But Does Torture Save Lives?
Torture, *Pikuakh Nefesh*, and the *Rodef* Defense | רודף/פיקוח נפש

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This is an abbreviated version of this article. The full text can be found at www.rhr-na.org.

I am convinced that more Americans are dying and will die if we keep the Gitmo prison open than if we shut it down… Why care? It's not because I am queasy about the war on terrorism. It is because I want to win the war on terrorism… This is not just deeply immoral, it is strategically dangerous… I would rather have a few more bad guys roaming the world than a whole new generation.
—Thomas Friedman[1]

…your own sword has devoured your prophets, like a destroying lion. (Jeremiah 2:30)

As mass attacks hit one city after another, as the world feels like an increasingly insecure place, we know that no public will remain safe without strong self-protection and counter-terrorism measures. Many of us may be tempted to want any means necessary used to protect our children and thwart more violent assaults on innocent lives.

But even in anxious times like these, torture arouses unique disgust from most corners of the democratic world, retaining its place on a brief list of moral "nevers." In international law, torture joins genocide and slavery as acts categorically deplored and outlawed, regardless of political circumstances….

One proverbial example tugs at the absolutist prohibition against torture. Known as the "ticking bomb" case, it presents some version of the following hypothetical: a captured fanatic has set a hidden nuclear device in the heart of a major metropolis, set to go off within hours. The authorities are certain that the prisoner in their hands is the perpetrator whose knowledge could avert the catastrophe and spare thousands of innocents, even a whole nation, and the non-violent devices of their most expert interrogators have not yielded enough information to locate and deactivate the bomb. Should we really, ask the thinkers who present this scenario, damn thousands rather than suspend our moral commitments?

This defense of torture strikes a Jewish nerve, for one of Judaism's most preoccupying values is the sanctity of life and the importance of preserving it at great cost. In the aftermath of the Holocaust, this traditional value is freighted with even greater emotional potency and urgency.

What instruction does Judaism provide about balancing the need for self-defense with other Jewish values? This section will focus on the "*rodef*" principle and conditions for its application, the classic Jewish statement of pre-emptive self-defense and defense-of-others.

■ *A Few Caveats: The Paucity of Jewish Sources on War*

…Given the historical realities of the Jewish people during previous eras of *halakhic* development, it is not surprising that there is a much more extensive treatment of the proper parameters for self-defense and defense-of-others in the sources on *rodef* than in those dealing with war proper. It is the assumption of this piece that to develop Judaism's positions on "battlefield ethics" issues, we must extrapolate from general principles of Jewish ethics and apply them to the military situation, particularly the laws of *rodef* and self-defense…

This section begins with an appreciation of the difficult and rudimentary nature of applying traditional *halakhic* principles to contemporary military concerns, and an acknowledgement that others might read these sources differently.

■ *Pikuakh Nefesh: The Sanctity and Preservation of Life in Judaism*

Judaism prizes nothing more than human life. The *halakhah* privileges the preservation of life above all other enactments, outside of murder, idolatry, and sexual crime (eg. adultery or incest). One *must* transgress ritual laws—including stringent Biblical laws like those governing *kashrut,* Shabbat, and Yom Kippur—rather than imperil human life (BT Yoma 82a, 85b). The law grants tremendous latitude in determining the degree of actual threat, recognizing that taking the time to assess whether a situation is in fact dangerous could result in death that might otherwise be averted (BT Shabbat 129a; Shulhan Arukh, Orah Hayim 328:2, 328:13).

■ *Self-Defense and Rodef: Im Ba L'Horgakh, Hashkem L'Horgo*

Capital punishment, *rodef* and self-defense are the only exceptions to an otherwise absolute prohibition against taking human life.

Based on a Biblical case of a thief invading a private home at night (Ex. 22:1-2), Jewish law lays out a general principle of self-defense: "The Torah decreed, 'If he comes to kill you, kill him first'" (Sanhedrin 72a; cf. BT Berakhot 58a and 62b).

Jewish law obligates one to act to preserve the lives of others as well as one's own life.[2] Third-party bystanders must attempt to save other innocent people from life-threatening danger, based on the verse: "Neither shall you stand idly by the blood of your neighbor" (M. Sanhedrin 8:7; BT Sanhedrin 73ff; Rambam Hilkhot Rotzeah 1:6-16; Shulhan Arukh, Hoshen Mishpat 425:1-2)…

While the original *rodef* rule applied only to perpetrators *directly* responsible for *capital* crimes, later applications extend the principle to cases of indirect harm and non-capital crimes (Piskei haRosh, Baba Kama 3:13; Shulkhan Arukh, Hoshen Mishpat 388:9 ff; Rema, Shulkhan Arukh, Hoshen Mishpat 425:1)…

However, the rabbis place many limits on applying the *rodef* principle, recognizing the enormous danger of providing a legal override to the prohibition against murder, especially one that shortcuts the judicial process.

1) Force must be intended to save a particular victim from imminent death.

• **Spontaneity rather than premeditation.** The *rodef* defense applies only to a spontaneous act in a moment of unavoidable urgency, when life is in immediate danger…
• **Difference of opinion over required degree of certainty.** In a situation of imminent threat, most say that one may respond to one's fear without full knowledge of the facts; but evidence must be strong, if not incontrovertible, that the aggressor poses a danger in the present moment.[3]

The analogues to self-defense and *rodef* in American law similarly require that force be used against a threat that is imminent, immediate, and certain.[4]

2) Rodef does not justify harm to third-party innocents.

Jewish law generally does not permit one to save oneself or others by killing other innocents. In such cases, another principle applies: "One life may not be given priority over another" (M. Ohalot 7:6, Rambam, Hilkhot Rotzeah 1:9 and Hilkhot Yesodei Ha-Torah 5:5, 5:7).

The classic text in this regard appears in the midst of the discussion on *rodef*, insisting on the equal value of human lives:

> Incest and murder [may not be practiced to save one's life] … How do we know this of murder?—It is common sense. Even as one who came before Raba and said to him, 'The governor of my town has ordered me, "Go and kill so and so; if not, I will kill you"'. He answered him, 'Let him rather kill you than that you should commit murder; why do you think your blood is redder? Perhaps his blood is redder' (Sanhedrin 74a; cf. BT Pesahim 25b). "Who says your life is more beloved by God than his? Perhaps his life is more beloved." (Rashi, Pesahim 25b)

Later authorities apply this principle to all cases in which one can find no way to avoid endangering oneself without committing violence against another innocent person; the law generally forbids one from doing so.

According to many authorities, not only are we prohibited from sacrificing an innocent life to protect our own; we are prohibited from surrendering a single innocent life even to protect a whole community. The foundational "one vs. many" text appears in the *Tosefta*, presenting a dilemma in which oppressors ask for a person to be delivered to death, threatening that otherwise the entire group in which he has sought refuge will be killed (T. Terumot 7:20). The *Tosefta* states unequivocally, "all must be killed rather than surrendering even one"… Authorities agree that *a community may not save itself by killing a single innocent individual unless that individual will die in any event*.

The *rodef* defense may not be invoked to justify harming any third-party innocent, even one who has committed crimes in the past. In the moment of direct violent attack or other indirect, grave, deliberate harm (e.g. the informer), the idea that "one life may not be given priority over another" no longer applies. After the imminent danger has passed, the principle of the equal worth of human lives pertains again in full force.

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• Who is "innocent?" Combatants, civilians, and collective punishment.

Judaism, as a general rule, rejects collective punishment, based on the verse: "The fathers shall not be put to death for the children and the children shall not be put to death for the fathers; every man shall be put to death for his own sin" (Deut. 24:16)... The tradition not only rejects collective punishment on the part of human agents, but also challenges instances of divine collective punishment, notably Abraham's famous intercession on behalf of the people of Sodom…

In each biblical incident of seeming collective punishment for the sins of individuals—the story of Shechem is the primary example, but there are a handful of others[5]—commentators scramble to either find some direct blameworthiness on the part of those punished, read their way out of the punishment's application to the innocent, or express their perplexity at the punishment's injustice. *The rabbis sustain the prohibition against collective punishment as a fundamental, unwavering principle despite its apparent tension with several biblical passages.*

Some of the methods used to resolve these biblical contradictions, however, have been used by a few contemporary authorities to argue that punishment may be extended to an entire society where that society does not enforce a legal system, harbors wrongdoers, or passively colludes in crime by withholding information.[6] Others go so far as to argue—in part through recourse to an obscure text in *Masekhet Sofrim* (15:7)[7]—that during wartime (*sha'at milhama)* the principle banning collective punishment is suspended altogether, and all members of the "enemy" society are considered "pursuers" by default rather than innocent bystanders.[8]

Jewish law, as already noted, does not extensively treat the subject of "battlefield ethics" nor give much guidance about how to distinguish combatants from civilians. Nonetheless, many sources reject the indiscriminate logic of these recent *halakhic* opinions even in the context of war, and reflect, rather, the judicious scruples reflected in the *rodef* literature…

Several laws recognize and attempt to limit suffering and destruction to "enemy" populations … Ramban comments: "God commanded us that when we lay siege to a city that we leave one of the sides without a siege so as to give them a place to flee to. *It is from this commandment that we learn to deal with compassion even with our enemies even at time of war.*"[9] …

On an *aggadic* level, Jewish tradition expresses a general abhorrence of resort to violence (BT Sanhedrin 108a, Mid. Tanhuma, Lekh Lekha 7) and anxiety about participating in bloodshed even in the context of legitimate armed conflict, realizing that too often innocent people get caught in the crossfire: "Abraham was filled with misgiving, thinking to himself, Maybe there was a righteous or God-fearing man among those troops which I slew'" (Gen. Rabb. 44:4; cf. Gen. Rabb. 76:2 and Mid. Tanhuma, Lekh Lekha 19).

Does Jewish law recognize a category of the "innocent civilian"? The prohibition against collective punishment and the restrictions on siege warfare—as well as *midrashim* renouncing violence, particularly towards innocent bystanders—present a stream of thought that would answer "yes." On the other hand, some of the exegesis about biblical stories that stand in tension with the prohibition against collective punishment—and a few other texts that generalize about "killing the best of the non-Jews" during times of war—present a stream of thought that might answer "no."

The definition of terrorism, as many thinkers have pointed out, is the refusal to recognize a distinction between combatant and civilian. Jewish law offers neither a "suicide pact" nor a doctrine of terror. If we—following Judaism's rejection of collective punishment and call to compassionate treatment even of enemies—recognize that the majority of Iraqis, Afghanis, and others of Middle Eastern and Muslim descent have no intention of participating in activities threatening to American lives, *we must extend to them the protections Judaism insists on for innocent third-parties even in situations of legitimate self-defense. If we recognize the category of "innocent civilians," the* rodef *defense will not permit harming them—nor determining treatment of them on the basis of cost/benefit, "balance of evils" calculations—for our lives may not take precedence over their lives; our blood is no redder than theirs*.

3) The rodef *must be thwarted with minimum possible harm, proportional to the threat he poses.*

> Abaye said: This applies where she could have been saved at the cost of one of the limbs [of the violator] and agrees with R. Jonathan b. Saul. For it has been taught: If one was pursuing his fellow to slay him, and he could have been saved by maiming a limb [of the pursuer] but did not thus save himself [killing him instead], he is executed on his account (BT Sanhedrin 74a).

In one of the few cases in which the Israeli Supreme Court invoked the concept of *rodef,* the Court applied the limiting condition of minimum possible harm. So too, American law mandates that force used in self-defense or defense of others be "necessary to defend" or "necessary to prevent" specified harms. A defendant may not exceed "the reasonable means which were necessary to protect himself."[10]

In sum, Jewish law shares with American and Israeli secular law the principle that no undue force may be justified in the name of self-

defense, and no force whatsoever may be justified once imminent danger has passed. Threat may not be inferred from past conduct, but must be visible and urgent in the present moment. No force may hurt innocent bystanders, and no more force may be used than is required to save particular victims from immediate harm. The morally problematic *rodef* defense is restricted to the smallest possible number of cases, as a last resort.

■ *Would a* Rodef *Defense Permit Torture in Iraq, Afghanistan, and Guantánamo?*

1) Imminence, spontaneity, and certainty.

• Imminence and spontaneity.

Most, if not all, of the thousands of detainees in American detention centers are not on the verge of committing an imminent, serious crime, directly or indirectly.

The *rodef* defense would apply to a *true* ticking bomb case should one ever occur. The *rodef* principle might release an interrogator from liability if he were to resort to torture spontaneously in a moment in which he had probable cause to believe the prisoner before him was a perpetrator with knowledge that could save lives in immediate danger. But it would not permit authorizing physically coercive techniques in advance or applying them across the board in a deliberate and routine way to detainees held over extended periods of time, even if many of these detainees had once but were not currently posing a threat to American lives. It would not permit "torture" or "cruel, inhuman, and degrading treatment" to be anyone's training or job description in the military. Nor would it allow torture to be used as a punishment, reprisal, or intimidation tactic.

In 1999 the Israeli Supreme Court *categorically declared that physically coercive techniques are not authorized by Israeli law.* In 1987, a judicial commission of inquiry headed by former Supreme Court Justice Moshe Landau had reported that "moderate physical pressure" was defensible in cases in which an interrogator "committed an act that was immediately necessary" to save lives from grave harm.

The Israeli Supreme Court ruled that neither the government nor the security services could establish directives authorizing the use of physical coercion *in advance*, but only as an "ad hoc…improvisation" responding to an urgent moment at hand. They also ruled that the GSS could not develop physical means of interrogation before the fact, but individual interrogators could resort to force in response to concrete situations of necessity, *post factum*.

The Court ruled that the "necessity" defense may serve as a way of pardoning a specific interrogator from liability, but has no other normative value. The defense might mitigate the penalty incurred by the investigator, but would not excuse the torture itself. The court specified that "the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, *provided the danger is certain to materialize and there is no alternative means of preventing its materialization*…

This standard of imminence is similar to that demanded by the *rodef* defense in Jewish law. The Court provided an exceptional, narrow "out" from an otherwise absolute prohibition against torture and "cruel, inhuman, and degrading treatment."…

Accounts of practices in American facilities suggest that "cruel, inhuman, and degrading treatment," or "torture lite," is the norm rather than the exception, a part of detention culture and broad policy, applied to large numbers of detainees who almost certainly lack specific knowledge about future attacks. Current U.S. practices would not satisfy the criterion of imminent peril required by the *rodef* defense.

• Certainty.

Even from a purely pragmatic point of view, the factual claim that torture saves lives is not substantiated. There are as many convincing arguments that torture endangers American lives, both of troops and civilians, as that it protects American lives.

Those who argue that torture "works" suggest that it provides vital information that can help avert deadly attacks. *Many of torture's success stories, however, appear more tenuous upon further probing.* Career interrogators claim that little valuable information was revealed to them through physical coercion. As John Langbein, who has researched the rise and fall of torture in the European criminal justice system, asserts: "History's most important lesson is that it has not been possible to make coercion compatible with truth."[11]

There are, moreover, forceful arguments that resort to torture and other cruel and degrading treatment hinders rather than serves a war effort whose success depends on securing the loyalty of the people among whom it struggles. The Ansar al-Islam terror network in Iraq, for example, an al Qaeda affiliate, prints pictures from Abu Ghraib in its recruiting literature. "An operation that crushes a cell but alienates an entire population of innocent bystanders is not a success. It is a failure."[12]

Former Secretary of State Colin Powell and other career military professionals believe that America's detention practices have placed current and future generations of U.S. soldiers at risk by sending a message of glibness about international law, not only to U.S. military personnel, but also to other governments and militaries throughout the world.

Finally, there is the argument that torture, even if it could in fact save our bodies, would in the meantime corrode our souls, as citizens of liberal democracies and as conscientious human beings. Democracies are brought to their knees by terrorism not in military defeat, but in yielding their own ideals through overreactions (Argentina, Colombia, the "Red Scare" in America, etc.). Terrorism tends to menace democratic states most by weakening their own constitutional and ethical commitments.

2) Harm to third-party innocents.

The "ticking bomb" hypothetical relies on the notion that the person being tortured is not a mere suspect; he is a confirmed perpetrator. In real life, however, interrogators rarely know that they have the "right" person before them, particularly when detainees have been gathered in broad round-ups and granted few due process protections.

As of 2003, the International Committee of the Red Cross estimated that between 70-90 percent of those held in Abu Ghraib were there "by mistake;" more recent official inquiries have dropped the estimate to two-thirds. At Guantánamo, official reports have estimated that 40 percent of detainees never belonged there.[13] 85 percent of those captured at Bagram in Afghanistan have since been released without any charges or evidence of terror links.[14] There have been reports of routine physical and psychological ill-treatment and abuse at each of these facilities.

From the perspective of Judaism, even if torture were proven to save lives, the *rodef* defense would not permit violence against innocents on the basis of a net saving of life; the imperative to preserve our own lives does not allow us to sacrifice the lives of other innocents. The lives of U.S. military detainees are as valuable as our lives; they too are imprinted with the divine image, their blood as red as ours.

3) Minimum possible harm.

Standard treatment in American detention centers has included stripping, leaving detainees naked in isolation and in public, hooding, beating, kicking, shackling in humiliating and physically painful "stress positions" for hours on end, spitting on and urinating on detainees, food and sleep deprivation, exposure to extremes of hot and cold, bombardment with painfully bright lights and loud violent music, and threatening with dogs. These techniques have been authorized at the highest levels of the Pentagon and Defense Department in part through a dubious distinction between torture and "cruel, inhuman, and degrading treatment" (C.I.D.).

The particular interrogation methods currently authorized and employed in U.S. detention induce severe enough pain—especially when used in combination and with frequency—to be determined torture by both the U.N. Committee against Torture and the European Commission of Human Rights.

Furthermore, rather than causing minimal possible harm, there is evidence that the U.S. is inflicting as much pain as it can get away with without being charged for war crimes.

Human rights activists who have worked with interrogators, victims, and policy-makers for decades insist that *the distinction between torture and cruel, inhuman, and degrading treatment is even harder to maintain in an actual interrogation room,* for the natural tendency is to drive pressure up:

> These practices are not separate and distinct categories of acts, but rather lie in an unbroken continuum. In practice, it is all too easy for cruel treatment to slide into torture. This is so for many reasons. The body becomes inured to pain, which prompts interrogators to ratchet up the pressure. Interrogators in the real world vie to be the one to 'break' the prisoner, rather than leave the glory to the next shift. Once an official has internalized permission to treat someone with cruelty, as a matter of human nature it becomes difficult to gauge what is then too cruel.[15]

…Even were U.S. interrogators to restrict themselves to those methods currently authorized by the Pentagon, however, they would violate the standards set by the U.N. Committee Against Torture—which oversees the Convention Against Torture, a treaty to which America is a signatory—as well as the minimum possible harm standard of the rodef *principle.*

• Alternatives to torture.

Many military interrogators argue that physical coercion is neither effective nor necessary, for prisoners cooperate most readily when their confidence has been earned…[16] Physical coercion, once standard fare in domestic police interrogations, has all but disappeared in the American police precinct… The Supreme Court has ruled that successful law enforcement and crime investigation does not demand physical violence, and may be achieved through "persistent cross-questioning," "patience," "self-assurance," "entreaty," and "cajolery."[17]

Torture would not be permitted according to the *rodef* principle's minimum possible harm standard, given that alternative, effective means are available to gather intelligence to protect American lives.

■ *Conclusion: The* Rodef *Defense Does Not Permit Routine Torture*

The *rodef* defense requires that action taken in self defense or defense of others must be intended to save a particular victim from imminent, probable harm rather than prior conduct or anticipated threat; such action must be spontaneous rather than premeditated, may not harm any third-party or innocent bystanders; and must cause minimal possible harm to the *rodef* himself.

Physical coercion is neither the least harmful nor most effective means of obtaining the information we need to protect ourselves. There is little demonstrated proof that torture, the ultimate shortcut, "works." There is *evidence that torture causes great harm— not only to the victims, but also to the interrogators, soldiers, and citizens of the society that permits it.*

The *rodef* defense would allow the killing of a suicide bomber strapped with explosives and might allow ad hoc physical coercion in a true "ticking bomb" case, but in all other cases would support international law's absolute prohibition against torture and "cruel, inhuman, and degrading treatment."

…By abstracting to the philosophical plane, the "ticking bomb" hypothetical allows us to overlook the thousands of real victims being tortured and degraded in U.S. custody, few of them "ticking bombs" by any definition, and all too many of them innocent of any crime or threat to American lives.

Over against the "ticking bomb" scenario, the present era calls up another nightmare scenario, posed by Feodor Dostoevski in *The Brothers Karamazov:*

> I challenge you—answer. Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature—that little child beating its breast with its fist, for instance—and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions? Tell me, and tell the truth.

Jewish law joins Dostoevski's Alyosha in answering with a soft but audible "no." We are not to adopt the sort of "collateral damage" logic that would justify horror to the few for the sake of the well-being of the many; we may not destroy innocent lives—entire, infinite worlds—so that we may live more securely. We may not "set aside one life for another," for Judaism reminds us that our blood is no redder than that of other human beings, equally beloved by God.

NOTES

1. "Just Shut it Down," *New York Times,* May 27, 2005.

2. As Chaim Povarsky elaborates, these two principles (*rodef* and self-defense) are not originally connected. The burglar, however, whom one may kill in self-defense, is designated as "*k'rodef"* (like a rodef) in *halakhic* sources. For an extensive discussion of the relation between these two principles, see Povarsky's "The Law of the Pursuer and the Assassination of Prime Minister Rabin," *Jewish Law Association Studies IX,* ed. by E. A. Goodman, Scholars Press, 1997.

3. See Resp. Maharam bar Barukh, cited in Mordekhai, Baba Kama 196 and Moshe Feinstein, *Iggerot Moshe,* Hoshen Mishpat II:69, sec. 2. For a summary of different views on the degree of certainty required for *rodef* to apply, see J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Contemporary Halakhic Problems IV,* Ktav Publishing House, 1995, pp. 84-86.

4. See Rav Meir Batiste, "Collective Punishment," *Crossroads: Halacha and the Modern World,* Vol. V, Zomet Institute, 1999, ibid. for others.

5. Batiste, ibid. p. 250.

6. The text reads: "R. Shimon b. Yohai taught: Kill the best of the non-Jews in times of war; crush the brain of the best of serpents. The most worthy of women indulges in witchcraft. Happy is he who does the will of the Omnipresent." The text includes many other broad generalizations not seen as having *halakhic* implications by later authorities: "A man should not teach his son to be an ass-driver, sailor, coachman, shepherd, or shopkeeper, because these occupations are robbery. R. Yehuda, however, quoting [Abba Guria] said: Ass-drivers are mostly wicked, but sailors are mostly pious. The best of physicians are [destined] for Hell and the most worthy of butchers is Amalek's partner. Bastards are mostly keen-witted, slaves are mostly arrogant," etc.

7. See Moshe Zemer, *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law,* Jewish Lights Publishing, 1999, pp. 206-210.

8. Ramban, *Hasahot haRamban L'Sefer Ha-Mitzvot,* Positive Commandment 5.

9. Mark C. Alexander, "Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings," *Arizona Law Review,* Winter 1997, p. 1190 and n. 155.

10. John H. Langbein,, "The Legal History of Torture," *Torture: A Collection,* ibid. p. 101.

11. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror,* Princeton University Press, 2004, p. 82.

12. Joseph Lelyveld, "Interrogating Ourselves," *New York Times Magazine,* June 12, 2005.

13. Tim Golden, "Army Faltered in Investigating Detainee Abuse," *New York Times*, May 22, 2005.

14. Dinah Pokempner, Dep. Gen. Counsel of Human Rights Watch, personal correspondence, Feb. 2005.

15. For a list of Army, FBI, and CIA agents who stress the inefficacy of torture, see: *http://www.amnestyusa.org/stoptorture/officersquotes.html.*

16. *Miranda v. Arizona* 384 US 436 (1966) and *Culombe v. Connecticut.*