[State of Israel symbol]

The Supreme Court in its Capacity as the High Court of Justice

HCJ 9018/17

Before:	Hon. Justice Y. Amit Hon. Justice D. Mintz Hon. Justice Y. Elron
The Petitioners:	1. Firas Tbeish 2. The Public Committee Against Torture in Israel
V	
The Respondents:	1. The Attorney General 2. The Inspector for Interrogee Complaints 3. The Israel Security Agency 4. Israel Security Agency Interrogators

Petition for the provision of a decree nisi

Date of the meeting:	14 of Av 5778 (26.07.2018)
On behalf of the Petitioners:	Adv. Efrat Bergman-Sapir; Adv. Khalil Zaher
On behalf of the Respondents:	Adv. Ran Rosenberg; Adv. Shai Cohen

Ruling

Justice Y. Elron:

At the heart of this Petition is the Petitioner's claim that he was tortured by the Israel Security Agency's Interrogators during his interrogation. Due to this, two remedies were requested as part of the Petition.

First, it was requested with regards to the Petitioner's individual case, the provision of a decree nisi to the Attorney General to cancel his decision not to open a criminal investigation against the Petitioner's interrogators.

Second, a general remedy was requested by way of cancelling the Attorney General's guideline titled "ISA Interrogation and the Necessity Defense – Framework for the Consideration of the Attorney General" (hereinafter: the AG Guidelines) which lays the ground for the implementation of internal guidelines in the Israel Security Agency (hereinafter: the Internal Guidelines). It was claimed that these guidelines allow interrogators to consult senior officials as to the use of "enhanced techniques" during interrogations, in a manner opposed the Law, and for this reason, the cancellation thereof was also requested.

Main facts concerning this case

The Petitioner's interrogation

1. The Petitioner, born in 1978, was detained by administrative detention on 2.11.2011 for a suspicion of membership and activity in the Hamas organization, which constitutes an unauthorized association, and of trade of weapons. His administrative detention was extended from time to time until 1.11.2012.

2. During his administrative detention, the Petitioner was interrogated by the Israel Security Agency (hereinafter: the ISA) on 5.9.2012, for a suspicion of involvement in terrorist activity, however he denied such suspicions. From this date and until 2.10.2012, the Petitioner was denied the right to consult with his attorney.

3. The Petitioner was interrogated by the ISA one more time on 12.9.2012 due to up-to-date intel which raised a suspicion of his involvement in Hamas military activity. The information contained a real suspicion concerning the Petitioner's knowledge of the whereabouts of an arsenal in a warehouse belonging to the terrorist infrastructure in which he was active, containing a significant amount of over ten weapons, including rifles.

According to this information, the aforesaid weapons had been used for a number of terrorist attacks, some of which caused deaths.

In addition, a suspicion was raised that the members of the terrorist infrastructure, to which the Petitioner belonged, were intending to commit an additional terrorist attack using these weapons.

4. Since the Petitioner denied the suspicions concerning him, as well as any knowledge with regards to the plan to commit terrorist attacks, and since the ISA's interrogators believed that he was holding information about a plan to harm public safety while endangering human lives, as of 18.9.2012, his interrogation included "enhanced interrogation techniques", as put by the Respondents.

   Following this, the Petitioner provided information which assisted with the exposure of many weapons which were used by an active military infrastructure of the Hamas organization. Among other things, the Petitioner admitted that he received many weapons in accordance with the instructions of one of the senior members of Hamas, and transferred them into a hiding spot and into the hands of known active members of the Hamas organization.

5. At this stage of the interrogation, the interrogators had based a suspicion with high probability, that the Petitioner was withholding information concerning a terrorist attack planned by the members of the terrorist infrastructure to which, as aforesaid, he belonged. This information, among other things, was based on a polygraph test performed on him. Due to this, "enhanced interrogation techniques" were also used in an additional interrogation of the Petitioner, on 21.9.2012.

   During this interrogation, the Petitioner provided information concerning additional weapons which he received and transferred to other active Hamas members, who were also under arrest at that time. Later in his interrogation, he provided additional information which assisted with the advancement of the interrogations of other active members of the terrorist infrastructure, and among other things, one of them admitted to planning a kidnapping attack and to setting additional terrorist acts in motion, as the Respondents put it.

6. During the period in which "enhanced techniques" were used in his interrogation – i.e. between 18.9.2012 and 21.9.2012 – the Petitioner was examined four times by the medical doctors of the Israeli Prison Service (hereinafter: the IPS).

   On 19.9.2012, the findings of the medical examination indicated "pain and swelling in the area of upper right molar", and noted "buccal swelling, pain at touch, periodontal abscess."

On 21.9.2012 at 05:37, the Petitioner was examined and found to be in "reasonable general condition", his skin was "pale" and he was suffering from diarrhea. Later on, at 06:03, he was examined due to complaints of pains in the knees, while the examiner stated that "during the examination – seems upset. Red eyes. Did not sleep tonight – interrogation". In accordance with the findings of the examination, no new medical intervention was found necessary. On the evening of that same day, at 18:42, the Petitioner was examined again, this time due to complaints of pain in his left knee. The findings of the examination indicate that his general condition was "reasonable" and that he received drug treatment due to swelling, pain, and limitation of movement in his knee.

The criminal proceeding concerning the Petitioner's case

7. As aforesaid, during the Petitioner's interrogation, his arrest was extended from time to time by the Judea Military Court. In the Decision concerning the first petition for extending the Petitioner's arrest, of 13.9.2012, it was noted as follows: "Concerning the Court's question about the Suspect's medical condition, the suspect replied that everything was okay and that he had no medical issues".

   The Decision concerning the second petition for the extension of the Petitioner's arrest, of 24.9.2012, three days following the cessation of the use of enhanced techniques as part of the Petitioner's interrogation, it was similarly stated that "As to the Court's question of whether his health is okay, the Suspect stated that he had no problem".

8. In a discussion held on 4.10.2012 concerning an additional request to extend his arrest, the Petitioner and his defense attorney first claimed that improper techniques were used as part of the Petitioner's interrogation, and that this fact in and of itself should be sufficient to immediately end his arrest. It was argued that the "ISA's interrogators threatened him [the Petitioner – Y.E.] and beat him and he has bruises on his legs". According to the documentation in the discussion minutes, at this point, the Petitioner "lifted his pants up to the knee. Over his left knee, there was a slightly dark bruise, and over his foot, there were 3 scratches that are not fresh".

   The Petitioner responded as follows to the Court's question of whether anything exceptional took place during the interrogation:

   > "On 20.9.2012 or 21.9.2012, I was notified that I would be taken to a military interrogation. From this moment on, I was asked to squat without a chair for an hour, or an hour and a half. Then I was asked to sit on a chair with my legs on one side, and my head on the other side (demonstrates), this took a long time. About 8 hours, irregularly. I

don't remember dates. It lasted irregularly for two days. During the interrogation, I lost consciousness 3 times and vomited many times. The interrogator hit my legs with his knee. An interrogator by the name of Tzachi hit me in the eye while I was wearing a blindfold. This is what happened during the interrogation".

9. The Court noted as follows within its Decision of that date:

"After listening to the Suspect's claim [the Petitioner – Y.E.] and reviewing the confidential memorandum submitted to me by the interrogation's representative, I am able to rule that exceptional techniques were used against the Suspect during in his interrogation".

Alongside this, the Court added as follows:

"For now, all I can say is that in light of the severity of the suspicions, as well as the findings produced by the interrogation, it **cannot** be ruled that the use of the techniques used against the Suspect were used in violation of the Law, and that there were no reasonable grounds for the use thereof, and that therefore this justifies his immediate release" (emphasis in original - Y.E.).

10. Following the completion of the interrogation, a bill of indictment was filed with the Judea Military Court against the Petitioner.

During the Court meeting held on 13.5.2013, his defense attorney repeated the claims as to improper interrogation techniques which, according to him, were used during the Petitioner's interrogation, including sleep deprivation, painful cuffing, being kept in stress positions such as the "frog" and "banana" positions, use of threats against family members, humiliation and even physical violence. In light of this, the Petitioner's defense attorney requested to conduct a trial within a trial.

11. On 6.9.2014 the Parties have reached a plea bargain, as part of which an amended bill of indictment was filed against the Petitioner, according to which he was a member of a Hamas fire team during 2009, as part of which he was responsible for the storage and concealment of weapons for the Hamas organization, with the purpose of having them available for the organization in time of need. In addition, in the beginning of 2010, the Petitioner acted together with others to transfer seven weapons to active members of the Hamas organization for the purpose of committing future terrorist attacks.

12. The Petitioner was convicted on that same day in accordance with his admittance in the amended indictment, of membership and activity in an unauthorized association, pursuant to

Regulation 85 of the Defense (Emergency) Regulations, 1945, as well as the trade of weapons, pursuant to Sections 233(b) and 201(a)(2) of the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009.

In light of the Petitioner's conviction in accordance with the plea bargain, it is unnecessary to discuss the claims of the trial within a trial, made in the beginning of his trial.

13. In its Final Verdict, the Judea Military Court (Vice President Lieutenant Colonel Z. Heilbron) sentenced the Petitioner in accordance with the sentences requested by the Parties as part of the plea bargain: 36 months of active prison term, counting as of the date of his administrative detention; a suspended sentence of36 months of imprisonment for a duration of 5 years, lest he repeat the offenses specified in the Final Verdict; and a monetary fine in the amount of ILS 20,000. In addition the Court activated a suspended sentence of imprisonment, which was pending against the Petitioner, so that six months of it would run parallel to his imprisonment sentence, and six months in accumulation.

The Court specified the arguments concerning the adoption of the punishment framework of the plea bargain, noting as follows:

> "The bill of indictment related to the Defendant [the Petitioner – Y.E.] is highly severe. The Defendant acted as part of a fire team and was responsible for the maintenance of highly dangerous weapons. The Defendant's activity led to a real danger to the safety of the area, and undoubtedly under regular circumstances, I would have imposed a far more severe sentence to the Defendant than that proposed by the Parties. However, due to the Parties' arguments, and especially in light of the unconventional interrogation which the Defendant had undergone, I have found the bargain to be reasonable, and I adopt it".

The Petitioner's complaint and the filing of a previous Petition with this Court

14. On 2.4.2013. before the completion of the legal proceeding in his case, the Petitioner filed a complained through his representatives from the Public Committee Against Torture in Israel (Petitioner 2), as part of which, the General Attorney was requested to commence an immediate criminal investigation against the Petitioner's interrogators due to a "brutal process of mental and physical torture", as it was put in the Complaint. In addition, it was requested to investigate medical teams, which, it was argued, were physically present inside the interrogation room for the purpose of providing medical treatment, and did nothing to "cease the torture".

According to the claims of the Complaint, during the first stage of the interrogation, the interrogators "exhausted" the Petitioner by performing an intensive interrogation and while

depriving him from undisrupted sleep, and in addition verbally abused him, including threats to kill him, to hurt his family and to tear down his home.

During the second stage, according to such claims, the Petitioner was physically "tortured", including being struck with a fist in his right eye; being kept in a "banana" position, while his back was on the seat of the chair, his head on one side, and his legs on the other side; being held by two interrogators by his head and legs, and "shaken" until he lost consciousness and vomited; being beaten with fists, slaps that caused one of his teeth to fall out, and being beaten on his leg muscle using the knee of one of the interrogators; being held in a "frog squat" position; being made to stand with his back to the wall for elongated periods of time; and being kept sitting on a chair for elongated periods of time, with his hands cuffed behind his back.

It was further claimed that during one of the times in which the Petitioner was made to stand with his back to the wall, his pants fell off, his interrogators verbally abused him while using expressions of a sexual nature, and one of the interrogators, according to such claims, took pictures of him. Finally, it was claimed that on a certain date, when the Petitioner received his meal at the interrogation room, one of his interrogators smeared jam over his face.

15. The Petitioner's complaint was transferred to the ISA Inspector for Interrogee Complaints (hereinafter: IIC). The IIC reviewed all interrogation materials in the possession of the ISA, and any report concerning the manner of the Petitioner's interrogation, including the intel giving rise to the interrogators' suspicions; memorandums written during the interrogation; medical records; as well as minutes and additional documents from the legal proceeding concerning his case.

    On 21.8.2014 and 21.1.2015, the IIC met with the Petitioner in prison in order to investigate his complaint. During these meetings, the Petitioner did not recall the course of his interrogation; did not recall which actions each of the interrogators enacted; did not recall the content of the verbal abuse and threats made against him, albeit according to him they were made consistently. The Petitioner requested to review his version of the events, as stated in the Affidavits he produced for his representative on 1.11.2011; 12.11.2012; 20.11.2012 and 29.11.2012, before the IIC.

    When asked if he would be willing to undergo a polygraph test with regards to his factual version, the Petitioner responded, through his representative, that he refuses the test since the experience might "re-traumatize" him in light of the previous polygraph test he had undergone during his interrogation. In addition, he argued that the polygraph test is inappropriate for the preliminary investigation stage prior to the decision of whether to open a criminal investigation (as opposed to the stage of the investigation itself), and that being an

"invasive" process involving a violation of basic rights, there are considerable reasons to avoid the test in the case of a "torture victim", as in this case.

16. During January and February of 2016, the IIC questioned ten of the Petitioner's interrogators and confronted them about his claims. A considerable part of the Petitioner's claims were denied by the interrogators.

    According to the interrogators' version, "enhanced interrogation techniques" were used during the interrogation, in the lack of any other option, for the purpose of saving human lives. However, the scope and nature thereof were significantly different from those claimed by the Petitioner.

17. In addition, the IIC met with prison guards whose name was mentioned in the Petitioner's complaint, and it turned out that only one of them was present at the shift during his interrogation. The prison guard stated that he did not recall any event as described by the Petitioner in his complaint – according to which prison guard spilled water on him, changed his clothes, and returned him to the interrogation room on a wheeled office chair – and that if such an event had taken place, then he would surely have remembered it.

    The IIC also met with the Israeli Prison Services' medic, whom the Petitioner met during his arrest. According to the medic, he did not recall the name or face of the Petitioner, and that anyway, it is impossible for a report to be received regarding loss of consciousness (by either an interrogee or an interrogator) without it being documented in medical records, even if no findings are discovered in a medical examination. It is noted that the doctor who examined the Petitioner during his interrogation is deceased, and therefore no additional details could be attained concerning his examination of the Petitioner. The medic stated to the IIC that the doctor was "highly diligent" and used to document any medical action he performed on interrogees, even routine actions.

18. On 24.2.2016, the IIC submitted her recommendation to the ISA Interrogee Complaints Supervisor at the State Attorney.

19. On 12.9.2016, the ISA Interrogee Complaints Supervisor notified the Petitioners that, based on the opinion of the Attorney General and the State Attorney, she decided to close the investigation of the Petitioner's complaint, since she believed that the findings of the preliminary investigation were insufficient to justify the taking of criminal, disciplinary, or other steps against the ISA's interrogators.

    Sections 12-13 of the decision state as follows:

> "Following a meticulous review of the investigation case's documents, I have found no flaw in the interrogators' consideration, and that their use of enhanced interrogation techniques under the circumstances of the matter is included under the necessity defense. In addition, and in light of the severity of the threat created by the terrorist infrastructure to which the Complainant [the Petitioner – Y.E.] belonged – I have found that the enhanced interrogation techniques were proportionate, and appropriate in light of the importance of the information withheld by the Complainant. However, alongside this, it is emphasized that no evidence was found in support of most of the Complainant's descriptions concerning the enhanced techniques used in his interrogation, including in medical records, though one would expect that, if they had been true, then such medical records would reflect objective findings. In addition, most of his claims were denied outright by the ISA's interrogators".

The decision specified that the investigation's findings indicated that, as opposed to the Petitioner's claims, no evidence was found that the Petitioner had undergone a "skipping journey", as he put it, between a number of detention facilities prior to the beginning of his interrogation in order to physically and mentally exhaust him; that the enhanced techniques were not used continuously in his interrogation from 18.9.2012 until 21.9.2012; that there is no evidence that the Petitioner has lost consciousness or that any physiological or mental injury was caused to him as a result of his arrest or interrogation; that no indication was found that the Petitioner was cuffed in a manner violating the ISA's regulations, and in fact it was documented that he was cuffed by only one hand; that no evidence was found that the Petitioner's interrogators have threatened him or verbally abused him; no evidence was found that an interrogator smeared jam over the Petitioner's face; and that no indication was found that the Petitioner's pants fell off his body, that the interrogators mocked him for this, or that the Petitioner was photographed in such state, as claimed.

The findings further indicate that no fault was found in the ISA's interrogators' response to the Petitioner's medical state, and that the interrogators did not prevent him from being examined or from receiving treatment during his interrogations. Alongside this, the findings of the preliminary investigation indicated that during the interrogation, the Petitioner was examined by a doctor within the interrogation room itself rather than at the clinic, on three different occasions, and all without any special urgency to the examination. Following this, the decision noted that "we intend to inquire with the suitable officials in the ISA concerning the relevant interrogation regulations in this context".

20. By and by, on 12.11.2014, before the IIC has even issued her decision, the Petitioners filed a Petition with this Court, in which the Court was requested to instruct the Police Internal Investigations Department to open a criminal investigation against the Petitioners'

interrogators, as well as to cancel the ISA's Internal Guidelines concerning the use of "enhanced interrogation techniques".

On 20.1.2017, this Court dismissed the Petition, while ruling that the first remedy requested for such is obviated, after the Attorney General has found that no criminal investigation should be opened against the ISA's interrogators due to the Petitioner's complaints; and that the second remedy – concerning the cancellation of the Internal Guidelines of the ISA – is a general remedy which needn't be addressed except as part of a concrete petition. It was further ruled that the Petitioners may file a new petition concerning the Attorney General's decision, and all their claims in this matter are reserved to them (HCJ 7646/14 John Doe Vs. the Attorney General (30/1/2017)).

21. After having reviewed some of the investigation materials of the IIC, as were permitted for review, the Petitioners filed the subject Petition hereof, on 19.11.2017.

The Parties' arguments

22. According to the Petitioners, the IIC's decision is extremely unreasonable. This is because the ISA's interrogators intentionally used violence against the Petitioner, which caused him severe pain and suffering, in a manner which constitutes torture. In this context, in which the Petitioners, with regards to the contents of the complaint filed, and in general, have emphasized the moving of the Petitioner from one detention facility to another immediately prior to the interrogation, without any apparent reason; the sleep deprivation he had suffered during the interrogation; and the violence used against him during the interrogation, according to him, as specified hereinabove.

It was argued that the absence of real time medical records cannot be construed to negate the Petitioner's claims concerning his pain and suffering; and that the medical opinion of Dr. Firas Abu Akar, attached by the Petitioners as Annex 17 of their Petition, which is undated and according to its content, is based on an examination of the Petitioner in prison on 17.2.2013, is sufficient to base the reliability of his version (hereinafter: Dr. Abu Akar's Medical Opinion).

The Petitioners also wish to rely on the medical records of the Petitioner's examination during the interrogation, and in particular the findings of knee swelling and tooth injury. The Petitioners further refer to the Petitioner's statements at the Military Court during discussion, as well as the contents of the Affidavits he provided to his Representative in November 2012.

23. The Petitioners believe that the Respondents' position, according to which "necessity" circumstances existed with regards to the Petitioner's interrogation, which exempts them from criminal responsibility, should be completely dismissed. According to them, the Respondents failed to indicate a "certain and concrete danger to human life", as they put it, while the information in their possession "referred concretely to a certain risk", as opposed to ordinary collection of information.

    Furthermore, according to the Petitioners, the existence of a time gap between the performance of the interrogation and the expected date for the realization of such danger indicates that the necessity defense was not applicable under the circumstances of this matter. The Petitioners also base this latter argument on the fact that the Petitioner was moved between facilities for seven days prior to the beginning of his interrogation, and on the fact that according to them, during the Tishrei holidays, his interrogation was paused.

24. It was further argued that the Respondents' position, according to which the use of "enhanced techniques" in an interrogation is included under the necessity defense, is insufficient to justify the decision to refuse the opening of a criminal investigation, since the necessity defense is a restriction granting **exemption** from criminal responsibility as opposed to **justification**, which legitimizes the act's legality, and is therefore relevant as a defense argument only following prosecution. In this context, the Petitioners referred to the professional opinion of Prof. Mordechai Kremnitzer and Prof. Yuval Shany, which is undated, attached as an Annex to the Petition (hereinafter: Kremnizer and Shany's Professional Opinion), and whose submission was dismissed by this Court as part of HCJ 5572/12 Abu Gosh Vs. the Attorney General), in Section 15 (12.12.2017) (hereinafter: the Abu Gosh Case), since Israeli Law interpretation does not require the submission of any expert opinions.

25. Finally, it was argued, that the rulings of HCJ 5100/94 the Public Committee Against Torture in Israel Vs. the Government of Israel 84 53(4) (1999((hereinafter: HCJ 5100/94) should be understood as indicating that ISA interrogators have no authority to decide to use torture in advance under the necessity defense, as opposed to a situation in which a ISA interrogator is forced to act out of an "individual, ad-hoc decision, as a response to an unexpected occurrence". According to the Petitioners, the AG Guidelines allow internal consultation between ISA interrogators and their superiors for the purpose of making an advance decision to use torture in certain cases, and as such, it is in violation with the instructions of this Court as specified in HCJ 5100/94, and must therefore be canceled. In this context, too, the Petitioners wish to rely on the contents of Kremnitzer and Shany's Proffesional Opinion.

26. On the other hand, the Respondents believe that this Petition should be dismissed.

According to them, even though "enhanced interrogation techniques" were used during the Petitioner's interrogation, such techniques were "proportionate and reasonable in relation to the danger indicated by the intel" in the possession of the Petitioners' interrogators. In this context, it was noted that the information provided by the Petitioner in his interrogation led to the apprehension of many weapons used as military infrastructure by the Hamas organization. It was further emphasized that the Petitioner was interrogated by the ISA for about a week prior to the use of "enhanced techniques" in his interrogation, and that during this time he denied the accusations against him, as well as any knowledge about this subject. Finally, it was emphasized that as opposed to the Petitioners' claims, the Petitioner's interrogation was not paused during the holiday period, and that he was also interrogated during Rosh HaShanna and on Saturdays.

According to the Respondents, under these circumstanced, the IIC's decision, which was certified by the Attorney General as well as the State Attorney – according to which the necessity defense applies to this case, relieving the Petitioner's interrogators of criminal responsibility – is reasonable, and should not be interfered with.

In this context, the Respondents emphasized the ruling precedent, according to which only in exceptional cases should this Court interfere with considerations as to the conduction of a police investigation and criminal prosecution.

27. The Respondents further argued that the Petitioner did not succeed in showing that torture was used against him during his interrogation. Regarding this, it was argued that the Petitioner's late version – as reflected through Affidavits he provided to this Representatives in November 2012, and through his complaint of April 2013 – was much broader in scope and force than the first version provided at the Military Court in October 2012, and that significant gaps exist between the Petitioner's version and the "factual scenario as indicated by the interrogation file". It was further emphasized that the Petitioner's refusal to undergo a polygraph test made it difficult to assess the reliability of his later version.

28. As to the Internal Guidelines, it was argued that these do not provide circumstances under which an interrogator is permitted to act within the necessity defense, but instead define how consultation with ISA senior officials should be performed in real time, concerning the appropriate way of action under the circumstances of any specific interrogation. As put by the Respondents:

> "The Internal Guidelines allow persons involved in interrogations to consult senior officials **in real time**, while such officials cannot authorize the interrogator to use

> unusual interrogation techniques, however they can express their opinion that under the given circumstances, the use of enhanced interrogation techniques is required immediately to save human lives. In addition, such senior officials partaking in the process of real-time consultation concerning given circumstances, may impose **command limitations** concerning the interrogator's actions under such circumstances as presented to them" (Section 81 of the Respondents' Response; emphases in original – Y.E.).

According to the Respondents' the interpretation of Court rulings concerning HCJ 5100/94 presented by the Petitioners – according to which the interrogator must make a decision alone on whether he is facing a "state of necessity" which requires the use of enhanced interrogation techniques – is false, and lacks any basis either by Law or ruling precedent. According to them, this interpretation is opposed to the AG Guidelines, according to which ISA interrogators are the "State's representatives", and that therefore they are entitled to received "a fair measure of judiciary certainty".

It was further argued that such Guidelines were certified by the Attorney General, who is the "authorized interpreter" of the Law for government authorities (so long as the Court has not ruled otherwise), and his interpretation binds the ISA. Finally, it was noted that during recent years, the ISA's interrogators only had need of such Guidelines in very exceptional cases.

29. Close near the discussion of the case, the Petitioners requested to attach a medical opinion on their behalf of June 2018, prepared by Dr. Rachel Rokach and Dr. Pau Perez-Sales, addressing the Petitioner's mental condition, and which, according to the Petitioners, illustrates the pain and suffering caused to him as a result of the interrogation. This professional opinion is based on a clinical examination and interview performed with the Petitioner on 14.12.2017 in accordance with the "Istanbul Protocol - Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (hereinafter: Dr. Perez-Sales and Dr. Rokach's Medical Opinion).

The Respondents objected to the submission of the Professional Opinion, and argued that very little weight should be given it, in light of the passing of five years since the end of the Petitioner's interrogation and until the date of the preparation of the Professional Opinion. The Respondents emphasized that the Professional Opinion was not available to the SNCC and the ISA Interrogee Complaints supervisor, and that it is inappropriate to only now request its submission, and all while the authors of the Professional Opinion have already met with the Petitioner close after the filing of the Petition, over six months beforehand.

Discussion and ruling

30. The Petitioners' arguments can be divided into two poles.

    The first refers to the individual case of the Petitioner. At the center of this discussion is the IIC's decision, given with the consent of the Attorney General and the State Attorney, to close the investigation case concerning the Petitioner's complaint. With regards to this, we are required to rule whether, as the Petitioners claim, the decision of the Attorney General not to open a criminal investigation against the ISA interrogators who were involved with the Petitioner's interrogation, and who, according to their claims, used prohibited interrogation techniques, is unreasonable in a manner that justifies this Court's interference.

    In order to rule in this question, I shall first lay down the normative infrastructure concerning the issue of judicial review of the Attorney General's decision regarding the opening of a criminal investigation against ISA interrogators; following this, I shall review the ruling precedent as to the applicability of the necessity defense as concerning ISA interrogations; and finally, I shall examine the application of the foregoing to the circumstances of the case at hand.

    The second pole of the Petitioners' arguments refers to the AG Guidelines and the Internal Guidelines thereunder. According to the Petitioners' argument, the Guidelines should be cancelled, and in particular inasmuch as they refer to the "system of consultations and approvals within the ISA". I shall discuss this argument while examining the compatibility of the AG Guidelines and the Internal Guidelines to customary Law, and in particular to this Court's ruling in HCJ 5100/94.

The decision to open a criminal investigation against a ISA employee and judicial review of this decision

31. The Attorney General is authorized to instruct the opening of a criminal investigation against a ISA interrogator pursuant to the provisions of Section 49I1(a) of the Police Ordinance [New Version], 5731-1971 (hereinafter: the Police Ordinance). The Attorney General has delegated this authority to the State Attorney and his subordinates, pursuant to his authority to do so under Section 49I1(b) of the Police Ordinance (Portfolio of Notifications 5770 no. 6013 of 29.10.9002, pp. 264).

32. As explained by the Respondents' Response to the Petition, any complaint filed against a ISA interrogator concerning an offense which, according to the claims thereof, was performed by him while fulfilling his duties or in relation to them, is investigated by a process of preliminary investigation by the IIC (with regards to authority for the performance of a preliminary investigation by the IIC, please see HJC 1265/11 the Public

Committee Against Torture in Israel Vs. the Attorney General, in Section 31 of the Ruling by (now former) Justice A. Rubinstein (6.8.2012) (hereinafter: HCJ 1265/11).

In the past, an IIC employee was a ISA employee, however now he works for the Ministry of Justice, which is subject to the ISA Interrogee Complaints Supervisor, who is a senior attorney at the State Attorney. This attorney is directly subject to the State Attorney and the Attorney General (on this matter, please see HCJ 1265/11 Sections 5 and 16).

In general, complaints against ISA interrogators are filed by interrogees, by themselves or through others. Upon the filing of a complaint to the IIC, a comprehensive investigation is performed with regards to such complaint, including, among other things, a meeting with the interrogee-complainant, a review of the material concerning their interrogation by the ISA, a review of the medical records available regarding their case, and a questioning of the relevant ISA personnel, as well as additional personnel (such as medical doctors or prison guards) related to the case. At the end of such investigation, the IIC submits the investigation file to the ISA Interrogee Complaints Supervisor at the State Attorney, along with all material collected in it, attached with the investigation's findings and recommendations.

The ISA Interrogee Complaints Supervisor examines the findings of the investigation and the recommendations submitted to him, and decides whether to instruct the opening of a criminal investigation or disciplinary procedures, or whether to instruct the performance of any systemic change of the ISA's work procedures.

33. Within the ruling of HCJ 1265/11, this Court has recommended that the decision of the ISA Interrogee Complaints Supervisor not to open an investigation shall be given with the consent of the Attorney General, or any person on his behalf, who has been authorized to instruct the opening of an investigation pursuant to the Police Ordinance, and all "in order to best reflect the legislators' intentions" (ibid, Section 28). Indeed, so has been done in the Petitioner's case.

The ISA Interrogee Complaints Supervisor's decision not to open a criminal investigation may be appealed to the State Attorney, pursuant to Section 64(a)(3) of the Criminal Procedure Law [Combined Version], 5742–1982 (hereinafter: the Criminal Procedure Law). Any decision made concerning the appeal, or any decision by the Attorney General's to open, or not to open, a criminal investigation, made with the consent of the Attorney General, may be appealed in this Court, as has been done in this case.

34. Despite the existence of a special provision of the Law concerning the opening of an investigation against a ISA employee – Section 49I1(a) of the Police Ordinance – the only

differences between a decision to open a criminal investigation in the case of any ISA employee, and a decision to open a criminal investigation in any other case, are the institutional identity of the investigating entity (the Police Internal Investigations Department, rather than the police) and of the entity authorized to make a decision concerning the opening of an investigation (the Attorney General rather than a police attorney or prosecutor).

The criteria for the Attorney General's decision on whether to instruct the opening of an investigation in the case of any ISA employee are identical to the criteria concerning a normal case of any decision to open a criminal investigation, pursuant to Section 59 of the Criminal Procedure Law (please see: 1265/11, Section 26 of (now former) Justice E. Rubinstein's ruling, and Section 2 of Justice U. Vogelman's ruling; and please see also: Additional HCJ Discussion 7516/03 Nimrodi Vs. the Attorney General (12.2.2004)). In this context, we examine the questions of whether there is sufficient evidence to justify the opening of a criminal investigation, and whether there is a public interest in the performance of an investigation and prosecution, in accordance with the circumstances of the matter.

35. Ruling precedent has provided that the prosecution authorities are authorized to perform a preliminary investigation as to the existence of evidence on which a reasonable suspicion of the commission of an offense could be based (please see HCJ 1265/11 in Sections 29-31 of (now former) Justice E. Rubinstein's ruling, and the references therein). This provision applies both to any IIC investigation, and to any other case in which the Police attains information concerning a suspicion of the commission of an offense. In accordance with this precedent, the Attorney General's Guideline no. 4.2204 was published on 31.12.2015, titled "Preliminary Investigation", which, according to its contents, concerns the classification of the cases in which a preliminary investigation must be conducted prior to the decision of whether or not to open a criminal investigation, as well as the scope of such investigation.

36. It is well known that the prosecution authorities hold broad discretion while making a decision regarding the opening of a criminal investigation, as well as while making a decision of whether to prosecute any person. Ruling precedent has repeatedly provided that this Court does not tend to interfere with the manner of this discretion, in light of the experience and professionalism of the prosecution authorities, except in exceptional cases, where the Court is convinced that a fundamental flaw exists in the practice of such discretion or the decision made thereby, under circumstances in which such decision was made in an extremely unreasonable manner, in lack of good faith, or due to extraneous considerations (HCJ 9607/17 Fischer Vs. the Attorney General (1.2.2018)). The burden of proof, to show that the prosecution authorities' decision extremely exceeded the bounds of reasonability, rests with the Petitioners who make such claim (Volume D ITZAK ZAMIR, THE ADMINISTRATIVE AUTHORITY 2787-2788 (2017)).

The estimation of the evidence's sufficiency is a matter which is clearly included within the prosecution authorities' field of specialty, and therefore any interference with the prosecution authorities' discretion not to open a criminal investigation due to the lack of sufficient evidential infrastructure is even narrower (the Abu Gosh Case, Section 22). One case in which this Court partially interfered with the discretion of the prosecution authorities concerning the estimation of the evidence's sufficiency was HCJ 869/12 John Doe Vs. the Attorney General (28.2.2017). The Petition in this case concerned the Attorney General's decision to close the investigation file regarding the complaint of a person who claimed that, while being detained in a police station, one of the police officers intentionally urinated on him in order to humiliate him. The Court believed that, under the circumstances described in its Ruling, that the evidential infrastructure collected against the police officer should be investigated by the Court in a criminal proceeding.

Applicability of the "necessity" restriction to "enhanced interrogation techniques" used by ISA interrogators

37. In this case, the Petitioners argue that the Attorney General's decision not to instruct the opening of a criminal investigation against the ISA interrogators, who participated in the Petitioner's interrogation, is extremely unreasonable, since the interrogation techniques used by the interrogators might constitute torture, which is prohibited by Law.

    The examination of this decision's reasonability should then be made in light of the guidelines ruled by this Court concerning the authority of the ISA's interrogators to make use of physical techniques against interrogees, and the circumstances under which they are permitted to do so.

    For the purpose of this discussion, I shall shortly address relevant legislature, the ruling precedent of this Court concerning the issue at hand, and the guidelines made thereunder.

38. Section 34k of the Penal Law, 5737-1977 (hereinafter: the Penal Law) titled "Necessity" provides 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 restricts the applicability of the necessity defense, and provides that this defense shall not apply in the event that "under the circumstances – the act was not a reasonable one for the prevention of the injury".

The form of the Sections, then, indicates that the applicability of the necessity defense is conditioned by five accumulative conditions, combined with each other and tightly bound together: that the act was necessary **immediately**; that the danger that led to such act was **real**; that the injury which such act was purported to prevent is a **severe injury** of one of the interests specified in Section 34k of the Penal Law; that the person who acted in such way had no **other alternative** but to commit the act; and that such act is **proportionate** compared with such expected severe injury.

39. Until the ruling in HCJ 5100/94, the necessity defense served as basis for the ISA's guidelines, which, among others things, included permission to make use of interrogation techniques including physical techniques, in the lack of any alternative, and in the event that such is required immediately for the purpose of saving human lives. Relying on this restriction, and based on the recommendations of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, headed by (former) President M. Landau of 1987, a special ministerial committee concerning ISA interrogations adopted a procedure titled "The Permission Procedure", which included permissions for the use of physical interrogation techniques in the event that the interrogator believed that the use of such techniques is justified, in a given case.

In HCJ 5100/94 it was ruled that this procedure is illegal and is therefore null. The Court ruled that torture must not be used against any interrogee during interrogation, nor any other cruel, inhuman or degrading treatment, and that actions such as shaking the interrogee, having them sit in painful positions, covering their head with a sackor long term sleep deprivation harm the interrogee's human dignity and are therefore prohibited.

40. That notwithstanding, the ruling made two important provisions referring to both poles of the Petition at hand.

As to the use of the necessity defense in specific cases, it was ruled that this may be available to ISA interrogators who used physical interrogation techniques, and were prosecuted due to this, all under the circumstances of a "ticking bomb", in the event that the interrogee holds information of the location of a bomb that was placed and is intended to explode soon, and having no way of neutralizing the bomb without such information, and when the only way to attain such information is through the interrogee.

It was further ruled in this matter that the immediacy requirement provided in Section 34k of the Penal Law refers to the immediacy of the act rather than the immediacy of the danger, and seeing as such, this requirement is fulfilled even if the danger may be realized days or even weeks after the date of the interrogation, on the condition that the realization is certain to be realized, and in the lack of any option to prevent this from occurring in any other way.

As to general instructions for the use of physical techniques during interrogations, it was ruled that these must be based on authorization explicitly enshrined by Law, rather than restrictions of criminal responsibility. It was clarified that the existence of general authority for the provision of instructions should not be inferred solely based on the necessity defense, since by nature it deals with:

> "[C]ases involving an individual reacting to a given set of facts. It is an ad-hoc act in response to an event; it is the result of an improvised reaction to an unpredictable occurrence. … this very nature of the restriction does not allow it to serve as the source of general administrative authority. Such authority is based on the establishment of general, prospective criteria" (HCJ 5100/94, Section 36).

Finally, the Court noted that the "Attorney-General may establish guidelines regarding circumstances under which interrogators shall not stand trial, if they claim to have acted out of 'necessity'". (ibid, Section 38).

41. As specified in the Respondents' Response to the Petition at hand, and in their Response to the Petition filed by the Petitioners as part of HCJ 5100/94 pursuant to the Contempt of Court Ordinance, attached as Annex 40 to the Petition at hand, the ISA's "Permission Procedure" was canceled immediately following the issuance of the Ruling for HCJ 5100/94. In addition, an instruction was given to all ISA interrogators that they were not longer authorized to make use of physical interrogation techniques, and that if they do, they could be prosecuted under a criminal procedure. Notwithstanding, the following was clarified to them:

> "If any ISA interrogator uses physical interrogation techniques under circumstances providing justification in accordance with the Law, he may use the 'necessity' restriction as defense, under appropriate circumstances, in which case, such interrogator shall bear no criminal responsibility for his actions" (Section 3 of the Response, signed by the Deputy State Attorney (special titles) at the time, Shay Nitzan; this Response was attached as Annex 40 of the Petition).

As indicated by the Ruling given concerning the Petition pursuant to the Contempt of Court Ordinance (HCJ 5100/94 The Public Committee Against Torture in Israel Vs. the

Government of Israel via the Cabinet Secretary (6.7.2009)), during the oral discussion, the Respondents emphasized that the Attorney General received retroactive reports inasmuch as physical interrogation techniques were used in any certain interrogation, and in which case the necessity defense is required.

42. Notwithstanding the cancellation of the "Permission Procedure", the Attorney General at the time, E. Rubinstein, published the AG Guidelines on 28.10.1999 (please see: Elyakim Rubinstein, *Security and the Law: Trends* HaPraklit 44(3) 409, 419 (1999)). As is mentioned in the document, this was intended as an "establishment of guidelines" in accordance with the instructions of the Court ruling in HCJ 5100/94.

The premise of these guidelines was that the State of Israel is engaged in an endless struggle against terrorist organizations; that the main authority bearing the task of fighting hostile terrorist activity is the ISA; and that the ISA's interrogators act as the representatives of the State of Israel, and insofar as they act on its behalf in accordance with the Law, they are entitled to receive a fair measure of judiciary certainty and appropriate defense whilst fulfilling their duties.

43. To the point of the matter, the AG Guidelines provide as follows:

> "In cases where any interrogator has used an interrogation technique required immediately to attain vital information for the purpose of preventing real danger of severe injury to the security of the State, or human life, freedom, or bodily integrity, and there being no reasonable alternative under such circumstances to immediately attain such information, and the use of such interrogation techniques was reasonable under the circumstances of the matter for the purpose of preventing such injury, then the Attorney General shall consider not to open criminal procedure under such circumstances. The decision of the Attorney General shall be given on a case-to-case basis, while performing a detailed investigation of all components aforesaid hereinabove, i.e. the proportionality and immediacy of such necessity, the severity of the danger and injury prevented, and the realness thereof, the alternatives for such act and proportionality of the techniques, including the interrogator's perception of the circumstances at the time of the interrogation, the senior officials who approved such act, their involvement with such decision, and their consideration at the time of such use, as well as the conditions of such act, the supervision and documentation thereof" (ibid, pp. 421).

As to the **immediacy** requirement, it was ruled that it refers to an interrogator's act rather than the danger, meaning that even if such real danger is not immediate but expected to occur after a while, the necessity defense might still be applicable. However, the wider the time gap between such act and the date of the realization of such danger, the heavier the burden of persuasion that such act was required immediately. As such, it is provided that a

regular and continuous act of information collection concerning terrorist organizations and their activity in general cannot, in and of itself, be considered as preventing "real danger", and that the danger to human life must be certain and particular in nature and kind.

Finally, it is provided that "the ISA should establish internal guidelines, among other things, concerning the system of intra-organizational consultations and approvals required for this purpose" (ibid, pp. 422).

44. As indicated by the Respondents' Response, following the AG Guidelines, internal guidelines were established by the ISA, "providing how consultations would be performed with ISA senior officials in real time, when the circumstances of any particular interrogation seem to be in compliance with the necessity defense, in the opinion of the persons engaged in such interrogation" (Section 79 of the Response).

As aforesaid in the Respondents' Response, such Internal Guidelines were presented to the Attorney General "in order to ensure that they comply with the framework of the Law and ruling precedent".

Finally, it is noted that, according to the Respondents, since the Internal Guidelines were established, the cases in which ISA interrogators have acted according to the assumption of compliance with the necessity defense, are exceptional cases, comprising a "small fraction" of all cases in which suspects were interrogated under a suspicion of terrorist activity during recent years.

From the general to the specific

45. Having laid down the normative infrastructure relevant for this discussion, I shall now move on to examine the Petitioners' arguments, according to which the decision of the IIC not to open a criminal investigation against the ISA interrogators – which was approved by the Attorney General and the State Attorney – is extremely unreasonable, both because the ISA interrogators tortured the Petitioner, according to the Petitioners' arguments, and because the necessity defense, which would exempt them from criminal responsibility, does not apply under the circumstances of this case.

46. An examination of all material submitted to us concerning the Petitioner's interrogation – both the material attached to the Petition and the Response thereto, and the confidential material submitted for our review with the consent of the Petitioners following our decision of 24.10.2018 – leads to the conclusion that the Attorney General's decision not to open a criminal investigation against the Petitioner's interrogators does not exceed the boundaries of reasonability, certainly not in a manner justifying our interference.

Did the ISA interrogators use torture during the Petitioner's interrogation?

47. The Petitioners' first argument is that the decision not to open a criminal investigation is extremely unreasonable, since the ISA interrogators have tortured the Petitioner during his interrogation, while using improper interrogation techniques.

    The term "torture" has been defined in Section 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (21 31, 249 (signed 22.10.1986)) (hereinafter: the Convention) to which Israel is a party, as follows:

    > "[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".

    In their arguments, the Petitioners have focused on the component of "pain or suffering, whether physical or mental" caused to the Petitioner, according to his claims, during his interrogation, as a result of the violence used against him by his interrogators.

    In this context, it was also argued that moving him from one detention facility to another was meant to exhaust him, as was the lack of sleep allowed to him during the interrogation; that during his interrogation the Petitioner was kept in the "banana position", kept in a squatting position and was made to stand against the wall – all position known as improper "torture methods"; that the Petitioner was beaten aggressively; that threats were made against him; and that the combination of all such techniques caused the Petitioner particular pain and suffering.

48. After having carefully examined the Petitioner's version – as presented through his Affidavits, his complaint, and the investigation procedure by the IIC – I do not believe that the Petitioners were successful in proving the existence of any suspicion of a commission of a criminal offense by the ISA interrogators, in a manner contradicting the recommendations of the IIC and the decision of the ISA Interrogee Complaints Supervisor.

49. After examining all investigation material of the IIC and the ISA Interrogee Complaints Supervisor submitted to us, I was given the impression that the investigation was thorough,

inclusive and comprehensive. The IIC referred to all documents relevant to the Petitioner's interrogation, and questioned all relevant persons, whose version could be attained, including the Petitioner's interrogators, the IPS medic, and the IPS prison guards.

On the other hand, there are considerable problems with the Petitioner's version, as presented in the Petition. His avoidance from presenting his factual version during both his meetings with the IIC, and his request to only rely on the contents of his Affidavits prepared for his representatives, while claiming that he did not recall the details of the interrogation, both weaken his version. Although almost two years have passed from the date of the interrogation and until the Petitioner's first meeting with the IIC, it could be expected that the Petitioner would remember the details of the interrogation, and would at least be able to describe the main points of the severe violence used against him, according to him. The Petitioner's refusal to undergo a polygraph test, which might have supported his version, especially in light of the ISA interrogators' complete denial thereof – also made it difficult to estimate his version's reliability.

50. The Petitioners believe that there are "objective real-time evidence of pain and suffering", supporting the Petitioners' version. In this context, the Petitioners referred to the "skipping journey", as they put it, which the Petitioner had undergone between detention facilities prior to the beginning of his interrogation. In addition, they referred to a finding indicated by the investigation of the IIC, according to which the Petitioner vomited during one of the interrogations, as well as medical records of 19.9.2012 and 21.9.2012 concerning tooth aches, as well as knee swelling and limitation of movement. The Petitioners further argued that the Petitioner's statement, as recorded in the Military Court's minutes, also reinforces his version. It was also argued that the medical records according to which the Petitioner felt a "black point" in his eye some time after the interrogations, as indicated by his medical record of 5.11.2012, and that in addition, as indicated by Dr. Abu Akar's medical opinion, he felt "pain in his left hip and paresthesia along his left leg, which increasingly improved with time" also enhance the reliability of his version.

Contrary to the Petitioners' arguments, I do not believe that all of the above is sufficient to prove the Petitioner's version.

51. As to the moving of the Petitioner between different detention facilities prior to the beginning of his interrogation, the findings of the investigation found no evidence that moving him was intended to physically or mentally exhaust him. I did not see fit to interfere with this finding. Moreover, it is noted that, although I do not make light to the inconvenience and difficulty which might be caused as the result of moving a suspect between detention facilities, I do not believe that such action, in and of itself, amounts to "torture".

52. The IIC's investigation does indicate that "during the Complainant's [the Petitioner's – Y.E.] interrogation, a one-time event did occur in which he vomited in the interrogation room **without** losing consciousness. Following this, the Complainant was taken by prison guards to the shower, his clothes were changed, and afterwards he was examined by a medical doctor" (emphasis in original - Y.E.).

    Of course, there is a large gap between this finding and the Petitioner's version, according to which he vomited a number of times in the interrogation room, and even lost consciousness three times. The fact that the Petitioner vomited once in the interrogation room, in and of itself, does not mean that the Petitioner was tortured during his interrogation.

    Contrary to the Petitioner's claim, the existing medical records do not prove his version, according to which he was tortured during his interrogation, with certainty. In this matter, I accept the position of the IIC, according to which, had the Petitioner's version been accurate, we would have expected to find real-time medical records indicating that he lost consciousness a number of times, as claimed by him.

53. In addition, the Petitioner's statements at the Military Court on 4.10.2012, about two weeks after the cessation of the use of enhanced techniques in his interrogation, do not suffice to prove his version.

    Firstly, such statements, quoted hereinabove, comprise a significantly "thinner" version than that presented in his complaint. Secondly, and mainly, in a previous discussion conducted concerning the extension of his arrest on 24.9.2012, only about three days after he was tortured by his interrogators, according to his claims, the Petitioner responded to the Court's question of whether his health was okay, by stating that he "had no problem". This fact also makes it difficult to accept his version as of ten days later as reliable.

54. In the records of the medical examination given to the Petitioner on 5.11.2012, it was stated that the Petitioner complains of a "black point in his left eye for about two months". However, following an examination given to him, it was noted that no pathological finding was found in his eye, and as such, there is no evidence of the damage caused to him as a result of the interrogation itself.

55. Dr. Akar's medical opinion also fails to benefit the Petitioner. This medical opinion indicates that as concerning the medical condition of the Petitioner's leg and eye, as referred to by the Petitioners, the medical opinion is based more on the Petitioner's complaints than on any medical findings. Although the latter part of the medical opinion states that "the findings of the examination concur with his [the Petitioner's - Y.E.] story concerning abuse

and torture", despite what is expected, the medical opinion does not specify what examinations were given to the Petitioner, if any, and what were the medical diagnoses of his condition, or what were the medical findings of the doctor's examination itself. In light of the foregoing, inasmuch as any weight should be given to this medical opinion, which almost completely relies on the Petitioner's complaints, without having been verified by an independent medical examination, such weight is very low indeed.

56. Without closing off the question of the admissibility of Dr. Perez-Sales and Dr. Rokach's Medical Opinion, submitted to us during discussion, and without discussing the contents thereof, its evidential weight is also very low.

    Firstly, this medical opinion was not available to the IIC and the ISA Interrogee Complaints Supervisor, and was brought to the Respondents' knowledge only a short time prior to the discussion conducted before us.

    Secondly, this medical opinion was prepared on 14.12.2017, over give years following the Petitioner's interrogation, and it is almost completely based on the Petitioner's version. Obviously, these two factors greatly weaken its evidential value, and in fact it cannot be given any real weight, nor can it be determined that any connection exists between its findings concerning the Petitioner's physical, cognitive and emotional condition, and the manner of his interrogation, as described by him in his complaint.

57. Considering the aforesaid so far, in light of the results of the IIC's investigation, according to which the Petitioner was not tortured during his interrogation, and since the Petitioners failed to prove that such decision was erroneous, I did not see fit to accept the Petitioner's version as presented in the Petition.

Should the necessity defense, which would exempt the interrogators from criminal responsibility, be applied in this case?

58. The Petitioners further claimed that the use of "enhanced interrogation techniques" during the Petitioner's interrogation – as was admitted by the ISA interrogators – is not included under the necessity defense, and anyway, such restriction was not applicable under the circumstances of the matter. According to the Petitioners "admittance of the use of 'enhanced interrogation techniques' indicates the use of violence and abuse against a helpless person".

    Such "enhanced interrogation techniques" as aforesaid were specified to us, as part of an ex parte discussion, while clarifying that such techniques did not include the use of violence against the Petitioner in such a manner as described in the complained and Petition at hand.

We therefore accept the IIC's decision according to which the "scope and nature of such techniques was significantly far" from the Petitioner's claims.

59. Considering the circumstances of this case, and after reviewing the confidential material submitted to us, I am convinced that the use of "enhanced techniques" in the Petitioner's interrogation is included within the necessity defense.

The circumstances of the Petitioner's interrogation, as specified as part of the IIC's recommendations, and the decision of the ISA Interrogee Complaints Supervisor, clearly indicate that the interrogation was intended to prevent real and concrete danger to human life, at a high level of certainty.

The "necessity" at the basis of the Petitioner's interrogation does not exist in a vacuum. It should be construed and interpreted in light of the complex security reality of the State of Israel. The Petitioner was active in a terrorist organization which committed, and keeps on committing, severe terrorist attacks, including cold blooded murder, with great cruelty and without mercy, of innocent people, women and children, for no crime but their being Israeli.

Given this framework, the Petitioner was an accomplice in a plot to collect and hide many dangerous weapons, with the intent of using them for the commission of hostile terrorist activity. This planned attack, if it had been committed, might have cost human lives. The key to preventing such real danger to human life was held within the information kept solely by the Petitioner, which he refused to disclose to his interrogators. This fear of a real danger of severe injury to human life, through the use of weapons concealed by the Petitioner and his co-members of this terrorist organization, in my opinion justifies the necessity to use "enhanced interrogation techniques" for the immediate prevention of such danger.

And indeed, as aforesaid, later in his interrogation, the Petitioner provided much information about concealed weapons and additional weapons which he received and delivered to other active members of Hamas, who were also arrested at that time. The information provided by the Petitioner in his interrogation, assisted, among other things, with the confession of another member of Hamas concerning the planning of a kidnapping attack and additional terrorist activity.

Under such circumstances, in which the danger which led to the use of enhanced interrogation techniques was certainly real; the injury, which the interrogation intended to prevent, was a severe injury to human life; the ISA interrogators had no alternative way of attaining the information of the weapons concealed in the warehouse and the plans to commit hostile terrorist activity; and the enhanced techniques used in the Petitioner's interrogation, as claimed before us and as discussed hereinabove, were proportionate to the

severe injury which the use thereof was intended to prevent – I believe that the IIC's decision, according to which the "use of enhanced interrogation techniques under the circumstances of the matter is included under the necessity defense"- is indeed in accordance with the Law.

60. The Petitioners' argument, according to which the necessity defense does not apply under the circumstances of this case, should also be dismissed, since the expected date for the realization of the danger was unknown, and anyway there existed a time gap between such date and the act of interrogation.

As we recall, in HCJ 5100/94, on which the Petitioners rely, it was specifically ruled that the requirement of immediacy in Section 34k of the Penal Law refers to the immediacy of the act rather than the immediacy of the danger, and as such, this requirement is fulfilled even if such danger may be realized after days or even weeks of the date of the interrogation. In our case, there is no doubt that the plan to make use of the concealed weapons for the purpose of hostile terrorist activity, as well as the delivery of additional weapons by the Petitioner to his co-members of the terrorist organization, in and of itself constitutes real danger to human life. Even if at the time of the interrogation, the accurate date for the execution of such terrorist plan was unknown, the Petitioner and his co-conspirators' intent to commit terrorist activity using such concealed cache of weapons, is sufficient to fulfill the requirement of immediacy and to justify the use of "enhanced techniques" as part of the interrogation. Such is also relevant concerning the plan to commit a kidnapping attack and an additional terrorist attack by other terrorist group members, which were prevented with the help of the information provided by the Petitioner in his interrogation.

61. The Petitioners further argued that the necessity defense may grant an **exemption** from criminal responsibility, but it should not be considered as a **justification** which legitimizes the act's legality. Therefore, according to them, in any case in which a complaint is filed concerning the use of torture in interrogations, and a necessity defense is raised by ISA interrogators, then a criminal investigation must be opened against the interrogators, and only after it is decided to prosecute them, then they could argue for the application of the necessity defense.

This argument is not to be accepted.

The Petitioners' position, according to which the applicability of the necessity defense could only be argued after the commencement of a criminal procedure in Court lacks any systemic logic, and is also opposed to the efficient and correct way of managing criminal procedures in other cases. Since in any event in which the prosecution authorities have been convinced that the necessity defense is applicable to the suspect, there is no justification to open

criminal procedures against him, since their result is already known. In my opinion, such considerations comprise the basis of the IIC's preliminary investigation of whether there exists any reasonable suspicion of the commission of a criminal offense by the ISA interrogators on a case-to-case basis, and all in accordance with the authority given to the prosecution authorities to conduct such investigation.

Furthermore, contrary to the Petitioners' argument, I do not believe that the Ruling in HCJ 5100/94 indicates that the decision regarding the question of the restriction's applicability should only be made **after** the conduction of a criminal investigation. As quoted hereinabove, as part of the Ruling, it was stated that the Attorney General may establish guidelines regarding circumstances under which interrogators shall not be prosecuted, if they claim to have acted out of "necessity". This statement does not indicate that the place of these guidelines is after the conduction of a criminal investigation and the filing of a bill of indictment, but vice versa, these guidelines may also be given in a preliminary stage, following a preliminary investigation of the circumstances of the case, and prior to the opening of any criminal procedures (see and compare: the Abu Gosh Case, Section 44). This indicates the great importance of the IIC's investigation, which is intended to be in-depth, factual, and independent, and the results of which should be used to assist the Attorney General to make a decision on whether the necessity defense is applicable, under the circumstances of the case, in a manner so as to tilt the scales in favor of a decision not to open a criminal investigation.

Moreover, it is noted that at least some criminal law theories consider the necessity defense as a justification argument rather than just an exemption argument. This means that the judicial norm regulating the necessity defense, doesn't only "legitimize" the act retroactively, but also excludes it from the bounds of criminal prohibition, under its particular circumstances. This is relevant whether such act must be committed under certain circumstances, or since legal norms at the very least empowers the relevant person to commit it. Thus, the result of the application of the necessity defense is not only the acquittal of the relevant person, but the legitimization of the act, such that it is not defined as a negative phenomenon which penal law wishes to consider as prohibited. Anyway, the necessity defense must be considered as a restriction for the act's criminality rather than an exemption from criminal responsibility only (see also: Volume B S.Z. FELLER, THE BASICS OF CRIMINAL LAW 390, 492, 503-511 5747; GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 237 (Muhammad S. Wattad, translator Efraim Heiliczer and Mordechai Kremnitzer, edis., 2018); Aharon Anker and Ruth Kanay *Self Defense and Necessity Following Amendment no. 37 of the Penal Law*, Criminal Law 3, 5, 24-26).

In light of all the foregoing, since the IIC's investigation indicated that the necessity defense is applicable to the Petitioner's interrogators under the circumstances of this case, and that

the existence of a reasonable suspicion to the commission of a criminal offense by them cannot be proven, then no flaw existed in the consideration of the Attorney General, who believed that there is no need to open a criminal investigation against them.

The legality of the AG Guidelines and the ISA's guidelines

62. Finally, the Petitioners argued that in general, the AG Guidelines and the Internal Guidelines established thereunder are illegal, and should be canceled. According to the Petitioners, these Guidelines are based on the assumption that the ISA has the authority to decide to use torture in advance under the necessity defense, while conducting internal consultation between the ISA's interrogators and their seniors, in a manner which stands in contradiction to the instructions of this Court in HCJ 5100/94.

    I have very carefully reviewed both the AG Guidelines and the confidential Internal Guidelines and did not find them to stand in contradiction with the instructions of HCJ 5100/94. The Petitioners' purported interpretation of such Guidelines is erroneous, does not concur with their purpose, and is not based on their contents.

63. As we recall, the AG Guidelines are intended to constitute "self-guidelines" of the Attorney General, as defined following the principles provided in HCJ 5100/94. It was emphasized as part of them, that the Attorney General cannot replace the legislators, and that therefore his guidelines "may only be established within the bounds of the Law and the interpretation of the Court ruling" (AG Guidelines, pp. 421).

    In Section B(2) [Translator's note: the original says B(2) but the correct reference is to Section B(3)] of the Guidelines is, it is established that since the necessity defense only applies in "very exceptional circumstances", a precise code of conduct cannot be formed in advance concerning specific circumstances in which it applies. It is emphasized as follows:

    > "The Attorney General cannot create advance guidelines for itself and interrogators to exceed their authority by using physical methods during investigations … However, the Attorney General may create guidelines for itself in advance, as to the type and nature of acts which, retroactively, might be considered as included under the 'necessity' defense" (ibid, pp. 420).

    This cautious and careful wording explicitly differentiates between "guidelines" permitted according to the ruling of this Court in HCJ 5100/94 and prohibited "guidelines", while balancing between the individual and circumstantial nature of the decision to use enhanced techniques, and consideration of a "fair measure of legal certainty" which the ISA's interrogators are entitled to receive. As stated in Section D of the Guidelines:

> "The ISA's interrogators are the representatives of the State of Israel, and insofar as they act on its behalf in accordance with the Law, they are entitled to receive a fair measure of judiciary certainty. They do not act elsewhere; they are an authority as all other State authorities, for better or worse, for obligations and rights. In their special work to collect information and to prevent terrorist attacks, they must constantly pay mind to compliance with the law and to the interrogees' rights in accordance with which; however, when acting within the bounds of the law, the necessity of an appropriate defense for fulfilling their duties, should not be ignored" (ibid).

Indeed, the guidelines established in the AG Guidelines, and in particular its operative part in Section G quoted hereinabove [Translator's note: the original says Section G but quoted above are Sections B(3) and D, while section G is quoted below], emphasize the examination of the fulfillment of the conditions of the necessity defense under the specific circumstances discussed – the need to take immediate action in order to prevent a real danger of severe injury, alongside the necessity of the act and its reasonability – thus well balancing between the different interests concerned.

64. I do not accept the Petitioners' argument, according to which reference to the circumstances of the "senior officials who approved the act, their involvement with such decision and their consideration during such act" as well as "supervision over such [act – Y.E.]" in Section G of the Guidelines, as quoted hereinabove [Translator's note: see note in previous paragraph], indicates that the Guidelines offer a coherent and foreseeable policy regarding cases in which the use of enhanced techniques would be approved for a ISA interrogation.

    This argument ignores the fact that the specification of all the circumstances, to be taken into consideration while making the decision of whether the interrogators' acts are included under the necessity defense, opens with an explicit statement providing that "the decision of the Attorney General shall be given on a case-to-case basis, while performing a detailed investigation of all components" [Translator's note: reference: Section G(1). The existence of an **ad-hoc approval** given **in real time** for the interrogators' actions is only one component out of an array of components specified in the Guidelines, including the level of necessity and the immediacy thereof, the severity of the danger and injury prevented and the realness thereof, the alternatives for such act and the proportionality of such techniques, and more.

65. I also do not accept the Petitioners' interpretation, according to which a ISA interrogator, who believes he encountered circumstances fulfilling the "necessity" component while interrogating a suspect, in that real danger exists requiring an immediate act to prevent it, should make the decision to use enhanced techniques solely by himself, without being

permitted to consult his superiors. Contrary to the Petitioners' arguments, this interpretation cannot be deduced from the provisions of the Ruling in 5100/94, and furthermore, I find it distasteful.

In this matter, differentiation should be made between a general instruction or guideline made in advance, and an instruction or guideline given to the interrogator in real time and in relation to immediate circumstances of the interrogation, in accordance with their development in that moment. I believe that with regards to the latter case, for the interrogator to consult his superiors, who have broader knowledge and experience, could in fact protect the interrogee from prohibited injury to his rights. This ad-hoc consultation does not cause injury to the individual and specific nature of the decision to use enhanced techniques while interrogating any interrogee, and all while it is also known and understood that the interrogator's superiors are also exposed to the possibility of a criminal prosecution, if under such circumstances their decision was unjustifiably unreasonable.

66. The foregoing is also relevant with regards to the Internal Guidelines, which were submitted for our review pursuant to our Decision of 24.10.2018. Without specifying their confidential contents, it could be noted that the Guidelines specify the structure of consultations in each specific case, including all entities involved in such; the limitations on consideration while deciding to use enhanced techniques under specific circumstances; and the manner of documentation required in interrogations of this type.

Contrary to the Petitioners' arguments, I find naught wrong with the establishment of clear guidelines as to the manner of consultation inside the ISA prior to making a decision to use "enhanced techniques" in any certain interrogation, nor with the establishment of clear guidelines as to the documentation of such consultation, as well as the documentation of the interrogation itself. Indeed, such guidelines create diligent and necessary control over the interrogators conducting the interrogation, and guarantee that the use of "enhanced techniques" during the interrogation shall only be made in very exceptional cases which justify it, and upon the fulfillment of all required conditions, and all in accordance with the consideration of experienced senior officials with the ISA.

Conclusion

67. In conclusion, I did not find it appropriate to interfere with the Attorney General's decision to approve the IIC's decision not to open a criminal investigation against the Petitioners' interrogators and to close the preliminary investigation file concerning his complaint. Contrary to the Petitioners' arguments, I believe that the foregoing decision, according to which the Petitioner was not tortured in his interrogation, and that therefore the Petitioners'

interrogators are in compliance with the "necessity defense" which exempts them from criminal responsibility for the use of "enhanced interrogation techniques" during his interrogation, is not unreasonable.

In addition, the remedy requested by the Petitioners for the cancellation of the AG Guidelines and the ISA's Internal Guidelines are not to be accepted, since they are not in violation of the provisions of the Law.

I shall therefore recommend my colleagues to dismiss the Petition, including both remedies requested therein. Under the circumstances of this case, no order for Court costs shall be issued.

J u s t i c e

Justice Y. Amit:

This Petition is divided into two parts, and I shall comment in short on each of them.

1. **The part of the Petition specifically concerning the Petitioner**: it is acceptable in civil Law that a plaintiff cannot be heard under the claim that his right to privacy takes precedence over his duty to expose evidence before the respondent (PCA 8551/00 Apropim Housing and Entrepreneurship (1991) Ltd. Vs. the State of Israel, 84 55(2), 102 (2000)), and hence his right to privacy recedes before the respondent's right, and he has the choice of whether to retract his suit or be prepared to waive his privacy (PCA 8019/06 Yediot Ahronot Ltd. Vs. Levin (13.10.2009). I shall note that as for myself, I believe that the statements in this Ruling are over-arching, however this issue exceeds the scope of the case at hand).

   By way of analogy, or by way of argumentum a fortiori, such is also relevant to the administrative procedure at hand. The Petitioner raised several claims against his interrogators, but refused to undergo a polygraph test regarding the truthfulness of his claims. I find that this weakens the Petition inasmuch as it specifically concerns the Petitioner at hand, and the factual claims that he made.

2. The case at hand is not a classic case of a "ticking bomb" which might go off at any minute, however as noted by Justice Elron, the Ruling in HCJ 5100/94 The Public Committee Against Torture in Israel Vs. the Government of Israel 84 53(4) (1999) (hereinafter: the Public Committee Case) provides that the immediacy requirement in Section 34k of the Penal Law, 5737-1977 refers to the immediacy of the act rather than the immediacy of the danger. In the case at hand, the combination of the severity of danger, the almost-certainty,

if not complete certainty of the realization of such danger, and the inability to act in any alternative way in such concrete circumstances as the security officials were facing (the necessity condition) in order to attain information which was very likely assist in the prevention of real danger of life-threatening terrorist activity – all of these lead to the conclusion that such proportionate action taken by the ISA interrogators, is included under the necessity defense (for more on the certainty of danger as a substantive measurement of the necessity of the act, please see: Mordechai Kremnitzer and Re'em Segev *Use of Force in ISA Interrogations – the Lesser of Two Evils?* Mishpat Umimshal (Law and Government in Israel) 4 667, 717 (5757-5758). This article was written before the Ruling on the Public Committee Case).

3. **The part of the Petition concerning the Internal Guidelines under the AG Guidelines**: the Petitioners requested to disqualify the Internal Guidelines, which allow an interrogator to consult senior officials in real time concerning the question of whether under their circumstance, the use of enhanced interrogation techniques is immediately required to save human lives.

I cannot help but wonder at the part of the Petition, and I join my colleague, Justice Elron, in stating that the Petitioners' interpretation is distasteful. This interpretation cannot be inferred from the provisions of the Ruling concerning the Public Committee Case, where it was stated as follows:

> "In accordance with the existing circumstances of the Law, the Government or the heads of the ISA have no authority to establish guidelines, instructions or permits for the use of physical techniques while interrogating suspects of hostile terrorist activity, which cause injury to their freedom, beyond instructions and rules required by the very fact of the interrogation […] The Attorney General may establish guidelines regarding circumstances under which interrogators shall not stand trial, if they claim to have acted out of 'necessity'" (ibid, pp. 844-845, Section 38).

Note well: this case does not concern general instructions and guidelines concerning the use of physical techniques while interrogating a suspect of hostile terrorist activity, but guidelines as to whether and how ad-hoc consultations must be conducted concerning the question of where certain circumstances require the use of enhanced interrogation techniques. As noted by my colleague, consultation with senior officials, who have broader knowledge and experience, might in fact prevent the use of enhanced interrogation techniques or restrain their use by placing limitations over the interrogator's actions. The interrogator is not necessarily aware of the full picture, since naturally, he is not exposed to all sources of information from all intelligence entities. It would be completely undesirable for the interrogators to decide whether their given circumstances require the use of enhanced

interrogation techniques, based on a partial picture of the information. In general, we assume that consultation with senior officials, sometimes highly senior, very much restrains the use of enhanced interrogation techniques and their manner of use. Here lies the proof that, as argued, the cases in which ISA interrogators have acted under the assumption that the necessity defense is applicable, are exceptional cases, the Petition at hand merely proving the rarity thereof.

4. One final comment.

Any person in possession of a heart and soul would be shocked upon hearing descriptions and reports of torture and abuse in interrogations. Torture is considered as highly morally severe, and the degradation, debasement and humiliation caused by torture comprises an injury to the very heart of human dignity, and hence comes the absolute moral and legal prohibition of torture (Daniel Statman, *The Absoluteness of the Prohibition Against Torture* Mishpat Umimshal (Law and Government in Israel) 4 161 (1997)). The negative moral and legal stance against torture is what gave rise to the Court's Ruling in the Public Committee Case that the use of physical pressure on interrogees is only permitted in very exceptional cases. And indeed, since this Ruling was issued, there has been a change both in quantity, i.e. the circumstances in which enhanced interrogation techniques are used under the necessity defense, and in the enhanced interrogation techniques used under such defense. It is the duty of the ISA to continue to ensure that in such exceptional cases of use of enhanced interrogation techniques, the interrogees' human dignity remains intact. The Internal Guidelines, as well as other mechanisms such as the IIC, are intended precisely for such purpose.

J u s t i c e

Justice D. Mintz:

1. Having carefully read the opinion of my colleague, Justice Elron, I join the conclusion he reached. I agree that the decision not to open a criminal investigation against the Petitioners' interrogators does not require any interference on our behalf, in light of the general rule according to which this Court should only interfere with the decisions of the Attorney General concerning prosecution, as well as concerning the opening of a criminal investigations, in exceptional cases, and only if the Court is convinced that his consideration was fundamentally flawed (HCJ 6274/11 The Israel Fuel Corp Ltd. Vs. the Minister of Finance (26.11.2012); HCJ 3922/14 The Public Committee Against Torture Vs. the Attorney

General (29.12.2015)). Indeed, claims of the sort raised by the Petitioner justify investigation and examination. However, as my colleague Justice Elron has stated, such claims were thoroughly and completely investigated, while referring to all relevant documents and after questioning the persons involved. In this context, the medical opinions submitted over five years following the Petitioners' interrogation are insufficient to tip the scales in his favor.

2. I also join the comment of my colleague Justice Amit concerning the issue raised by the Petitioners regarding the AG Guidelines, and especially the possibility given therein to the conduction of internal consultation between ISA interrogators and their superiors, in order to make a decision to use "enhanced techniques" in certain circumstances. The Petitioners' argument, that by permitting consultations prior to making such decisions, the Guidelines establish an aspect of "methodicalness", as opposed to the existence of a momentary and immediate "necessity", is captivating. However, it cannot be accepted.

3. It is assumed that consulting with senior officials for the purpose of making a decision, in appropriate cases, due to their sensitivity or importance, is vital (see for example: Guideline no. 4.1004 of the Attorney General guidelines titled "Advance Approval for the Filing of an Indictment"). The possibility to consult senior officials prior to making such decision does not, in and of itself, extend the range of cases which require the use of enhanced techniques, and in fact it seems that vice versa. In fact, the possibility of conducting consultations may restrain the use of enhanced interrogation techniques, and lead to a more accurate and verified decision concerning cases in which this is required. Therefore, not only does this possibility not derogate from the rule providing that torture is prohibited, except in very exceptional cases, but it also improves the implementation thereof.

4. As to characterizing the use of enhanced techniques as a "method" or as "necessity", the existence of a "necessity" is not measured by the speed of spontaneous response to danger requiring the use of enhanced techniques. As pointed out by my colleague Justice Elron (Section 38 of his opinion), the applicability of the necessity defense is conditioned by five accumulative conditions, not including the act's spontaneity, as opposed to the requirement of the "act's immediacy". The existing time gap between an immediate act and a spontaneous action allows room for the ISA interrogator to consult his superiors.

J u s t i c e

Decided as aforesaid in the Ruling of Hon. Justice Y. Elron.

Issued on this day, 18 of Kislev 5779 (26.11.2018).

Justice Justice Justice