International Law in the Domestic Arena: The Case of Torture in Israel

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* J.D. Candidate 2001, University of Iowa College of Law. The author coordinated the Birzeit University Human Rights Action Project from October 1994 to August 1997. This Note is dedicated to Khalid, Ahmad, and Majda.
The conditions in dungeons\textsuperscript{1} are indescribable to those who have never experienced them. When you are (God forbid) in a dungeon, you realize there exists an abyss between what you experience and what people outside understand it to be like. No windows. Depressing. Disgusting. There are two strong iron doors to every dungeon. Abysmal and squalid conditions . . . . Detainees are put on small and uncomfortable chairs specially constructed for torture, with their hands tied together and bound to the chair. Then there are the dirty sacks put over their heads, "de rigueur" for torture, along with the very loud and noisy music all day long to keep you from sleep.

This is the worst thing in this situation. Detainees are not allowed to sleep more than 5-7 hours per week, on Saturday night. So, every week is the same throughout the interrogation period, a timeless eternity that you know can be extended to several months.\textsuperscript{2}

I. INTRODUCTION

Torture is both universally banned and very common. It is difficult to imagine a contemporary government that would unabashedly defend a right to torture detainees. Even governments most resistant to the idea of universally recognized human rights adopt the rhetoric. Yet, detainees in at least one in four countries and territories worldwide personally know that rhetoric is not practice, and that torture remains a daily threat to their health and safety. This Note creates a record of the gap between the rhetoric and the reality in one country, Israel, where until September 1999, Palestinian detainees expected to face torture and ill-treatment as an ordinary part of detention. It also documents a stream of legal interventions that applied domestic and international laws in both domestic and international forums to enforce the international ban against torture. This case study implicitly assesses the strength of these legal tools and of the international ban at the turn of the century.

This Note traces Israel’s use of torture and ill-treatment in the interrogation of Palestinian detainees.\textsuperscript{3} It focuses on Israeli interrogation practices and the legality of these practices under international and domestic law. The rhetorical struggle between the State of Israel and

\textsuperscript{1} The cells in the basement of the interrogation center.


\textsuperscript{3} See generally infra Part III.A (detailing research on Israeli interrogation methods and discussing Israeli methods of interrogation); infra notes 35-39 (providing examples of the reports cited).
nongovernmental and intergovernmental human rights organizations frames this discussion. It also provides essential background to understanding the landmark Israeli High Court of Justice decision in September 1999 declaring the methods illegal.

After the September 1999 court decision, many international observers celebrated the presumed end of torture and ill-treatment in Israel. This decision seemed to close the gap between rhetoric and actual practice in Israel in a way that would protect the health and safety of Palestinian detainees. Yet, while the decision halted torture and ill-treatment in the short term, a close reading shows that the decision rests on a gap in Israeli law, rather than on a recognition that Israeli practice violated the international prohibition on torture and ill-treatment. In fact, by inviting the Israeli parliament to consider whether to sanction physical force in interrogation, the court left the debate wide open.

This Note proceeds in five Parts. The first three sections examine in detail the practical and legal context in which the September 1999 decision arose. Specifically, Part II discusses the international prohibition on torture and ill-treatment. Part III examines Israeli methods of interrogation, Israel's legal and regulatory framework, and previous High Court decisions. Part IV reviews the positions of the State of Israel and the nongovernmental and intergovernmental human rights organizations concerning Israeli General Security Service interrogation methods and concludes with an examination of the September 1999 High Court decision. Part V recommends that the Israeli legislature adopt legislation enacting the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture) or, in the alternative, requiring respect for the international ban on torture and ill-treatment in the interrogation of Palestinian detainees. Part V also suggests again the significance of this case study in the international arena.

4. See infra Part IV.B (discussing nongovernmental and intergovernmental organizations' work against Israel's practice).


6. See supra Part IV.C (discussing the September 1999 Israeli High Court decision).

7. Letter from Joanna Oyediran, Researcher, Amnesty International/International Secretariat, to author (Sept. 15, 2000) (on file with author) (reporting that Palestinian detainees held by the Israeli General Security Service had not reported torture or ill-treatment since the decision).
II. THE PROHIBITION OF TORTURE AND ILL-TREATMENT

State laws, customary international law, and treaty law prohibit torture and cruel, inhuman, or degrading treatment ("ill-treatment"). The clearest language applies to torture. The Convention Against Torture, to which Israel is a party, defines torture in the following manner:

'[T]orture' 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 her] or a third person information or a confession... when such pain or suffering is inflicted by or at the instigation of... a public official or other person acting in a public capacity.

This definition contains the standard elements of torture: (1) an intentional act (2) by an official actor that (3) causes (4) severe pain or suffering (5) with the intention of eliciting information. The Convention also obliges each state party to "undertake to prevent... other acts of cruel, inhuman, or degrading treatment or punishment." The prohibition of torture and ill-treatment is not, itself, controversial. The prohibition in application, however, yields endless contention as each perpetrator seeks to define its own behavior so as not to violate the ban.

International estimates suggest that governments use torture or other ill-treatment in more than sixty countries or territories worldwide. That torture and ill-treatment are so prevalent stands in contrast to the fact that the legal prohibition on torture is universally recognized. Authorities responding to accusations that they torture or ill-treat prisoners often argue that certain circumstances justify the use of extreme pressure in interrogation. While an extensive discussion of this subject is beyond the

8. NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 137 (2d ed. 1999) [hereinafter TREATMENT OF PRISONERS]. State in this context refers to nation states in the international arena.
9. Id. at 65-67.
10. Id. at 47-61.
11. 34 Kaf-Aleph 1039, 294.
13. TREATMENT OF PRISONERS, supra note 8, at 7.
14. CAT, supra note 12, at art. 16. For brevity's sake, this Note uses "ill-treatment" to refer to "cruel, inhuman, or degrading treatment or punishment."
15. See TREATMENT OF PRISONERS, supra note 8, at 9-10 (reporting conclusions of documentation efforts by Amnesty International and the United Nations Special Rapporteur on Torture).
16. Id. at 73-74 (finding that no country allows torture under its law).
17. For example, Israel regularly argues that urgent and lethal security threats require intensive interrogation and justify the use of physical and psychological pressure. For an example, see Summary of the Record of the First Part (Public) of the 296th Merling: Israel, U.N. Committee Against Torture, 18th Sess., 296th mtg. ¶¶ 6-7, 34-37, U.N. Doc. CAT/C/SR.296
scope of this Note, there is nearly universal agreement that the prohibition
on torture is absolute and that torture cannot be justified under any
circumstances. A strong case can be made that this is also true with respect
to ill-treatment.

In addition to justification arguments, some authorities, especially state
governments, have debated the point at which a detainee's pain and
suffering become severe enough to constitute torture. Some authorities
who argue about the line drawing rely on the inclusion of both "torture" and
"cruel, inhuman, or degrading treatment" in Article 5 of the Universal
Declaration of Human Rights to validate a distinction between ill-treatment
and torture. Yet, other language of the Universal Declaration, which is
echoed in the Convention Against Torture, makes the distinction
meaningless for purposes of determining the legality of questionable
interrogation methods. Both authorities strictly forbid both torture and ill-
treatment. For example, the Convention Against Torture states, "No state
may permit torture or other cruel, inhuman or degrading treatment or
punishment."22

States frequently invoke a controversial European Court of Human
Rights case to substantiate distinctions between torture and ill-treatment.
The European Court of Human Rights found ill-treatment, not torture, to
have occurred in Ireland v. United Kingdom, a case involving British

(1997) [hereinafter CAT Special Report Record]. A critique of Israel's security justification for
torture is beyond the scope of this Note.

18. TREATMENT OF PRISONERS, supra note 8, at 78-79. For example, see Article 2(2) of the
Convention Against Torture: "No exceptional circumstances whatsoever, whether a state of war
or a threat of war, internal political instability or any other public emergency, may be invoked
as a justification of torture." CAT, supra note 12, at art. 2(2). In keeping with the absolute
nature of the ban on torture, this Note does not generally report whether Israel subsequently
released a detainee without charge or prosecuted the detainee in the military courts. For a
limited discussion of this topic, see HUMAN RIGHTS WATCH/MIDDLE EAST, TORTURE AND ILL-
TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 1-3
(1994) [hereinafter TORTURE AND ILL-TREATMENT].

19. See TREATMENT OF PRISONERS, supra note 8, at 96, 98 (remarking that sharp
distinctions among various prohibited forms of treatment may not be necessary and that the
reports of the Special Rapporteur on Torture de-emphasize the distinction between torture and
ill-treatment).

20. Id. at 77-100.

21. "No one shall be subjected to torture or cruel, inhuman, or degrading treatment or
5; see also TREATMENT OF PRISONERS, supra note 8, at 75 (stating that the broad language of the
Universal Declaration of Human Rights created an opening for debate on the distinction
between torture and ill-treatment).

22. CAT, supra note 12, at art. 3.

length here because Israel relied heavily on it to explain why its interrogation practices did not
fall within the universal ban on torture or ill-treatment. See infra Part IV.A (discussing Israel's
position).
interrogation of detainees from Northern Ireland. In this decision, the European Court of Human Rights held that a finding of torture rather than ill-treatment "derives principally from a difference in the intensity of the suffering inflicted." The court concluded that while the contested techniques in combination "undoubtedly amounted to inhuman and degrading treatment," the methods individually did not necessarily constitute torture. Many international jurists and scholars criticized the European Court's decision for minimizing the effects of mental suffering and relying on extreme definitions of torture. Professor Nigel Rodley noted that United Nations' bodies examining facts similar to those in Ireland found that torture occurred.

Although "torture" identifies an "extreme end of a range of prohibited ill-treatment" and the exact line at which ill-treatment becomes torture remains open to disagreement, legal analysis of contested practices usually addresses "torture and ill-treatment" collectively. Collective analysis adheres to the language of the Universal Declaration of Human Rights and the Convention Against Torture. This Note follows this practice.

As noted above, torture and ill-treatment are almost universally condemned. Certainly no country asserts a right to torture or ill-treat a detainee. Possibly because the ban is so strong, the international human rights community paid close attention to Israel's interrogation practices and its claim that its practices did not violate the international ban. Many human rights advocates considered the debate regarding contested interrogation methods vital not only to the safety and health of Palestinians in Israeli detention, but also to the strength of the universal ban and the safety of detainees elsewhere threatened with torture and ill-treatment.

25. Id.
26. Id.
27. See TREATMENT OF PRISONERS, supra note 8, at 92-93; see also TORTURE AND ILL-TREATMENT, supra note 18, at 81 (reporting that a variety of experts criticized the European Court of Human Rights ruling).
28. TREATMENT OF PRISONERS, supra note 8, at 94. Professor Rodley presents a detailed review of the European Court of Human Rights case law on the degree of suffering required to find torture. Id. at 85-100.
29. Id. at 99.
30. Id. at 96, 98 (discussing the practice of the Human Rights Committee and the Special Rapporteur on Torture of minimizing the distinction between torture and ill-treatment when dealing with practices that fall clearly within prohibited behaviors).
31. For a discussion of the universality of the ban on torture and ill-treatment and the assertion that no country asserts a right to torture or ill-treat prisoners, see Filartiga v. Pena-Irala, 630 F.2d 876, 883-85 (2d Cir. 1980).
32. See infra Part IV.B (discussing past and ongoing human rights monitoring activities by the international human rights community).
III. TORTURE IN ISRAEL

Palestinian, Israeli, and international human rights organizations researched, documented, and published numerous studies on the Israeli General Security Service (GSS) methods of interrogation. Based on this research, Palestinian, Israeli, and international human rights organizations, national governments, and United Nations monitoring and oversight bodies concluded that the GSS systematically used

34. For an abbreviated list of such reports, see TORTURE AND ILL-TREATMENT, supra note 18, at 66-72 (presenting a survey of organizations monitoring Israeli interrogation methods); see also infra notes 35-39 (citing sources documenting methods of interrogation).


36. For examples of the conclusions of some Israeli human rights organizations, see the website of B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, at http://www.beslem.org (last visited Aug. 30, 2000) (publishing periodic reports and press releases on GSS torture and ill-treatment of Palestinian detainees), or HaMoked (6 Abu Obeidah Street, Jerusalem) or the Public Committee Against Torture in Israel (P.O. Box 8588, Jerusalem). For examples of publications by Israeli nongovernmental human rights organizations, see YUVAL GINAR, ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE (B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, 1998) (presenting the seventh extensive B'Tselem report describing GSS interrogation methods as torture and ill-treatment); TORTURE: HUMAN RIGHTS, MEDICAL ETHICS, AND THE CASE OF ISRAEL (Neve Gordon & Ruchama Marton eds., 1995) [hereinafter MEDICAL ETHICS] (reporting on a conference on the role of physicians in GSS interrogation and torture sponsored by the Association of Israeli-Palestinian Physicians for Human Rights and the Public Committee Against Torture in Israel).


39. For examples of the conclusions of some United Nations bodies see REPORT OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE, MR. NIGEL S. RODLEY, U.N. COMMISSION ON HUMAN RIGHTS, 53RD SESS., PROVISIONAL AGENDA ITEM 8(A), U.N. DOC. E/CN.4/1997 (1997) [hereinafter SPECIAL RAPPORTEUR, 53RD SESS., 1997] (stating that certain forms of interrogation that “can only be described as torture” appeared so consistently and had not been denied that the Special
techniques in the interrogation of Palestinian detainees that constituted prohibited torture and ill-treatment. In particular, the Committee Against Torture found that the primary GSS interrogation methods constituted torture. This Part of this Note presents the prohibited GSS methods of interrogation and then discusses the legality of these methods in Israel in three sections. First, it presents Israeli laws and legal obligations concerning torture. Next, it discusses interrogation guidelines, focusing specifically on the Landau Commission report. Finally, it reviews relevant Israeli High Court decisions prior to September 1999.

Israeli laws, the Landau Commission report, and Israeli High Court decisions document that the GSS systematically has used torture and ill-treatment in interrogation. It is less clear how frequently the GSS employed the condemned techniques. In 1995, the Israeli state attorney estimated that the GSS interrogated approximately 23,000 Palestinians between 1987 and 1994, amounting to over 3,000 Palestinians annually. By the late 1990s, the number of Palestinians passing through interrogation declined to approximately 1,000 each year. In 1998, HaMoked, an Israeli human rights organization, used governmental sources, documentation from human rights organizations working directly with detainees, and reports from attorneys representing detainees to estimate that the GSS and Israeli military tortured eighty-five percent of interrogated detainees. In other words, HaMoked calculated that in the late 1990s, the GSS used torture or ill-treatment on at least 850 Palestinian interrogatees each year. A careful examination of the kinds of interrogation methods Palestinians experienced provides a starting point for the discussion of torture in Israel.
A. METHODS OF INTERROGATION

Until September 1999, the GSS subjected a typical detainee to both psychological and physical pressure during interrogation using highly systematized interrogation methods. Interrogation lasted from one or two days to weeks or months. During general interactions with Palestinian detainees, as well as during interrogation, GSS interrogators struck and kicked detainees. Interrogators often concentrated beatings on the genitals or other sensitive areas. Interrogators also excessively tightened shackles as a means of inflicting pain on the detainees. The GSS placed psychological pressure on detainees through prolonged isolation from the outside world (including isolation from the detainee's attorney), sleep deprivation, and sexual threats or harassment. The Committee Against Torture and human rights researchers reported that GSS interrogators usually employed psychological methods in combination with each other or with physical violence.

48. TORTURE AND ILL-TREATMENT, supra note 18, at 110; GINBAR, supra note 36, at 13-36.
49. See GINBAR, supra note 36, at 55 (noting that GSS interrogation became increasingly systematic beginning in the late 1980s).
50. For an example of a well-documented case where the GSS interrogated a detainee for five weeks, see the description of the case of Omar Ghaneimat. GINBAR, supra note 36, at 39-67.
52. See GINBAR, supra note 36, at 34 (listing "slapping, punching, and kicking" among various interrogation techniques).
53. Id.
54. For an example, see the case of Omar Ghaneimat in GINBAR, supra note 36, at 45. Ghaneimat reported, "They would put handcuffs on my forearm, about fifteen centimeters from the palm of my hand, my hands behind my back. The interrogator would fasten them so tight that the blood would not flow." Id.
55. See id. at 13 (noting that security regulations allow Israeli authorities to refuse detainees contact with their attorneys for up to ninety days). For an example of this practice, see the affidavit of Advocate Elia theodory (Jerusalem, Dec. 25, 1997), submitted to the Israeli High Court with H.C. 7628/97, Qur'an v. Minister of Def., reprinted in The Case Against Torture in Israel: A Compilation of Petitions, Briefs, and Other Documents Submitted to the Israeli High Court of Justice (Allegra Pacheco ed. & trans. May 1999) (unpublished manuscript, on file with author) (reporting that the General Security Service had prevented Advocate theodory from seeing his client Fuad Awad Qur'an for eighteen days).
56. See TORTURE AND ILL-TREATMENT, supra note 18, at 164 (reporting that interrogators use position abuse, deafening music and loud noise, and monitoring and harassment by prison guards to keep detainees from sleeping).
57. See TERESA THORNHILL, MAKING WOMEN TALK: THE INTERROGATION OF PALESTINIAN WOMEN DETAINES 28 (1992) (reporting on the use of sexual threats in the interrogation of women); see also GINBAR, supra note 36, at 25 (reporting that threats employed by interrogators are often of a sexual nature).
58. See CAT Concluding Observations, 1997, supra note 39, ¶ 257 (noting that in the "standard case" methods of interrogation are used in combination); GINBAR, supra note 36, at 15, 34-35, 38 (describing various combinations of interrogation methods).
The Committee Against Torture concluded that seven GSS interrogation methods constitute torture: violent shaking, restraining in painful positions (shabeh or position abuse), hooding, subjection to loud music for prolonged periods, sleep deprivation for prolonged periods, threats (including death threats), and exposure to protracted cold air. The first two methods, shaking and position abuse, constituted the most prevalent GSS methods of physical abuse. While both techniques used physical violence, they resulted only in invisible, internal damage to the detainee. Some observers have argued that methods like these reflect increased sophistication intended to make torture and ill-treatment less visible and harder to document in court.

Shaking, according to the Israeli High Court of Justice, is "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." One detainee described his experience with shaking in the following manner: "I sat on the chair, and the interrogator, who was strong, grabbed my shirt on both sides of the collar and shook me with great force, maybe five seconds each time. I felt my eyes rolling around inside my head, and I couldn't speak."

Shaking damages the detainee's brain and spinal column in a manner that can be fatal. On April 26, 1995, 'Abd al-Samad Harizat, age thirty, died in Israeli detention from a brain hemorrhage caused when interrogators violently shook him. This event provoked much discussion in Israel and elsewhere, and led to increased attention on Israel's use of shaking and its effects on detainees. Many monitors and observers previously had overlooked this dangerous interrogation method, perhaps because, as noted

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59. CAT Concluding Observations, 1997, supra note 39, ¶ 257. The Committee issued this ruling after the Israeli High Court refused to enjoin the GSS from using these methods of interrogation against Khader Mubarak. Id. The list of prohibited interrogation methods is based on Mr. Mubarak's case, rather than on a full survey of GSS interrogation methods. Id. See also infra text accompanying notes 152-55 (discussing Mr. Mubarak's case).

60. TORTURE AND ILL-TREATMENT, supra note 18, at 111-54.

61. See id. at 58-59 (quoting remarks delivered at a conference sponsored by the Association of Israeli-Palestinian Physicians for Human Rights and the Public Committee Against Torture in Israel on June 14, 1993).


63. GINBAR, supra note 36, at 32 (quoting the affidavit of N.S. upon his release from interrogation in October 1997). Israeli forces detained N.S. in October 1997; the GSS interrogated him in Jerusalem for ten days and released him on the thirteenth day. Id. at 12.

64. See Consolidated Cases, supra note 5, ¶ 9 ("All agree that in one particular case [Harizat's] the suspect in question expired after being shaken."); see also H.C. 4054/95, Ass. for Civil Rights in Israel v. Prime Minister of Israel ¶ 1 (Allegra Pacheco trans.) (translation on file with author) (appealing to the court to halt the use of shaking, partially as a result of Harizat's death).

65. H.C. 4054/95, Ass. for Civil Rights in Israel v. Prime Minister of Israel ¶ 1 (Allegra Pacheco trans.) (translation on file with author).
above, shaking leaves only internal, difficult to document, injuries. In July 1995, the late Israeli prime minister Yitzhak Rabin admitted that Israel had interrogated approximately 8,000 detainees using this type of shaking. Amnesty International reported that the GSS apparently increased its use of this form of torture in the early 1990s.

Position abuse, called shabeh by Palestinians, was another dominant component of GSS interrogation of Palestinian detainees. The expression shabeh actually refers to a set of abusive techniques that the GSS typically used in concert. Shabeh involved tying the prisoner’s body in a contorted position, as well as covering her head with a heavy sack and subjecting her to continuous deafening music. The following testimony, extracted from a petition to the Israeli High Court of Justice, described one detainee’s shabeh:

They forcibly seat me on a small chair which is about 20 centimeters in height off the floor, a square chair, like in a kindergarten. The back of the chair is made of iron and the seat from wood.

The detainee continued by describing how the GSS contorted his body around the small chair using shackles.

The front legs of the stool are shorter than the back legs... My hands are shackled and I am chained in a crucifixion position, where one hand is pulled through from behind the back of the chair and tightened from metal handcuffs and the second hand is pulled through from behind the back of the chair. The feet are chained together in metal cables.

GSS often used this form of shabeh when the detainee was “waiting” for questioning. One purpose of shabeh was to prevent the detainee from

67. LEGITIMIZING TORTURE, supra note 44, at 5 (citing an interview on Kol Israel, Israel’s state-owned radio station, on July 29, 1995).
68. See DEATH BY SHAKING, supra note 66, at 6-7 (quoting a U.N. report’s concern over the large number of cases of ill-treatment).
69. TORTURE AND ILL-TREATMENT, supra note 18, at 111.
70. GINBAR, supra note 36, at 15-16.
71. H.C. 7565/97, Ghaneimat v. Minister of Def. (Allegra Pacheco trans.) (translation on file with author) (quoting the affidavit of Salah Abu Ramila T 3, Petitioners’ Principal Arguments Presented to an Expanded Panel at Attachment 2); H.C. 7628/97, Qur’an v. Minister of Def. (Allegra Pacheco trans.) (translation on file with author).
72. H.C. 7565/97, Ghaneimat v. Minister of Def. (Allegra Pacheco trans.) (translation on file with author) (quoting the affidavit of Salah Abu Ramila T 3, Petitioner’s Principal Arguments Presented to an Expanded Panel at Attachment 2).
73. GINBAR, supra note 36, at 15.
sleeping. Interrogators also used position abuse while actively questioning a detainee by forcing him to squat forward balancing on his toes while his hands are tied behind his back for protracted periods (the "frog position") or by painfully stretching the detainee's body over a table or chair. Hooding and subject to deafening music typically took place during the "waiting" period when a detainee was not being questioned. As mentioned above, the GSS used these techniques in combination with position abuse. Hooding involved covering the detainee's head with a thick dirty canvas sack that usually carried an extremely foul odor. The sack reached below the detainee's shoulders and fit tightly enough that some detainees reported that it restricted airflow. Often after hooding the detainee, the GSS subjected him to loud and continuous noise—usually blaring and repetitive music. One detainee described the combination of these methods during the "waiting" periods in his interrogation:

[T]hey hooded me with a sack made from a thick material. For a prolonged period I was hooded for about 20 or 18 days with a sack on my head. The sack was opaque, and only with difficulty could one breathe with it . . . . All the time, from morning to night, there is blaring Western music . . . . During the periods that they sat me in the cell that is coined the "closet" there was the same raucous music . . . . The sitting position and the music together gave me a feeling that in another minute I would go crazy and lose my mind. More than once I cried when I felt paralyzed and that I could not get up.

The remaining methods on which the Committee Against Torture ruled are self-explanatory. The GSS prevented the detainee from sleeping for extended periods. A typical pattern involved continuous interrogation

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74. TORTURE AND ILL-TREATMENT, supra note 18, at 164.
75. GINBAR, supra note 36, at 28-31.
76. Id. at 26-28, 35-36.
77. See TORTURE AND ILL-TREATMENT, supra note 18, at 112 ("GSS agents employ the euphemism 'waiting' when referring to the combination of hooding, sleep deprivation, and abusive body positioning"); see also GINBAR, supra note 36, at 24 (presenting a GSS document tracking the treatment of a Palestinian prisoner and showing the "waiting" periods).
78. See TORTURE AND ILL-TREATMENT, supra note 18, at 156-63 (describing hoods smelling of saliva, gasoline, and excrement).
79. Id. at 160.
80. Id. at 175; see also AMNESTY 1994, supra note 51, at 5 ("Virtually every security detainee brought into custesty is hooded with dirty and sometimes wet sacks, which disorient and hamper respiration.").
81. H.C. 7563/97, Ghaneimat v. Minister of Def., translated in GINBAR, supra note 33, ¶ 3 (quoting the affidavit of Salah Abu Ramila (Jan. 6, 1998)). This affidavit was included as attachment 2 to petitioners' principal arguments presented to the High Court. See also H.C. 7628/97, Qur'an v. Minister of Def., (Allegra Pacheco trans.) (translation on file with author).
82. See TORTURE AND ILL-TREATMENT, supra note 18, at 164 (reporting that interrogators
or other methods of sleep deprivation from Sunday through Thursday (day and night), followed by two days of rest. At times the GSS prevented detainees from sleeping twenty-four hours a day, seven days a week.

Threats against the detainee or the detainee's relatives were used in most interrogations. Interrogators also routinely made sexual threats against the detainee or members of the detainee's family. For example, one detainee reported, "The interrogator 'Dori' told me, 'I am going to kill you just like I killed 'Abd al-Samad Harizat.' They said they would do nasty things to my mother and sister, and they threatened to arrest my relatives."

Finally, the GSS regularly subjected a detainee to temperature extremes during the "waiting" phase. In some cases, the GSS exposed the detainee to an air conditioner blowing cold air directly on him. In other cases, the GSS subjected the detainee to extreme (hot or cold) weather. Even though the Committee Against Torture did not rule expressly on sanitation, humiliation and degradation caused by typical GSS limits on a detainee's use of toilet and bathing facilities exacerbated the detainee's suffering.

This summary describes the most common forms of GSS interrogation; these are also the methods the Committee Against Torture judged to constitute torture. No credible source disputes the use of these methods. Palestinians repeatedly and consistently reported the use of these methods after being released from interrogation. In addition, many different researchers investigated Israeli interrogation methods and reached similar descriptions of typical GSS methods of torture and ill-treatment. Finally, Israel conceded that the GSS employed these methods of interrogation

use position abuse, deafening music and loud noise, and monitoring and harassment by prison guards to keep interrogatees from sleeping).

83. GINBAR, supra note 36, at 22-23.
84. See Khalid Yassin Farraj, BIRZErT HUMAN RIGHTS RECORD: A REPORT ON HUMAN RIGHTS AT BIRZErT UNIVERSITY (Birzeit University Human Rights Action Project, West Bank), Apr.-July 1995, at 2, available at http://www.birzeit.edu/hrarc/hrrl5.html (reporting that Khalid Farraj had been interrogated twenty-four hours each day, seven days a week).
85. GINBAR, supra note 36, at 22-23.
86. Id. at 25-26. 'Abd al-Samad Harizat died in interrogation. See supra note 64 and accompanying text (discussing Harizat's death).
87. GINBAR, supra note 36, at 15.
88. See supra note 36 at 152-54.
89. See id. at 177-81 (discussing specific instances of purposeful deprivation of access to toilets and bathing facilities); see also GINBAR, supra note 36, at 14 (publishing testimonies of detainees concerning access to sanitary facilities).
90. TORTURE AND ILL-TREATMENT, supra note 18, at 177-81.
91. CAT Concluding Observations, 1997, supra note 39, ¶¶ 257, 260(a) (finding that the forms of interrogation discussed in Part III.A of this Note constitute torture).
92. See supra notes 35-39 (listing findings of torture methods reportedly used on Palestinians).
93. See supra notes 35-39 (referencing consistent research findings by different types of researchers).
when interrogating Palestinian detainees. Not only do Israeli interrogation methods violate international law, the methods conflict with the basic requirements of Israeli law.

B. Israel's Underlying Legal Framework

Israeli penal law criminalizes the use of force in interrogation, and international conventions to which Israel is a party ban the use of torture and ill-treatment without exception. Section 227 of the Israeli Penal Code states that any public servant who uses, directs the use of, or threatens to use force against a person in order to extort a confession will be punished with a three-year prison sentence. Israeli case law prohibits the use of "brutal or inhuman means" during interrogation. Case law also protects the basic dignity of detainees. Finally, because Israel automatically incorporates customary international law into its domestic law unless it conflicts directly with Israeli statutory law, customary norms on the treatment of detainees—including the ban on torture and ill-treatment—have legal effect.

In 1991, Israel ratified a number of international human rights conventions. Three of these conventions expressly prohibit torture. First, Israel signed the Convention Against Torture on October 22, 1986, and ratified it on August 4, 1991. In addition, the International Covenant on Civil and Political Rights (ICCPR), ratified on August 18, 1991, and the Convention on the Rights of the Child, ratified in August 1991, provide that

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94. See H.C. 3124/96, Mubarak v. Gen. Sec. Serv., translated in LEGITIMIZING TORTURE, supra note 44, at 20-21 (presenting specific examples of torture in the interrogation of Mr. Mubarak).
96. See infra text accompanying notes 102-05 (listing the conventions Israel has signed and ratified).
101. See supra Part II (discussing prohibition of torture and ill-treatment of detainees).
103. 34 Kaf-Aleph 1039, 294.
104. 31 Kaf-Aleph 1040, 169.
no person and no child, respectively, shall be subject to torture or cruel, inhuman, or degrading punishment.\textsuperscript{105} Israel, like the United Kingdom, has a dualist system. A treaty in Israel does not, therefore, have legal effect until it is incorporated by statute. These treaties have not been incorporated into Israeli statutory law.\textsuperscript{106}

Israel has shown some attention to its treaty obligations by fulfilling its reporting obligations (albeit belatedly) under these conventions.\textsuperscript{107} Israeli penal law, as well as its treaty obligations, expressly prohibits all use of torture and ill-treatment in the interrogation of detainees. Regulations specifically governing GSS interrogations, primarily as articulated in the Landau Commission report, seem, however, to exist outside of this framework.

C. \textit{Regulating Interrogation: The Landau Commission Report}

In May 1987, GSS forces, acting under official orders, killed two Palestinian kidnappers after taking them into custody.\textsuperscript{108} In response to public outcry over these killings, the president of the Israeli Supreme Court appointed a commission, popularly known as the Landau Commission after its head Justice Moshe Landau, to investigate GSS authority to interrogate Palestinian detainees and to use force while doing so.\textsuperscript{109} The Landau Commission issued a report of its findings and conclusions in October 1987.\textsuperscript{110} It is not clear what regulations governed GSS interrogation before 1987. Since that time, however, the GSS has been governed by the Landau Commission's detailed regulations which sanction the use of "moderate

\begin{itemize}
  \item \textsuperscript{106} Benvenisti, \textit{supra} note 102, at 138; see also Lapidot, \textit{supra} note 100, at 458 (discussing the need for treaties to be incorporated by statute before they have legal effect).
  \item \textsuperscript{107} For a discussion of Israel's reports to the Committee Against Torture, see \textit{infra} Part IV. Israel's reports to the Human Rights Committee, the oversight body for the Convention on Civil and Political Rights, largely repeat its reports to the Committee Against Torture. For the sake of brevity, this Note focuses solely on reports to the Committee Against Torture. The United Nations High Commissioner for Human Rights maintains a database of all reports at its Treaty Bodies Database at http://www.unhchr.ch/tbs/doc.nsf (last visited Aug. 30, 2000).
  \item \textsuperscript{108} \textit{See Report of Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, First Part, §§ 1.6-1.9} (Jerusalem, Oct. 1987), \textit{reprinted in 25 Isr. L. Rev. 146} (1989) [hereinafter \textit{Landau Commission Report}] (noting that these killings and subsequent investigations during which GSS interrogators lied to official government investigators motivated the establishment of the commission); see also Felicia Langer, \textit{The History of the Legal Struggle Against Torture in Israel}, in \textit{MEDIC-ETHICS}, \textit{supra} note 36, at 75, 77 (presenting the details of the case from the perspective of the attorney for the families of the executed Palestinians).
  \item \textsuperscript{109} \textit{Landau Commission Report, supra} note 108, §§ 1.1.
  \item \textsuperscript{110} \textit{Id.} §§ 1.6.
physical pressure" during interrogation.

The Landau Commission report is divided into two sections. The Landau Commission published the first section; the second remains secret. In the publicly available section of its report, the commission recommended that GSS interrogators should combine “non-violent psychological pressure of a vigorous and extensive interrogation... with... a moderate measure of physical pressure” to meet the threat of “hostile terrorist activity.” In the secret section of its report, the commission provided detailed guidelines on sanctioned interrogation methods. GSS interrogators apparently acting within the Landau Commission guidelines conducted the interrogations presented in Part III.A of this Note.

The Landau Commission report begins by discussing the terrorist threat to Israel and arguing that only “physical pressure” can safeguard the country from security threats. Its report expressly considered the international prohibitions on torture and cruel, inhuman, or degrading treatment. It discussed the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention of Human Rights, as well as the Fourth Geneva Convention. Finally, the report analyzed the European Court of Human Rights decision in Ireland v. United Kingdom noting, with reference to the abusive interrogation methods used by the United Kingdom, that “[i]t remains to be considered whether each of these acts separately constituted a deviation from what is permissible.”

The guidelines set out in the Landau Commission report governed the interrogation of Palestinian detainees until the September 1999 decision of the High Court of Justice. While the 1999 ruling undermined certain methods apparently sanctioned by the regulations, it did not declare the regulations void or illegal. As a result, these regulations continue to have some authority.

111. Id. ¶ 4.7.
112. Id.
113. Id. ¶¶ 2.9-2.10. The Landau Commission report discusses the threat posed by terrorist activity throughout its report and presents its recommendations in the context of necessity. Id.
116. Id. ¶ 3.21.
117. Id. ¶ 3.24.
118. Id. ¶ 3.22. For a discussion of the European Court of Human Rights decision in this case, see supra Part II.
120. The Landau Commission kept the section of the report detailing authorized interrogation methods secret. It remained secret following the September 1999 High Court decision. See supra text accompanying note 114.
The report states that interrogation "must never reach the level of physical torture, or maltreatment of the suspect or grievous harm to his honour, which deprives him of his human dignity." At the same time, however, the report apparently sanctions the methods of interrogation presented in Part III A of this Note. These are the same methods that the Committee Against Torture, and others, consistently find to constitute torture and ill-treatment. Not surprisingly, the Landau Commission guidelines catalyzed extensive debate both within Israel and internationally. The Israeli High Court of Justice has played an ongoing role in this debate.

D. Israeli High Court of Justice

The Supreme Court of Israel, sitting as the High Court of Justice, hears Palestinian detainees' appeals concerning their treatment by the GSS while under interrogation. This review resembles an application for a writ of habeas corpus in the United States courts. As early as 1968, detainees' lawyers sought interventions from the High Court of Justice to protect their clients from anticipated abuse or to halt ongoing torture. In a typical action, a detainee applied directly to the court for an order forcing the GSS to show cause for using certain methods of interrogation. Lawyers regularly sought an interim injunction ordering the GSS to halt using the protested methods immediately. In the 1990s, human rights advocates decided to apply to the High Court as frequently as possible as part of a campaign to compel the court to rule on the legality of the interrogation methods. As a

122. See supra Part III A (discussing the methods of interrogation used).
124. The Israeli Supreme Court sits as the High Court of Justice, a court of first instance, to hear administrative and constitutional cases. Because Israel does not have a constitution and has only begun to adopt statutes protecting human and civil rights, the High Court of Justice has played a central role in developing and protecting human and civil rights for Jewish citizens of Israel. Stephen Goldstein, The Protection of Human Rights by Judges: The Israeli Experience, in JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 55, 57-58 (Mark Gibney & Stanislaw Frankoski eds., 1999); see also Izhak Zamir, Administrative Law, in PUBLIC LAW IN ISRAEL 18, 38-40 (Izhak Zamir & Allen Zysblat eds., 1996) (discussing the role of the High Court of Justice as the court of final appeal).
126. See Langer, supra note 108, at 75-76 (describing her own legal interventions beginning in the late 1960s).
127. The High Court describes this process in its opinion. See Consolidated Cases, supra note 5, ¶ 17 (discussing this process and the Court's resolutions in several example cases). To read three of these rulings, see LEGITIMIZING TORTURE, supra note 44, at 7-10, 14-16, 20-21.
result, between 1995 and 1997, dozens of Palestinians undergoing torture and ill-treatment appealed to the court to intervene on their behalves.128

The court typically responded only to the request for an interim injunction. Until September 1999, it expressly withheld judgment on the question of the legality of the GSS methods. Petitions ordinarily framed the latter issue as whether the methods constituted torture or illegal ill-treatment.129 In many of these cases, the GSS responded to the petition by informing the court that it had completed interrogation of the detainee or that it would voluntarily stop using violence in interrogation against that particular prisoner.130 When the GSS responded in this manner, the court denied the petition.131 In other instances, the court issued the requested injunction without either explaining the grounds for doing so or ruling on the substantive issues involved.132

In the few cases where the court issued an injunction, the GSS appealed, returning to the same court. When the GSS returned to court to challenge the injunction, the court consistently cancelled the injunction and allowed interrogation to resume without restriction.135 Two cases provide clear examples of this pattern.

‘Abd al-Halim Bilbeisi134 alleged that the GSS was interrogating him using violent shaking, position abuse (both tying him in contorted positions and forcing him to squat in a “frog position” for protracted periods),

128. LEGITIMIZING TORTURE, supra note 44, at 4; see also CAT Special Report Record, supra note 17, ¶ 23 (stating that the court received dozens of petitions from Palestinian detainees between 1995 and 1997).

129. See, for example, H.C./V.R. 336/96, Bilbeisi v. Gen. Sec. Serv., translated in LEGITIMIZING TORTURE, supra note 44, at 7, ¶ 4(d) (“Our decision concerns only the interim injunction issued in this case, and it does not constitute a final statement of our position regarding the question of [why the GSS tortures the Appellant], which we have refrained from discussing today. . . .”).

130. For an example of this practice, see H.C. 3282/97, Chaneimat v. Minister of Def., translated in GINBAR, supra note 36, at 59 (“As for the future, we noted the statement of [counsel for the state] that at this stage of the interrogation, no further physical means will be used against the Petitioner, and that there is no intention to use physical means against him in the future. . . . The petition is denied.”). See also AMNESTY INT’L., INDEX No. MDE 02/04/98, ISRAEL/occUPIED TERRITORIES AND THE PALESTINIAN AUTHORITY: FIVE YEARS AFTER THE OSLO AGREEMENT—HUMAN RIGHTS SACRIFICED FOR “SECURITY” 13 (1998) [hereinafter AMNESTY 1998], available at http://www.amnesty.org/ailib/ aipub/1998/MDE/50200498.htm (last visited Aug. 30, 2000) (discussing the GSS practice of agreeing to suspend interrogation).

131. For an example of this practice see H.C. 3282/97, Chaneimat v. Minister of Def., translated in GINBAR, supra note 36, at 53.

132. See AMNESTY 1998, supra note 130, at 13 (discussing the success of petitions against sleep deprivation since 1994).

133. See LEGITIMIZING TORTURE, supra note 44, at 4 (noting that when the GSS appealed an injunction, the High Court of Justice consistently canceled it).

hooding, sleep deprivation, and subjection to deafening music. The court granted an injunction on December 24, 1995. On January 10, 1996, the GSS petitioned the court to cancel the injunction. The GSS alleged that Mr. Bilbeisi possessed information concerning “the planning of serious terrorist attacks in Israel in the near future.” In oral rebuttal, Mr. Bilbeisi’s counsel asked the court to revise the injunction by limiting its scope to ban only violent shaking. The court rejected this proposal and cancelled the injunction altogether. In so doing, it noted that cancellation of the injunction did not “constitute permission to take during the interrogation of the Appellant steps which are not in accordance with the law.” This caveat contrasted sharply with its denial of the request to enjoin the use of violent shaking.

In a second case, Muhammad ‘Abd al-Aziz Hamdan alleged that the GSS used similar forms of interrogation against him. In addition, the GSS issued threats, including death threats, against him. Initially, the Israeli government agreed to the issuance of an injunction on the grounds that it did not intend to use physical force against Mr. Hamdan. Within twenty-four hours, however, the government appealed to the court to cancel the injunction on the grounds that Mr. Hamdan possessed information vital to the security of the state. The government argued that the GSS must be allowed to interrogate Mr. Hamdan “without the needs of interrogation being subjected to the restrictions of the interim injunction.” It further stated that the methods the GSS intended to use did not constitute torture

135. See LEGITIMIZING TORTURE, supra note 44, at 11 (noting that the state either acknowledged using or refrained from denying the use of these methods of interrogation on Mr. Bilbeisi).
136. See H.C./V.R. 336/96, Bilbeisi v. Gen. Sec. Serv., ¶ 1 (citing H.C. 7904/93, Bilbeisi v. Gen. Sec. Serv.), translated in LEGITIMIZING TORTURE, supra note 44, at 78. Amnesty International reports that the GSS violated the injunction and continued to subject Mr. Bilbeisi to torture including position abuse, sleep deprivation, and violent shaking. AMNESTY 1998, supra note 130.
138. Id. ¶ 2.
139. Id. ¶ 3.
140. Id. ¶ 4.
141. Id. ¶ 4(c).
142. LEGITIMIZING TORTURE, supra note 44, at 12.
144. See LEGITIMIZING TORTURE, supra note 44, at 17.
145. Id.
147. Id.
148. Id. ¶ 4.
within the meaning of the Convention Against Torture. The court revoked the injunction on the grounds that "the Appellant possesses extremely vital information, the immediate procurement of which would prevent an awful disaster, would save human lives, and would prevent very serious terrorist attacks." The court again allowed the GSS to resume use of violent interrogation without expressly ruling on the legality of GSS methods.

Thereafter, in Mubarak v. General Security Service, the court examined four alleged interrogation methods but refused to order the GSS to halt use of the techniques. Khader Mubarak alleged that the GSS was employing position abuse, hoooding, deafening music, and sleep deprivation during interrogation. The state conceded that the GSS was using the alleged interrogation methods, but it denied that the methods constituted torture or that the GSS used them with the intention of causing pain or suffering to Mr. Mubarak. While the court ruled that "painful shackling" was illegal, it nevertheless found that the remaining methods did not justify the issuance of an interim injunction.

This pattern of rulings heightened domestic and international concern for the safety of Palestinian detainees in GSS interrogation cells. In particular, observers became concerned that the Israeli judiciary would not protect Palestinian detainees from torture and ill-treatment.

E. SUMMARY OF ISRAELI PRACTICE AND LAW

The Landau Commission regulations, as reflected in the GSS interrogation of Palestinian detainees and as sanctioned by the High Court of Justice, authorized GSS torture and ill-treatment of Palestinian detainees in contravention of Israeli penal law and international law. This reality came into sharp focus as international attention concentrated on Palestinian human rights during the first Palestinian intifada, a Palestinian campaign...
of popular resistance to the Israeli occupation that began in December 1987.158 As a result, Israel found itself under increasing pressure to explain GSS interrogation methods.

IV. “MODERATE PHYSICAL PRESSURE” AND TORTURE

Israel views itself as a modern democratic state and values its reputation in the world community.159 Perhaps as a result, Israel responded seriously to allegations that the GSS systematically tortured and illegally ill-treated Palestinians.160 For many years, Israel responded to allegations of torture by totally denying that any abuse occurred.161 At another level, Israel simultaneously used political arguments related to the need for national security to excuse torture and worked to redefine torture so as to exclude GSS interrogation practices.162 Nongovernmental and intergovernmental organizations countered Israel’s official position with legal arguments based primarily on international law. In September 1999, the Israeli High Court of Justice rejected GSS interrogation practices as taking place without legal authority and, at least in dicta, used international law to articulate a new norm for GSS interrogation that excluded torture and ill-treatment.163 In so
doing, the court declared the contested GSS methods illegal and degrading.

Upon first review the Palestinian, Israeli, and international human rights monitors heralded the court decision as a victory. Many quickly realized, however, that the court expressly tied its decision to Israeli law. Furthermore, the court noted that the Israeli parliament could revise Israeli law, thereby removing the legal barrier. While as of November 2000 the parliament had not passed such a law, and the court arguably assumed no such law would be passed, the case ultimately rejects the international standard. In so doing, the court leaves open a possibility that the GSS will resume torturing and ill-treating Palestinian detainees.

A. Israel’s Official Position

Until the late 1980s, the Israeli government at all levels regularly and without challenge dismissed allegations that the GSS and the military systematically tortured or ill-treated Palestinian detainees. The courts and the media largely ignored or dismissed Palestinian detainees’ testimony. The publication of the Landau Commission report in 1987, however, coincided with the Palestinian intifada. This led to a dramatic increase in the number of Palestinians arrested and interrogated. These events brought about a marked increase in international attention to Israeli treatment of Palestinian detainees and increased skepticism of the Israeli denial of maltreatment.

In response to these events, the official Israeli position regarding allegations of torture and ill-treatment began to shift. Israel continued to deny the use of methods constituting torture or prohibited ill-treatment and to emphasize that Israeli law “strictly forbids all forms of torture or


165. Langer, supra note 108, at 76. Israeli lawyer Felicia Langer writes, “The courts were characterized by an utter lack of faith in the testimonies of those claiming to have been tortured.... [T]he official response to such claims were [sic] accredited to the wild imaginations of prisoners.” Id. at 75.

166. See supra Part III.C (discussing the publication and content of the Landau Commission report).

167. See supra notes 157-58 and accompanying text (describing the Palestinian intifada that began in December 1987).

168. Amnesty International reported that in the first year of the intifada alone the Israeli government arrested more than 25,000 Palestinians. Israel and the Occupied Territories, AMNESTY INTERNATIONAL REPORT 1989, at 260 (1989).

169. CAT Special Report Record, supra note 17, ¶ 3 (reporting that the Israeli representative “categorically denied the allegations that Israeli authorities used torture during the interrogation of detainees”).
maltreatment.\textsuperscript{170} State officials continued to allege that Palestinians fabricated complaints of torture and ill-treatment.\textsuperscript{171} At about the same time, however, Israel began to make new legal arguments, primarily in the international arena, that specific GSS methods did not meet the definition of torture or prohibited ill-treatment. On a parallel track primarily in the domestic arena, the government argued that national security necessitated and authorized the use of torture and ill-treatment.\textsuperscript{172}

Israel argued that while the GSS used "moderate physical pressure," as authorized by the Landau Commission guidelines, the methods were not severe enough to constitute torture or prohibited ill-treatment according to international law.\textsuperscript{173} Israel's initial report to the Committee Against Torture in 1992 illustrates these arguments well. In this report, Israel expressly argued that international law allows the use of "moderate physical pressure"

\textsuperscript{170} Gaulan, supra note 159; see also CAT Special Report Record, supra note 17, ¶ 18 ("Israel categorically deplored and prohibited the practice of torture, including during interrogation."); see Summary Record of the Public Part of the 184th Meeting: Israel, U.N. Committee Against Torture, 12th Sess., 184th mtg. ¶ 9, U.N. Doc. CAT/C/SR.184 (1994) [hereinafter CAT Initial Report Record].

[Many of the practices described in [reports of nongovernmental organizations on the prevalence of torture and ill-treatment in Israel] were illegal in Israel and if the authorities had information to the effect that such prohibited methods were being used, they would initiate proceedings against the perpetrators. The practices of hooding detainees with wet or dirty sacks, depriving them of food or subjecting them to extremes of cold and heat were all prohibited.

Id.

\textsuperscript{171} For an example of an incident where the state accused a detainee of fabricating complaints in court, see Protocol of the High Court Hearing, H.C. 3282/97, Ghaneimat v. Minister of Def., translated in Ginbar, supra note 36, at 50. In this hearing, counsel for the state argued, "I checked and found that... [h]is allegations are baseless. They did not beat him, they did not cause him open wounds... What [the petitioner] is saying is not the truth." Id. at 50. The counsel for Mr. Ghaneimat responded that Mr. Ghaneimat's body showed evidence of torture. His hands and legs were visibly swollen from beatings, among other signs. Id. at 51.

For a more general example, see STATE OF ISRAEL MINISTRY OF JUSTICE, JUSTICE MINISTRY ON 1995 AMNESTY INTERNATIONAL REPORT (July 5, 1995), available at http://www.mfa.gov.il/mfa/go.asp?MFAH01F0 (last visited Aug. 31, 2000) ("Amnesty International has often upheld allegations of torture made by Palestinian detainees on the basis of evidence that is neither credible nor reliable according to any modern legal standard. The Palestinian detainees have their own motivations for fabricating these claims... ").

\textsuperscript{172} Israel argues that GSS interrogators are collectively and individually excused from liability for using moderate physical pressure (torture) "as a last resort" when a detainee is thought to possess information that is vital to the protection of people and the state. This is also known as "the ticking bomb theory." CAT Initial Report Record, supra note 170, ¶ 15. In its September 1999 opinion, the Israeli High Court held that the necessity defense cannot provide a general authorization for interrogation with physical force and that its applicability in the case of an individual GSS interrogator would depend on the initiation of criminal proceedings. Consolidated Cases, supra note 5, ¶ 34. A more detailed discussion of the defense of necessity is beyond the scope of this Note.

\textsuperscript{173} For example, see the state's argument as represented in the Consolidated Cases, supra note 5, ¶ 15.
and that Israeli methods did not exceed the permitted level of coercion.\footnote{174} Israel's conclusion relied on the decision of the European Court of Human Rights in \textit{Ireland v. United Kingdom}.\footnote{175} \textit{Ireland} involved interrogation methods very similar to those employed by the GSS: position abuse, hooding, subjection to noise, sleep deprivation, and food and drink deprivation.\footnote{176} Israel used the European Court's distinctions between degrees of pressure to support its argument that "moderate physical pressure" need not constitute torture or prohibited ill-treatment.\footnote{177}

Israel also parsed the language of the Convention Against Torture to support its distinction between "moderate physical pressure" and torture or prohibited ill-treatment. It argued that the Convention limits torture to "severe" pain or suffering and that this should be distinguished from "moderate" pressure.\footnote{178} Israeli representatives addressed allegations of hooding, sleep deprivation, "handcuffing," and subjection to deafening music.\footnote{179} The Israeli delegation did not comment on violent shaking. For method discussed, the representatives defended the purpose of the method and argued that it did not constitute torture or prohibited ill-treatment.\footnote{180}

In addition, Israeli authorities engaged in extensive correspondence and public relations efforts to promote their official position that "torture" and "cruel, inhuman, or degrading treatment" did not include the kind of "moderate" physical and psychological pressure used in Israel.\footnote{181} Instead of retreating under international scrutiny, Israel adopted the rhetoric of human rights by repeating that Israeli law banned torture and by distinguishing GSS techniques from the outlawed practice. Because human rights observers had clear information that regular GSS practices constituted torture, they challenged the gap between Israeli rhetoric and Israeli practice not only to protect Palestinian detainees but to protect the strength of the


\footnote{176} \textit{Id.} \textsection{} 96. For a discussion of the methods of interrogation employed by the GSS, see supra Part IIIA.


\footnote{178} \textit{CAT Special Report Record}, supra note 17, \textsection{} 15, 48. In this session the Israeli delegation remarked that, as professors of international law, two members of the Committee Against Torture should understand Israel's argument. \textit{Id.} \textsection{} 15.

\footnote{179} \textit{Id.} \textsection{} 16.

\footnote{180} \textit{Id.} \textsection{} 17-20. While the dialogue in paragraphs 14-21 of the \textit{CAT Special Report Record} refers only to torture, the Israeli representative was responding to questions based on the prohibition on Article 1 (torture) and Article 16 (cruel, inhuman, or degrading treatment or punishment). \textit{Id.} \textsection{} 12-13.

\footnote{181} See supra notes 164-80 and accompanying text (citing different ways Israel communicated its position).
international ban on torture.

B. LEGAL ANALYSIS AND DOCUMENTATION BY HUMAN RIGHTS ORGANIZATIONS

As mentioned above, nongovernmental and intergovernmental human rights organizations closely monitored GSS interrogation practices and contested Israel's claim that torture and ill-treatment occurred only rarely. These organizations also challenged Israel's political versus legal distinction between "moderate physical pressure" and torture or prohibited ill-treatment. They presented the debate in legal terms, invoking international legal standards and bringing the problem to multiple forums. These activities are cataloged in detail here to demonstrate how the international ban on torture and ill-treatment infiltrated and became central to the debate on GSS interrogation methods. This took place even though Israel had not incorporated the Convention Against Torture into domestic law, resisted the applicability of the ban to the GSS practices, and consistently raised justification arguments.

Palestinian, Israeli, and international human rights organizations, working with Palestinian and Israeli lawyers, documented interrogation practices by interviewing Palestinians who had been detained and interrogated. They analyzed the detainees' testimonies for patterns evidencing consistent practices of systematic torture and ill-treatment. This research developed extensive documentation about actual interrogation methods and cataloged difficult-to-document injuries resulting from GSS interrogation methods. International and intergovernmental bodies relied on these organizations' documentation to question and to

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182. For a discussion of Israel's position, see supra Part IV.A.
183. See infra text accompanying notes 184-208 (discussing the different forums where nongovernmental and intergovernmental organizations challenged Israel's definition of torture).
184. The methodology used by James Ron in researching TORTURE AND ILL-TREATMENT, supra note 18, is typical of this research. He describes his research in the following manner:

In preparing this report, [Human Rights Watch] conducted lengthy interviews with thirty-six ex-detainees who were interrogated .... In addition to our own interviews, this report draws on five interviews conducted by defense lawyers with Palestinians still in prison ....

While not a cross-section or a random sample of the population that undergoes interrogation, our diverse sample demonstrates that Israel's principal interrogation agencies routinely mistreat Palestinians in their custody in ways that constitute torture.

Id. at 24.

185. For examples of the organizations working to document Israeli interrogation methods, see supra notes 35-37. Several organizations published a series of documents over time. For example, B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, published seven reports on torture by the GSS between 1991 and 1997. GINBAR, supra note 96, at 8 n.5.
contradict Israel’s reports and public statements regarding GSS interrogation methods.186

Nongovernmental organizations used formal intergovernmental avenues to challenge Israel’s position. Such interventions began in the middle of the 1980s and continued throughout the 1990s and into the year 2000. Organizations working directly with detainees, such as the Birzeit University Human Rights Action Project and al-Haq, the West Bank Affiliate of the International Commission of Jurists, regularly submitted requests for intervention on behalf of their clients to the United Nations Special Rapporteur on Torture.187 Under the so-called urgent action procedure,188 the Special Rapporteur frequently contacted Israel to request that Israeli authorities ensure that GSS interrogators were not torturing or ill-treating a particular detainee.189 The Special Rapporteur subsequently reported his conclusions that Israeli practices constituted torture to the United Nations Commission on Human Rights, thereby involving an additional intergovernmental body.190

In addition, nongovernmental organizations reported directly to the United Nations Commission on Human Rights, the United Nations Human Rights Committee,191 and the Committee Against Torture.192 As a signatory

186. See CAT Initial Report Record, supra note 170, ¶ 9 (noting that the United Nations Committee Against Torture had relied on reports by international and Palestinian human rights organizations); CAT Concluding Observations, 1997, supra note 39, ¶ 257 (relying on descriptions of interrogation methods supplied by nongovernmental organizations).


188. Under the Special Rapporteur’s “urgent action procedure,” the Special Rapporteur can approach a government directly if she or he has reason to believe a detainee may be being subjected to torture at the time of the intervention. Peter H. Kooijmans, The Role and Action of the U.N. Special Rapporteur on Torture, in THE INTERNATIONAL FIGHT AGAINST TORTURE 56, 59 (Antonio Cassese ed., 1991).


190. See Special Rapporteur, 55th Sess., 1999, supra note 187, ¶ 394 (reporting that use of “moderate physical pressure” violated the prohibition of cruel, inhuman, and degrading treatment); Special Rapporteur, 54th Sess., 1997, supra note 187, ¶ 121 (“It is nevertheless clear that Israel has not found a means compatible with international law to interrogate suspected terrorists.”); Special Rapporteur, 53rd Sess., 1997, supra note 39, 7 (finding methods of interrogation used by Israel constitute torture).

191. For an example of these interventions, see Amnesty International’s list of publications and news releases since 1996, including reports on Amnesty statements to the Commission on Human Rights and the Committee Against Torture, at http://www.amnesty.org/allib/countries/indx515.htm (last visited Aug. 31, 2000). The Birzeit University Human Rights
of the International Covenant on Civil and Political Rights, Israel reported to the Human Rights Committee on its implementation of the rights guaranteed under the Convention. Nongovernmental human rights organizations provided alternative sources of information to the United Nations bodies. The reports played a roll in coalescing the international legal response when the U.N. committees relied on them in evaluating Israel's official reports.

Intergovernmental human rights organizations took an active role in challenging Israel's practices. Many United Nations bodies issued statements criticizing Israel's interrogation methods and calling for a halt to the GSS use of torture and ill-treatment. In a particularly clear example, after learning of the Israeli High Court of Justice decision in the case of Khader Mubarak, the Committee Against Torture asked Israel to submit an extraordinary report on the court's decision and "its implication for the implementation of the Convention [Against Torture] in Israel." In 1994, 1997, and 1998, the Committee Against Torture formally rejected Israel's position that "moderate physical pressure" does not constitute torture and recommended that Israel stop using this method in interrogation.

Actions addressed to domestic Israeli forums constituted an important part of the campaign against torture. Nongovernmental human rights

Action Project and Al-Haq, the West Bank affiliate of the International Commission of Jurists, submitted similar interventions.

Israel also submitted reports and appeared in hearings before the committee according to its obligations as a signatory of the treaty. See supra Part IV.A (discussing Israel's reporting practices).


See supra note 186 (providing examples of occasions when the U.N. Committee Against Torture relied on reports of nongovernmental organizations).


See supra Part III.D (discussing this case).


organizations intervened directly with Israel through governmental channels. For example, between 1990 and 1999, Amnesty International regularly issued Urgent Action Requests for letter-writing campaigns on behalf of Palestinian detainees undergoing GSS interrogation. Each request raised the case of a particular Palestinian under interrogation. The request asked network members to contact Israeli authorities to call for the detainee’s protection and to protest Israel’s rhetorical stance that “moderate physical pressure” did not violate international law. B’Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, submitted documentation and requests for intervention to the Israeli parliament, as well as to the executive branch.

An important aspect of this work involved educating Israeli citizens and professional associations. For example, Amnesty International worked extensively with the Association of Israeli-Palestinian Physicians for Human Rights to document the role of medical professionals in the interrogation of Palestinian detainees. The groups also worked to raise awareness of the practice with the Israeli Medical Association and to remind Israeli health


200. See, for example, AMNESTY INT’L, INDEX NO. MDE 15/27/99, TORTURE/LEGAL CONCERN/HEALTH CONCERN, ISRAEL/OCCUPIED TERRITORIES: MUNA HASSAN AWAD BARHASIN (F), NURSERY SCHOOL MANAGER, AGED 28 (12 Mar. 1999). The opening line of this request reads, “Amnesty International is alarmed at reports that Muna Hassan Awad Barhasin, a Palestinian woman arrested last month at an Israeli checkpoint in the West Bank, is being tortured and ill-treated under interrogation by Israel’s General Security Service.” Id. at 1. The Urgent Action then provides the details of the case and information about Israel’s use of torture or ill-treatment in interrogation. Finally, the Urgent Action recommends that the recipient contact the responsible Israeli officials to inquire about their treatment of Ms. Barahasin. The Urgent Action then provides information for contacting Israeli officials. Id.

201. See About B’Tselem at http://www.btselem.org (last visited Aug. 30, 2000) (discussing B’Tselem’s contact with the Israeli legislature, the Knesset, and others). Many nongovernmental human rights organizations contacted the United States and European governments, as well as the European Union, to raise awareness of GSS interrogation practices and to call for interventions against the Israeli position. For one example of this practice, see TORTURE AND ILL-TREATMENT, supra note 18, at xv-xviii, calling on the United States and Europe to support efforts to halt torture and ill-treatment in Israel.


203. See Marton, supra note 202, at 39; see also Mamdouh Al-Aker, Where is the Israeli Medical Association?, in TORTURE: HUMAN RIGHTS, MEDICAL ETHICS, AND THE CASE OF ISRAEL 63, 63 (Neve Gordon & Ruchama Marton eds., 1995) (calling for a more active role by the Israeli
professionals of their ethical obligations not to collude in torture.204

Starting in about 1994,205 nongovernmental human rights organizations and lawyers turned their attention to the Israeli judiciary and decided to bring every case of suspected torture or ill-treatment before the Israeli High Court of Justice. This strategy stemmed from the realization that judicial intervention sometimes could protect detainees.205 In addition, nongovernmental human rights organizations deliberately involved the Israeli judiciary in the central debate on whether “moderate physical pressure” amounted to torture or prohibited ill-treatment. This strategy heightened focus on the legal question rather than the political rhetoric. As noted above, the court consistently withheld judgment on the interrogation methods used and on several occasions allowed the GSS to employ methods involving physical pressure.207 In the same time period, the Public Committee Against Torture in Israel and the Association for Civil Rights in Israel, two human rights organizations, appealed directly to the court concerning GSS interrogations.208 The court did not rule on these cases until September 1999.

Nongovernmental and intergovernmental organizations systematically provided an alternative analysis of GSS interrogation methods in both domestic and international forums. In doing so, they brought international law to bear on Israeli domestic actions. The nongovernmental and intergovernmental organizations constructed a forum in which the international ban on torture and ill-treatment informed domestic analysis. Finally, by seeking judicial review, the organizations insisted that GSS interrogation methods be judged in the domestic setting according to (international) legal norms, rather than political considerations or evasions.

C. ISRAELI HIGH COURT OF JUSTICE DECISION, SEPTEMBER 1999

In January 1998, the Israeli High Court of Justice agreed to conduct hearings directly addressing the GSS interrogation methods. The court joined the petitions of five Palestinian detainees with two public petitions submitted by Israeli human rights organizations.209 The individual petitions

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204. See generally the report on the Conference on the International Struggle Against Torture and the Case of Israel, held in Tel Aviv, Israel, on June 13-14, 1993, and organized by the Association of Israeli-Palestinian Physicians for Human Rights and the Public Committee Against Torture in Israel, in MEDICAL ETHICS, supra note 202 (providing different perspectives on collusion between medical professionals and the GSS).

205. See AMNESTY 1998, supra note 130, at 13 (noting that torture cases had been brought to the High Court of Justice for about five years).

206. Id.

207. See supra Part III.D (discussing High Court of Justice rulings).

208. See infra notes 205-07 and accompanying text (discussing the nongovernmental petitions).

209. Consolidated Cases, supra note 5, ¶ 2-7.
detailed the methods of interrogation employed against each detainee and asked the court to find each method illegal. One public petition challenged whether the GSS mandate allowed the unit to conduct interrogations at all. It also challenged the legality of the Landau Commission's authorization of "non-violent psychological pressure" and "a moderate degree of physical pressure." The second petition challenged the use of violent shaking. The court considered these petitions in an expanded nine-judge panel.

On September 6, 1999, in a unanimous ruling, the court rejected the government's distinction between the GSS methods and illegal interrogation. Justice Aharon Barak, writing for the court, held that the law of Israeli police interrogations also governs GSS interrogators. Justice Barak then set forth the limits of the Israeli law of interrogation.

Justice Barak stated that the Israeli law of interrogation requires the interrogator to "preserve the 'human image' of the suspect" and that "an illegal investigation harms the suspect's human dignity." Barak then defined "a reasonable investigation," noting that such an interrogation "is necessarily one free of torture, free of cruel inhuman treatment of the subject and free of any degrading handling whatsoever." He stated that Israeli law prohibits the "use of 'brutal or inhuman means' in the course of an investigation." In explicating these limits, Barak referenced international law. He continued, "These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing." Barak stated that the court's ruling "is in perfect accord" with international law and conventions and cited international law treatises. He also relied on the work of Professor Nigel Rodely, a vocal critic of Israel's severe/moderate distinction.

210. Id.
211. Id.
212. Id. ¶ 2.
213. Id.
214. Consolidated Cases, supra note 5.
215. Id. The court also rejected the government's use of the defense of necessity. See id. ¶¶ 33-38. A discussion of this part of the ruling is, however, beyond the scope of this Note.
216. Id. ¶ 32.
217. Id. ¶ 22 (citing Cr.A. 115/82, Mouadi v. State of Israel, 35(1) P.D. 197, 222-24 (1982)).
218. Consolidated Cases, supra note 5, ¶ 22.
219. Id. ¶ 23.
221. Consolidated Cases, supra note 5, ¶ 23.
222. Id.
223. Id. Barak cited Nigel S. Rodely, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (1987). Id. Professor Rodley is the U.N. Special Rapporteur on Torture. His criticism of the Israeli position is discussed supra Part IV.B.
court discussed the European Court of Human Rights decision in *Ireland v. United Kingdom* and emphasized that the opinion may have distinguished between torture and ill-treatment, but it prohibited both forms of abuse.

After setting out a general requirement for a reasonable interrogation and the prohibition on torture, Justice Barak discussed each challenged method of interrogation in turn. The opinion prohibits as "degrading treatment" the following methods: shaking, enforced squatting, handcuffing that causes pain, "seating a suspect on a forward tilting chair" (with or without hands tied behind the back), hoody, subjecting to "powerfully loud music," shabeh, and sleep deprivation "for the purpose of... breaking" a suspect.

The court rejected the government's defense of the necessity of "moderate physical pressure" and, at least implicitly, adopted the nongovernmental and intergovernmental organizations' assessment of the GSS interrogation methods. Human rights organizations heralded the court's decision as "one of the most important decisions made by the High Court during [Israel's] history" and as "a milestone in the long attempts by Israeli, Palestinian, and international human rights activists to end the effective legalization of torture in Israel."

As noted above, however, Justice Barak tied his ruling to Israel's law of interrogation. He noted, "There is no statutory instruction endowing a GSS investigator with special interrogating powers... ." This statement sets out the real holding of this case: The Israeli law of interrogation, which governs GSS interrogations, does not authorize the contested methods of interrogation.

The opinion did not hold that any law authorizing violent shaking, shabeh, or sleep deprivation would be illegal under Israel's treaty obligations or case law. In contrast, Barak noted, "If the State wishes to enable GSS interrogators to utilize physical means in interrogations, they must seek the..."
enactment of legislation for this purpose.”

He reasoned that such a law is "necessary" for government instruction and administration of the GSS. The precarious balance between the court’s holding and Barak’s demarcation of acceptable interrogation methods illustrates the weakness and the strength of the international ban on torture and ill-treatment in one domestic setting.

By November 1999, approximately 64 members of the 120-member Israeli parliament introduced a bill specifically authorizing the GSS to use physical pressure in interrogation. The author of the bill acknowledged that the bill would be “introducing torture into the law of the State of Israel” and that the provisions he proposed violated international law and Israel’s treaty obligations. The introduction of this bill led to a new round of lobbying by nongovernmental and intergovernmental organizations urging Israel to commit itself to compliance with the international ban on torture and ill-treatment. The law did not pass in November 1999 and had not been reintroduced as of November 2000. It is arguable that the court, recognizing the strength of the international ban and the persistent governmental rhetoric stating opposition to torture, assumed the parliament would not adopt such a controversial bill. Nonetheless, by failing to recognize the international ban on torture as part of Israeli law, Barak’s decision creates the opening that such a bill will pass in the future.

V. RECOMMENDATIONS AND CONCLUSION

Israel should take affirmative steps to ban the use of torture and ill-treatment in the interrogation of detainees. While this ban would most immediately effect Palestinian detainees, it also has important implications for the civil rights of Israeli dissenters. Justice Barak’s opinion lays the

235. Id. ¶ 37.
236. Id. ¶ 38.
237. Aryeh Dayan, A Ticking Time Bomb in the Knesset Some 64 MKs have Signed a Bill Specifically Authorizing the Shin Bet to Use Torture Under Certain Conditions—Despite the Fact that Israel Has Signed an International Treaty Prohibiting It, HA’ARETZ (Tel Aviv), Nov. 1, 1999, available at 1999 WL 29925200; see also Press Release, Amnesty Int’l, Fear of the Legalization of Torture (Nov. 29, 1999) (reporting on the introduction of the bill and the fact that it violates the Convention Against Torture).
238. Dayan, supra note 237.
239. For an example of the kinds of campaigning that resulted, see POSITION PAPER: LEGISLATION ALLOWING THE USE OF PHYSICAL FORCE AND MENTAL COERCION IN INTERROGATIONS BY THE GENERAL SECURITY SERVICE (B’Tselem: The Israeli Information Center for Human Rights in the Occupied Territories ed., 2000) (reporting on steps by the parliament to adopt legislation allowing torture and inviting recipients to protest against enactment of such legislation).
240. Barak could have done this by recognizing the ban on torture as a part of customary international law. See supra note 100 and accompanying text (explaining the automatic incorporation of customary international law into the law of Israel).
241. See supra note 41 (noting that the GSS has tortured non-Palestinians).
groundwork for such action by invoking international standards to measure “a reasonable interrogation” under Israeli law. In drafting a law to govern GSS interrogations, members of the Israeli parliament should remember Barak’s reliance on the international standards and should vote to prohibit torture and ill-treatment under all circumstances. In addition, Israel should take steps to incorporate the provisions of the Convention Against Torture into Israeli law, as recommended by the Committee Against Torture in 1997 and 1998, so that it has legal effect.

Until September 1999, the Israeli government consistently defended the use of “moderate physical pressure” against Palestinian detainees despite international and domestic protestation that the interrogation methods constituted torture and prohibited ill-treatment. Palestinian detainees routinely experienced torture and ill-treatment when detained. International and domestic nongovernmental and intergovernmental advocacy repeatedly raised the international ban on torture and ill-treatment to challenge the legal foundations of the governmental rhetoric. In September 1999, the judiciary pushed the governmental rhetoric toward the international ban and, perhaps more importantly, forced the GSS to stop torturing and ill-treating Palestinian detainees, at least for the moment. This Note has reviewed this turn of events by examining Israeli law, Israeli practice, and domestic and international interventions leading up to the September 1999 decision. In so doing, it has provided one assessment of the strength of international and domestic legal tools and of the international ban on torture at the turn of the twenty-first century.

242. Consolidated Cases, supra note 5, ¶¶ 22-23.
243. See Press Release, Amnesty Int'l, Fear of the Legalization of Torture (Nov. 29, 1999) (calling on Amnesty members to contact parliament members urging them to support a draft penal code amendment prohibiting torture).
244. CAT Concluding Observations, 1997, supra note 39, ¶ 260(b) (calling on Israel to incorporate the provisions of the Convention Against Torture into Israeli statutory law).
245. CAT Concluding Observations, 1998, supra note 198, ¶ 240(b) (calling on Israel to incorporate the provisions of the Convention Against Torture into Israeli statutory law).
246. See supra text accompanying note 106 (noting that a treaty does not have legal effect in Israel until it is incorporated by statute and explaining that the Convention Against Torture has not been incorporated).