HCJ 9018/17

Petitioner:	1.	Firas Tbeish
	2.	Public Committee against Torture in Israel
		v.
Respondents:	1.	Attorney General
	2.	Director for Complaints Against the Israel Security Agency
	3.	Israel Security Agency
	4.	Interrogators of the Israel Security Agency

The Supreme Court sitting as High Court of Justice

[Nov. 26, 2018]

Before Justices I. Amit, D. Mintz, Y. Elron

Judgment

Justice Y. Elron

At the heart of this petition is the Petitioner's claim that he was tortured by interrogators of the Israel Security Service [formerly the General Security Service or GSS – ed.] in the course of his interrogation. He therefore seeks two remedies in this petition.

The Petitioner first seeks personal relief in the form of an order nisi ordering the Attorney General to rescind his decision not to open a criminal investigation of the Petitioner's interrogators.

Secondly, the Petitioner seeks general relief in the form of rescinding the Attorney General's Directive entitled: "ISA Interrogations and the Necessity Defense – Framework for the Attorney General's Discretion" (hereinafter: the AG's Directives) that provide the basis for internal guidelines in the ISA (hereinafter: the Internal Guidelines). It is argued that these

Guidelines unlawfully permit interrogators to confer with their superiors in regard to employing "special means" in the course of interrogations, and should, therefore, be annulled.

The Primary Relevant Facts

The interrogation of the Petitioner

1. The Petitioner, who was born in 1978, was placed under administrative detention on Nov. 2, 2011, on suspicion of membership and activity in the Hamas, which is an unlawful association, and commerce in military ordnance. His detention was periodically extended until Nov. 1, 2012.

2. In the course of his administrative detention, the Petitioner was interrogated by the Israel Security Service (hereinafter: the ISA) on Sept. 5, 2012, on the suspicion of terrorist activity, but he denied the suspicion. From that date until Oct. 2, 2012, the Petitioner was denied the right to meet with his attorney.

3. The Petitioner was again interrogated by the ISA on Sept. 12, 2012, based on fresh intelligence raising a suspicion of involvement in military activity in the Hamas. The intelligence included a concrete suspicion that the Petitioner knew the location of a substantial arms cache held in a storage facility belonging to the terrorist network in which he was active, which comprised more than ten weapons, including rifles. According to the intelligence, the said weaponry had been used in the perpetration of several terrorist attacks, some of which resulted in the loss of life.

Additionally, there was a suspicion that the terrorist network of which the Petitioner was a member, intended to carry out another terrorist attack with those weapons.

4. In light of the Petitioner's denial of the suspicions and of any knowledge of a planned terrorist attack, and in view of the ISA interrogators' opinion that he had information about a plan to harm public safety that would endanger human lives, the ISA employed what the Respondents term "special means of interrogation" against the Petitioner on Sept. 18, 2012.

As a result, the Petitioner provided information that led to the discovery of a large number of weapons that were in the use of an active military infrastructure of the Hamas. Inter alia, the Petitioner admitted that he had received many weapons upon the instructions of a senior member of Hamas, and had transferred them to a hiding place and to known Hamas activists.

5. At that point, pursuant to a highly probable suspicion that the Petitioner was withholding information in regard to an attack planned by members of the network of which his was a member, as aforesaid – which information was grounded, inter alia, upon a polygraph administered to the Petitioner – "special means of interrogation" were again employed in the interrogation of the Petitioner on Sept. 21, 2012.

In the course of his interrogation, the Petitioner provided information about additional weapons that he had received and had transferred to other Hamas activists, who were also under arrest at that time. Later in the interrogation, he provided information that aided in advancing the interrogation of other members of the terrorist network, one of whom admitted to planning a kidnapping attack and to "setting in motion" – in the words of the Respondents – additional terrorist activity.

6. In the course of the period during which "special means" were employed in his interrogation – i.e., from Sept. 18, 2012 to Sept. 21, 2012 – the Petitioner was examined four times by a Prison Service physician.

On Sept. 19, 2012, the medical examination found "pain and swelling in the upper right molar area", and noted "Buccal swelling. Pain upon palpation. Periodontal abscess".

An examination of the Petitioner conducted on Sept. 21, 2012 at 5:37 AM found "his general condition is reasonable", his skin is "pale", and he suffers from diarrhea. Thereafter, at 6:03 AM, he was examined following complaints of pain in his knees, and it was noted that "in the examination – he appeared agitated. Red eyes. Did not sleep tonight – interrogation". The examination did not find reason for new treatment. Later that day, at 6:42 PM, the Petitioner was examined again, this time for complaints of pain in his left knee. The examination found "his general condition is reasonable", and he was given medication for swelling, pain and restricted movement of his knee.

The Criminal Proceedings in regard to the Petitioner

7. As noted, the Military Court in Judea periodically extended the Petitioner's arrest over the course of his interrogation. The decision in regard to the first extension request, on Sept. 13, 2012, noted: "In response to the court's question concerning the suspect's medical condition, the suspect answered that everything was fine and he had no medical problems".

The decision on the second extension request, on Sept. 24, 2012, three days after the end of the use of the special means in the Petitioner's interrogation, similarly noted: "In response to the court's question as to whether he was in good health, the suspect answered that he had no problems."

8. In a hearing on a further request to extend his arrest, the Petitioner and his attorney first raised the claim that improper means had been employed in the Petitioner's interrogation, and that this was sufficient to warrant his immediate release. It was claimed that "the ISA interrogators threatened him [the Petitioner – Y.E.] and hit him, and he has signs on his legs". According to the transcript of the hearing, the Petitioner then "raised his pants to his knee. There is a somewhat dark spot above the left knee, and there are three scratches above the foot, which are not new".

In response to the court's question regarding exceptional matters in the interrogation, the Petitioner responded:

> On Sept. 20, 2012 or Sept. 21, 2012, they told me I was brought to a military interrogation. From that moment, they asked me to sit bent over, without a chair, for an hour or an hour and a half. After that, they asked me to sit on a chair with my legs on one side and my head on the other (demonstrates), and that took a lot of time. About 8 hours with interruptions. I lost consciousness 3 times in the course of the interrogation, and I vomited a lot. The interrogator hit me in the legs with his knee. An interrogator named Tzahi hit me in the eye while I was blindfolded. That's what happened in the interrogation.

9. In its decision that day, the court noted:

> After hearing the suspect's [the Petitioner – Y.E.] claims and examining the secret memorandum submitted by the representative of the investigation, it can be established that exceptional means were employed in interrogating the suspect.

The court added:

> All that can be said at this time is that considering the severity of the suspicions, as well as the results produced by the investigation, it *cannot* be established that employing the means applied against the suspect was unlawful and that there was no reasonable basis for their application, and that they should, therefore, lead to his immediate release [emphasis original – Y.E.].

10. Upon conclusion of the investigation, an information was filed against the Petitioner in the Military Court in Judea.

In the court hearing on May 13, 2013, the Petitioner's attorney again raised arguments regarding the use of improper interrogation methods that he claimed were employed against the Petitioner, among them sleep deprivation, painful handcuffing, use of stress positions like the "frog" and "banana", threats against family members, degradation, and even physical violence. In light of the above, his attorney asked to conduct a voir dire.

11. On June 9, 2014, the parties presented a plea agreement under which an amended information was filed. According to the amended information, in 2009 the Petitioner was a member of a military squad of the Hamas. In that capacity, he was responsible for the storage and hiding of military ordnance for the Hamas organization, in order that it be available for the organization when required. Additionally, at the beginning of 2010, the Petitioner, together with others, transferred seven weapons to members of the Hamas for the purpose of perpetrating future terrorist attacks.

12. That day, in accordance with his guilty plea, the Petitioner was convicted of membership and activity in an unlawful association under sec. 85 of the Defence (Emergency) Regulations 1945, and of commerce in military ordnance under secs. 233(b) and 201(a)(2) of the Order concerning Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009, as stated in the amended information.

In view of the Petitioner's conviction under the plea agreement, it was unnecessary to address the voir dire arguments presented at the beginning of the trial.

13. In accordance with the request of the parties under the plea agreement, the court sentenced the Petitioner to 36 months imprisonment from the day of his initial administrative detention, a

36-month suspended sentence, on condition that he not commit any offense detailed in the judgment for a period of 5 years, and a monetary fine in the amount of NIS 20,000. The court further activated a pending suspended sentence, six months of which would be served concurrently and six months consecutively.

The court explained its reasons for adopting the penalties under the plea arrangement, noting:

> The information filed against the defendant [the Petitioner – Y.E.] is very serious. The defendant acted in the framework of a military squad that was entrusted with keeping extremely dangerous ordnance. The defendant's activity posed a real threat to the security of the area, and there can be no doubt that under normal circumstances I would impose a far more severe sentence upon the defendant than that proposed by the parties. However, in view of the reasons presented by the parties, and particularly in view of the exceptional interrogation that the defendant experienced, I found the arrangement reasonable, and I adopt it.

The Petitioner's Complaint and his Prior Petition to this Court

14. On April 2, 2013, before the conclusion of the legal proceedings in his matter, the Petitioner filed a complaint through his attorneys from The Public Committee against Torture in Israel (Petitioner 2), asking that the Attorney General immediately open a criminal investigation against the Petitioner's interrogators due to "a brutal course of psychological and physical torture", as stated in the complaint. The complaint further requested the investigation of the members of the medical staff that allegedly were physically present in the interrogation room in order to provide medical treatment, but who did nothing to "stop the torture".

According to the complaint, in the first stage of the interrogation, the interrogators "wore down" the Petitioner by conducting an intensive interrogation while depriving him of continuous sleep, and also employed verbal aggression that included threats to kill him, harm his family and demolish his house.

At the second stage, it is alleged that the Petitioner was subjected to physical "torture", in the course of which he was punched in his right eye; held in a "banana position" with his back on the seat of a chair, his head to one side and his legs to the other; held by his head and feet by two interrogators and "shaken" until he lost consciousness and vomited; punched and slapped, leading to the loss of a tooth, and was kneed in his leg muscle by one of the interrogators; held in a "frog squat" position; made to stand with his back to the wall for an extended period; and made to sit on a chair for an extended period with his hands handcuffed behind his back.

It was further claimed that on one occasion when the Petitioner was required to stand with his back to the wall, his pants fell, and his interrogators insulted him with expressions of a sexual nature, and one of the interrogators allegedly photographed him. Lastly, it is claimed that on one occasion, when the Petitioner received his meal in the interrogation room, one of the interrogators smeared jam on his face.

15. The Petitioner's complaint was sent to the Department for Complaints Against the Israel Security Agency (hereinafter: the Department). The Head of the Department (hereinafter: the Inspector) examined all of the investigative material held by the ISA, and every report on the manner of the Petitioner's interrogation, including the intelligence information that formed the basis for the interrogators' suspicions; memoranda written in the course of the interrogation; medical documents; transcripts and additional documents from the Petitioner's legal proceedings.

On Aug. 21, 2014 and January 21, 2015, the Inspector met with the Petitioner in jail in order to examine his complaint. In the course of these meetings, the Petitioner did not remember the details of his interrogation, did not remember the content of the insults and threats made against him, although he claims that they were made persistently. The Petitioner asked that the affidavits that he gave to his attorney on Nov. 1, 2011, Nov. 12, 2012, Nov. 20, 2012, and Nov. 29, 2012, be taken as his version of the complaint to the Inspector.

When the Petitioner was asked if he would be willing to undergo a polygraph examination in regard to his factual version of the events, he replied through his attorney that he refuses to be examined because it might cause him a "repeat trauma" in view of the prior polygraph that had been administered in the course of his interrogation. He further argued that a polygraph was inappropriate to a preliminary examination prior to a decision as to whether to open a criminal investigation (as opposed to its use in the course of the investigation itself), and that because it is

an “invasive” procedure that involves infringing basic rights, there are serious reasons for refraining from the examination in the case of a “victim of torture”, as in his case.

16. In the course of January and February 2016, the Inspector questioned ten of the Petitioner’s interrogators and confronted them with his allegations. A significant part of those allegations were denied by the interrogators.

According to the interrogators, “special interrogation means” were employed in the course of the interrogation, in the absence of any alternative and in order to save human lives, but their scope and nature differed significantly from what the Petitioner claimed.

17. The Inspector also met with the prison guards whose names were mentioned in the Petitioner’s complaint, but only one of them was found to have been on duty at the time of the interrogation. That guard stated that he did not recall an event like that described in the Petitioner’s complaint – according to which the guards doused him with water, changed his clothes, and returned him to the interrogation room on an office chair with wheels – and that if such an event would have occurred, he would certainly remember it.

The Inspector also met with the Prison Service EMT who met with the Petitioner while he was held under arrest. According to the EMT, he did not remember the Petitioner’s face or name, but in any case, it is not possible that a report (by a suspect or an interrogator) of the Petitioner’s loss of consciousness would not be recorded in the medical records, even if there were no medical findings. It should be noted that the physician who examined the Petitioner in the course of the interrogation has died, such that further details about his examination of the Petitioner are unobtainable. The EMT noted before the Inspector that the physician was “very meticulous”, and it was his practice to document every medical action taken in regard to the Petitioner, even if it was a routine matter.

18. On Feb. 24, 2016, the Inspector submitted her recommendations to the Director for Complaints against the Israel Security Agency in the State Attorney’s Office.

19. On Sept. 12, 2016, the Director for Complaints against the Israel Security Agency informed the Petitioners that she had decided, with the approval of the Attorney General and the State Attorney, to close the investigation of the Petitioner’s complaint because she was of the opinion

that the investigation's findings did not justify criminal, disciplinary, or other proceedings against the interrogators.

Paragraphs 12-13 of the decision noted:

> Following a meticulous review of the documents in the examination file, I have found that there was no flaw in the discretion of the interrogators, and that under the circumstances of the matter, the use of special means of interrogation are subject to the necessity defense. Moreover, in view of the severity of the threat posed by the terrorist network to which the complainant [the Petitioner – Y.E.] belonged – I have found that the special means of interrogation employed by the interrogators were proportionate, and were appropriate to the importance of uncovering the information that the complainant was withholding. It should also be emphasized that no support was found for most of the complainant's descriptions of the special means employed in his interrogation, including in the medical records, although it would be expected that if there were substance to the claims, the medical records would show objective findings. Additionally, the ISA interrogators absolutely denied most of the claims.

The decision explained that the findings of the examination found that contrary to the Petitioner's claims, there was not support for the claim that he was "shuttled" to and fro, in his words, among a number of detention centers prior to his interrogation in order to wear him down physically and mentally; that the special means employed in his interrogation were not applied continuously from Sept. 18, 2012 until Sept. 21, 2012; that there was no support for the claim that the Petitioner had lost consciousness or that he suffered any physiological or psycholgical harm as a result of his arrest or interrogation; that there were no indications that the Petitioner was handcuffed in a manner inconsistent with ISA guidelines, and there is even documentation showing that only one hand was handcuffed; that no support was found for the claim that the Petitioner's interrogators threatened or insulted him; that no basis was found for the claim that an interrogator smeared jam on the Petitioner's face; that there was no indication that the Petitioner's pants fell down, that the interrogators subsequently taunted him, or that he was photographed in such a state, as was claimed.

The findings further showed that there was no defect in the manner of the interrogators' response to the Petitioner's medical condition, and that the interrogators did not withhold medical attention or treatment in the course of his interrogation. In addition, the investigation found that on three occasions, the Petitioner was examined by a physician in the interrogation room and not in the clinic, although there was no particular medical urgency for the examination. As a result, the decision noted that "it is our intention to consult with the appropriate persons in the ISA to enquire as to the relevant interrogation procedures in this regard".

20. In the interim, on Nov. 12, 2014, before the Inspector issued her decision, the Petitioners filed a petition with this Court, asking that the Court order the Department for the Investigation of Police Personnel to open an investigation against the Petitioner's interrogators, and to annul the ISA's internal guidelines in regard to "special means for interrogation".

On Jan. 30, 2017, this Court dismissed the petition, holding that the first requested remedy had become superfluous after the Attorney General determined that no criminal investigation of the interrogators should be opened in regard to the Petitioner's complaint, and that the second remedy – in regard to annulling the ISA's internal guidelines – is a general remedy that should be addressed only in the framework of a concrete petition. It was further held that the Petitioners could submit a new petition against the Attorney General's decision, and that all of their arguments were reserved in this regard (HCJ 7646/14 *A. v. Attorney General* (Jan. 30, 2017)).

21. After reviewing that part of the Inspector's examination material that was available for their review, the Petitioners filed the current petition on Nov. 19, 2017.

The Arguments of the Parties

22. According to the Petitioners, the decision of the Director that was approved by the Attorney General is unreasonable in the extreme. This is so because the ISA interrogators intentionally employed violence against the Petitioner, which caused him severe pain and suffering, in a manner that constitutes torture. In this regard, the Petitioners repeated what was presented in the complaint that was filed, while emphasizing the transfer of the Petitioner from one detention facility to another prior to the interrogation without apparent reason; depriving him of sleep in the course of

the interrogation; and the alleged physical violence perpetrated against him in the course of the interrogation, as detailed above.

It is argued that the absence of real-time medical documentation cannot refute the Petitioner's claims in regard to his suffering and pain, and that the undated medical opinion of Dr. Firas Abu Aker, appended to as Appendix 17 of the petition, the content of which relies upon an examination of the Petitioner conducted in the jail on Feb. 17, 2013, suffices to show the reliability of his version (hereinafter: the opinion of Dr. Abu Aker).

The Petitioners also seek to rely upon the medical documentation of the Petitioner's examination in the course of his interrogation – particularly the findings of swelling of the knee and injury to his tooth. The Petitioners further refer us to the Petitioner's statement in the Military Court hearing, and to what was stated in the affidavits that he presented to his attorney in November 2012.

23. The Petitioners are of the opinion that the Court should reject the position of the Respondents that Petitioner's interrogation was conducted under circumstances of "necessity" that would exempt them from criminal responsibility. In the Petitioners' view, the Respondents did not show what the Petitioners termed a "certain and specific danger to human life", such that the information available to the Respondents "concretely referred to a particular danger", as opposed to a routine act of gathering information.

Moreover, the Petitioners argue that the existence of a time gap between the interrogation and the date when the danger was expected to materialize shows that the necessity defense does not apply to the circumstances. The Petitioners further support this argument by noting that the Petitioner was moved among detention facilities over the course of seven days prior to the beginning of his interrogation, and allege that the Petitioner's interrogation was suspended during the Tishrei holidays [i.e., Rosh Hashana and Yom Kippur – ed.].

24. It was further argued that the Respondents' position that the use of "special means" in an interrogation falls under the necessity defense does not justify the decision to refrain from conducted a criminal investigation, inasmuch as the necessity defense provides an *exemption* from criminal responsibility, as opposed to a *justification* that would render the action lawful. Therefore, it is only relevant as a defense after charges have been laid. In this regard, the Petitioners referred

us to an undated opinion of Prof. Mordechai Kremnitzer and Prof. Yuval Shani, which was appended to the petition (hereinafter: the Kremnitzer-Shani opinion), the submission of which was rejected by this Court in HCJ 5572/12 *Abu Ghosh v. Attorney General*, para. 15 (Dec. 12, 2017) (hereinafter: the *Abu Ghosh* case) on the grounds that the interpretation of Israeli law does not require the submission of an expert opinion.

25. Lastly, it was argued that the holdings in HCJ 5100/94 *Public Committee against Torture v. State of Israel*, IsrSC 53(4) 817) (1999) (hereinafter: HCJ 5100/94) should be read such that ISA interrogators do not have authority to decide in advance upon employing torture on the basis of the necessity defense, as opposed to a situation in which an ISA interrogator is forced to act "on the basis of an individual, *ad hoc* decision, in response to an unforeseen scenario". According to the Petitioners, the AG's Directive permits internal consultations between ISA interrogators and their superiors for the purpose of deciding in advance upon resorting to torture in a specific case, and as such, it contradicts the directions of this Court in HCJ 5100/94, and must, therefore, be annulled. In this regard, as well, the Petitioners seek to rely upon the Kremnitzer-Shani opinion.

26. As opposed to this, the Respondents are of the opinion that the petition should be denied.

According to them, while "special means of interrogation" were employed in the interrogation of the Petitioner, they were "proportionate and reasonable in relation to the danger presented by the intelligence" in the possession of the Petitioner's interrogators. It should be noted in this regard that the information provided by the Petitioner in the course of his interrogation led to the seizure of a large amount of ordnance that served the military infrastructure of the Hamas. It was further emphasized that the Petitioner had been interrogated for a week prior to the resort to "the special means" in his interrogation, and that during that period he denied the allegations against him and any knowledge of this matter. It was lastly emphasized that , contrary to the claims of the Petitioners, the interrogation of the Petitioner was not suspended over the holidays, and that the was even interrogated on Rosh Hashana and on the Sabbaths.

It is the position of the Respondents that under these circumstances, the decision of the Director, which was approved by the Attorney General and the State Attorney – according to which that the necessity defense exempted the Petitioner's interrogators from criminal responsibility – was reasonable, and the Court should not intervene therein.

In this regard, the Respondents emphasized that it is decided law that this Court will only intervene in exceptional cases in discretion concerning the conducting of a police investigation and the filing of charges.

27. The Respondents further argued that the Petitioner did not succeed in showing that he was tortured in the course of his interrogation. It was argued in that regard that the Petitioner's later version – as expressed in the affidavits he submitted to his attorney in November 2012 and in his complaint of April 2013 – is of broader scope and magnitude than the first version that he presented to the Military Court in October 2012, and that there are significant differences between the Petitioner's version and "the factual scenario that arises from the interrogation file". It was further emphasized that the Petitioner's refusal of a polygraph examination makes it difficult to evaluate the reliability of his later version.

28. In regard to the Guidelines, it was argued that they do not establish circumstances in which an interrogator may act in the framework of the necessity defense, but rather define how real-time consultations with senior ranks of the ISA are to be carried in regard to the appropriate course of action in the circumstances of a particular interrogation. The Respondents state:

> The Internal Guidelines make it possible for one involved in an interrogation *to consult in real time* with more senior ranks, who cannot authorize the interrogator to employ exceptional means of interrogation, but who can state their opinion that the use of special interrogation methods are immediately required in a given situation in order to save lives. Those senior ranks who participate in the real-time consultation in regard to a given situation can also *order restrictions* on the activities of the interrogator in that situation brought before them (para. 81 of the Respondents' response; emphasis original – Y.E.).

According to the Respondents, the Petitioners interpretation HCJ 5100/94 as holding that an interrogator must decide for himself whether he faces "a situation of necessity" that requires the use of special means of interrogation is mistaken and lacks any basis in law or precedent. According to the Respondents, that interpretation contradicts the AG's Directives, under which ISA interrogators are "agents of the state" who are, therefore, entitled to "an appropriate measure of legal certainty".

It was further argued that the Guidelines were approved by the Attorney General, who is the "authorized interpreter" of the law for governmental agencies (if the Court has not ruled otherwise), and his interpretation binds the ISA. Lastly, it was noted that over the course of the last years, ISA interrogators made recourse to those Guidelines only in very exceptional cases.

29. Just prior to hearing the petition, the Respondents requested to submit a medical opinion from June 2018, prepared by Dr. Rachel Rokach and Dr. Pau Perez-Sales, regarding the Petitioner's psychological state, from which – according to the Petitioners – the pain and suffering caused to the Petitioner can be deduced. The opinion is based upon an examination and clinical interview conducted on Dec. 14, 2017 under the "Istanbul Protocol – Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (hereinafter: the Opinion of Dr. Perez-Sales and Dr. Rokach).

The Respondents objected to the submission of the opinion, arguing that it could be granted only very little weight in view of the passage of five years from the end of the Petitioner's interrogation to the time of the preparation of the opinion. The Respondents emphasized that the opinion was not available to the Inspector and the Director, and that it is improper to request its submission at this stage, bearing in mind that the writers of the opinion met with the Petitioner immediately following the submission of the petition, over a year-and-a-half ago.

Discussion and Decision

30. The Petitioners' arguments are divided into two heads.

The *first head* addresses the specific matter of the Petitioner. The focus is upon the decision of the Director, made with the approval of the Attorney General and the State Attorney, to close the examination into the Petitioner's complaint. In this matter, we must decide whether, as the Petitioners argue, the Attorney General's decision not to open a criminal investigation of the ISA interrogators involved in the Petitioner's interrogation, who allegedly employed unlawful interrogation methods, was unreasonable to an extent that would justify this Courts intervention.

In deciding this question, I will first present the normative framework in regard to judicial review of the Attorney General's discretion in decisions on opening criminal investigations against

ISA interrogators. I will then survey the precedent on the application of the necessity defense to ISA interrogations. Lastly, I will examine the application of the above to the present case.

The second head argued by the Petitioners concerns the Directive of the Attorney General and the Internal Guidelines established thereunder. The Petitioners argue that the Guidelines should be declared void, particularly to the extent that they concern "the system of consultations and approvals in the ISA". I will address this argument by examining whether the Directive and the Guidelines are consistent with the applicable law, and specifically, with the holdings of this Court in HCJ 5100/94.

A Decision on Opening a Criminal Investigation of an ISA Employee and Judicial Review of such a Decision

31. The Attorney General is granted authority to order a criminal investigation of an ISA interrogator under the provisions of sec. 49I 1(a) of the Police Ordinance [New Version], 5731-1971 (hereinafter: the Police Ordinance). The Attorney General delegated that authority to the State Attorney and his deputies, in accordance with his authority under sec. 49I 1(b) of the Police Ordinance (*Official Gazette* 5770 No. 6013 of Oct. 29, 2009 p. 264).

32. As explained in the Respondents' response to the petition, a complaint against an ISA interrogator in regard to an offense allegedly perpetrated in the fulfillment of his duty or in relation thereto will undergo a preliminary examination by the Inspector for Complaints Against the Israel Security Agency (on the authority to conduct a preliminary examination by the Inspector for Complaints Against the Israel Security Agency, see HCJ 1265/11 *Public Committee against Torture in Israel v. Attorney General*, para. 31 of the opinion of Justice E. Rubinstein (Aug. 6, 2012) (hereinafter: HCJ 1265/11)).

In the past, an employee of the Department for Complaints Against the Israel Security Agency was an employee of the ISA, but is now an employee of the Ministry of Justice subject to the Director of Complaints Against the Israel Security Agency, who is a senior attorney in the State Attorney's Office. That attorney is directly answerable to the State Attorney and the Attorney General (in this regard, see HCJ 1265/11, paras. 5, 6-16).

As a rule, complaints against ISA interrogators are submitted by the interrogee or through others. Upon the filing of a complaint, a comprehensive examination of the complaint is conducted,

which includes, inter alia, a meeting with the interrogee-complainant, an examination of the material pertaining to his ISA interrogation, an examination of his medical records, and questioning of the relevant persons in the ISA, as well as other relevant persons (such as physicians and prison guards). At the conclusion of the examination, the Inspector delivers the examination file and all material collected in the course of the examination, together with the findings of the examination and his recommendations, to the Director in the State Attorney's Office.

The Director examines the findings and the recommendations and decides whether or not to order a criminal investigation or disciplinary proceedings, or whether to order a systemic change in the work procedures of the ISA.

33. In HCJ 1265/11, the Court recommended that a decision by the Director not to institute a criminal investigation be issued with the approval of the Attorney General or by a representative of the Attorney General authorized to order a criminal investigation under the Police Ordinance "in order to optimally express the legislative intent" (*ibid*., para. 28). That is, indeed, what was done in the matter of the Petitioner.

The Director's decision not to open a criminal investigation can be appealed to the State Attorney under sec. 64(a)(3) of the Criminal Procedure [Consolidated Version] Law, 5742-1982 (hereinafter: the Civil Procedure Law). The appeal decision, or a decision by the Attorney General not to investigate, or a decision by the Director that has been approved by the Attorney General, can be challenged in a petition to this Court, as was done in this case.

34. Despite the existence of a special legal provision treating of the opening of an investigation of an ISA employee – sec. 49I 1(a) of the Police Ordinance – the only differences between a decision on the opening of a criminal investigation of an ISA employee and a decision on opening an investigation in any other case is the institutional identity of the investigating body (the Police Internal Investigations Unit rather than the police) and the person authorized to decide upon opening the investigation (the Attorney General as opposed to a prosecuting attorney or a police prosecutor).

The criteria for the Attorney General's decision on opening an investigation of an ISA employee are the same as the criteria for a regular decision upon opening a criminal investigation under sec. 59 of the Criminal Procedure Law (see: HCJ 1265/11, para. 26 of the opinion of Justice

E. Rubinstein, and para. 2 of the opinion of Justice U. Vogelman; and see: HCJFH 7516/03 *Nimrodi v. Attorney* General (Feb. 12, 2004)). In this regard, the questions addressed are whether there is sufficient evidence to justify a criminal investigation, and whether there is a public interest in the investigation and trial, as the circumstances may be.

35. It is established law that the prosecutorial authorities are authorized to conduct a preliminary examination into the existence of evidence that grounds a reasonable suspicion of the commission of a crime (see: HCJ 1265/11, paras. 29-31 of the opinion of Justice E. Rubinstein and the citations there). That also holds for the examination both for the Department and for any other case in which the police receive information about a suspicion of the commission of a crime. In accordance with this rule, the Attorney General's Directive No. 4.2204 "Preliminary Examination" was published on Dec. 31, 2015. The Directive treats of the classification of matters that should be subject to a preliminary examination prior to deciding upon a criminal investigation, and the scope of such an examination.

36. It is a well-known principle that the prosecuting authorities are granted broad discretion in deciding upon opening a criminal investigation, as well as upon filing charges. It has been repeatedly held that it is not the practice of this Court to intervene in the manner of the exercise of that discretion, in view of the experience and professionalism of the prosecution authorities, except in exceptional cases in which the Court is persuaded that there was a substantive defect in the manner of the exercise of discretion or in the subsequent decision, in circumstances in which the decision reflects extreme unreasonableness, a lack of good faith, or extraneous considerations (HCJ 9607/17 *Fisher v. Attorney General* (Feb. 1, 2018)). The burden of proving that the prosecution's decision deviated to an extreme degree from the margin of reasonableness falls upon the petitioners who make the claim (YITZHAK ZAMIR, ADMINISTRATIVE AUTHORITY, vol. 4, 2787-2788 (2017) (in Hebrew)).

The evaluation of the sufficiency of the evidence is a matter that is distinctively a matter for the expertise of the prosecution, and intervention in the discretion of the prosecution not to open a criminal investigation due to a lack of evidentiary grounds will, therefore, be even more limited (the *Abu Ghosh* case, para. 22). One case in which this Court intervened in part in the discretion of the prosecution in evaluating the sufficiency of the evidence was in HCJ 869/12 *A. v. Attorney General* (Feb. 28, 2017). The petition in that case challenged a decision by the Attorney

General to close the investigation of the complaint of a person who claimed that while being detained in a police station, one of the police intentionally urinated on him in order to degrade him. The Court was of the opinion that the evidence against the policemen should be examined by a court in criminal proceedings.

The Applicability of the "Necessity" Defense to adopting "Special Means of Interrogation" by ISA Interrogators

37. In the present case, the Petitioners argue that the Attorney General's decision not to order a criminal investigation of the ISA interrogators who participated in the interrogation of the Petitioner is unreasonable in the extreme, inasmuch as the interrogation methods employed by the interrogators can be viewed as torture, which is prohibited by law.

An examination of the reasonableness of a decision must therefore be conducted in accordance with the guidelines established by this Court in regard to the authority of ISA interrogators to employ physical means against interrogees, and the circumstances in which they may be permitted to do so.

For the purpose of this discussion, I will briefly address the relevant legislation, the guiding case law of this Court in the matter, and the guidelines established on that basis.

38. Section 34K of the Penal Law, 5737-1977 (hereinafter: the Penal Law), titled "necessity, states as follows:

> No person shall bear criminal responsibility for an act that was immediately necessary in order to save his own or another person's life, freedom, bodily welfare or property from a real danger of severe injury, due to the conditions prevalent when the act was committed, there being no alternative but to commit the act.

Section 34P of the Penal Law limits the application of the necessity defense, establishing that this defense will not apply "if – under the circumstances – the act was not a reasonable one for the prevention of the injury".

The language of the sections informs us that the necessity defense is subject to five cumulative conditions, which are interrelated and closely bound together: the act must be

immediately necessary; the danger prompting the action must be *real*; the injury that the act was intended to prevent must be a *severe injury* to one of the interests enumerated in sec. 34K of the Penal Law; that the actor had *no alternative* but to commit the act; and that the act was *proportionate* to the expected severe harm.

39. Prior to the decision in HCJ 5100/94, the necessity defense served as the basis for ISA guidelines that included permission to employ interrogation methods that included physical measures, in the absence of any alternative, and where immediately necessary for saving human life. Relying on this defense and the recommendations of the 1987 Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, headed by Supreme Court President (emeritus) M. Landau, a special ministerial committee on ISA interrogations approved a procedure known as the "Permissions Procedure". The Procedure comprised permission to employ physical means in interrogations when an interrogator was of the opinion, in a specific case, that the use of such methods was justified.

In HCJ 5100/94, the Court found that Procedure unlawful and void. The Court held that it is forbidden to employ torture or to treat an interrogee cruelly and inhumanely, and that such actions as shaking an interrogee, seating him in an uncomfortable position, hooding, and sleep deprivation for extended periods infringe the interrogee's human dignity, and are therefore prohibited.

40. The decision also comprised two important holdings in regard to the two heads of the present petition.

In was held that an ISA interrogator who employed physical interrogation methods and who subsequently stood trial, could make recourse to the necessity defense in circumstances of a "ticking bomb", where an interrogee possesses information as to the location of a bomb that has been planted and is set to explode shortly, and where there would be no way to neutralize the bomb without that information, and the only way to obtain it was from the interrogee.

It was further held in this regard that the immediacy requirement under sec. 34K of the Penal Law relates to the immediacy of the act and not the immediacy of the threat. That being so, the condition is met even if the threat may only materialize days or weeks after the interrogation, as long as the realization of the threat is certain, and there is no other way to avoid it.

It was further held that general guidelines for the use of physical means in the course of interrogation must be based upon authorization expressly grounded in law, and not from defenses to criminal responsibility. The Court made it clear that the existence of a general authority to establish guidelines could not be derived from the necessity defense alone, as by its nature, it treats of a decision of:

> an individual reacting to a given set of facts. It is an *ad hoc* reaction to an event… Thus, the very nature of the defense does not allow it to serve as the source of general administrative authorization. Such authority is based on establishing general, forward looking criteria (HCJ 5100/94, para. 36).

Lastly, the Court noted, "The Attorney General can instruct himself regarding circumstances in which investigators shall not stand trial, if they claim to have acted from 'necessity'" (para. 38).

41. As detailed in the Respondents' response to the petition, as well as in their response to the request of the petitioners in HCJ 5100/94 under the Contempt of Court Ordinance, which was submitted as Appendix 40 to the present petition, the ISA rescinded the "Permissions Procedure" immediately following the decision in HCJ 5100/94. In addition, all ISA interrogators were instructed that they are not authorized to employ physical pressure in their interrogations, and that if they do so, they may be subject to criminal charges. However, they were also informed:

> If an ISA interrogator employs physical means of interrogation under circumstances that legally justify them, he may be able to make recourse to the "necessity" defense in appropriate circumstances, in which case, that interrogator will not bear criminal responsibility (sec. 3 of the response, signed by the then Deputy State Attorney (Special Tasks) Shai Nitzan; the response was submitted as Appendix 40 to the petition).

As arises from the decision in the matter of the request under the Contempt of Court Ordinance (HCJ 5100/94 *Public Committee against Torture in Israel v. Government of Israel* (July 6, 2009)), the Respondents emphasized in oral arguments that the Attorney General receives a post-facto report if physical interrogation methods were employed in a particular interrogation and the necessity defense is required.

42. Along with rescinding the "Permissions Procedure", on Oct. 28, 1999, the Attorney General at the time, E. Rubinstein, published the Directive of the Attorney General (see: Elyakim Rubinstein, *Security and the Law: Trends*, 44(3) HAPRAKLIT 409, 419 (1999)). As stated therein, the document was intended as "self instruction" as directed by the Court in HCJ 5100/94.

The basic assumption of the AG's Directive was that the State of Israel finds itself in an unceasing struggle against terrorist organizations; that the primary agency carrying out the mission of the war on terrorism is the ISA; that ISA interrogators are agents of the State of Israel, and to the extent that they act on its behalf in accordance with the law, they are entitled to an appropriate measure of legal certainty in performing their task.

43. On point, the Attorney General's Directive stated as follows:

> In cases in which, in the course of an interrogation, an interrogator adopted interrogation means immediately necessary to obtain vital information for preventing a concrete danger of severe harm to state security, human life, liberty or physical integrity, and there is no reasonable alternative under the circumstances to obtain the information, and employing the interrogation means was reasonable under the circumstances in order to prevent the harm, the Attorney General will consider not instituting criminal proceedings under the circumstances. The Attorney General's decision will be made in each case on its merits, after a detailed examination of all of the said elements, i.e., the proportionality of the need and its immediacy, the severity of the danger and the harm prevented and their actuality, alternatives to the act and the proportionality of the means, including the interrogator's understanding of the situation at the time of the interrogation, the levels that approved the act, their involvement in the decision and their discretion at the time of performance, as well as the conditions under which the means were employed, its supervision and its documentation (p. 421).

It was established that the requirement of *immediacy* refers to the action of the interrogator and not to the danger. In other words, the necessity defense can apply even if the real danger is not

immediate, but rather expected to occur at some time in the future. However, the greater the time gap between the action and the date of the realization of the danger, the greater the burden of persuasion that the action was immediately necessary. Therefore, it was held that routine, ongoing gathering of intelligence as to terrorist groups and their activities in general cannot, itself, be deemed as motivating a "real threat", but rather the danger to human life must be of a certain and specific character and nature.

Lastly, it was established that "it would be appropriate that the ISA have internal guidelines, inter alia, in regard to the system for consultation and permissions within the organization required for the matter" (*ibid*. p. 422).

44. As we learn from the Respondents' response, internal guidelines were prepared by the ISA pursuant to the Attorney General's Directive "establishing how consultations with senior levels in the ISA would be carried out in real time, when the circumstances of a specific interrogation appear to those involved in an interrogation as meeting the necessity defense" (para. 79 of the response).

As stated in the Respondent's response, these internal guidelines were presented to the Attorney General "in order to ensure that they are consistent with the law and precedent".

Lastly, it should be noted that, according to the Respondents, since the issuing of the Internal Guidelines, ISA interrogators have acted under the assumption of the applicability of the necessity defense only in exceptional cases that represented a "tiny percentage" of the cases in which suspects were interrogated for suspected terrorist activity over the last years.

From the General to the Particular

45. Having laid the relevant normative groundwork for the matter, I will now turn to an examination of the Petitioners' arguments that the Director's decision not to initiate a criminal investigation of the ISA interrogators – which was approved by the Attorney General and the State Attorney – is unreasonable in the extreme, both because the ISA interrogators allegedly tortured the Petitioner, and because the necessity defense exempting them from criminal responsibility is inapplicable to the circumstances of the matter.

46. An examination of all the material submitted to us in the matter of the Petitioner's interrogation – both the material appended to the petition and the response, and the classified material presented to us with the consent of the Petitioners pursuant to our decision of Oct. 24, 2018 – leads to the conclusion that the Attorney General's decision not to initiate a criminal investigation against the Petitioner's interrogators does not deviate from the margin of discretion, and certainly does not deviate to an extent that would justify our intervention.

Did the ISA Interrogators employ Torture in Interrogating the Petitioner?

47. The Petitioners' first argument is that the decision not to initiate a criminal investigation was unreasonable in the extreme, inasmuch as the ISA interrogators tortured the Petitioner in the course of his interrogation, by employing improper interrogation methods.

The term "torture" is defined in art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Kitvei Amana* 31, 249 (signed Oct. 22, 1986)) (hereinafter: the Convention), to which Israel is a party, thus:

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

The Petitioners focused their arguments on the element of "pain or suffering, whether physical or mental" allegedly caused to the Petitioner in the course of the interrogation, as a result of the violence inflicted upon him by the interrogators.

In this regard, it was argued that transferring the Petitioner from one detention center to another was intended to wear him down, as was the limited sleep allowed him during his

interrogation; that the Petitioner was held in a "banana position", in a crouch position, and stood against the wall – all positions known as improper "torture methods"; that he was beaten intensively; that he was threatened; and that the combination of these means caused the Petitioner singular pain and suffering.

48. After carefully examining the Petitioner's version – as presented in his affidavits, his complaint, and in the examination of the Inspector – I do not believe that the Petitioners succeeded in proving the existence of a suspicion of the commission of a criminal offense by the ISA interrogators in a manner that contradicts the recommendations of the Inspector and the decision of the Director.

49. From the entirety of the examination material of the Inspector and the Director that was presented to us, I have the impression that the examination was meticulous, thorough, and comprehensive. The Inspector addressed all the documents relevant to the Petitioner's interrogation, and questioned all the relevant persons whose version could be obtained, including the Petitioner's interrogators, the Prison Service EMT and the Prison Service guards.

As opposed to this, there are not insignificant problems with the Petitioner's version as presented in the petition. His refraining from presenting his factual version in the course two meetings with the Inspector, and his request to rely exclusively upon what he submitted to his attorneys in affidavits, while claiming that he did not recall the details of his interrogation, both weaken his version. Although nearly two years passed between the time of the interrogation and the Petitioner's first meeting with the Inspector, one could expect that the Petitioner would remember the details of the interrogation, or at least would be able to describe the main facts of the severe violence he claims was perpetrated against him. The Petitioner's refusal to undergo a polygraph examination, which might support his story – particularly in view of the absolute denial of his version by the ISA interrogators – also makes it difficult to evaluate the veracity of his version.

50. The Petitioners are of the opinion that there is "objective evidence of the pain and suffering in real time" that supports the Petitioner's version of the events. In this regard, the Petitioners pointed to what they termed the "shuttling" of the Petitioner between detention centers before the beginning of his interrogation. They also referred us to the finding of the Inspector that the Petitioner vomited in the course of one of the interrogations, and to the medical records from Sept.

19, 2012 and Sept. 21, 2012 in regard to tooth pain and swelling, and limited movement of his knee. The Petitioners further argued that the Petitioner's statement that was recorded in the Military Court transcript supports his version. It was also argued that the veracity of his version is also demonstrated by the medical records according to which the Petitioner felt "a black spot in the eye" after the interrogations, as reflected in his medical chart from Nov. 5, 2012, and additionally, according to the opinion of Dr. Aker, he felt "pain in his left knee and paresthesia along his entire leg, which improved over time".

As opposed to the Petitioners' claim, I am not of the opinion that the above serves to prove the Petitioner's version.

51. As for moving the Petitioner between different detention facilities prior to his interrogation, the findings of the examination did not support the claim that the transfers were intended to wear him down physically or mentally. I do not find reason to intervene in this regard. Over and above, I will note that while the discomfort and hardship that may be caused by moving a suspect between detention facilities is not something I take lightly, I am not of the opinion that such actions, themselves, constitute "torture".

52. The Inspector's examination indeed found that "in the course of the complainant's (the Petitioner – Y.E.) interrogation, there was a one-time situation in which he vomited in the interrogation room, *without* losing consciousness. Pursuant to that, the guards took the complainant to the shower, his clothing was changed, and he was then examined by a physician" (emphasis original – Y.E.).

This finding is a far cry from the Petitioner's version according to which he vomited several times in the interrogation room, and even lost consciousness three times. The mere fact that the Petitioner vomited once in the interrogation room does not show that he was tortured in the course of his interrogation.

As opposed to the Petitioner's claim, the existing medical records do not definitively prove his version, according to which he was tortured in the course of the interrogation. In this regard, I accept the position of the Director that if the Petitioner's version were accurate, it could be expected that there would be real-time medical records of his having lost consciousness several times, as he claims.

53. The Petitioner's statement in the hearing in the Military Court on Oct. 4, 2012, some two weeks after the employment of special means in his interrogation, does not prove his version.

First, that statement, as quoted above, constitutes a significantly "thinner" version than the one he presented in his complaint. Second, and this is the main point, in an earlier hearing for the extension of his arrest on Sept. 24, 2012, just three days after he was allegedly tortured by his interrogators, the Petitioner responded to the court's question as to "whether he in a good state of health" that "he has no problem". This fact, as well, makes it difficult to accept the reliability of the version he gave ten days later.

54. The medical record of the Petitioner's examination on Nov. 5, 2012 recorded that the Petitioner complained of "a black spot in his left eye for some two months". However, after an examination, it was noted that there was no pathological finding in the eye. That being the case, there is no support for harm caused to him as a result of the interrogation itself.

55. Even the medical opinion of Dr. Abu Aker does not serve the Petitioner. Reviewing that opinion shows that in regard to the medical condition of the Petitioner's eye and leg, to which the Petitioners referred, the opinion is based more upon the Petitioner's complaints than upon any medical findings. Although at the end of the opinion it is noted that "the findings of the examination match his (the Petitioner – Y.E.) story in regard to abuse and torture", as opposed to what might be expected, the opinion does not give the details of the examinations of the Petitioner, if any, what was the medical diagnosis of his condition, or what were the medical findings of the medical examination itself. In view of the above, very little weight can be attributed to this opinion, which relies primarily upon the Petitioner's complaints, unsupported by an independent medical examination.

56. Without making any definitive statement as to the admissibility of the medical opinion of Dr. Perez-Sales and Dr. Rokach that was presented to us in the course of the hearing, and without addressing its content, it, too, is of very little probative weight.

First, the opinion was not made available for review by the Inspector and the Director, and was brought to their attention only immediately prior to the hearing before this Court.

Second, the opinion was prepared on Dec. 14, 2017, more than five years after the Petitioner's interrogation, and it is almost entirely based upon the Petitioner's version of the events.

Clearly, these two facts seriously detract from its probative value, and one cannot actually grant it real weight and use it as the basis for a finding that there is a connection between its findings as to the Petitioner's physical, cognitive, and emotional state and the manner of his interrogation as described in his complaint.

57. Considering what has been said thus far, since the examination of the Inspector found that the Petitioner was not tortured in his interrogation, and since the Petitioners did not succeed in proving that finding to be mistaken, I do not find reason to accept the version of the Petitioner as presented in the petition.

Can the ISA Interrogators rely upon the Necessity Defense that would exempt them from Criminal Responsibility?

58. The Petitioners further argued that the use of "special means of interrogation" in interrogating the Petitioner – which the ISA interrogators admitted – is not covered by the necessity defense, and in any case, this defense is not applicable to the circumstances. According to the Petitioners, "the admission to employing 'special means of interrogation' means the use of violence and the abuse of a vulnerable person".

The said "special means of interrogation" were presented to us in detail in an ex parte hearing, with the clarification that these means did not include the exercise of violence in the manner described by the Petitioner in his complaint and in the petition before us. We therefore accept the finding of the Director that "the scope and type of these means is significantly far from" what was claimed by the Petitioner.

59. Under the circumstances, and after reviewing the classified material presented to us, I am convinced that the use of "special means" in the interrogation of the Petitioner falls within the scope of the necessity defense.

The circumstances of the Petitioner's interrogation, as detailed in the Inspector's recommendation and in the Director's decision clearly show that the interrogation was intended to prevent a real, concrete threat to human life at a high degree of certainty.

The "necessity" grounding the Petitioner's interrogation does not exist in a vacuum. It must be understood and interpreted against the background of the complex reality of the State of Israel's security situation. The Petitioner was an active member of a terrorist organization that perpetrated, and continues to perpetrate, severe terrorist attacks, including cold-blooded, cruel, and merciless murder of innocent men, women and children, for no reason other than their being Israelis.

In this framework, the Petitioner was party to a plot to collect and conceal a large quantity of dangerous weapons, with the intention of using them for the perpetration of terrorist activity. Had this terrorist attack been realized, it might have cost human lives. The key to preventing this real danger to human life was extracting the information held by the Petitioner, which he refused to divulge to his interrogators. This fear of a real danger of serious harm to human life by means of the weapons concealed by the Petitioner and his partners in the terrorist organization, led his interrogators to the believe that the use of "special means of interrogation" were necessary for the immediate thwarting of the danger.

And indeed, as noted, in the course of his interrogation, the Petitioner provided a large amount of information about hidden weapons and about other weapons that he had received and transferred to other Hamas operatives who had also been arrested at that time. The information provided by the Petitioner in the course of his interrogation also helped, inter alia, in causing another Hamas operative to confess planning a kidnapping and other terrorist activity.

Under these circumstances, in which the danger that led to the use of the special means in the interrogation was certainly real; the attack that the interrogation sought to prevent was serious harm to human life; the ISA interrogators had no other means for obtaining the information about the weapons stockpile hidden in a storage unit, and of the plans to perpetrate terrorist attacks; and the special means employed in the interrogation were, as argued before us and as examined above, proportionate relative to the serious threat that their use was intended to frustrate – I am of the opinion that the finding of the Director that "employing the special means of interrogation under the circumstances, falls within the purview of the necessity defense" is well founded.

60. We must also reject the Petitioners' argument that the necessity defense does not apply under the circumstances inasmuch as the expected date for the realization of the danger was unknown and that, in any case, there was a time gap between that date and the interrogation.

As may be recalled, HCJ 5100/94, upon which the Petitioners rely, expressly held that the immediacy requirement under sec. 34K of the Penal Law refers to the immediacy of the act and not the immediacy of the danger. That being the case, the requirement is met even when the danger may be realized days or even weeks after the interrogation. In the present matter, there is no doubt that that the plan to use the weapons in the hidden storage unit for the purpose of terrorist activity, as well as the transfer of additional weapons by the Petitioner to his accomplices in the terrorist organization, create a real danger to human life in and of themselves. Even if the exact date for actually realizing the terrorist plan was unknown at the time of the interrogation, the intention of the Petitioner and his accomplices to perpetrate terrorist acts by means of that collection of hidden arms suffices to meet the immediacy requirement and to justify the use of "special means" in the framework of the interrogation. This is also true in regard to the kidnapping plan and an additional terrorist attack by the other terrorist operatives, which were frustrated thanks to the information given by the Petitioner in his interrogation.

61. The Petitioners further argued that the necessity defense might, indeed, *exempt* from criminal responsibility, but it should not be viewed as a *justifying* the legality of the act. Therefore, according to their approach, whenever a complaint of torture in an interrogation is filed and the ISA interrogators claim the necessity defense, a criminal investigation of the interrogators should be initiated, and recourse to the necessity defense can be made only after a decision is made to bring them to trial.

This argument cannot be accepted.

The Petitioners opinion that the necessity defense can be raised only after criminal proceedings have begun in court lacks systemic logic and is also contrary to the efficient, proper manner of conducting criminal proceedings in other circumstances, since when the prosecution is convinced that a suspect is entitled to the necessity defense, there is no justification for initiating criminal proceedings against him when the result is already known. In my opinion, these are the considerations that underlie the preliminary examination by the Inspector as to whether there is a reasonable suspicion of the perpetration of a criminal offense by the ISA interrogators on the merits of each case, in accordance with the authority granted the prosecution to conduct such an examination.

Moreover, as opposed to the Petitioners' claim, I am not of the opinion that the judgment in HCJ 5100/94 requires that a decision as to the applicability of the necessity defense be made *only after* conducting a criminal investigation. As quoted above, the judgment states that the Attorney General can establish guidelines for himself as to the circumstances in which interrogators who acted due to a sense of "necessity" will not stand trial. That does not imply that such guidelines would apply only after a criminal investigation and the filing of an information, but quite the opposite. This guidance can be given even at an early stage, after a preliminary examination of the circumstances, and before initiating criminal proceedings (see and compare: the *Abu Ghosh* case, para. 44). This demonstrates the great importance of the Inspector's examination, which is supposed to be an in-depth, pertinent, independent examination whose results can aid the Attorney General in reaching a decision as to whether the necessity defense applies under the circumstances, such that the scales tilt towards not initiating a criminal investigation.

While not strictly necessary, we would note that at least some criminal law theories deem the necessity defense as a justification and not merely an excuse. In other words, the legal norm establishing the necessity defense does not merely "exculpate" the act after the fact, but rather removes it, under its special circumstances, from the scope of the criminal prohibition. That is the case whether because the act is required under certain circumstances, or whether because the legal norm, at the very least, authorizes the actor to do it. The result of the application of the necessity defense is, therefore, not merely the exoneration of the actor, but also the justification of the act, such that it is not defined as a harmful phenomenon that the criminal law seeks to prohibit. In any case, the necessity defense should be deemed a defense to the criminality of the act, and not merely as excusing from criminal responsibility (see: S.Z. FELLER, ELEMENTS OF CRIMINAL LAW, vol. II, 390, 492, 503-511(1984); GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (Hebrew edition, S. Watad, trans., Ephraim Heiliczer & Mordechai Kremnitzer, eds., 237 (2018)); Aharon Enker & Ruth Kannai, *Self Defense and Necessity after Amendment 37 of the Penal Law*, 3 PELILIM 5, 24-26 (Hebrew).

In view of all the above, inasmuch as the Inspector's examination found that, under the circumstances, the Petitioner's interrogators can claim the necessity defense, and there is no reasonable suspicion of their having perpetrated a criminal offense, there is no defect in the

exercise of discretion by the Attorney General, who was of the opinion that a criminal investigation should not be initiated.

The Lawfulness of the Attorney General's Directive and the ISA Guidelines

62. Lastly, the Petitioners made the general argument that the Directives of the Attorney General and the ISA Internal Guidelines pursuant thereto are defective and should be declared void. According to the Petitioners, the above are premised upon the assumption that the ISA is granted that authority to decide in advance upon the use of torture by virtue of the necessity defense, through internal consultations between the ISA interrogators and their superiors, in a manner that is inconsistent with the directives of this Court in HCJ 5100/94.

I reviewed the Directives of the Attorney General and the ISA Internal Guidelines very carefully, and I did not find them to be contrary to what was stated in HCJ 5100/94. The interpretation urged by the Petitioners is inconsistent with the purpose of the said Directives and Guidelines, and is not founded in its language.

63. As may be recalled, the Directive of the Attorney General was intended, as defined, to serve as "self-insruction" for the Attorney General, pursuant to the principles established in HCJ 5100/94. In that framework, it was emphasized that the Attorney General cannot put himself in place of the legislature, and therefore, his directive "can only be within the boundaries of the law and the interpretation of the Court in the judgment" (Directive of the Attorney General, p. 421).

Section B(2) of the of the Directive establishes that inasmuch as the necessity defense will apply only "in very exceptional situations", precise rules of behavior cannot be drafted in advance for specific situations in which it will apply. It emphasizes that:

> The Attorney General cannot instruct himself and the interrogators in advance to deviate from their authority and adopt physical means in the course of interrogation … however, the Attorney General can instruct himself in advance as to the type and character of acts that he may deem as falling within the scope of "necessity" after the fact (*ibid*., p. 420).

This careful, measured language expressly distinguishes between a "directive" permitted on the basis of the holdings of this Court in HCJ 5100/94 and a prohibited "directive", while making the required balancing of the individual, circumstance-contingent character of the decision to adopt special means, and consideration of "the proper level of legal certainty" to which the ISA interrogators are entitled. In the language of sec. D of the Directives:

> The Agency's interrogators are agents of the State of Israel, and to the extent that they lawfully act on its behalf, they are entitled to an appropriate measure of legal certainty. They do not act in another place; they are an agency like any other agency of the state, for the good and the preferable, in obligations and rights. In their special work in gathering intelligence for the frustration of terrorist attacks, they must often address maintaining the law and the rights of those interrogated under it; but in their acting within the framework of the law, we cannot ignore the necessity of appropriate protection in doing their work (*ibid*.).

Indeed, the guidelines established under the Directives established at the direction of the Attorney General, particularly in its operative part in sec. G, quoted above, emphasize the consideration of the existence of the conditions of the necessity defense in the specific circumstances under discussion – the need for immediate action in order to prevent a real danger of a serious attack, along with the necessity of the act and its reasonableness – and in doing so, they properly balance the various, relevant interests.

64. I do not accept the Petitioners' argument that the consideration of the circumstances of "the levels that permitted the act, their involvement in the decision and their discretion at the time of implementation", as well as "its [the act – Y.E.] supervision" in sec. G of the Directives, as quoted above, demonstrate that the guidelines offer a predetermined, systematic canon in regard to cases in which the use of special means will be approved in ISA interrogations.

That argument disregards the fact that the detailing of circumstances that will be considered in reaching a decision whether the interrogators' action falls within the scope of the necessity defense begins with the express statement that "the Attorney General's decision will be made in each case on its merits, after a detailed examination of all of the said elements". The existence of an *ad hoc approval* given *in real time* for performing the interrogators' acts is but one element

among the complex of elements detailed in the Directive, among them, the degree of the necessity and its immediacy, the severity and concreteness of the threat and of the harm prevented, the alternatives to the act, the proportionality of the means, etc.

65. I also do not accept the Petitioners' interpretation according to which an ISA interrogator who believes he is confronted with a situation that gives rise to circumstances of "necessity" in the interrogation of a suspect – in the sense that there is a real danger that requires immediate action to prevent it – must make the decision as to adopting special mean on his own, without be allowed to consult his superiors. As opposed to the Petitioners' argument, that interpretation cannot be inferred from the provisions of the judgement in HCJ 5100/94, nor is it desirable in my opinion.

In this regard, a distinction should be drawn between general, advance instruction or direction, and instruction or direction given to the interrogator in real time in regard to the specific circumstances of the interrogation, as they develop at that moment. I am of the opinion that in the latter case, the interrogator's consulting with his superiors, who have broad discretion and greater experience, can actually serve to protect the interrogee from an unlawful infringement of his rights. Such immediate consultation does not detract from the specific, individual nature of the decision to adopt special means in the interrogation of the suspect, specifically when it is also clear that the interrogator's superiors are also exposed to the possibility of facing criminal proceedings if, under the circumstances, their decision was unreasonable in that it was not properly justified.

66. This is also true for the Internal Guidelines, which were presented for our review in accordance with our decision of Oct. 24, 2018. Without divulging details of the classified contents, it can be said that the Guidelines detail the system of consultation in a specific case for all those involved therein; the limitations upon discretion in deciding upon adopting special means in specific circumstances; and the required manner for memorializing such interrogations.

As opposed the Petitioners' claims, I find no defect in establishing clear rules as to the manner of consulting within the ISA prior to reaching a decision upon adopting "special means" in a particular interrogation, nor in establishing clear rules in regard to documenting that consultation and the interrogation itself. On the contrary, those rules invite meticulous, necessary supervision of the interrogators conducting the interrogation, and ensure that the use of "special means" in an interrogation will be carried out only in the most exceptional cases that justify it, and

in the presence of the required conditions, in accordance with the discretion of senior, experienced elements in the ISA.

Conclusion

67. In conclusion, I have not found reason to intervene in the decision of the Attorney General to approve the decision of the Director not to initiate a criminal investigation of the Petitioner's interrogators and to close the examination file on his complaint. As opposed to the Petitioners' claim, I am of the opinion that the said decision – according to which the Petitioner was not tortured in the course of his interrogation, and according to which the Petitioner's interrogators are entitled to the "necessity defense" that exempts them from criminal responsibility for employing "special means of interrogation" in his interrogation – does not deviate from the margin of reasonableness.

Accordingly, we should deny the relief requested by the Petitioners to void the Directives of the Attorney General and the Internal Guidelines of the ISA, as they are not contrary to law.

I therefore recommend to my colleagues that we deny the petition in regard to both requested remedies. Under the circumstances, there will be no order for costs.

Justice I. Amit

There are two heads to this petition.

1. *The first head specifically concerns the Petitioner*: It is a rule in civil litigation that the plaintiff cannot raise a claim that his privacy outweighs his obligation to reveal evidence to the defendant (LCA 8551/00 *Aprofim Housing and Promotion (1991) Ltd. v. State of Israel*, IsrSC 55(2) 102 (2000)). Therefore, his right to privacy retreats before the right of the defendant, and he has the choice either to withdraw his suit or be prepared to waive his privacy (LCA 8019/06 *Yediot Aharonot Ltd. v. Levin* (Oct. 13, 2009). I would note that, in my opinion, the statements in this judgment are overly broad, but this strays from the matter at hand).

By analogy, or perhaps *a fortiori*, this is also true for the administrative proceedings before us. The Petitioner brought a list of complaints against his interrogators, but refused to undergo a

polygraph examination on the truth of his claims. To my mind, that serves to weaken the petition in all that relates to the specific matter of the Petitioner before us and his factual claims.

2. The case before us is not one of a classic "ticking bomb" that may explode any minute, but as Justice Elron noted, HCJ 5100/94 *Public Committee against Torture v. State of Israel*, IsrSC 53(4) 817) (1999) (hereinafter: the *Public Committee* case) held that the immediacy requirement in sec. 34K of the Penal Law, 5737-1977, concerns the immediacy of the act and not the immediacy of the danger. In the present case, the combination of the seriousness the nearly-certain danger, if not the certainty of the realization of the danger, and the inability to act in an alternative manner in the concrete situation that faced the security authorities (the necessity condition) in order to obtain information that would very probably thwart a real danger of life-threatening terrorist activity – all lead to the conclusion that the proportionate act adopted by the ISA interrogators falls under the aegis of the necessity defense (on the certainty of the danger as a primary indicator of the necessity of the act, see Mordechai Kremnitzer and Re'em Segev, *The Use of Force in Interrogations by the Israel Security Agency – The Lesser Evil?* 4 MISHPAT UMIMSHAL 667, 717 (5757-5778) (in Hebrew). The article was written before the judgment in the *Public Committee* case).

3. *The second head of the petition concerns the Internal Guidelines in the form of the Directive of the Attorney General*: The Petitioners sought to void the Internal Guidelines that enable the interrogators to consult with their superiors in real time on the question of whether the use of special means of interrogation is immediately required in a given situation in order to save human life.

I can only express wonder at this head of the petition, and I concur with my colleague Justice Elron that the interpretation advanced by the Petitioners is undesirable. That interpretation is not reflective of what was stated in the *Public Committee* case, which said:

> [A]ccording to the existing state of the law, neither the government nor the heads of the security services have the authority to establish directives, rules and permissions regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, which would infringe their liberty, beyond the general rules inherent to the very concept of an interrogation itself… The Attorney General can instruct

himself regarding circumstances in which investigators shall not stand trial, if they claim to have acted from "necessity" (*ibid*., pp. 844-845, para. 38).

Note: we are not concerned here with general directives and permissions regarding the use of physical means in the interrogation of a person suspected of hostile terrorist activity, but rather with a guideline as to when and how to carry out an ad hoc consultation on the question of whether a given situation requires the use of special means of interrogation. As my colleague noted, it is precisely this consultation with more senior elements, who possess greater discretion and experience, that may prevent the use of special means of interrogation, or moderate their use by imposing restrictions upon the interrogator's conduct. The interrogator does not necessarily have the complete picture, as by nature, he is not party to all the sources of information of the entire intelligence community. It would be manifestly undesirable for interrogators to decide, on the basis of a partial intelligence picture, whether a given situation is one that requires the use of special means of interrogation. In general, the assumption is that precisely that consultation with senior – sometimes the most senior – levels is a factor that significantly moderates the very use of special means of interrogation and the manner of their use. The proof is, as argued, that the cases in which ISA interrogators acted under the assumption that the necessity defense applied are exceptions, and the petition before us only proves their rarity.

4. A comment before concluding.

Any person with a sense of humanity would be shocked to hear descriptions and reports of torture and abuse in the course of interrogation. Torture is deemed morally wrong, and the degradation, debasement and humiliation involved in torture go directly to the heart of human dignity. Thus, the absolute moral and legal prohibition of torture (Daniel Statman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 MISHPAT UMIMSHAL 161 (5757-5758) (in Hebrew)). Due to the negative moral and legal view of torture, this Court held in the *Public Committee* case that the use of physical pressure against interrogees is permitted only in the most exceptional cases. Indeed, since the delivery of that decision, there has been both a quantitative change – i.e., a change regarding the circumstances in which special means of interrogation are employed under the necessity defense – and in the special means employed in interrogations under that defense. It is the responsibility of the security services to continue to ensure that the human dignity of the interrogees be preserved in those exceptional cases of use of

special means of interrogation. The Internal Guidelines, as well as other mechanisms like the Department for Complaints against the Israel Security Agency, are specifically directed to that end.

Justice D. Mintz

1. After carefully reading the opinion of my colleague Justice Elron, I concur with his conclusion. I agree that the decision not to conduct a criminal investigation against the Petitioner's interrogators does not give rise to grounds for our intervention, in view of the well-known principle that this Court will intervene in the decisions of the Attorney General in regard to filing charges, and even in regard to the initiating of a criminal investigation, only in exceptional cases, and only when the Court is convinced that there was a substantive defect in the exercise of discretion (HCJ 6274/11 *Dor Alon Energy v. Minister of Finance* (Nov. 26, 2012); HCJ 3922/14 *Public Committee against Torture v. Attorney General* (Dec. 29, 2015)). Claims like those raised by the Petitioner do, indeed, justify examination. However, as my colleague Justice Elron explained, those claims were thoroughly and carefully investigated, after all the relevant documents were examined and the parties involved were questioned. In this regard, there is also nothing in the opinions submitted over five years after the Petitioner's interrogation that would tilt the scales in this matter in his favor.

2. I also concur with the observations of my colleague Justice Amit on the issue of the Directive of the Attorney General, and particularly in regard to the possibility that it provides for internal consultation between ISA interrogators and their superiors in order to arrive at a decision on adopting "special means" in a particular set of circumstances. The Petitioners' argument that specifically by enabling consultation prior to making the decision, the Directive grounds an aspect of "systemization" as opposed to the immediate examination of "necessity" in the moment, has its attraction, but cannot be accepted.

3. The assumption is that consulting with senior elements for the purpose of reaching a decision, in appropriate cases due to their sensitivity or importance, is vital (see, e.g.: Directive No. 4.1004 of the Directives of the Attorney General, "Pre-Approval for Filing an Information"). The possibility of consulting with senior levels prior to arriving at a decision does not, itself,

expand the scope of cases in which the use of special means is required, and it would even seem that the opposite is true. In practice, the possibility to consult may moderate the very use of special means of interrogation, and lead to a more precise and considered choice of cases in which it is required. Therefore, not only does this possibility not detract from the rule that torture is prohibited, apart from extremely exceptional cases, but it facilitates its better implementation.

4. As for the characterization of the use of special means as a "method" or as a "necessity", the existence of "necessity" is not examined according to the speed of the spontaneous response to the danger requiring special means. As my colleague Justice Elron pointed out (para. 38 of his opinion), the application of the necessity defense is contingent upon five cumulative conditions, of which the spontaneity of the act is not one, as opposed to the "immediacy of the act". There is room to permit an ISA interrogator to consult with his superiors in the gap between an immediate act and a spontaneous one.

Decided as stated in the opinion of Justice Y. Elron.

Given this 18th day of Kislev 5779 (Nov. 26, 2018).