position of the victims of torture who return to their societies after incarceration is comparable to the position of the victims of Nazi death camps after World War II ended. Initially, their experiences were unbelievable. The horrors they described were often *too bad to be true*. Thus, their recent life histories were impossible to articulate in the public sphere. The systematic annihilation of evidence is particularly significant in both cases; the “extermination” camps have come to signify the extermination not only of life, but also of the paper trail that would have immediately and undeniably proven the existence of the crime, its vastness, and the ongoing agony of its victims.¹⁵⁷ A moral theory that would do justice to such victims would focus on the strange status of wrongs that in certain

¹⁵⁵ Hajjar, *supra* note 7, at 317.

¹⁵⁶ REJALI, *supra* note 43.

¹⁵⁷ Paraphrasing LYOTARD, *supra* note 16, at 56.

social or discursive conditions cannot be articulated in the public sphere. A “victim” is precisely someone who is not recognized as such.

Indeed, unrecognized victims whose suffering is impossible to articulate publicly are the gloomy shadows that seem to accompany any discussion of modern democratic torture. Rejali opens the momentous *Torture and Democracy* with a description of someone who was saved from becoming such a victim by sheer luck. Explaining how Rodney King was brutally assaulted by Los Angeles police officers, receiving repeated electric shocks, he quotes the Independent Commission of the Los Angeles Police Department: “[w]hether there even would have been a Los Angeles Police Department investigation without the video is doubtful, since the efforts of King’s brother, Paul, to file a complaint were frustrated, and the report of the involved offices was falsified.”¹⁵⁸ And in a poignant observation that fits perfectly into this context, he compares the violence that has saturated public discourse to the subdued voices of the tortured: “[s]ome argue that we are desensitized to violence we see on the evening news, but about violence we can’t see—even when its effect lies before our eyes, shaping the very flow of traffic in our streets—we cannot reflect, much less react.”¹⁵⁹

Considering such uncounted victims, Rejali makes an important distinction between “clean” and “scarring” torture techniques.¹⁶⁰ Whereas scarring techniques leave conspicuous marks on the body, clean techniques are physically painful interrogation methods that leave few or no marks. In line with the movement we suggested from the tortured body to the legal environment in which it is couched, a complementary distinction between clean and scarring legal regimes of torture is useful. Clean methods of torture are the invention of democratic regimes, rather than totalitarian ones. The public monitoring and free flow of information has paradoxically shaped methods of torture so as not to mutilate the body, in effect making them much more difficult to recognize publicly and to talk about.

Hence, we propose to distinguish between clean and scarring legal regimes of torture. *Necessity management* is a clean legal regime, as is *un-prosecution* at large. At best, they leave the victim of torture in the position of public silence. At worst, something like a “necessity procedure” becomes whitewashed legal language that goes hand in hand with the clean techniques applied to the body.

Compared to the reality in the interrogation room, rules and regulations seem inherently clean, even if the lowly courts that apply them—from the military courts of the West Bank to the Military Commissions of Guantanamo—often seem to be drowning in mud.¹⁶¹ Indeed, invoking “scarring regulations” can only be a metaphor.

¹⁵⁸ REJALI, *supra* note 43, at 2.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Hajjar described the dilapidated physical conditions of Ofer, the Israeli Military Court adjacent to a prison at the outskirts of Ramallah, *supra* note 72. For pictures and discussion of the physical structure and presence of Guantanamo, see JUDITH RESNIK AND DENIS CURTIS, REPRESENTING JUSTICE: FROM CITY-STATES TO DEMOCRATIC COURTROOMS AND GUANTANAMO BAY (2007).

But is it a misleading one? For the Landau Commission, itself a “scarring” legal instrument inasmuch as it sought to render torture legal and conspicuous, it was precisely the *cleansing* effect of the rule of law that provided authority. Rejali’s argument that the widespread public monitoring in democracies creates incentives to develop clean methods of torture also suggests that the Commission’s recommendations should be perceived as clean; that is, it was precisely the public response to foul practices that led to the establishment of the Commission to begin with. Is such a touch of law inherently clean?

The answer is no. For the “cleaning” effect the Landau Commission sought reveals the *undemocratic* premises it was based upon—most strikingly not in the very aim to legalize torture, but in the way it divides the actors who create the legal regime from the defendants who are subject to it. The latter are not granted an opportunity to participate in the conversation.¹⁶² The Commission does not even mention trying to hear the victims. It was only with democratizing transnational public monitoring that the clean regulation of torture was brought about in *Public Committee*.¹⁶³

Whereas the quintessential moral problem with scarring methods (whether physical or legal) is the actual harm they do to helpless bodies, the moral problems with clean methods are presented most clearly by the silenced victims in their banishment from the public sphere. This would be important even in scarring legal regimes that manifestly legitimized torture did not allow for a legal remedy. At least then the victim could say: here is my body; here are my scars; and here is the ordinance (or the report) that allowed them to do this to me.

3. *The Laws of Torture and the History of the Lie*

Creating fear is a central method of covering up the evidence of torture, precisely because it is a condition for the use of torture. In order to account for this emotion, one must consider the actualization of the “worst nightmare” of unbearable *pain* as a means of extracting information. On the other hand, one must also consider *fear* itself—regardless of whether it is actualized with pain—as perhaps more fundamental in the logic of torture. Which of these two is a more decisive aspect of what is happening in the interrogation room? It is difficult to decide.¹⁶⁴ But whichever one has precedence, what is important to realize is that pain and fear remain mutually reliant.

¹⁶² “Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as *participants in a practical discourse*.” See JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, 66 (1990).

¹⁶³ Anthony Lewis, *Abroad at Home: To Thine Own Self be True*, N.Y. TIMES, May 31, 1984, at A. The New York Times first published the information that led to the public scandal in 1984, after it became clear that two terrorists captured on a Line 300 bus were killed while in custody. As indicated above, this scandal ignited the public turmoil that led to appointing the Landau Commission. *The Landau Report*, *supra* note 14, at 148.

¹⁶⁴ For a philosophical exegesis of this indecisiveness, and its centrality in a conceptualization of sovereignty, see AGAMBEN, *supra* note 24, at 39-48 (discussing “potentiality”).

Imagine an alternative world in which an inventory of legal interrogation techniques would be publicly accessible. This album would perhaps be posted by the government online and may go so far as to provide pictorial specifications of every possibility of physical contact in the interrogation room. This free access would be conceived as a fundamental right of suspects and detainees, but also of the interrogators; if indicted, suspected torturers would simply be able to show that they were following the manual. Everyone would be presumed to be knowledgeable about criminal regulations relating to interrogation (*nullum crimen sine lege*). The very implausibility of this imaginary world illuminates the centrality of fear in any explanation of torture.¹⁶⁵

Furthermore, this little thought experiment also goes to show the way lies are structurally embedded in the history of torture. Just like fear, lies too seem to be a necessary condition for torture. The winking understanding that harsh interrogation methods can always be used is itself a lie. If fear and secrecy are indeed the most salient and definitive aspects of torture, this little lie may also be a necessary condition for policing and politics in general. For, as is made clear in *Public Committee*, even though the police are not authorized to inflict pain, they are allowed to cause fear. Arendt, at least, seems to think that this link between state secrets and lies is an essential aspect of government at large:

Secrecy—what diplomatically is called “discretion,” as well as *arcana imperii*, the mysteries of government—and deception, the deliberate falsehood and the outright lie used to legitimate means to achieve political ends, have been with us since the beginning of recorded history. Truthfulness has never been counted among the political virtues, and lies have always been regarded as justifiable tools in political dealings. Whoever reflects on these matters can only be surprised by how little attention has been paid, in our tradition of philosophical and political thought, to their significance, on the one hand for the nature of action and, on the other, for the nature of our ability to deny in thought and word whatever happens to be the case.¹⁶⁶

But the lie Arendt writes about here, a lie which quite literally “goes without saying,” does not do justice to the short history of torture presented above. State authorities have confronted the most blatant of lies; they have problematized them, made them an object of public discussion, and, indeed, have initiated interventions in them. They have thus brought about not simply the ubiquitous lie upon which torture is conditioned—or the lie of politics, which Arendt is concerned with—but also a short history of the lie.

Our history of legal engagement with torture begins with this confrontation in the Landau Report. Here, it takes the form of a hierarchy of values. For the Landau Commission, the prohibition of torture is important but should be trumped by security considerations; the prohibition on perjury, on the other hand, is absolute, and cannot be circumvented. This position is understandable, considering the fact that

¹⁶⁵ As we have shown above, this manual exists in one form or another, but is simply kept as a *secret norm*.

¹⁶⁶ HANNAH ARENDT, *CRISES OF THE REPUBLIC*, 4-5 (1972).

violence in general is such a pervasive aspect of law enforcement. Lying, as Arendt notes, is not perceived to be central to sovereignty, as it is in fact regularly denied—much more often than violence.¹⁶⁷

The Commission adapts a version of a Kantian position on lying. It conceptualizes the duty of truth as a necessary condition for legality—for the existence of “rights.” For Kant, “a lie is defined merely as an intentionally untruthful declaration to another man,” and “does not require the additional condition that it must do harm to another, as jurists require in their definition. For a lie always harms another . . . inasmuch as it vitiates the source of right.”¹⁶⁸ The commission agrees with the interrogators that the lies were not harmful, but still perceives them as a threat to the justice system at large. Kant’s viewpoint remains purely and formally juridical (or meta-judicial). It corresponds to the concern with the formal condition of right and the social contract. Kant thus excludes in his definition of the lie all the historicity that, by contrast, Arendt introduces into its very essence.¹⁶⁹ As we will see, the commission also chooses to think of these lies in a rather abstracted, disembodied way.

Kant discusses the conditions of law, but distinguishes his position from that of “the jurists.” In the short quotation above, we are nevertheless hinted that there is a history of the lie, at least in the form of an alternative position to Kant’s. One jurist who holds that alternative position is Alan Dershowitz. In his critique of the Landau Report, he asks why torture can be performed under the necessity doctrine, but perjury cannot be justified. He finds no logic in the Commission’s position.¹⁷⁰ In that respect, he seems to be in agreement with the interrogators interviewed by the Commission who asserted that they did not have any option other than lying. But he does not seem to understand the magnitude of the lie that will be exposed if the interrogators are left unprosecuted. As Avigdor Feldman, attorney for the Public Committee Against Torture, has explained, this would turn the whole justice system into a kind of lie. Well before the Landau Report was published, Feldman argued:

[T]here are two possibilities as far as the courts are concerned. If the Landau Commission determines that the GSS agents lied in almost all of the cases in which they appeared in court, and that this practice had been going on for a long time, then either everything that we know and think we know about the courts being able to assess evidence, uncover the truth, and distinguish between truth and falsehood is total rubbish, and the courts do not know how to tell truth from lies, or there is a real case of cooperation [between judges and security agents]. In both cases . . . the implications are shocking and disturbing.¹⁷¹

¹⁶⁷ *Id.*

¹⁶⁸ See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 64 (James Ellington trans., 1993); JACQUES DERRIDA, *WITHOUT ALIBI* 44 (Peggy Kamuf, ed., 2002).

¹⁶⁹ These are points Jacques Derrida makes in his essay *History of the Lie: Prolegomena*, in *WITHOUT ALIBI*, *id.*

¹⁷⁰ See Dershowitz, *supra* note 24.

¹⁷¹ See Hajjar, *supra* note 72, at 110.

Thus, we have two distinct positions in this short history of lies in the law of torture. One is the Landau Commission's position, an austere and a-historical Kantianism, which nevertheless allows for torture. The Commission condemns the individuals' perjury, while lying about systemic features of the justice system. But the other position merits consideration as well. It espouses a kind of "philanthropic" lie, for the good of the polity. This position appears in both the interrogators' interviews and Dershowitz's response to the Commission.

We are now equipped to ask perhaps the most difficult question: what kind of lie, if any, is presented by Justice Barak's decision in *Public Committee*? Granted, the business of accusing someone of lying is a difficult one from the start. "One will never be able to prove anything against the person who says, 'What I said is not true; I was wrong, to be sure, but I did not mean to deceive; I am in good faith.'"¹⁷²

Precision also requires specifying that Barak's holding is not a factual statement: he does not say "from now on there shall be no torture," a proposition that would surely be a lie. The lie in the opinion is that it implies a kind of conviction not to torture, a moral decisiveness against it, when it actually allows torture to continue. Regardless of whether this tacit authorization is intentional or simply a result of negligence where continued torture is reasonably foreseeable, it presents a third model in our short history of the lie. It is the model of performing a promise while failing to create the circumstances for its fulfillment.¹⁷³ This is central to the strategy of *un-prosecution*.

4. *Managing Torture in America*

As torture has become such a pervasive aspect of the United States' "War on Terror," the comparison between Israeli and American regulation of torture becomes valuable. Very broadly speaking, a movement from legitimation to *un-prosecution* can be identified in the U.S., perhaps as is a movement from scarring legal instruments to clean ones. While the Bush administration sought to legitimize torture, using an approach similar to that of the Landau Report,¹⁷⁴ the Obama administration seems to have moved towards a strategy of *un-prosecution*. To be sure, we know of no undisputable evidence of torture during the Obama administration. However, leaning on the state secrets doctrine, the administration has consistently denied victims of torture access to the evidence of their abuse. In other words, it is positioning them in an institutionalized position of silence. As the Israeli experience has shown, this position is closely bound to the existence of additional torture, which is imminent. It will not be proven in courts or compensated for, and there will be no paper trail to point to. As the arguments that have been applied in the American context have been

¹⁷² DERRIDA, *supra* note 169, at 34.

¹⁷³ *Id.*, at 37.

¹⁷⁴ Scheppele gives a rather concise description of the "hopelessly technical hairsplitting" during the Bush administration that allowed for legalizing torture outside the U.S. *See* Scheppele, *supra* note 2, at 291.

discussed and reviewed extensively, we will only review them quickly and offer a provisional comparison.¹⁷⁵

The Bush administration invoked many arguments that were very different from those brought up in the Israeli context. Particularly, a complete phenomenology of pain absent from the Israeli discussion was developed.¹⁷⁶ In Israel, the analysis was based on possible charges against security officials for various crimes from the general penal code, such as assault, threat, etc. The discussion took this form largely because the very existence of the GSS, let alone its modes of activity, was not authorized by statute. In the U.S., on the other hand, the discussion was shaped by the fact that the interrogations took place outside the territory of the country, an argument that was never available in Israel.

Nevertheless, shortly after the first allegations of torture were voiced in February 2002, President Bush invoked *necessity*, arguing that prisoners would be treated consistently with the Geneva Convention “to the extent appropriate and consistent with military necessity.”¹⁷⁷ Doctrinally, “military necessity,” as used in International Humanitarian Law, is not the “necessity” discussed by the Landau Commission or in *Public Committee*, which is the regular criminal law defense. How easily these categories fade into each other is illustrated by the invocation of the criminal law justification just six months after Bush’s statement in John Yoo’s famous memo: “under the current circumstance, necessity or self-defense may justify interrogation methods that may violate the criminal prohibition on torture.”¹⁷⁸

Proportionality analysis, also an important instrument in *necessity management*, goes a long way to legitimize torture in the American context as well. In his analysis of pain, Yoo lays out pain of multiple shapes and colors, explaining how each nuance reaches—or rather does not reach—the level of “torture.” Discussing a possible argument of self-defense, he quotes LaFave and Scott, who, in a discussion that is not specifically about torture, write: “the amount of force which [the defender] may justifiably use must be reasonably related to the threatened harm which he seeks to avoid.”¹⁷⁹ Two months after the memo was issued, Lieutenant Colonel Diane Beaver wrote that “use of a wet towel to induce the misperception of suffocation,” or

¹⁷⁵ For a more detailed account, see Scheppele, *supra* note 2; see also Luan, *supra* note 5. For the paper trail, see JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATOIN OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHREIB AND BEYOND (2007).

¹⁷⁶ Jay Bybee, Memorandum for A. Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A (Dep’t of Justice August 1, 2002). By “phenomenology of pain,” we refer to propositions that assume hierarchies of different levels of suffering, not based on scientific data but rather, it seems, on a kind of introspection. For example, on page one of the memo it is assumed that *death* is the highest level of the hierarchy, even though it is not at all clear that death is indeed necessarily painful: “for an act to constitute torture . . . it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”

¹⁷⁷ Luban, *supra* note 5, at 1453.

¹⁷⁸ Bybee, *supra* note 176, at 2.

¹⁷⁹ *Id.*, at 43.

“waterboarding,” one of the more notorious methods of torture, is warranted, provided there is a legitimate national security objective.¹⁸⁰ Again, the gravity of the method of torture is weighed against the underlying security purpose. Notice, however, that the use of proportionality analysis here is closer to that of the Landau Report than to the way it is absorbed into prosecutorial discretion under *Public Committee*. Like the Commission, Yoo uses the balancing of interests that the commission framed as “the principle of lesser evil” to obliterate the requirement of imminence.¹⁸¹

The emphasis on *confirmations from above*, by now familiar from *necessity management* and particularly from the *necessity procedure*, also came into play in the Yoo memo, if in a slightly different way. Here, it took the form of a checklist of pre-approved techniques that allowed interrogators immunity.¹⁸² As Scheppelle explains, “at first the Bush administration tried to neutralize the memo by having the President state that all U.S. interrogations were required to ‘follow the law.’” But what is Law? Does following the law mean following internal guidelines? If law is to be interpreted as it was in the Yoo memo, it does not seem to prohibit much.¹⁸³

The Israeli practice of bringing a higher official into the torture room, physically or not, to authorize exceptions, probably came into play when particularly harsh methods were to be employed. A memorandum from Defense Secretary Donald Rumsfeld in April 2003 also conditioned such techniques on individualized approval.¹⁸⁴ However, the defense of following instructions from above has been a dubious one at least since Adolf Eichmann’s trial in Jerusalem in 1961.¹⁸⁵

5. Torturous Legal Traditions

Alan Dershowitz has been one of the most outspoken and cited supporters of efforts to contain torture within the rule of law. Dershowitz developed his idea of

¹⁸⁰ Diane Beaver, Memorandum for Commander, United States Southern Command, 3511 NW 91st Avenue, Miami, Florida 33172-1217 Subject: Counter-Resistance Strategies (Dep’t of Defense, 11 October 2002), *available at* <http://www.defense.gov/news/Jun2004/d20040622doc3.pdf> (last visited Oct. 31, 2010).

¹⁸¹ Bybee, *supra* note 176, at 33. *See also* Scheppelle, *supra* note 2, at 322 (“The principle of lesser evil has loomed large not only in legal discussions, but in the popular mind right away after the September 11th attack. In October 2001, on CNN’s *Crossfire*, the right-winger Tucker Carlson suggested that, under certain circumstances, torture may be ‘the lesser of two evils.’”); MacMaster, *supra* note 19, at 4.

¹⁸² Scheppelle, *supra* note 2, at 297.

¹⁸³ *Id.* at 296.

¹⁸⁴ *Id.* at 308. *See* Donald Rumsfeld, Memorandum for the Commander, US Southern Command, Subject: Counter-Resistance Techniques in the War on Terrorism (The Secretary of Defense, 16 April, 2003). Rumsfeld writes, “If, on your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.”

¹⁸⁵ *See* ARENDT, *supra* note 102

instituting “torture warrants” in the late nineteen eighties. At the time, his suggestions were drawn directly from the Landau Report.¹⁸⁶ Yoo’s memorandum also shows signs of the same inspiration.

Yoo’s comparative law analysis is limited to just two case citations. One is Barak’s decision in *Public Committee*, which he uses to substantiate the proposition that the methods Barak discussed do not constitute torture. Yoo emphasizes that Barak does not name them “torture;” therefore, he concludes, they must have been perceived as not included in that definition.¹⁸⁷ Yoo discusses the *Ireland v. United Kingdom* case in the European Court of Human Rights.¹⁸⁸ This case is also the first precedent relied upon in the Landau Report, and the Commission’s analysis is very similar to Yoo’s. We do not know if Yoo actually read the Landau Report before writing his memo; but at the least, they belong to the same torturous legal tradition that by now has its own transnational legal conversations and common historical sources.

President Obama’s policy on torture is still taking shape. Ostensibly, Obama has repudiated torture. However, his decision not to prosecute Bush Administration officials implicated in torture, coupled with his invocation of the state secrets privilege, functions to silence torture victims.

The decision not to indict Bush Administration officials was publicly explained as an attempt to avoid alienating a large part of the American population who supported the previous administration. Framed this way, prosecution becomes a form of political persecution.

However, even a policy barring criminal indictments would not obviate the need to compensate the victims. Such compensation would not even require exposing the evidence of torture, as with the compensation offered by the Canadian government to Maher Arrar, a Syrian who was tortured under the renditions program. Only if the Administration had offered the victims some form of public recognition could it really claim that *un-prosecution* stemmed from the political considerations it claimed. For the time being, the failure to do so cannot be merely an issue of “litigating the past,” as Obama said. For the victims of torture, as long as the present conditions of non-recognition remain, the past limits the horizons of the future.

A much more plausible reason to avoid prosecution is the recognition that there is no guarantee that it will stop at low level perpetrators in the interrogation room; the investigation would have to reach all the way up to Rumsfeld and probably to Bush. Such trials bring to mind revolutionary show trials against the *ancien régime*. But to accept that such trials are impossible is to accept a maxim at least as old as the Israeli occupation in the West Bank and Gaza and its *necessity management*: get yourself a high-ranking accomplice, and you’re fine. This form of impunity, grounded as it is on confirmation and consultation procedures that both Rubinstein and Rumsfeld have built on, is extremely resilient. Paul Kahn articulated this resilience when he brushed away the possibility that *Public Committee* will yield indictments for torture. He points

¹⁸⁶ Dershowitz, *supra* note 24. See also MacMaster, *supra* note 19, at 11.

¹⁸⁷ Bybee, *supra* note 176, at 30.

¹⁸⁸ Judgment of the European Court of Human Rights, *Ireland v. the United Kingdom*, 2 Eur. Ct. H.R. 25 (1978).

out that, “short of defeat and victor’s justice, it is hard to imagine such a prosecution being brought in a case in which there is a reasonable claim in support of the [necessity] defense. Conversely, if the conditions exist for that prosecution, it is hard to imagine the defense being successful.”¹⁸⁹ What seems to be at stake is the integrity of the polity; but choosing political integrity is also a choice to silence the victim of what has, for the same polity, traditionally been considered one of the most heinous crimes.

In what we would argue constitutes torture, a U.S. court and government attorney pushed Binyam Mohamed to confess to terrorism crimes as part of a plea bargain; he would gain freedom if he denied that he was ever tortured and *promised not to talk about his torture after his release*.¹⁹⁰ This agreement, initiated in October 2009, is a paradigmatic example of *un-prosecution* in the Obama era. On the one hand, we are in the “classic” realm of torture, aimed at extracting a confession. As we saw in the context of the Landau Commission, the now-accepted story that the application of torture is limited solely to information collection is refuted. On the other hand, silencing the victim is no longer an auxiliary result of torture; it is a new and independent act of torture in and of itself.¹⁹¹

Recently, the British government has decided to settle with former Guantanamo detainees, including Mohamed, paying them millions of pounds in order not to go to trial.¹⁹² As Peter Goldsmith, British Attorney General under Tony Blair, explained, this was not an admission of guilt. The settlement is an important demonstration of the British commitment to the rule of law. Even if this solution will allow the government to refrain from exposing some of the information on what happened in Guantanamo, it presents itself—unlike the position of the Obama administration—as commitment to truth: “I think the most important part of this settlement is that it now clears the way for a public inquiry into these allegations of torture and complicity in torture which has already been announced,” said Goldsmith.¹⁹³

¹⁸⁹ Kahn, *supra* note 2, at 13.

¹⁹⁰ Richard Norton-Taylor and Duncan Campbell, *US Offered to Free Terror Suspect Binyam Mohamed if he Made False Statements*, GUARDIAN, March 24, 2009 available at <http://www.guardian.co.uk/world/2009/mar/24/binyam-mohamed-us-military> (last visited Oct. 31, 2010).

¹⁹¹ See in this context John Langbein’s thesis on the historical connection between plea-bargaining and torture, *supra* note 142. Binyam Mohamad did not agree to this plea bargain, and did not plead guilty. In February 2009 he was returned to Britain, with no charges filed against him.

¹⁹² Patrick Wintour and Matthew Weaver, *Guantánamo Bay Prisoners to get Millions from British Government*, THE GUARDIAN, Nov. 16, 2010, available at <http://www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-prisoners-compensation>

¹⁹³ PRI’s The World, *UK to compensate former Guantánamo Detainees*, Nov. 16, 2010, available at <http://www.theworld.org/2010/11/16/uk-to-compensate-former-guantanamo-detainees/>

Conclusion

In its conclusion, the Landau Commission Report situates the reader at an historic crossroads. Either we continue to live with illicit state practices, or we accept a limited amount of torture under the auspices of law. The rhetoric is dramatic, and the stakes seem to be high. The first option is presented as “the choice of the hypocrite.”

The Commission cautions against a political choice of hypocrisy. It uses imagery from an interview with a GSS interrogator to illustrate the nature of such a choice. It invites the reader to imagine the ordinary Israeli sitting in a sunny backyard. That person doesn’t want to know or see what is going on in the sewage system running under him and into his house. But this infrastructure is what allows him to sunbathe in a livable environment.¹⁹⁴

Such an image, explains the Commission, implicitly allows security to take place in the twilight of illegality. The political costs are high; it is exactly the kind of environment that potentially allows security to gain independence from the state, and act according to its own standards and with no outside accountability. Security can then become “a state within a state,” as the Commission puts it.¹⁹⁵ But is the only other option to recognize torture as legal? A survey of Israeli and American history indeed reinforces that impression. In this article we have shown that torture has been more or less constant across Israeli history, and the only thing that has changed is its legal management. The United States is going in the same direction.

But of course, we do not feel obliged to choose between these two options. The very presentation of these as two distinct options is highly dubious. Quite to the contrary, empirical evidence suggests that movement towards legitimizing torture perpetuates a growing zone of independence and impunity in security services, above and beyond what is allowed by law.¹⁹⁶ Harsh torture techniques that have been recognized but limited in various ways have tended to “migrate” across theatres of war and spread virally.¹⁹⁷ Every step toward legitimation opens up new frontiers for “hypocrisy” and for exceeding the already permissive limitations enumerated by the law. This dynamic is tightly bound with the fact that contemporary torture is always psychological. No less than obtaining information through the use of physical pain, it extracts information by relying on the victim’s imagination of the unknown method that may come next, lurking behind the corner of its own legal limitations.

Today, after torture has ostensibly (again) been abolished in the United States, we have returned to the “twilight zone” the Landau Commission warned about. A regime that manages torture by condemning it, while at the same time protecting its perpetrators, is not morally superior to a regime that openly tortures. Palestinians and Israelis under Israeli control have lived under one of these two options at least since 1967, when, according to the Landau Commission, “physical pressure” in

¹⁹⁴ *The Landau Report*, *supra* note 14, at 162.

¹⁹⁵ *Id.* at 163.

¹⁹⁶ REJALI, *supra* note 43, at 446–479, 519–536.

¹⁹⁷ Schepelle, *supra* note 2, at 317.

interrogations first became systematic.¹⁹⁸ It is no mere circumstance that this happened precisely when Israel occupied the West Bank and Gaza; torture was deemed a necessary part of protecting Israel from Palestinians, who remained stateless and were now subject to military rule. In order to understand the similar relationship that developed between law and torture in the U.S. after 9/11, one must realize that in inspiration at least, it was imported from the non-democratic Israeli context.

The rhetorical move the Landau Commission makes in its presentation of the two options clear: by not discussing an option of living without torture, the Commission powerfully asserts that such an option is impossible. But according to the accepted public narrative, this impossible option is the one that societies in Israel and the U.S. have actually chosen, at least as the ideal to strive for. The Commission's narrative may be true only inasmuch as the political option of inclusive democracy is not even pondered.

To be sure, if there were the political will to take such a course of action, the steps to be taken are clear. Bearing in mind the contemporary tendency towards clean methods of torture and clean regulation of torture, the objective should be to allow some filth into the public sphere. In other words, fighting torture depends on the opportunity to know about and talk about torture. It requires procedural mechanisms that ensure, as Elaine Scarry has put it, the transparency of government and the opaqueness of the citizen.¹⁹⁹

Thus, fighting the contemporary patterns of torture entails focusing on the prohibition's enforcement mechanisms. Evidentiary considerations are an important aspect of this fight. In civil suits, the burden of proof to show that someone was not tortured could be shifted to the government, as the doctrine already requires in criminal cases. But as we have shown in the Israeli example, other regulations can turn this doctrine into a dead letter. Similar evidentiary reforms have been proposed by feminist legal scholars, who have described the political construction of the ways we acquire knowledge and evidence, and therefore also the means to articulate wrongs.²⁰⁰ Many of the same lessons apply when it comes to giving the tortured a voice. It is thus necessary to take up and give a normative response to not only the reality of torture, but also to the meta-reality of the destruction of the evidence of torture.²⁰¹

¹⁹⁸ *The Landau Report*, *supra* note 14, at 158.

¹⁹⁹ ELAINE SCARRY, *RULE OF LAW, MISRULE OF MEN* (MIT Press 2010).

²⁰⁰ *See, e.g.*, Francis Olsen, *Statutory Rape: A Feminist Critique of Rights*, 63 *TEX. L. REV.* 387 (1984-1985); *FEMINIST PERSPECTIVES ON EVIDENCE* (Mary Childs and Louise Ellison eds., 2000).

²⁰¹ Paraphrasing LYOTARD, *supra* note 16, at 57:

[W]ith Auschwitz, something new has happened in history (which can only be a sign and not a fact), which is that facts, the testimonies which bore the traces of *here's* and *now's*, the documents which indicated the sense or senses of the facts, and the names, finally the possibility of various kind of phrases whose conjunction makes reality, all this has been destroyed as much as possible. Is it up to the historian to take into account not only the damages, but also the wrong? Not only the reality, but also the meta-reality that is the destruction of reality? Not only the testimony, but also what is left of the

When torture is part of a regime that differentiates between two populations, only one of which is granted access to public participation, the legal system may adopt even more dramatic measures. Justice Mahomed of the South African Constitutional Court articulates the role of such legal measures after explaining the unspeakable position of torture victims. Like *un-prosecution*, these far-reaching legal measures can sometimes require compromising justice by way of decisions not to prosecute.

Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Truth and Reconciliation Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly . . . That truth, which the victims of repression seek so desperately to know, is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do.²⁰²

But then again, perhaps the very fact that quite mundane normative solutions are readily available indicates that they miss a more fundamental problem: that we live in a world where governmental actors have never seriously considered truly doing away with torture. The political imagination of such a world is constrained by a truly naturalistic, apolitical understanding of necessity: in order to make an omelet, it is necessary to break a few eggs.

testimony when it is destroyed (the dilemma), namely, the feeling? Not only the litigation, but also the differend?

²⁰² Azapo & Others v. President of the Republic of South Africa, 1996(4) SA 671 (CC) at paragraph 17 (S. Afr.).