

LETTER TO THE EDITOR

Dear Editor:

Vice-Dean Kremnitzer has brought to my attention the Report of the Landau Inquiry Commission. The Report raises interesting and important issues. Of particular interest is the claim of justification for the use of physical force against suspected terrorists in custody to force them to reveal information that would save innocent lives. Given its significance, it might be useful for the *Review* to solicit and publish brief letters of comment on this issue. Below I set out my own views.

The Commission is right, I believe, to conclude that imminent threat need not be required. The proper focus is not on the timing of the threat but rather on the timing of the act needed to avoid the threat. There are many instances where it will be too late to avoid a threatened harm if the actor waits until the threat is imminent. Rather than requiring that the *threat* be imminent, I believe it is appropriate to require only that the responsive *action* be “immediately necessary”. It ought to be necessary in its timing and in the amount of harm that it causes. That is, if the threat could be as safely and easily avoided through later action or through less harmful means, then the action is not “immediately necessary”. My treatise, *Criminal Law Defenses*, discusses this point in some detail, and the Commission was right to cite and rely on it as supporting its position.

It is not enough, however, that the action is necessary to avoid the threatened harm. To be justified, the force used must also avoid a *greater* harm than it causes. In the situation at hand, one may be inclined to compare the injury to the captive terrorist to the many deaths of innocent persons threatened by a planted bomb, for example, and conclude that the use of force in the interrogation of the terrorist is justified. But such an assessment does not account for all of the competing interests at stake.

An additional, and more important, harm that would come from justifying the use of force in the interrogation of the terrorist is the precedent that it would set for the use of force in the interrogation of prisoners generally. That is, it creates the danger of a claim of justification for using force against prisoners in cases of less serious threats. For example, such a precedent might be used to justify the use of force in the interrogation of a terrorist to reveal whether suspected terrorist X is, in fact, a member of a terrorist

organization. The harm avoided by compelling such a disclosure is clearly less significant and more speculative than the death of innocent people from a planted bomb. Further, an additional harm that may come from the precedent of justifying the use of force in the interrogation of prisoners is that it may be used to justify other groups (e.g., terrorist organizations) to use greater force in the interrogation of Israeli prisoners.

On balance, I am not prepared to say that the use of force in the questioning of terrorists can never be justified. I would make these observations, however:

- (A) If there are instances in which such use of force is justified, the number is relatively small. The hypothetical of forcible interrogation to avoid the death of innocent persons from a planted bomb is to my mind a close case, once one takes into account the resulting danger of establishing the precedent. (Certainly, the precedent would be even more costly if it permitted the use of force against an innocent person (i.e., not a terrorist).)
- (B) A justification for such use of force should be considered by interrogators only if the question has not been previously resolved by the legislature. That is, security forces should not be free to make decisions on such an issue if the Knesset or other binding authority has already spoken on the issue of permissible force during interrogations.
- (C) The issue is a classic example of a policy question that is best determined by the legislature rather than on an ad hoc basis by security forces or by a judge or jury reviewing the actions of the security forces. The question calls for a balancing of competing interests – a value judgement uniquely within the prerogative of the legislative body in a democracy. I am not familiar with the make-up of the Landau Inquiry Commission. It may be representative in character, but the Knesset would certainly be more representative. (The establishment of a rule by an authoritative body has the advantage of increasing consistency between cases and of providing better notice of the conduct that is forbidden.)

One possible resolution of the case at hand is to deny a justification for the forcible interrogations, but to provide an excuse to the actors. This would announce the rule against forcible interrogations in the future, but would avoid the difficulties and possible unfairness of imposing liability on interrogators who were not previously aware of an authoritative prohibition of such practice. (I must note that there is common-law precedent that would bar such an excuse for even a reasonable mistake as to such

authority, which is a mistake as to proportionality in a justification defense. I have argued elsewhere, however, that exclusion of such a mistake defense is inappropriate. There are good arguments to be made for providing a defense for mistakes as to proportionality, just as a defense is commonly provided for mistakes as to necessity and as to the existence of conditions triggering the justification.)

If I were the Landau Inquiry Commission, knowing what I do about the facts of the situation (which is admittedly too little), I would be tempted to provide such an excuse but not a justification. As I have said, however, it would not violate the principle of justification for the legislature to decide that the forcible interrogation of terrorists did indeed avoid a greater harm than it caused. On the other hand, Israelis should expect that some others are likely to disagree with such a conclusion.

Sincerely,

Paul H. Robinson

Former Commissioner
United States Sentencing Commission

Acting Dean and Distinguished Professor of Law
Rutgers University School of Law at Camden,
New Jersey