

DEMOCRACY AND THE MIS-RULE OF LAW: THE ISRAELI LEGAL SYSTEM'S FAILURE TO PREVENT TORTURE IN THE OCCUPIED TERRITORIES

Barak Cohen*

INTRODUCTION

The continual violence in the Middle East brings with it increasingly urgent hostility against Palestinians, demands for national security on the part of Israeli Jews, and renewed resentment of Israeli violence on the part of Palestinians. These reactions are particularly serious given the Israeli government's policy in the Occupied Territories with respect to the alleged torture of Palestinians. Israel has contended with the moral and physical challenges of military occupation since it captured the West Bank of the Jordan River from Jordan, and the Gaza Strip from Egypt in the 1967 Arab-Israeli War. While in the course of this occupation, Israel has faced significant criticism from human rights advocates concerning the occupation's general treatment of Palestinians, nothing has proven more problematic, in terms of both Israel's self-image and its world image, than the alleged torture of Palestinians. It seems particularly troubling to most reasonable people that a country that describes itself as a democracy should care so little about human rights. However, considering the recent history of England's torture of suspected terrorists in Northern Ireland, the French colonial experience in Algeria, and the American experience with Jim Crow in Parchman Penitentiary, Alabama, among other examples, it may be more relevant to ask why we would expect that torture would *not* occur in democratic societies.

Perhaps what bothers people about torture in ostensibly democratic regimes and, in particular, Israel, a country with a well-developed legal system, is the complicity of the law in facilitating torture. This complicity somehow invalidates the alleged primacy of the rule of law in democratic societies. In a democracy, the law supposedly upholds rights. What higher right could there be in a polity that worships "self-government" than human rights, the right of the individual?

This article examines these questions in the context of Israel's torture of Palestinians. In the article's first section, torture is defined, paying particular attention to the fact that torture may encompass both physical and psychological abuse. Accordingly, categorizing an action as torture may have more to do with the context and combination of actions inflicted on a victim than on any particular activity. Field data, anecdotal evidence and official

* The author wishes to thank Professor David Luban for his encouragement, guidance, and, above all, for insisting that conscience and responsibility are central to the law.

statements from the Israeli government are then marshaled to prove that Israel has, indeed, systematically tortured Palestinian suspects. Section II of the article examines justifications for torture. Rather than assuming that torture is necessarily "bad", this article examines Israel's use of national security needs as justification for the abrogation of Palestinian rights, historicizes torture to evaluate if there is anything inherently objectionable about it, and critiques Israel's justification for torture, both on its own terms and by evaluating its underlying premises against their de facto impact. This critique ultimately determines that not only is Israel's use of torture unjustifiable, at least on the basis of national security needs, but that there may be deeper psychological impulses rooted in group violence and the nature of the nation-state that drives states to torture. The article's final section analyzes the Israeli legal regime's response to torture and concludes that not only is this response both ambiguous and inadequate, but that it also calls into question the very notion of the "rule of law" in a democratic society.

I. DOES ISRAEL TORTURE PALESTINIANS?

A. *Defining Torture*

Regardless of official denials to the contrary, facts suggest that Israel has tortured Palestinians systematically in the Occupied Territories (the Territories) since Israel captured these lands in 1967. Proving this requires a careful definition of "torture". Because the primary focus in this inquiry is the Israeli legal regime's response to torture, it makes particular sense to define the term legally. Article 1 of the 1984 United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention") defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹

1. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1, 23 ILM 1027 (1984).

The UN definition is appropriate to this topic for two reasons. First, the Convention's definition of torture is widely accepted on an international basis, encompassing the broadest possible understanding of what torture is and when it is worthy of sanction. Furthermore, the Israeli government ratified the Convention in 1991, stating that "[w]hile Israeli legislation does not specifically define torture, statutory provisions clearly cover all acts of torture as found in the definition of Article 1 of the Convention."²

Accepting the Convention's definition presents a useful starting point for developing a working understanding of torture, but it also poses challenges in distinguishing between torture, in the relatively narrow, legal sense, versus "merely" cruel and inhumane treatment. In terms of international law, this is not necessarily a problem because all major instruments of international law equally prohibit both forms of abuse.³ However, distinguishing the two is important in conducting a critical inquiry into the Israeli response to alleged torture since torture suggests a more egregious level of moral culpability and concomitant legal responsibility than the morally lesser offense of inhumane treatment.

Distinguishing torture from inhumane action raises three questions. First, should we define torture in terms of single actions only, or should we consider combinations of lesser actions on a single person as torture in an aggregate sense? Secondly, to what extent does psychological abuse count as torture? Lastly, how should we account for the subjective measurement of pain in different people to achieve the level of "severity" required by the Convention to categorize an action as torture?

While most people would have no problem viewing certain extremely violent actions as torture in light of the Convention, classifying relatively less physically brutal activities, such as what is generally understood as psychological pressure (threats, verbal intimidation, etc.) and non-impact physical abuse (sleep deprivation or position abuse⁴, among other things, as opposed to electrocution and mutilation) as torture is more difficult. For example, few people would argue that a prisoner subjected to prolonged, intense questioning, perhaps after a sleepless night on a narrow prison bed, while seated in an uncomfortable chair, is suffering from torture. In fact, it is arguable whether that prisoner is even being treated inhumanely, given the fact that interrogations inherently tend to employ some measure of physical discomfort. However, extreme applications of a combination of these factors—prolonged lack of sleep, being forced to stand for unreasonable periods of time with arms held to the front at shoulder level, being denied food

2. *Id.*

3. See HUMAN RIGHTS WATCH / MIDDLE EAST, TORTURE AND ILL TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 76 (1994).

4. Generally defined as forcing a subject to remain in a painful physical position for an extended period of time.

and use of a lavatory for extended periods, culminating with concentrated questioning and verbal threats of future abuse could be considered torture, although any one of these activities by itself might not be severe enough to constitute torture *per se*.

Furthermore, distinguishing between physical and mental abuse in defining torture is not constructive. Physical abuse is generally understood as an action, such as the administration of electrical shocks, inflicted primarily to produce physical pain. Any psychological effect resulting from the abuse is contingent upon the inducement of that physical pain. On the other hand, mental abuse is generally understood as an action that seeks to generate primarily mental distress, such as constantly exposing subjects to loud, disorienting noises. In fact, the distinction between the two is artificial. Both forms of abuse employ physical means to achieve a psychological effect—fear and anxiety that ultimately brings about the rupture of the subject's ego, thereby allowing a torturer to impose his will on the subject. Furthermore, in a long-term sense, both methods result in physical and psychological suffering—physical abuse produces mental trauma and a scarred psyche often produces physical symptoms.⁵ Consequently, the key to identifying torture is in determining whether any particular activity or combination of activities, exacerbated by the intensity and duration of abuse, inflicts the "severe pain or suffering" necessitated by the Convention. This is a crucial point, keeping in mind that Israeli interrogation in the Territories generally employs combinations of techniques that, taken individually, might not otherwise constitute torture.⁶

5. See HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 77-78.

6. The English experience in using what this article would define as torture against the Irish Republican Army (IRA) in Northern Ireland illustrates the importance of critically assessing the aggregate effects, duration, and intensity of various interrogation techniques that, taken alone, do not seem particularly abusive. In 1971, the British Army detained large numbers of suspected IRA activists, fourteen of whom were subsequently subjected to a combination of abuses consisting of mild position abuse, subjection to loud noise, and sleep, food, and drink deprivation. Ultimately, the case of alleged torture of these suspects was brought before the European Court of Human Rights. In a controversial decision, the majority of the court held that, "Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment...they did not occasion suffering of the particular intensity and cruelty implied by the word torture as understood." The Landau Commission discussed, *infra*, in this article, noted this decision with approval. It is possible to infer that Israel based their torture regimen on the British experience in Ireland. See *Id.* at 79-81. However, the Israeli High Court of Justice stated that "since [the techniques] treated the suspect in an 'inhuman and degrading' manner, they were nonetheless prohibited." *The Judgment Concerning the Interrogation Methods Implied by the GSS*, the Supreme Court of Israel, sitting as the High Court of Justice, adjudicating H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99 (from the official website of the Israeli Supreme Court, last visited December 2, 2000) available at <http://www.court.gov.il/mishpat/html/en/verdict/judgments.html>, para. 30 (hereinafter *Judgment*).

This begs the question of whether assessing torture requires a subjective measurement of "severe" pain that accounts for the variable tolerance to suffering in different people. What may be severe pain to one person may not be severe to another person. It is only logical that the standard of severity required to identify the torture of a particular subject should differ for a strong, physically and mentally robust man versus the standard applied to a frail, impressionable boy. However, it is sufficient for this examination to accept that most humans have a comparable level of tolerance to pain. In any case, if the goal of torture is to reduce all subjects to roughly the same level of mental and emotional subordination to the torturer, the only important point is that any given subject has been reduced to this state or that a serious attempt has been made to reduce the subject to this state. Consequently, the level of pain required to accomplish this goal is secondary, and we need not assess it as a factor in this investigation.

In summary, the Convention offers a useful, basic definition of torture for the purpose of this article. In addition to the language of the Convention, this article's view of torture explicitly includes the understanding that combinations of lesser forms of abuse, including what others may understand as psychological coercion, may, in the aggregate and when exacerbated by prolonged application, amount to torture.

B. Israel's Torture of Palestinians

Irrefutably establishing that Israel uses torture, as defined above, against Palestinians is a challenging proposition. Israel has never officially admitted to torturing prisoners. Moreover, sources investigating and reporting alleged torture, including a variety of Palestinian, international, and Israeli human rights organizations, are open to charges of bias and lack of sensitivity to Israel's national security situation. Close Israeli allies, such as the United States, have criticized Israeli treatment of Palestinian prisoners in official State Department reports, but these reports stop short of accusing Israel of outright implementation of torture.⁷

However, reference to a variety of sources makes it possible to assemble a mosaic illustrating Israeli use of torture. These include Israel's two preeminent legal statements on permissible interrogation practices in the Territories, the 1987 Landau Commission Report and the High Court of Justice's (HCJ) watershed 1999 ruling specifically addressing GSS interrogation methods.⁸ These pronouncements allow a glimpse of the contours, if not the specifics, of Israeli interrogation practices. Also, a vast amount of anecdotal evidence gathered in studies conducted in the Territories

7. See ILAN PELEG, *HUMAN RIGHTS IN THE WEST BANK AND GAZA: LEGACY AND POLITICS* 94 (Syracuse University Press 1995).

8. See *Judgment, supra* note 6.

by human rights organizations as well as widely-reported and substantiated cases of Palestinian injury and death help provide the content of Israeli practices by establishing a pattern of systemic activity that amounts to institutionalized torture.

Israel has flatly denied employing torture against Palestinians since its capture of the Territories in 1967. In fact, between 1967 and November 1987, Israel denied using any type of coercive interrogation techniques whatsoever. For example, the July 3, 1977 issue of the London *Sunday Times* published a scathing expose providing strong evidence of methodical, institutionalized use of torture against Palestinian detainees.⁹ The Israeli Embassy in London responded that:

Israeli police and security have every reason to refrain from use of force. Such use of force is a serious criminal offense, and where cases of police brutality have been found in the past, police officers have been prosecuted, and it is Israel's policy to do so in the future. Furthermore, as has been emphasized, any statement obtained by such methods is inadmissible [in a court of law].¹⁰

The Landau Commission Report, issued in November 1987, belied these official contentions.

The Landau Commission (the Commission), headed by former Israeli Supreme Court Justice Moshe Landau, was appointed in May 1987 to investigate the General Security Service's (GSS, also known as the Shin Bet) "methods of interrogation in regard to hostile terrorist activities" and court testimony regarding interrogation of Palestinians.¹¹ The Commission's appointment was motivated by two notorious incidents. The first incident involved the fabrication of evidence by GSS officials to hide the fact that agents had beaten to death two Palestinian bus hijackers. The second incident concerned a Turkic Muslim Israeli Defense Forces (IDF) officer falsely imprisoned for espionage on the basis of a false confession coerced from him by GSS agents. The agents later lied in court as to how they had forced the confession from the officer. The Commission's report, issued in November 1987 and endorsed by the Israeli government, was the foremost Israeli official

9. PELEG, *supra* note 7, at 94.

10. HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 46-47.

11. The GSS is a highly secretive organization that reports directly to the Prime Minister. In fact, the existence of the unit was not publicly acknowledged by the Israeli government until the Landau Commission report was published. The unit has no direct enforcement powers, but, among other things, it recommends the arrest, detention, and deportation of Palestinians, interrogates high-priority Palestinian detainees, and prepares secret evidence for presentation before governmental review committees. See Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 267, 269 fn. 4 (Emma Playfair, ed., 1992).

statement concerning treatment of Palestinians during interrogation until the HCJ's 1999 ruling addressing interrogation procedures.¹²

The Commission squarely refuted Israel's official averments that it did not practice torture. In fact, the Commission found that since 1971, GSS interrogators' policy was to extract confessions from Palestinians through coercive means and to perjure themselves before the military courts to hide the fact that they had coerced confessions.¹³ The Commission also found that GSS agents routinely lied to military judges regarding the use of torture to coerce confessions from Palestinian detainees and that the practice was routinized through guidelines distributed through the GSS.¹⁴

Moreover, the Commission dictated formal guidelines for continued use of coercive pressure against Palestinian detainees. Recognizing the necessity of pressure to overcome terrorist suspects and possibly prevent acts of terrorism against Israeli citizens, the Commission stated that, "The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation...*However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided* [emphasis added]."¹⁵ The Commission sought to balance national security against civil rights by justifying this treatment of suspects by applying the provisions of Article 22 of the Israeli Penal Law, which allows actors accused of criminal offenses to assert the affirmative defense of "necessity." Under Article 22, proving that particular actions that would otherwise be criminal are "necessary" for the prevention of some greater evil exempts actors from criminal liability.¹⁶ The Commission analogized coercive interrogation procedures to "necessity" by reasoning that in acting to preserve state security, interrogators prevented grievous harm to Israeli citizens.¹⁷

In a classified section of its report, the Commission dictated guidelines for applying such pressure, stating that, "if these boundaries are maintained exactly...the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity."¹⁸ While it is difficult to say with certainty what actions these secret principles allow, it is possible to infer their nature. First, the Commission showed little recognition that psychological pressure is questionable. This

12. For a discussion of the events leading up to the Commission's appointment see Pnina Lahav, *A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture*, 10 CARDOZO L. REV. 529 (1988).

13. PELEG, *supra* note 7, at 93.

14. *Israel and the Occupied Territories* at 52. See HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 49.

15. *Id.* at 53.

16. *See Id.* at 52.

17. *See id.*

18. *Id.* at 54.

implies relative leniency in the application of psychological pressure by Israeli interrogators. Furthermore, GSS agents testifying before Military Courts in the Territories since 1987 have openly admitted to using various techniques of physical coercion against Palestinian subjects, including position abuse, imposing hoods on subjects to produce disorientation, and sleep deprivation. The fact that these agents have readily detailed this information without facing prosecution and that Military Courts have not automatically discarded confessions when interrogators have used these methods on defendants strongly suggests that they fall within the Commission's standards.¹⁹ It is noteworthy, regardless of the specific nature of the guidelines, that in October 1994, the Israeli government authorized the GSS to use "increased physical pressure" for a three month period against Palestinian terrorist subjects after the bombing of Dizengoff Street in Tel Aviv. After the January 1995 Beit Lid suicide bombing, the government renewed this heightened standard of coercion, and has continued to do so thereafter.²⁰

The HCJ's 1999 decision sheds further light on the practices of Israeli interrogators. In 1998, the HCJ consolidated seven petitions, five from Palestinian detainees and two from Israeli human rights organizations, questioning GSS interrogation policy.²¹ In the decision, the HCJ unanimously and unequivocally stated that:

a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever...These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable.²²

Furthermore, the HCJ disavowed use of the necessity defense to vindicate physical coercion. The HCJ did not construe the Commission's report as resting on the necessity defense as the source of the legal authority for employing physical coercion; "[a]ll that the [Commission] determined is that if an investigator finds himself in a situation of 'necessity,' constraining him to choose the 'lesser evil—harming the suspect for the purpose of saving

19. See HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 51.

20. See AMNESTY INTERNATIONAL, ISRAEL / OCCUPIED TERRITORIES AND THE PALESTINIAN AUTHORITY—FIVE YEARS AFTER THE OSLO AGREEMENT: HUMAN RIGHTS SACRIFICED FOR "SECURITY" 10 (1998).

21. See Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 306, 333 (2000).

22. *Judgment*, *supra* note 6, at para. 23.

human lives—the ‘necessity’ defense shall be available to him.”²³ The HCJ found, as a doctrinal matter, that interrogators could not use the necessity defense to establish a prospective normative standard for use of coercion against suspects; necessity is intended to serve as an after-the-fact, highly particular justification of certain *extreme, imminent* actions that the law would otherwise sanction as “criminal.” Standardizing these actions in advance effectively de-criminalizes them, which the state should accomplish properly through legislation, rather than through a theory of criminal defense.²⁴

The HCJ’s judgment also openly addressed four types of physical pressure used, alone and in combination, by Israeli interrogators: “shaking,”²⁵ position abuse (specifically, the “shabach” and the “frog crouch”),²⁶ excessive tightening of suspects’ handcuffs, and sleep deprivation.²⁷ The 1999 decision officially prohibits these techniques, flatly disavowing use of physical coercion by GSS interrogators.²⁸ It is particularly noteworthy that the decision does not patently ban psychological pressure—it addresses only physical abuse. The point is that the GSS has used these techniques since the publication of the Commission’s report and that the HCJ’s 1999 decision does not retroactively sanction the GSS for unauthorized use of coercion. The obvious implication is that Israel systematically and legally promoted the use of these techniques, which can constitute torture in light of the definition established in this article.

Anecdotal evidence collected and subjected to critical study by human rights organizations and a number of widely-reported cases of abuse help establish clear patterns of activity that elaborate the sketches of coercive interrogation procedure offered by the Israeli government itself. Human Rights Watch / Middle East (HRW) conducted a study of Israel’s interrogation of Palestinians in the Territories consisting of lengthy interviews with thirty-six former detainees interrogated by either the IDF or the GSS between June 1992 and March 1994; five interviews conducted by defense lawyers with incarcerated Palestinians; a review of declassified GSS documents, such as official interrogation logs; and interviews with former Israeli soldiers posted

23. *Id.* at para. 36.

24. *See id.*

25. The HCJ defined shaking as “the forceful shaking of the suspect’s upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly.” *Id.* at para. 9.

26. The HCJ stated that, “a suspect investigated under the ‘Shabach’ position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair’s seat and back support. His second hand is tied behind the chair, against its back support. The suspect’s head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room...suspects are detained in this position for a prolonged period of time, awaiting interrogation at consecutive intervals.” *Id.* at para. 10. The frog crouch “refers to consecutive, periodical crouches on the tips of one’s toes, each lasting for five minute intervals.” *Id.* at para. 11.

27. *See id.* at para. 12, 13.

28. *See id.*

to interrogation centers.²⁹ The period of incarceration examined in the study is significant because it accounts for post-Commission changes in interrogation practice that were ostensibly intended to curb abusive practices. Also, while it occurs after the peak of the conflict, the period occurs during the Intifada, the wide-scale uprising of Palestinians in the Territories marked by open Palestinian defiance of the occupation and resulting intensification of Israeli policing of the Territories that began in 1987 and continued until the beginning of the Middle East peace process in 1992.³⁰ While the interviewees constitute neither a broad cross-section nor random sample of those Palestinians subjected to interrogation, these reported incidents yield valuable anecdotal data that helps establish a clear scheme of abusive treatment amounting to torture.

In summary, the HRW investigation found that since the beginning of the Intifada, Israel has interrogated between four and six thousand Palestinians each year. The strategy of Israeli interrogators during the examined period was to subject these detainees to a coordinated regime of painful psychological and physical duress over a period of days and sometimes for as long as four weeks. A statistical breakdown of some of the abuses inflicted on interviewees yielded the following data:

1. *Beating and Shaking* Of seventeen GSS subjects, nine reported suffering from beatings or shakings. Two of sixteen GSS subjects reported being beaten on the testicles (interviewers did not question the seventeenth subject on this topic). Of nineteen IDF detainees, sixteen reported being beaten and thirteen reported being beaten on the testicles. Interviewers did not consider light blows or slaps intended to intimidate through degradation, as opposed to brute infliction of physical pain, in this tally.
2. *Position Abuse*
 - *Shackling* Ten of seventeen GSS subjects reported being shackled to walls for periods ranging from a few hours to, in one case, three days, with short breaks for interrogation, eating, and use of a lavatory. Seven of this group were shackled while uncomfortably seated on "kindergarten chairs," while six were shackled in standing positions. One IDF subject reported being shackled to a wall.

29. See HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3.

30. For a discussion of the Intifada from an Israeli perspective see ISRAEL, THE "INTIFADA" AND THE RULE OF LAW (David Yahav et al., eds., 1993).

- *Standing* Fifteen of nineteen IDF subjects reported being forced to stand for periods of at least three hours and for periods commonly exceeding ten hours, with breaks for interrogation, eating, and use of a lavatory.
 - *Seating on "Kindergarten Chairs"* Thirteen GSS subjects reported being confined for extended periods in uncomfortably small kindergarten chairs.
3. *Deliberate Exposure to Temperature Extremes* Five GSS detainees reported being imprisoned in deliberately over-cooled spaces. Two other interviewees reported exposure to cold weather without adequate clothing. One was placed in a hot, poorly-ventilated space.
 4. *Hooding/Blindfolding* All GSS and IDF detainees reported having their heads covered with hoods for prolonged periods.
 5. *Sleep Deprivation* Sixteen of the GSS subjects alleged that they were deprived of sleep for extended periods, while being forced to remain in uncomfortable standing or sitting positions.
 6. *Deliberate Subjection to Loud and Continuous Noise* All the GSS interrogation subjects claimed that loud, disruptive music was constantly broadcast through the facilities in which they were interrogated.³¹

Additional methods of interrogation inflicted on nearly all interrogated Palestinians included generally degrading treatment, such as verbal intimidation, confinement in extremely small spaces, extended toilet and hygiene deprivation, and the forcing of prisoners to eat and use the lavatory simultaneously.³² HRW states that the Commission's report, and, specifically the secret guidelines included in the report, did little more than to systematize the abuses in terms of measured combinations of psychological and physical pressure, with reduced use of crude physical coercion, such as beatings.³³ The sustained, intensive, and combined use of these various interrogation techniques produces the level of severity required to categorize activity as torture within the meaning of the term established in this article.

Studies from other sources verify the HRW findings. In a 1998 report, Amnesty International stated that although the five years since the Oslo

31. *Id.* at 27-29.

32. *See id.* at x.

33. *See id.* at 55.

Agreement signed between the Palestinians and the Israeli government marked an ostensible reduction in the reduced tension between Israel and Palestinians in the Territories, Israeli use of torture has continued to entrench itself as an institutionalized aspect of the occupation.³⁴ The report verifies use of the same types of abuse detailed in the HRW study.³⁵ A 1991 report by the Israeli human rights organization *B'Tselem* notes at least nine cases in which Palestinians died while in the process of interrogation since the beginning of the Intifada.³⁶ The United States' Department of State human rights report for 1989 cites ten such cases since the beginning of the Intifada.³⁷ The fact that many of these claims received widespread, public media attention within Israel implies how frequently the abuse of Palestinians occurs, given the extent to which secrecy shrouds GSS interrogations.

Examined with reference to the legitimation of coercive pressure in the Commission's report and their subsequent disavowal (with the glaring exception of psychological pressure) in the HCJ's decision in 1999, the consistency of detail, sheer volume of alleged occurrences, and public acknowledgment of some of the abuses cited in the evidence listed strongly point to widespread, institutionalized abuse of interrogated Palestinians under the Israeli occupation. Subjecting this evidence to the definition of torture presented above, it is at least possible to conclude that the use of torture by Israeli security personnel is so widespread that the practice certainly enjoys *de facto*, if not outright *de jure*, acceptance.

II. IS THE TORTURE OF PALESTINIANS JUSTIFIABLE?

A. *National Security Rhetoric—How Israel Justifies Torture*

National security is a preeminent concern in Israeli society. This is unsurprising considering the fact that the country has never known peace and is surrounded by hostile, numerically superior nations that disavow Israel's very right to existence. Even before Israel's establishment, Jews fought Arab and British forces to win the right to carve an independent state from the Palestinian Mandate. In 1948, on the dawn of the new state's declaration, Israel defended its independence against the Arab population of Palestine and the organized armies of surrounding Arab states. In the ensuing decades, Israel has fought four major wars, ceaseless border skirmishes and terrorist raids, launched a number of cross-border strikes and special operations missions, and, among other territorial gains, in 1967 captured and occupied the Territories. To this day, with the exception of Egypt and Jordan, Israel

34. See AMNESTY INTERNATIONAL, *supra* note 20, at 9.

35. See *id.*

36. See PELEG, *supra* note 7, citing B'TSELEM, ANNUAL REPORT 52 (1989) and B'TSELEM, THE MILITARY JUDICIAL SYSTEM IN THE WEST BANK 6 (1989).

37. See PELEG, *supra* note 7, at 94.

remains at war with the Arab states of the Middle East, not to mention the Palestinian Arab population of the Territories that fall under Israeli control. While it falls beyond this article's scope to explore the political or moral rectitude of Israel's history of conflict and arguable right to control the Territories, we may assume that Israel has grave reasons to decisively respond to threats to its security.

The Palestinians of the Territories represent a particular challenge to Israeli security, given that many are declared enemies of Israel with relatively open access to Israeli territory.³⁸ Palestinian terrorists operating from the Territories successfully launch terrorist attacks against civilian targets within Israel. The consequent inability to distinguish terrorists from Palestinian non-combatants only serves to heighten the overall tension of the occupation. This justifiable concern with security has grown into a strong commitment to the defense of Israel. The commitment intertwines with Zionist discourse³⁹ to generate a powerful cultural narrative that, in its simplest articulation, tells the following story:

Formerly, we (Jews) lacked a home and could not defend ourselves, and nobody was willing to defend us. Under great duress, we founded Israel as the bastion of world Jewry. Now we have a state and we may defend ourselves. Thus, Israel as a state and Jews as a people share a common fate—if Israel falls, so fall the Jews. Unfortunately, Israel is a relatively weak state with many enemies and without dependable friends. Therefore, we can never afford to relax our vigilance in the defense of the state, since, after all, world Jewry depends on us for its guaranteed existence. *Israel must survive.*⁴⁰

Consequently, Israeli politicians commonly invoke the security imperative to justify otherwise questionable conduct. When the President of Israel pardoned GSS agents for beating to death a terrorist under interrogation

38. It is virtually impossible to entirely close Israeli borders to the Occupied Territories—there are too many unmonitored back-roads that offer access to the Israeli hinterland. Typically, in relatively peaceful times, major roads between Israel-proper and the Territories are loosely manned and open to both traffic from Israel-proper into the Territories, and vice versa.

39. For a description of the development of Zionism with respect to modern anti-Semitism, see ALBERT S. LINDEMANN, *ESAU'S TEARS: MODERN ANTI-SEMITISM AND THE RISE OF THE JEWS* (Cambridge University Press, 1997). See also S. ZALMON ABRAMOV, *PERPETUAL DILEMMA: JEWISH RELIGION ON THE JEWISH STATE* 63-81 (1976).

40. *Id.* See also the description of "catastrophe zionism" in PRINA LAHAV, *JUDGEMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTRUY* (University of California Press, 1997); TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* (Mill and Wang, 1993).

in one of the incidents that led to the Commission's appointment, he stated that "[i]n the special conditions of the State of Israel we cannot allow ourselves any relaxation of effort, nor permit any damage to be caused to the defence establishment and to *those loyal men who guard our people*."⁴¹ This narrative generates a prevailing, consequentialist justification for acts that would otherwise be viewed as criminal under Israeli, as well as international law. Furthermore, it helps explain how the judges appointed to the Commission could extend the necessity defense of the Israeli penal code to prospectively rationalize acts of brutality in the course of interrogations.

Briefly, consequentialists evaluate the morality of all actions based solely on their consequences. Thus, it is possible to understand the Commission as having justified the use of torture on consequentialist grounds. On the basis of the Commission's reasoning, if a terrorist is held in custody with knowledge of the location of a bomb capable of killing hundreds of Israelis, then the pain, perhaps even the death of that terrorist, under interrogation is not as compelling a moral interest as the saving of many innocent lives if it is possible to get that terrorist to reveal the location of the bomb in time to defuse it. Implicit in this moral formulation is that there is still something problematic about torture, even if it may be justified under certain circumstances. Exactly what is it about torture that is morally offensive?

B. *Evaluating Israel's Justification for Torture*

1. *Evaluating Torture*

Organized bodies of human beings regularly commit extreme acts of violence against other human beings in acts of war; yet only committed pacifists argue that war is morally unjustifiable under any circumstances. Is torture, as an instrument of state policy and as a tool defined by its use of violence to inflict pain, so different from aiming missiles, firing handguns, detonating mines, etc., against human targets in warfare? Is there something intrinsically problematic about the application of torture that is different from other categories of state violence?

History suggests that the aversion to torture expressed in international legal instruments has more to do with contemporary cultural norms than with any quality inherent to torture. In fact, torture, defined in roughly the same terms as established in Section I, has seen wide use as a legal instrument since Graeco-Roman times. M.I. Finley noted that ancient Greek practice dictated that slaves could only give evidence at trial under torture.⁴² Torture held an

41. Lahav, *supra* note 12, at 545 citing H.C. 428/86, *Barzilai v. Israel*, 40(3) P.D. 505 (1986) (emphasis in original).

42. See M.I. FINLEY, *ANCIENT SLAVERY AND MODERN IDEOLOGY* 94 (Viking Press, 1980).

established place in Western Europe as a judicial tool for ascertaining the truth dating from the thirteenth century. Thus, the civil lawyer Bocér Blithely wrote in the seventeenth century, "[t]orture is interrogation by torment of the body, concerning a crime known to have occurred, legitimately ordered by a judge for the purpose of eliciting the truth about the said crime."⁴³

This attitude changed in Europe in the eighteenth century with the advent of the Enlightenment. Thinkers such as Voltaire and Montesquieu propagated humanitarian principles that implicitly undermined the legitimacy of torture. Cesare Beccaria made this potential explicit in *On Crimes and Punishment*, the seminal piece of legal scholarship that inspired the rejection of torture in legal codes throughout Europe. As Beccaria wrote, "The torture of the accused while his trial is still in progress is a cruel practice...[a] man cannot be called 'guilty' before the judge has passed sentence, and society cannot withdraw its protection except when it has been determined that he has violated the contracts on the basis of which that protection was granted to him."⁴⁴ Moreover, changes in European trial practice, such as implementation of jury trials, rendered torture a crude and irrelevant instrument for distinguishing the guilty from the innocent.⁴⁵

Scholars have attributed the resurgence of institutionalized torture in the twentieth century to the rise of totalitarianism before World War II.⁴⁶ It makes sense, given that states such as the Third Reich used torture as part of a greater expression of contempt for egalitarian notions, that people dislike torture because it somehow insults their notion of the respect due to others as human beings. Torture differs from warfare in the vague notion that soldiers choose to serve, or at least to obey orders, and, therefore, choose to engage in warfare. Once at war, they may fight and defend themselves, but, if taken prisoner, are supposedly protected from violence because they no longer have the benefit of choice. In essence, war is supposed to be a "fair fight." As Henry Shue has suggested, perhaps one aspect of people's disgust with torture lies in the fact that torture begins only after the fair fight, from the victim's perspective, has ended—it is blatantly unfair.⁴⁷

Following World War II, these concerns and the powerful reaction to Axis atrocities led to the evolution of international legal norms outlawing torture and inhumane treatment. Chief among these is the definitive articulation of this prohibition, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Torture has

43. RITA MARAN, *TORTURE, THE ROLE OF IDEOLOGY IN THE GRENCH-ALGERIAN WAR* 6 (Praeger, 1989).

44. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 29 (Hackett Publishing Company, 1986) (1764).

45. See Maran at 6.

46. RONALD D. CRELINSTEIN AND ALEX P. SCHMID, *THE POLITICS OF PAIN: TORTURERS AND THEIR MASTERS* 147 (Westview Press, 1995).

47. See Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 130 (1978).

undoubtedly proven morally problematic from the view of international law and the vast majority of human beings. However, the primary concern in this discussion is the Israeli justification for use of torture in exceptional circumstances, and it is this consequentialist justification that will be critiqued. Accepting the consequentialist position for the sake of argument, this article will examine the Israeli government's position, not by rejecting the consequentialist premise, but by showing that even granting its validity, the position's logic fails.

2. *Evaluating Israel's Use of Torture*

An internal critique that accepts Israel's justification of torture on its own terms generally belies any reasonable claim that Israel tortures Palestinians in the maintenance of a consequentialist balance of evils. A cogent examination of the practical results achieved by institutionalized torture and the way that torture is applied strongly suggests that Israel tortures Palestinians for reasons other than those expressed by the Commission, or even officially acknowledged by the Israeli government.

Consequentialism dictates that the use of torture to prevent terrorism is only justifiable where the moral good of preventing the harm of innocent Israelis outweighs the evil of inflicting pain on interrogation subjects. An easy way to support the Commission's argument on this point is to cite the raw data verifying that the GSS has prevented numerous terrorist incidents that would have resulted in the deaths and injuries of many Israeli civilians. While this data is not readily available, we can assume, *arguendo*, that the use of torture has successfully coerced Palestinian terrorists into revealing information that has directly prevented destructive acts against Israel. However, consequentialism must account for long-term, as well as short-term moral outcomes.

On a long-term view, torture fails to prevent terrorism because it builds hostility in the Palestinians of the Territories, encouraging them to support and pursue terrorism. Also, the very rationale used to justify torture, *mutatis mutandis*, justifies terrorism. As Sanford H. Kadish noted, "[i]f the norm to prevail for torture and other cruel treatment is that it may be justified if the evils to be avoided are great and significant enough, how can a similar qualification be denied to the resort to acts of terrorism?"⁴⁸

The British experience in Ireland and the French experience in Algeria are striking examples of the long-term inefficacy of torture regimes in this respect. In particular, it is significant that while the French military defeated *Front de Liberation Nationale* (FLN) terrorists in the Battle of Algiers through widespread use of torture, the resentment bred by use of torture fed Algerian

48. Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISRAEL L. REV. 345, 353 (1989).

nationalism and made it difficult for the French to continue to argue that colonization of Algeria was based on altruistic humanitarian principles. Unsurprisingly, the FLN ultimately defeated the French.⁴⁹ The United Kingdom fared little better in its fight against Irish nationalists.

Furthermore, institutionalized abuse of human rights may pose serious negative consequences for societal mores by disrupting the internal logic of the rule of law in a democratic society. Kadish has pointed out that legitimization of torture, even on narrow grounds, establishes a sliding scale of outrages that the state may commit against individuals.⁵⁰ Undoubtedly, given the complication of legal processes, many unjustified acts of torture will take place, but will be accepted as part of the normal course of doing business in a legal regime that recognizes torture. More significantly, assuming that the rule of law in a liberal democratic society⁵¹ is built on the foundation of respect for individuals and human rights,⁵² inserting a legal element that contradicts those values fractures the internal coherence of the entire construct, as is already happening in Israel (this point will be explored more fully in Section III of this article). If inhumane treatment becomes acceptable in fighting terrorism, it would probably not take long until the state would feel compelled to extend its use to other high-stake contexts. This could result in a broader relaxation of humanitarian standards, for, as Justice Brandeis observed in a related issue concerning American society, governmental law is "the potent, the omnipresent teacher."⁵³

Given these arguments, perhaps it is possible to justify torture on the narrowest of grounds, invoking the greatest of short-term positive outcomes to outweigh the least problematic of evils, as to prevent the corruption of the state's legal body and the encouragement of further terrorist acts. Such a scenario might require that the state know that the subject of interrogation is a terrorist, that a bomb has been planted, and that torture will enable the state

49. See Maran for a general history; ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962* (Viking Press, 1977).; see also LA BATTAGLIA DI ALGERI (Gillo Pontecorvo 1967) for a compelling cinematic exposition of the close relationship between torturer and terrorist in the context of French colonialism in Algeria. Interestingly, Saadi Yacef, the leader of FLN operations in Algiers during the Battle, starred in and co-produced the film.

50. See Kadish, *supra* note 49.

51. This article adopts the definition of liberalism presented by Frank I. Michelman in BRENNAN AND DEMOCRACY 65 (Princeton University Press, 1999). Liberalism describes a set of programmatic commitments that stress freedom, individual rights, the rule of law, and limited government. Freedom and individual rights in this context generally mean some formulation of pluralism, voluntary association, toleration, privacy, free speech, and a separation of government actors to prevent the growth of powerful, centralized government. See *id.*

52. Granted, every "democratic" society has failed this ideal (we only have to look at Jim Crow in the United States, among other examples of American failures in this regard). At the risk of being too optimistic, the ideal and the potential to fulfill it still exist, as well as an altruistic commitment to serve that ideal, at least in many quarters.

53. Kadish, *supra* note 49. It is interesting that Kadish allows torture on an ad hoc basis. His critique of state-sponsored torture hinges on the vast implications for a society and its legal system when the state prospectively sanctions torture for regular use.

to defuse that bomb in time to save the lives of citizens. The problem remains, as demonstrated in Section I of this article, that Israel widely employs torture against Palestinians. In fact, the evidence presented suggests that Israel undoubtedly uses torture against Palestinians who have only a peripheral involvement with terrorism or subversive movements (perhaps merely having general knowledge of group members or activities, rock-throwing, or distributing political pamphlets). Thus, as applied, Israel's internal justification for torture is invalid.

Then why does Israel torture Palestinians? Perhaps the most obvious answer is, lacking objective distance from the heated emotion surrounding the Arab-Israeli conflict, the Israeli government truly believes that torture is justified on the grounds of national security. A critique of the consequentialist premise reveals the problem with this answer and suggests the real reason why Israel tortures Palestinians. If national security alone justified the use of torture, then one could reasonably expect torture to be used against national security threats of Jewish, as well as Palestinian, origin.

In fact, the different treatment of Israeli versus Palestinian (and other non-Jewish) subversives is striking. For example, in 1983, twenty-nine (Jewish) yeshivah students attempted to infiltrate the Temple Mount in Jerusalem, a site holy to Muslims. When captured, Israeli authorities found that the students had brought massive quantities of explosives with them, presumably to destroy the two mosques built over the site of Solomon's Temple (a Jewish holy site) on the Mount. The judge, deciding their case on the grounds that "the assault was only the amateurish act of innocent youth," acquitted all twenty-nine Israelis.⁵⁴ Although we do not know this for a fact, based on the inconsequential nature of this holding, it is doubtful that any of these students faced GSS interrogators intent on discovering the extent of the students' terrorist activity.⁵⁵ Similarly, the members of a Jewish terrorist underground movement were captured while attempting to wire West Bank buses with bombs. These same men had launched a series of attacks targeting Palestinians in the Territories. These attacks included bombing cars, attacking a girls' high school in Bethlehem with automatic weapons, and attacking an Islamic college in Hebron. None of these men served more than three years in jail for their crimes.⁵⁶ There are no reports that they were tortured and the leniency of their sentences certainly suggests that the Israeli authorities did not consider their crimes particularly serious, enough to warrant "coercion." In contrast, the GSS has little problem torturing Palestinians for comparatively minor anti-occupation activity, such as the production of anti-Israeli leaflets.

54. MARTIN EDELMAN, *COURTS, POLITICS, AND CULTURE IN ISRAEL*, 110-12 (University Press of Virginia, 1994); for a broader discussion of discriminatory practice in Israeli law enforcement, see B'TSELEM, *LAW ENFORCEMENT VIS-À-VIS ISRAELI CIVILIANS IN THE OCCUPIED TERRITORIES* (1994).

55. *See id.*

56. *See id.* at 114.

One explanation for this difference is that Jews are citizens of Israel while the Palestinians of the Territories are not. However, this difference should not really matter if Israel adheres to the values of humanism and the rule of law supposedly inherent to democracy. Democratic governments are implicitly predicated upon a respect for the intrinsic value of human beings (think of the phrase, in the United States Declaration of Independence, "all men are created equal"). Violating this standard, regardless of citizenship, calls into question democracy itself. Section III of this article will address this point in greater detail.

An Israeli national security ideologue might counter that a Palestinian terrorist threatens the lives of Israeli citizens, if not the existence of the state of Israel itself, and, therefore, constitutes a grave enough threat to Israeli security to necessitate torture; whereas a Jewish terrorist merely threatens the stability of Arab-Israeli relations. However, any threat to national stability is a *de facto* threat to security. Furthermore, national security for Israel is contingent upon Arab-Israeli relations. The destruction of holy sites and the murder of Palestinians certainly has the potential of provoking serious responses from Arab powers hostile to Israel. Clearly, the Israeli government feels comfortable torturing Palestinians where it does not feel comfortable torturing Jews, and close examination reveals that this has little connection with national security. This suggests that Israel tortures Palestinians because it is useful for reasons other than imminent threats of national import.

Ervin Staub offers a convincing rationale from a social psychology perspective, to describe why Israel may torture Palestinians. Staub describes torture as a form of group violence rooted in difficult life conditions, such as ongoing territorial conflict. To protect their self-concept and self-esteem during challenging times, states may elevate themselves by socially denigrating others.⁵⁷ This rationale for torture makes particular sense in light of Henry Shue's notion of "terroristic torture," wherein a single victim's pain is used to intimidate an entire community and "[t]he victim is simply a site at which great pain occurs so that others may know about it and be frightened by the prospect."⁵⁸ In Israel's case, terroristic torture may reinforce a nationalistic ideology (Zionism) which focuses on the welfare, well-being, and future of one's nation (defined in terms of Jewishness) by subordinating a threatening enemy. It is key that such philosophies are contingent upon identifying enemies: an *other* from which to distinguish the superior group *self*.

Staub notes that certain societal characteristics may predispose a state to use torture against its designated enemy. The characteristics that apply with particular relevance to Israel include:

57. See Ervin Staub, *Torture: Psychological and Cultural Origins*, Politics at 99-111.

58. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 132 (1978).

1. *A monolithic rather than a pluralistic society.* Given the major divisions in its Jewish population along religious and ethnic lines, it is possible to argue that Israel is not truly a monolithic society. However, with respect to collective Jewish self-identity versus Arabs, particularly given Israel's security situation, Israel may be understood as monolithic. A monolithic society's belief in its cultural superiority often goes unchallenged. Thus, minority outsiders are less likely to share in the full rights of the society's monolithic in-group and thus far more likely to suffer from abuse. This characteristic seems to apply strongly to Israel. While the numerical dominance of Jews is not significant within Israel, the fact that the nation defines itself as a Jewish state supports the applicability of this predisposition to Israel vis-à-vis the Palestinians.
2. *A sense of cultural superiority.* A sense of vulnerability often accompanies a sense of cultural superiority. This is particularly true when a sense of cultural superiority is frustrated by the actual conditions of a state. Israel, in particular, exhibits a sense of frustration with its growing internal incoherence, exhibited by the strife between secular versus religious Jews for control of the nation's self-concept, and cracks in its facade of moral superiority, arguably exhibited by the growing numbers of Israeli youth seeking to evade national military service.⁵⁹
3. *A history of aggression.* Where a state has generally resorted to aggression to resolve conflict, as is the case of Israel, this normalizes the use of violence, making it an acceptable response to threats to the state.
4. *A history of antagonism between two groups.* The ongoing fact of the Arab-Israeli conflict obviously reflects this predisposition in Israeli society.⁶⁰

These factors are mutually reinforcing. A sense of cultural superiority depends upon a monolithic self-understanding. Cultural superiority feeds upon historical antagonism, which, in turn, is exacerbated by a predisposition to violent reaction to state threats. The result, according to Staub, is an identification of the dominant in-group in terms of antithetical opposition to

59. ELIOT A. COHEN ET AL., *KNIVES, TANKS, AND MISSILES: ISRAEL'S SECURITY REVOLUTION* (Washington Institute for Near East Policy 1998) for a discussion of the rising numbers of Jewish Israeli youth evading military service.

60. Staub, *supra* note 57.

a designated *other*, in this case, the Palestinians. This self-identification is not only dependent upon opposition to Palestinians, but it also depends upon Israeli vulnerability and perceived superiority to Palestinians. Thus, while it would be unthinkable to treat Jews, even if they threaten Israeli security interests, as somehow lesser beings undeserving of the full protection of the humanitarian rule of law, Jewish identity politics might demand a different standard for Palestinians.⁶¹

Thus, Israel does not torture Palestinians because they represent a threat to national security, in the tangible sense of vulnerability to armed attack, but because Palestinians threaten the security of Israel's fragile self-identification as a Zionist nation. While this phenomenon may also exist in the case of Israeli Arabs, Israeli Arabs are ostensibly citizens of the state, and thus extended some measure of state protection in the form of the rule of law, although perhaps in a lesser measure than their Jewish compatriots (a related issue beyond the immediate scope of this article). Palestinians, on the other hand, are subjects of a military occupation, and from the outset, suffer from a lesser status that allows Israel to act out its deeper social needs through discriminatory abuse.

At this point, it is useful to summarize our progress. We have defined torture, and on the basis of this definition have determined that Israel systemically tortures Palestinians from the Territories. We have scrutinized Israel's justification for torturing Palestinians—the overwhelming need to maintain state security, on its own terms, and have determined that Israel's stated rationale for these actions fails to justify the derogation of Palestinian rights. We have also examined the state security justification from an external viewpoint and found that Israel's actions fail from this perspective, as well. Applying Ervin Staub's view of the relationship between social psychology and group violence, we have found it is possible Israel tortures Palestinians as part of a greater process of self-definition. This inquiry leaves only one area unexplored—the adequacy of the Israeli legal regime's response to torture.

III. TORTURE AND THE ISRAELI LEGAL REGIME

A. *Democracy and the Rule of Law*

The legal response to torture is critical because of the importance of the rule of law, as a normative matter, in any society that describes itself as

61. There is a long and complicated history of Jewish self-perception as an elite community. Often this elitism coexisted and was strongly influenced by the oppression of Jews from more powerful communities. Thus, Jews of nineteenth century Russia often maintained their communal self-esteem by perceiving themselves as superior to their Slavic neighbors, despite the fact that the Jews were isolated in shtetls (ghettos) and often subject to abusive programs instigated by the Russians. Elements of this elitism survive in the Zionist narrative. See LINDEMANN, *supra* note 39.

democratic.⁶² In Ronald Dworkin's view, democracy, understood as a representative form of collective government that seeks to maximize self-government, depends upon foundational laws to "rule out caste, guarantee a broad and equitable political franchise, prevent arbitrary legal discriminations and other oppressive uses of state powers, and assure governmental respect for freedoms of thought, expression, and association and for the intellectual and moral independence of every citizen."⁶³ Thus, in a functioning democracy, the law is supposed to insure a base level of equality among citizens that facilitates self-government through electoral representation.

But what about non-citizens and the rule of law? Why should Israel's problems addressing the human rights of Palestinians, the subjects of an occupation, implicate questions of the validity of "democracy" within Israel? Democratic governments implicitly understand themselves as predicated upon a respect for the intrinsic value of human beings; this value inherently underlies democracy's rhetorical commitment to self-government. It also explains the importance of the counter-majoritarian nature of the rule of law in democratic society in preventing a "tyranny of the majority" that might deprive individuals of their rights. While we might not expect the conferral of full benefits of democratic citizenship to non-citizens, it is, at least, reasonable to extend the recognition of human worth, which supposedly defines democracy, to any human being.⁶⁴ To make basic human rights contingent upon citizenship is to deny the internal logic of democracy, which purports to acknowledge the intrinsic value of all human beings (thus, American use of the phrase "all men are created equal," rather than "all citizens are created equal" in the Declaration of Independence).

Where a democratic government does not respect these rights within land that it *controls* and, in fact, subverts the rule of law to undermine these rights over an extended period of time, then there is a serious disjunction between that state's self-conception versus its actions, and we should seriously question the nature of the polity served by that regime, if not the nature of democracy itself. Thus, we care about the rule of law with respect to the torture of Palestinians in Israel because exploring this issue sheds light not only on problems in Israel but, perhaps more importantly, on ways in which the law may fail to serve democratic ideals in other places as well.

62. There is a healthy debate regarding the extent to which Israel can be described as a democracy, particularly given that it describes itself as a "Jewish state," and that the nation's official policies reflect this self-definition. In any case, Israel describes itself as a democracy and utilizes democratic procedures in its decision-making. Whether or not these procedures fully embrace the Israeli populace (Jewish, Arab, Druze, etc.) is material for a related, but different article.

63. MICHELMAN, *supra* note 51 at 17.

64. Although, scholars have argued, from a cosmopolitan perspective, that we should extend citizenship rights beyond those limits. See OWEN FISS, *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* (Beacon Press, 1999).

So what formal commitment does Israel have to human rights? In the forty-four years between Israel's inception in 1948 until 1992, human rights *within* Israel were, for the most part, protected by judge-made law because the country lacks a written constitution, at least in the sense of a single, unified document. Instead, the nation has depended upon a series of "Basic Laws" passed in piecemeal fashion by the Knesset, Israel's parliament, with the intention of ultimately organizing them into a constitution. Three background factors generally helped to make the Israeli legal environment inhospitable to the protection of human rights.

First, the nascent state incorporated British mandatory law into its own legal body. Not only did British mandatory law lack any clear public principles regarding the protection of human rights, but it also included the Mandatory Government of the Emergency Regulations—statutes providing draconian powers of detention and arrest, among other oppressive powers, to the government, that, ironically, were originally directed against Jewish resistance to the British Mandate before Israel's independence. These regulations have been used to enforce the military court system over Palestinians in the Territories. Secondly, two of the primary ideological sources of Israeli law—Jewish law and socialism—do not emphasize individual rights. Jewish law tends to be duty-oriented, rather than rights-oriented, and socialist law privileges communitarian principles at the expense of individual liberties.⁶⁵ Lastly, the country's national security situation tends to pressure the judiciary into supporting security concerns, rather than defending civil liberties, when the two issues clash. However, through key decisions in a number of important cases, the Israeli HCJ has managed to sculpt a legal system that recognizes the rights of Israeli citizens.⁶⁶ In 1992, the Israeli Knesset formally embodied these rights in the Basic Law: Human Dignity and Freedom. The Basic Law enumerates and protects vital human rights, such as the right to life, body, and dignity.

On the other hand, human rights in the Territories depend upon an entirely different and less secure basis. In terms of international law, Israel administers the Territories in a situation of "belligerent occupation." This refers to temporary possession of territory as a result of military hostilities, in contrast to long-term possession via national sovereignty. International law, accepted in this instance by most countries, including Israel, as customary law, dictates that an occupying power must maintain the legal system of a displaced sovereign in civil and criminal matters. At the same time, the occupier reserves the right to create a separate system of courts to administer matters

65. See ROBERT COVER, *OBLIGATION: A JEWISH JURISPRUDENCE OF THE SOCIAL ORDER*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 239 (Michael Ryan et al. eds. 1993).

66. See Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, in *JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY?* 55 (Mark Gibney, ed., 1999).

relating to the occupation.⁶⁷ While Israel has allowed the existence of a highly atrophied system of local courts using Jordanian law on the West Bank and a system of courts employing Egyptian law in the Gaza Strip, it has, at the same time, progressively broadened the jurisdiction of its military courts to encompass most important legal matters in the Territories.⁶⁸ For reasons explained in greater detail below, but broadly attributable to the fact that 1) military courts are geared towards security interests rather than public needs from a Palestinian view and 2) Palestinians are enemies of the Israeli occupation, the human rights of Palestinians are a relatively lesser concern to the military courts.

The contrast between the rights of Israeli Jews and the rights of non-Israeli Palestinians reflects the legal dimension of the "self-other" distinction articulated in Section II of this article. In fact, nothing more graphically illustrates this dichotomy than the fact that the Palestinians are governed by a different set of laws and courts than Israeli citizens. One counter-argument to this point is that the schism is not a function of an "us-them" attitude or racism, but instead, that it results either from the necessary distinction between Israeli territory and occupied territory, or between ordinary law enforcement and anti-terrorism. However, as pointed out in Section II, if this counter-argument were true, then Jewish settlers, who live in occupied territory and are also sometimes terrorists, should be governed by the law applied to Palestinians. This is obviously not the case: the operative distinction at work in Israeli law is "us-them," or, as Martin Luther King wrote in his "Letter from Birmingham Jail," the dichotomy is based on "difference made legal."⁶⁹

It is possible to measure the disconnection between Israel's professed concern with the human rights of Israelis versus the rights of Palestinians with respect to torture in two facets of the Israeli legal regime. The first aspect is the bifurcation of the Israeli legal system. The second feature is Israel's ambiguous support of Palestinian rights at the highest levels of the state's legal body.

B. Bifurcation of the Legal System

As a member of the Israeli Knesset once noted, "In [the Territories] there are two legal systems and two types of people: there are Israeli citizens with full rights, and there are non-citizens, non-Israelis with non-rights."⁷⁰ Indeed, Israel maintains an entirely separate legal system to administer Palestinians in the Territories. This is part of a larger attempt to prevent the occupation from

67. See Articles 42-56 of the Regulations annexed to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949.

68. See EDELMAN, *supra* note 54, at 100-104.

69. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 85 (Mentor, 1964) (1963).

70. B'TSELEM, *supra* note 54, at 15.

corrupting Israel's internal legal norms, which tend to favor individual rights over security concerns.

Occupation policy in the West Bank and the Gaza Strip is determined by the Israeli government and executed by the Israeli Ministry of Defense through its Civil Administration.⁷¹ Military courts are an essential component of Israeli control of the Territories. The military court system operates almost exclusively in the Territories and maintains jurisdiction only over Palestinians—Jewish settlers fall under the jurisdiction of the Israeli court system.⁷² As discussed in Section II, this creates a striking dichotomy in the treatment of Israeli citizens versus Palestinians. This makes little sense when national security, which can be affected by both Palestinian and Israeli conduct, is used to justify harsh legal measures under the occupation. Under the residual Mandatory Government of the Emergency Regulations, reinforced by post-1967 legislation, the scope of this jurisdiction over Palestinians is all-encompassing. The military courts were originally restricted to jurisdiction over "security" issues, but the Civil Administration has defined security so broadly that the military courts currently hear cases involving a wide variety of issues, many of which are arguably only tangentially related to national security.⁷³

The maintenance of this jurisdiction clashes squarely with the Fourth Geneva Convention, signed by Israel in 1949, which limits substantive derogation of local legal systems during belligerent occupations. Israel claims that the Convention is not binding in the land captured by Israel during the 1967 Six Day War because Egypt's claim to the Gaza Strip and Jordan's claim to the West Bank were never recognized by international law.⁷⁴ Consequently, Israel is not an occupier in the legal sense established by the Convention. Furthermore, Israel holds that the rules of international law do not limit national action unless those rules have been formally incorporated within the law of that state. While Israel recognizes the application of the Convention as customary law, it maintains that customary law only serves as an aid to interpretation of international legal codes, and thus lacks any intrinsic weight.⁷⁵ The military court system consists of single-judge and three-judge military

71. See EDELMAN, *supra* note 54, at 100-104.

72. See *id.*

73. See *id.* at 104. Military court jurisdiction covers: firearms; public safety; illegal military training; aiding, abetting, and membership in unlawful organizations; sabotage; "injuring the safety of the roads" (spreading nails on roadways, throwing stones at cars, etc.); contact with the enemy; forging documents; interfering with the IDF's actions; obtaining military information; entry into prohibited zones; actions against public order, such as threats, pamphleteering, displaying the Palestinian flag, unauthorized meetings, nonprevention of actions; economic offenses, such as tax evasion and bribery; entering and leaving areas without a permit; incitement; hostile propaganda; illegal contacts; and political strikes.

74. See John Quigley, *Judicial Protection in Israel-Occupied Territories*, in JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 79 (Mark Gibney, ed., 1999).

75. See *id.*

tribunals. Single-judge courts, which try the vast majority of cases, may impose sentences of up to ten years incarceration.⁷⁶ Three-judge courts may pass any sentence, although these are always contingent upon the approval of the local IDF regional commander.⁷⁷ The courts are divided into courts of first instance and courts of appeal. Military courts of appeal for sentences decided by three-judge tribunals were established in 1989 at the bequest of the Israeli Supreme Court.⁷⁸ Palestinians may also appeal cases to the HCJ.⁷⁹

Judges and prosecutors are recommended by the IDF Military Advocate General (the chief legal officer of the Israeli armed forces), are required to hold the rank of captain or above (a captain is a junior officer in the IDF), and are formally appointed by IDF regional commanders. Judges sitting in single-judge courts and the senior judge of three-judge courts are required to have legal training. Military court judges and prosecutors are formally attached to the same military organization within the IDF, and judges are generally selected from the ranks of former prosecutors, although prosecutors are required to spend a "cooling-off period" in other positions before sitting as judges. Regardless of the cooling-off period, the selection process of judges begs the question of potential conflicts of interest and the questionable existence of an impartial judiciary in the Territories.⁸⁰

1. *How the Legal System Affects Palestinian Rights*

This system severely limits the rights of Palestinians, particularly with respect to torture. For example, Palestinians detained by the military court system lack *habeas corpus* remedies. Until 1992, Israel could hold Palestinian suspects incommunicado for up to eighteen days before they had to be brought before a judge. In 1992, this period was shortened to eight days for lesser offenses, such as "disturbances of public order." Furthermore, suspects are often denied lawyers throughout their interrogations. Israeli Military Order 378 guarantees a detained Palestinian the right to see a lawyer upon request, or if a family-retained lawyer requests to visit the detainee. However, persons in charge of investigations can, upon special request, deny this right for up to ninety days. Ultimately, many, if not most, detainees do not consult with lawyers until they have either confessed (quite possibly under torture) or until the authorities have released them.⁸¹ The result is that many prisoners are tortured before they are ever fully informed of their rights by a sympathetic attorney. Few complaints of torture even make it through the military court

76. See JORDAN J. PAUST ET AL., *INQUIRY INTO THE ISRAELI MILITARY COURT SYSTEM IN THE OCCUPIED WEST BANK AND GAZA* (International Commission of Jurists, 1989).

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*; See also *Israel and the Occupied Territories* at 15-16.

81. See HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 106-07.

appeals system because more than half of those detained, questioned, and tortured never appeared before a judge—they are released without ever facing charges.⁸² Furthermore, the adversarial nature of the occupation, the legal system, and the poverty of many Palestinians produces a chilling effect that discourages Palestinians from taking any kind of legal action against abuses: why appeal to a legal system that seems so overwhelmingly committed to depriving your community of its rights?

2. *Broader Social Effects of the Compartmentalization of Rights*

The creation of a separate legal body for Palestinians virtually compartmentalizes legal treatment of Palestinians from the legal norms enjoyed by Israeli citizens. This has two interrelated effects. First, it allows the Israeli occupation to abuse Palestinians in the name of national security (although, as argued in Section II, there may be deeper motivations at work). Secondly, it upholds the coherence of the rule of law, which ostensibly stands for the maintenance of human rights, in Israel proper. If a single legal system existed that both claimed to defend the rights of Israeli citizens and systematized torture in the manner described above, then, ultimately, we could expect to see the decomposition of the value of human rights as applied to Israelis as society grew de-sensitized to torture. As Sanford H. Kadish has written, "When torture is no longer unthinkable, it will be thought about."⁸³

However, there is evidence that the "dam" separating the two legal systems in Israel is beginning to crack. As increasing numbers of Israeli settlers have expanded into the Territories, some have committed acts of random violence and even organized terrorism against innocent Palestinians. Because of the fractured nature of Israeli jurisprudence, rather than adjudicating these cases in the military courts of the Territories, the government has tried these settlers in Israeli civil and criminal courts.⁸⁴ This has helped publicize the post-Commission inequitability of Israeli law and exposed Israeli Jews to some of their government's abuses in the Territories. Just as the reporting of abuse resulted in the Commission's report, post-Commission legal inequitability resulted in the HCJ's reappraisal of torture in 1999. However, while this decision seems to disavow torture, in some respects, it is just as ambiguous in its definition of "coercion" as the Commission's report. This reflects fundamental problems in the HCJ's ability to uphold the rule of law in the maintenance of human rights in Israel.

82. See EDELMAN, *supra* note 54, at 106-7.

83. Kadish, *supra* note 49, at 353.

84. See EDELMAN, *supra* note 54, at 101-2.

C. *The Israeli Supreme Court*

Sitting as the HCJ, the Israeli Supreme Court (the Court) has jurisdiction in three primary areas. First, it serves as Israel's court of final resort, hearing civil and criminal appeals from Israel's district courts and appeals generated by the military courts in the Territories. Secondly, the Court functions as an appellate court for serious criminal cases or civil suits involving large amounts of money. Lastly, it adjudicates all administrative matters. As Israel's highest legal authority, the Court bears the greatest burden for the state's legal treatment of torture. However, the Court's response to torture has generally proven ambiguous, reflecting competing interests in the Israeli judiciary between the Court's fear that it might forsake its autonomy if it upholds the rights of Palestinians too boldly, the grip of national security narrative on popular culture, the spill-over of human rights abuses from the military courts, and the consequent realization of the failings of Israeli legality.

In *Segal v. Minister of Interior*, the Court stated that it must exercise increased authority to protect the rule of law in Israel: "When the Court does not become involved, the principle of the rule of law becomes flawed. A Government that knows in advance that it is not subject to judicial review, is a Government likely not to give dominion to the law, and likely to bring about its breach."⁸⁵ Yoav Dotan has amassed evidence suggesting that despite this rhetoric, the Court has, in the past, feared to act decisively to protect the rights of Palestinians because it was afraid that doing so would place it in conflict with the government, thereby jeopardizing the Court's prestige and autonomy.⁸⁶ This implies that the rule of law may not be as strong in Israel as Israelis might prefer to believe.

Dotan examined petitions to the HCJ from Palestinians in the Territories from 1986-1995. This period saw a sharp increase in the number of Palestinian appeals due to the violent excesses of the Intifada; in the twenty years between 1967 and 1986, the HCJ received 557 petitions from Palestinians, whereas during the first four years of the Intifada, the HCJ received 806 petitions.⁸⁷ The Court responded to this high volume of complaints, many of which concerned human rights violations, with strong rhetoric stressing the HCJ's commitment to judicial activism and human rights. According to most studies, Palestinian petitions to the Court during this period enjoyed extremely low rates of success. Based on these studies, it is only possible to conclude that the HCJ never translated its rhetorical attachment to human rights into a willingness to intervene in decisions of the military

85. EDELMAN, *supra* note 54, at 103, quoting *Segal v. Minister of Interior* (1980) 34 (iv) P.D. 249.

86. See Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada*, 33 L. & SOC'Y REV. 319 (1999).

87. See *id.* at 328.

government on behalf of Palestinians.⁸⁸

However, Dotan found that in a relatively high rate of cases, Palestinian petitioners succeeded in their claims via out-of-court settlements in spite of low rates of success in final court decisions. In fact, in absolute terms, Palestinian petitioners achieved their goals, either fully or partly, through HCJ adjudication in about six out of ten cases—a rate significantly higher than that of non-Palestinian petitioners (an unsurprising fact given the severity of human rights violations arising in these claims).⁸⁹ Dotan argues that this large reliance on out-of-court settlements, rather than public decisions and judicial statements, reflects on the political context in which the HCJ adjudicated human rights violations of the Palestinians during the Intifada.

This behavior makes sense in light of the view that judges seek to maximize two competing interests—their influence on society and their institutional autonomy. While these interests sometimes cohere, often, the more a court seeks to influence a society, the more likely it is the court will interfere with political spheres of responsibility, thereby risking the possibility of a backlash against judicial activism. During the Intifada, the HCJ faced a large amount of criticism from IDF leaders, cabinet members, and senior politicians who argued that legal constraints prevented decisive action against Palestinian unrest and threatened national security. Moreover, surveys reveal that HCJ rulings in favor of Palestinian human rights have generally enjoyed less support than other areas of jurisprudence. Consequently, it is unsurprising that the HCJ would find that the only way it could serve Palestinian rights without threatening its own continued viability was through out-of-court dealings.⁹⁰ Considering the current tension surrounding the Palestinian-Israeli peace process, it is quite likely that this apprehension still influences HCJ decisions in regards to torture, as well as other areas concerning Palestinian rights.

These contradictory pressures are also apparent in the two major legal statements regarding interrogations: the Commission's report and the HCJ's 1999 decision. For example, while the Commission's report was a direct response to the realization of GSS abuses of Palestinians under interrogation, its tacit approval of "coercion" and classified articulation of guidelines for use of coercion, which effectively sanctioned as *de jure* what had only been *de facto* abuses, reflected the need to satisfy Israel's preoccupation with national security.

Similarly, while the 1999 decision is the HCJ's reply to post-Commission human rights concerns, it nonetheless reflects the lingering anxiety in Israeli society that if the government does not maintain a "tough" attitude towards Palestinian subversives, Israeli security might suffer. Thus, in

88. *See id.* at 329.

89. *See id.* at 335.

90. *See id.* at 345-47.

1999 the Court specifically addressed post-Commission criticism of the necessity rationale for coercive interrogations, stating "[u]ntil [this decision]...the Court did not actually decide the issue of whether the GSS is permitted to employ physical means for interrogation purposes in circumstances outlined by the defense of 'necessity'."⁹¹ As discussed in Section I, the HCJ disavowed the necessity defense as a prospective justification for coercive interrogations and even went so far as to claim that the Commission's report never legitimized physical coercion. Perhaps more significantly, the Court continued by rejecting any sort of consequentialist balancing of evils in regards to use of physical violence and by explicitly accepting international legal norms concerning torture:

[A] reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject [of interrogation] and free of degrading handling whatsoever...Human dignity also includes the dignity of the suspect being interrogated...This conclusion is in perfect accord with (various) International Law treaties—to which Israel is signatory—which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment." [citations omitted] These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigative practice.⁹²

While the HCJ's 1999 judgment seemingly disavows physical torture, it notes "[i]f the State wishes to enable GSS interrogators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose."⁹³ Furthermore, by failing to address specifically psychological interrogation techniques, the decision implicitly retains for Israel the right to psychologically coerce Palestinian suspects (which may still, of course, allow for the torture of Palestinians in light of the definition of torture used in this article). Thus, it appears that the Israeli judiciary is still struggling to maintain the coherence of a legal system that holds one set of basic rights for citizens and another for non-citizens within the framework of a single polity which implicitly claims to endorse universal human rights. While that legal system has grown closer to acknowledging the problems in employing torture, the tacit retention of the right to psychologically coerce suspects suggests that while the legal system has limited the means to torture Palestinians, it still accepts some "balancing" of their rights vis-à-vis the rights of Israelis.

91. *Judgment*, *supra* note 6, at para. 17.

92. *Id.* at para. 23.

93. Grosso, *supra* note 21, at 335-36 (quoting *Judgment* at para. 37).

CONCLUSION

There are indications that the Israeli government ceased torturing Palestinian detainees following the HCJ's 1999 decision,⁹⁴ but it is difficult to predict the ultimate effectiveness of the judgment in preventing torture given the turbulence of the current state of Israeli-Palestinian relations. In fact, as recently as March 2000, then-Prime Minister Ehud Barak announced that a governmental committee would examine the possibility of passing legislation allowing the GSS once again to apply physical coercion against Palestinians in the Territories.⁹⁵ In any case, we may conclude that Israel has tortured Palestinians in recent history, and it did so, if not with the full approval of the state's legal body, then at least with that legal body's tacit, if conflicted support. If we accept that Israel is a democratic country, even in the attenuated sense of existing as an ethnic democracy, then two issues should immediately come to mind. The first is the acceptance that democratic states, which implicitly claim an ideological commitment to abstract notions of freedom and dignity in terms of human rights, abuse those rights. However, this should not surprise anybody, given the acknowledged fact that democratic regimes have abused these rights in the past. This begs the larger question of whether or not humanism of this sort bears any real weight, beyond vague rhetorical invocations, on the reality of democratic rule. The second issue is the role of the law in Israel in legitimizing and refusing to address fully what it formally rejects as illegitimate—torture.

Despite clear aversion to the use of torture, the Israeli judiciary has proven unable to address the use of torture in the Territories in a way which reconciles the abuse of Palestinians with the rights accorded to Israeli citizens. If a legal body is unable or unwilling to foment change when it clearly recognizes the need for such change, we must question the law's centrality to that society. Because Israel appears to be a functioning democracy, even if that democracy arguably does not fully extend to non-Jewish citizens, we must question the implications for the primacy of the rule of law in any democracy. At the very least, may conclude that in regard to the torture of Palestinians, the Israeli legal regime is largely subject to the powerful grip of the country's national security narrative and the influence of the Israeli government's occupation policies.

94. See *id.* at 307 (citing a letter from Joanna Oyediran, Researcher, Amnesty International/International Secretariat, September 15, 2000, reporting that Palestinian detainees held by the GSS had not reported torture or ill-treatment since the judgment).

95. See AMNESTY INTERNATIONAL, ORAL STATEMENT TO THE UN COMMISSION ON HUMAN RIGHTS CONCERNING ISRAEL AND THE OCCUPIED TERRITORIES (2000), available at <http://www.angelfire.com/ia/palestinefoever/amnestytorture.html>.

