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Confronting Evil: Terrorists, Torture, The Military and *Halakhah*

Dov S. Zakheim

Abstract: The international outcry and the rulings of both the United States Supreme Court and Britain's Law Lords regarding prisoner abuse have serious implications for Jews in the military, whether that of Israel, America, or elsewhere. The uncertainties relating to the actual information that might be gleaned from prisoners subjected to torture, and the likelihood that such abuses would generate both *hillul ha-shem* and *eivah*, the latter resulting in danger to Jews everywhere, militate against the use of torture in all but the most extreme circumstances. Only when it is absolutely clear that a prisoner possesses information that could result in the near-term loss of life, the so-called case of the "ticking bomb," is it arguable that prisoner abuse might be tolerated.

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On July 29, 2006, the Supreme Court of the United States handed down a landmark decision, *Hamdan v. Rumsfeld, Secretary of Defense et. al.*, holding that, contrary to orders handed down by the Bush Administration, the U.S. government was bound by the provisions of Geneva Conventions with respect to all terrorism suspects held in American custody.[1] The Court rejected an appeals court ruling that "the Conventions do not apply because Hamdan was captured during the war with al-Qaeda, which is not a convention signatory, and the conflict is distinct from the war with signatory Afghanistan." The Court then pointed out that "there is at least one provision of the Geneva Conventions that apply here even if the relevant conflict is not between signatories." Common Article 3, which appears in all four Conventions, provides that, "in a conflict not of an international character occurring within the territory of one of the High Contracting Parties [i.e. signatories] , each party to the conflict shall be bound to apply, as a minimum," provisions protecting "[p]ersons... placed *hors de combat* by...detention." It added that "Common Article 3...affords some minimal protection, falling short of full protection under the Conventions to individuals associated with neither a signatory nor even a non-signatory who are involved in a conflict 'in the territory of' a signatory."

The Court was addressing the constitutionality of special military tribunals that the Department of Defense had established. But in ruling that Common Article 3 governed the law of the United States, it also upheld the binding nature upon U.S. law of other provisions of that article which states, among other things, that "as a minimum," detainees shall "in all circumstances be treated humanely." Common Article 3 continues by explicitly prohibiting "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."[2]

The question of prisoner abuse continues to roil the United States, Britain and Israel in particular, as well as much of the rest of Europe, where it has been alleged that terrorists are being held and tortured in secret prisons. Reports by organizations such as Human Rights Watch and Amnesty International regularly accuse United States servicemen and women of prisoner abuse, while the photographs taken at Abu Ghraib prison, and reports of abuses at other prisons, have seriously tarnished America's reputation throughout the Middle East, and elsewhere.

Although in the first instance, halakhic decisors have addressed the issue of prisoner abuse as it affects the IDF, concerns about the extent to which such abuse might be permissible within a halakhic framework extend beyond Israel's military. Jews serve in America's armed forces, currently at ranks from the lowest levels to that of four-star general, the highest rank in today's American military. They also serve in the armed forces of Britain, France and other western countries. For them, it might be assumed that they must follow orders under their military's code of conduct—in America it is the Uniform Code of

[1] Supreme Court of the United States, *Hamdan v. Rumsfeld, Secretary of Defense et. al.*, http:www.supremecourtus.gov/opnions/05pdf/05-184.pdf, pp. 6-7.

[2] United Nations Office of the High Commissioner for Human Rights, *Geneva Convention relative to the Treatment of Prisoners of War: Adopted on 12 August 1949*, http:www.unhchr.ch/html/menu3/b/91.htm, pp. 1-2.

Military Justice,[3] instructions handed down by each of the armed services, as well as *dina de-malkhuta*, the law of the land.

Yet there are those who argue that "torture" can be defined narrowly, and that even the Supreme Court's decision may not rule out the types of treatment that some American (and British) forces have meted out to imprisoned terrorists.[4] In addition, some argue that that the Geneva Conventions do not really apply to terrorists. The Conventions presuppose the notion of "communality of combat," with prisoners of war being treated as "brothers-in arms...The Geneva Conventions codified practice as it had developed in the 18th century.

The principles of the Geneva Conventions were the product of the 'Western warrior ethos.'

The basic principles of the Geneva Conventions, which were only modified by later Conventions in the 1970s, were thus the product of the 'Western warrior ethos' as it had developed up to the point of the Conventions."[5] On the other hand, terrorists fight in very different ways from those that generated the ethic of the Geneva Conventions. Indeed, it is precisely because terrorists, who are far more willing to die than troops in Western armies, are viewed by troops in those armies as "an other that represents everything the West is not;"[6] they are "simply not legitimate actors....[they are] outside the standards of civilization."[7] As such, they should not be subject to the protections that the Conventions afford. In this regard, it is noteworthy that the United States is perceived as being especially prone to treating enemies as moral inferiors, since "America's great wars have been all-out wars against adversaries, to be treated as criminals and pursued until their total destruction."[8] Indeed, some American experts would continue to take a narrow interpretation of Common Article 3 of the Geneva Conventions, which would, in their view, permit behaviors that others would consider abuse.

Of course, Jews played no real part in the development of the "Western warrior ethos." Nor are they necessarily bound by Western notions of what lies within, or outside, the bounds of "civilized" behavior. Indeed, the so-called "American" notion that an enemy is criminal and

[3] Section 934, Article 134 of the UCMJ states that "all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial...and shall be punished at the discretion of that court."

[4] See *Statement of Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice Before the House Armed Services Committee, U.S. House of Representatives Concerning The Supreme Court's Decision In Hamdan V. Rumsfeld* (July 12, 2006), pp. 7-10; Eric Posner, "Apply the Golden Rule to al Qaeda?," *The Wall Street Journal* (July 15-16, 2006), p. A9; Joseph Margulies, "Wiggle Room on Cruelty," *Washington Post* (July 17, 2006), p. 15. It should be noted that the definition of what is a "terrorist" is not universal, nor is it the subject of agreement by specialists. Moreover, experts do not agree as to whether a terrorist is a criminal or an enemy combatant. There is more agreement as to what constitutes a "terrorist act." For a brief discussion by a leading academic, see Adam Roberts, "The 'War on Terror' in Historical Perspective," *Survival* 47 (Summer 2005), pp. 101-103. Roberts is Montague Burton Professor of International Relations at Oxford. See also James P. Terry, "Legal Aspects of Terrorism," in Trevor N. Dupuy, et. al., eds. *International Military and Defense Encyclopedia* (Washington, DC and New York: Brassey's, 1993), pp. 2732-34. For an attempt to fit terrorism and terrorists within a halakhic framework, see David Rosen, "Does Ariel Sharon Consult His R.?: How Israeli Responses to Terrorism Are Justified Under Jewish Law," http://www,jlaw.com/Articles.html, pp. 5-6, 24-25. Rosen acknowledges that his approach at times involves "broad interpretation of the Halakha" arguing that "desperate times require desperate measures" (p. 53). It is not at all clear, however, whether his definitions or premises are objectively valid, so as to justify his halakhic approach.

[5] Mikket Vedby Rasmussen. "The Prisoner's Reflection: Identity and Detainees in the 'War on Terrorism,'" in Bertil Heurlin, Kristian Soby Kristensen, Mikkel Vedby Rasmussen & Sten Rynning, eds., *New Roles of Military Forces: Global and Local Implications of the Revolution in Military Affairs* (Copenhagen: Danish Institute for International Affairs, 2003), pp. 220-221.

[6] *Ibid.* p. 223.

[7] *Ibid.*, p. 225.

[8] Gilles Adreani. "The 'War on Terror': Good Cause, Wrong Concept," *Survival* 46 (Winter 2004-2005), p. 35.

must be defeated until total destroyed is central to the Torah's attitude towards Amalek or the Seven Nations. Moreover, virtually all[9] decisors who have addressed questions relating to the activities of terrorists against the State of Israel appear to agree that terrorists are of an organized force that seeks the destruction of the State and the murder of Jews because they are Jews—hardly the limited military aims of "civilized" forces.

How then, should Jewish soldiers, whether in the IDF or elsewhere, comport themselves? Does *halakhah* mandate that the individual soldier adopt a broader definition of torture, and seek to avoid involvement in activities that could be interpreted as such? Or given that the provenance of the Geneva Conventions is not central to Judaism, and in light of the beastly nature of terrorists, is there no halakhic imperative to adopt any but the most narrow definition that *dina de-malkhuta* mandates, thereby permitting severe corporal treatment of prisoners?

How should Jewish soldiers, in the IDF or elsewhere, comport themselves?

For Jews the issue actually extends beyond those who serve in their nation's military. Because Judaism offers guidance to all mankind, a concept encapsulated in the phrase *or la-goyim* ("a light to the nations"), it is important to understand not only the halakhic ramifications of prisoner abuse, but also the degree to which such abuse is countenanced within the realm of Jewish *hashqafah* (*weltanschauung*) and values. This question is especially salient in Great Britain and the United States. In Britain, reports of military abuses prompted the Law Lords to rule that evidence obtained through torture is inadmissible. In the United States, apart from the Supreme Court's ruling, the Abu Ghraib and related scandals led to the passage of new, restrictive legislation in the Senate that specifically addressed torture and to which the President, after months of opposition, finally assented (though again there are those who would take a narrow view of the law).

The treatment of prisoners, especially those caught in the war on terror, has received relatively light treatment in halakhic literature. It is a subset of a much larger corpus of responsa that address a host of aspects emerging from Israel's war against Palestinian terrorists. It has been Israel's misfortune to have been engaged in a war on terror for decades before the term was coined, particularly in the aftermath of the Six Day War. As the violence has persisted over the years, the responsa literature relating to terrorism has grown accordingly to include, as noted, some discussion of the treatment of prisoners.

The Biblical and Talmudic Legal Context

"With the exception of the Black Death," writes Vladimir Bukovsky, who spent about a dozen years in Soviet prisons, labor camps and psychiatric hospitals, "torture is the oldest scourge on our planet."[10] The Torah is emphatic about the humane treatment of both Jews and non-Jews who are subject to any form of corporal punishment. It places a firm limit upon the number of lashes to be meted out to Jewish criminal offenders, regardless of the violation that they have committed. No one can receive more than thirty-nine lashes, "lest being flogged further, to excess, your brother be degraded before your eyes."[11] Seforno was quite graphic about the meaning of degradation: excessive lashes would cause the prisoner to wet or soil himself on account of the pain to which he was being subjected.

The Torah's concern for human dignity extends beyond the Jew's lifetime. It expressly prohibits allowing the corpse of a convicted blasphemer or

[9] I have been unable to find a single decisor who views terrorists as merely criminals. Adreani considers terrorists to be criminals: see *id.*, pp. 40-43. The author is Head of Policy Planning at the French Defense Ministry.

[10] Vladimir Bukovsky, "Torture's Long Shadow," *The Washington Post* (December 18, 2005), p. B1.

[11] Deuteronomy 25:3.

[12] Thus Nahmanides on Deuteronomy 21:22.

idolater[12] to remain hanging for any length of time. As Rashi points out, because man is made in the image of his Creator, to humiliate his body is to demean the heavenly King.[13]

While the Torah had less to say about the treatment of non-Jews, it did so in one very specific case, that of the *yefat to'ar*, the non-Jewish female prisoner of war who had been raped in the heat of battle.[14] The Torah was emphatic about the subsequent treatment of this woman. It specifies that if the soldier who brought her home elected not to marry her, she could not be sold as a slave or mistreated in a demeaning manner.[15] For those commentators and decisors who consider the first sexual encounter to have taken place prior to her conversion, it is clear that the biblical injunction applies to the *yefat to'ar* in her status as a non-Jew (*be-goyutah*).

This sensitivity to human dignity, even in the case of a captive non-Jewish female, stood in marked contrast to the behavior and attitudes of the rest of the ancient world. For example, the firm biblical limit on the number of lashes applied to a prisoner was unique among all ancient Near Eastern peoples and their legal codes.[16] Far more common were the practices of the Romans, whether as pre-Republican kingdom, Republic or Empire. At a time when the kingdoms of Judah and Israel were still functioning entities, Tullus Hostilius, one of the seven Roman kings who preceded the creation of the Roman Republic, ordered that a traitor should be "suspended by a rope from a gallows, he shall be scourged whether inside or outside the *pomerium*."[17] Death invariably followed. During the Republic, torture was used to corroborate a slave's testimony. The assumption underlying this practice was that slaves could not be trusted to reveal the truth voluntarily, and in this case the slaves were not killed. Nevertheless, the contrast with the biblical emphasis on protecting the slave from permanent bodily harm is profound.

To humiliate man's body is to demean the heavenly King.

During the Empire, capital crimes were often dealt with by means of torture prior to death. For example, it was decreed that "persons who are privy to the art of magic shall be...thrown to wild beast or crucified. The magicians themselves are burned alive."[18] In contrast, biblical and talmudic law stressed the importance of administering the death penalty with a minimum of anguish for the convicted criminal.

Physical Abuse Of Prisoners In Bible And Talmud

The Bible provides some accounts of the physical abuse of non-Jewish as well as Jewish prisoners. Such abuse was geared to humiliation and retribution. For example, Judges 1:6-7 recounts the story of King Adoni Bezeq, who, following the

[13] *Ibid.* 21:23.

[14] It is the consensus of many *halakhic* decisors that the *yefat to'ar* can be subject to involuntary intercourse, though only once, after which she must undergo a specific regimen prescribed in the Torah, conversion and marriage, before her captor is permitted further sexual relations with her. There is a dispute among *rishonim*, pre-sixteenth century decisors, regarding the venue of the initial sexual relationship. Some argue it can take place on the battlefield; others state it must take place elsewhere; still others maintain that relations on the battlefield prior to conversion can only take place with the woman's consent. There are others who are of the view that even the first sexual contact can only take place after the regimen, conversion and marriage. For a complete discussion see R. Shlomo Yosef Zevin, et. al., eds., *Intsiqlopediyah talmudit: le-inyanei halakhah*, Vol. 25 (Jerusalem: Talmudic Encycolpedia, 2002), especially columns 30- 34

[15] Deuteronomy 21: 10-13.

[16] Jeffrey H. Tigay, *JPS Torah Commentary: Deuteronomy* (Philadelphia & Jerusalem: Jewish Publication Society, 1996), p. 230.

[17] Cited in Naphtali Lewis and Meyer Reinhold, eds. *Roman Civilization: Sourcebook I: The Republic* (New York: Harper & Row, 1966), p. 62.

[18] Paulus, Opinions, cited in *Ibid.: Sourcebook II: The Empire*, p. 549.

[19] Yehuda Elitzur, *Da'at Miqra: Sefer Shofetim* (Jerusalem: Mosad Harav Kook, 1993), p. 8. Elitzur notes that the original practice was to slice off the right thumbs of the vanquished to prevent them from ever using a sword.

usual Canaanite practice,[19] would cut off the thumbs and big toes of the kings whom he had defeated and captured. When the soldiers of Judah defeated and captured him, they sliced off his own thumbs and large toes. The king himself acknowledged that he had suffered retribution for the humiliation that he had inflicted on others: "I had seventy kings, with thumbs and big toes removed, gathering (scraps) under my table; as I did so the Lord has repaid me."[20]

Similarly, in retribution against King Zedekiah of Judah for breaking his vow not to rebel against Babylonia, King Nebuchadnezzar blinded Zedekiah after first forcing him to watch the execution of his sons.[21] The *midrash* notes that watching his sons being put to death was a worse form of torture than being blinded himself.[22] Interestingly, both Adoni Bezeq's victims and Zedekiah both survived their ordeals, though Adoni Bezeq may have died from his injuries.[23]

The pain of lashes is more terrifying than death.

The *Bavli* discusses a form of torture for prisoners which actually relates to capital punishment. A multiple offender who was liable each time for the punishment of *karet* (premature death) can be placed in a "cramped cell that has no room for him either to stretch or lie down."[24] He is then fed bread and water until his stomach shrinks, and then barley and water until it bursts and he dies.[25] However, such a case appears to have been unusual in that the guilty individual would already have received lashes twice, and was sufficiently recidivist to have been deserving of lashes a third time.[26]

The *Bavli* also reflects upon torture and physical abuse with respect to the miraculous escape of Hananiah, Mishael and Azariah and the death of R. Akiva. Hananiah, Mishael and Azariah did not actually face torture, but rather were threatened with the death penalty if they did not worship Nebudchadnezzar's golden idol. Precisely because they were prepared to face death, Rav argues that if Hananiah, Mishael and Azariah had been subject to lashes they indeed would have worshipped the golden image that had been placed before them.[27] Since they were righteous men and were prepared to meet their death rather than commit idolatry, the Talmud infers that the pain of lashes, i.e. torture, is more terrifying to a prisoner than death.

In a case that *Tosafot* notes leads to the opposite conclusion (i.e., that torture does not bring about desired behavior on the part of a prisoner), the Talmud recounts R. Akiva's willingness to endure being raked by iron combs for publicly teaching Torah in the face of the Roman edict to the contrary. Although, he was tortured until he died in line with Roman practice noted above, R. Akiva never lost his composure or his faith. Indeed, he viewed his torture as an opportunity to fulfill the commandment of loving God "with all his soul" that otherwise would have eluded him.[28]

All of the aforementioned instances involve torture inflicted *upon* Jews. They do not address the question of torture inflicted *by* Jews upon others,

[20] Judges 1:5-6

[21] 2Kings 25:6-7; Jeremiah 52: 9-11.

[22] Dictum of R. Shimon. See *Yalkut Shim`oni*, Vol I : Section 735 (Jerusalem, n.p. 5740 [1980]), section 735, p. 480.

[23] Regarding Adoni Bezeq, see Judges, id. R. Yohanan states that Nebudchadnezzar predeceased Zedekiah, see *Mo`ed Qatan*, 28b

[24] *Sanhedrin* 81b.

[25] Charles J. Harary, "Incarceration as a Modality of Punishment," (http://www.jlaw.com/Articles/ch_incarceration.html), pp. 4-5.

[26] *Id.*

[27] 33b.

[28] *Berakhot* 61b.

[29] To be sure, the case of Adoni Bezeq does recount torture inflicted by Jews, but, as noted, the torture was intended as punishment rather than to obtain information or a behavioral change.

as was the case with respect to Adoni Bezeq.[29] While the issue might have been dealt with on a theoretical basis, as were so many other matters over the centuries, this does not appear to have been the case. It was with the establishment of the State of Israel that the treatment of prisoners became a salient halakhic matter.

As noted above, there has been relatively little *halakhic* discussion about the treatment of imprisoned terrorists. The literature has focused instead on two particular sets of issues relating to terrorists. The first involves responses to hostage-taking, a long-standing bane of Jewish existence that has evolved into a major form of terrorist activity—Israel re-invaded both Gaza and Lebanon in June-August 2006 in response to the taking of hostages by the terrorist organizations Hamas and Hezbollah. The second relates to questions of risk with respect to potential terrorist activity. Both sets of issues provide the context, as well as indications of some of the parameters, within which issues relating to the treatment of imprisoned terrorists might be evaluated.

Trading For Lives; Risking Lives

Among the earliest developments that prompted rabbinic discourse with respect to Israel's response to terrorism was the rash of hostage-taking—affecting Jewish civilians of various nationalities as well as Israeli soldiers—that first broke out in the early 1970's. Hostage-taking is nothing new to the Jewish community. For centuries, indeed, as far back as talmudic times, Jews found themselves confronting demands both to hand over an individual Jew to forestall the extermination of an entire Jewish community or to pay exorbitant sums for the release of their imprisoned rabbi and leaders (*pidyon shevuyim*). The talmudic ruling was unequivocal, and set the pattern for future behavior on the part of Jewish communities everywhere: "We do not redeem captives for more than their value. This is an enactment for the protection of society."[30] The primary rationales given for this ruling were that excessive payment for any individual might impoverish the community and that redemption would encourage yet more hostage-taking. The majority of authorities adopted the latter reason: captives should not be redeemed for more than their value so as to discourage future abductions.[31] This rule was circumvented only in limited circumstances, such as the redemption of one's wife, or by particular communities in special circumstances.[32]

With the State of Israel, the treatment of prisoners became a salient halakhic matter

The taking of hostages by Palestinian terrorists differed from the classic question of freeing Jewish prisoners in a number of respects. First, the State of Israel possessed a powerful military that had the ability to free the hostage by force. The key issue in the context of such operations was that of collateral damage—whether the attempt to free hostages was worth the risk both to the hostages

[30] *Gittin* 45a.

[31] R. Avraham I. Halevi Kilav, "Releasing Terrorists," trans. R. Ezra Bick, in Ezra Rosenfeld, ed. *Crossroads: Halacha and the Modern World*, Vol. I (Alon Shvut: Zomet, 1987), pp. 207, 209. R. Kilav cites two views regarding the determination of value. According to Maharam Lublin, it remains the Mishnaic standard in *Gittin*, namely, the value that an individual is worth in a place where the slave trade exists. According to Radbaz, value is determined by the prevailing accepted cost to ransom non-Jewish captives. R. Kilav then asserts that "if the terrorists demand more people than is *common practice* [my italics], it will be forbidden according to all opinions. In fact, there is no "common practice." Demand is a function of a variety of factors, which, in the aggregate, represent the bargaining power of the terrorists' sponsors or commanders.

[32] See Maharshal's praise of the Jewish community of Turkey (*Yam shel Shelomoh*, on *Gittin* 45a, section 66). Maharshal noted, however, that Maharam of Rothenberg refused to be redeemed, because it would encourage the practice of taking scholars hostage. Indeed, Maharshal notes he heard that Maharam's captor, presumably Emperor Rudolph I, was planning the abduction of Maharshal's greatest student, the Rosh. As a result of this threat, Maharam concluded that not only would the community be totally impoverished but that "Torah would be forgotten in Israel." For a discussion of the various positions taken by decisors with respect to redemption of one's wife see Kilav, "Releasing Terrorists," pp. 202-206.

themselves and to the soldiers attempting to free them.

Second, terrorists did not necessarily take hostages for monetary gain. More frequently it was to force the release of their confreres from Israeli jails. At issue, therefore, was the risk that releasing terrorists, and particularly the large numbers that the hostage-takers demanded in exchange for a small number of hostages, would encourage their organizations to take even more hostages in the future. Moreover, there was the risk that the very terrorists who were released might strike again against Israeli military and civilian targets. Finally, if the hostages in question were members of the Israel Defense Forces, there was the question of whether the state had a special obligation to free them regardless of cost, because they were acting on the State's orders.

The issue of whether to risk the lives of hostages, and of the troops attempting to rescue them, gained special prominence in the context of the Entebbe Operation of July 4, 1976. R. Ovadia Yosef addressed the question in a lengthy responsum that he had begun to write prior to the rescue but did not complete until after the military operation had taken place.[33] Citing the classic Talmudic ruling that it was permitted to violate the Sabbath in order to deter an attack planned by gentiles against Judaean cities,[34] R. Yosef considered hostage-taking to be a threat to the State itself. Moreover, R. Yosef contended that numerous scholars including Maimonides[35] and R. Joseph Karo[36] had argued that the talmudic ruling applied even if there were only a potential danger to life (*safeiq nefashot*). As a consequence, R. Yosef asserted that in the case of the Ugandan hostage crisis, where life was no doubt at risk, the planned rescue was permitted "as long as the operation was sufficiently well-planned by military experts so that it was almost certain that God would grant them success."[37] R. Yosef did not rule out "surprises," i.e., he recognized that no planned operation could guarantee success, nor did he discount the likelihood of casualties. He acknowledged that there was danger attendant upon all military combat. Nevertheless, he ruled that such danger did not override the imperative to carry out a rescue operation.

The threat to the hostages was immediate, while the threat posed by the terrorists was less certain.

Although he argued that the rescue operation was permissible, R. Yosef had been prepared to support the release of the hostages in exchange for the four Palestinian prisoners demanded by the terrorists. In his view, the threat to the lives of the hostages was immediate, while the threat posed by the released terrorists was longer term and less certain.[38] Indeed, he felt that there was no certainty that "the released terrorists would return to their murderous activities in Israel after they had suffered for their evil intentions."[39]

However R. Yosef's ruling regarding the release of terrorists provoked both dissent and criticism. R. J. David Bleich argued that R. Yosef "ignores the fact that the release of terrorists in order to save the lives of hostages is not the act of a third party who is himself free of danger. The government officials and the citizens who must release the imprisoned guerrillas are themselves among the potential victims of possible terrorist activity."[40] In fact, R. Yosef clearly did recognize the danger to the community—of which the government is most certainly a part. Rather, in weighing the need to

[33] Ovadia Yosef, *Responsa Yabia Omer*, Vol. X (Jerusalem: Me'or Yisrael Institute, 5764/2004), p. 471-83.

[34] *Eruvin* 45a.

[35] *Mishneh Torah,Hilchot Shabbat*, 2:23.

[36] *Kesef Mishnah* ad loc, note 24, "*Ve-afilu.*"

[37] R. Yosef, above, n. 33, p. 483.

[38] *Id.*, pp. 473, 479

[39] *Id.*, p. 474.

[40] J. David Bleich, *Contemporary Halachic Problems*, Vol. II (New York: Yeshiva University/Ktav, 1983), pp. 225.

eliminate the clear and present danger to the hostages against the uncertain likelihood of future terrorist attacks at some unspecified time, R. Yosef opted for the more urgent demand. [41]

In an argument akin to that of R. Bleich, R.Shlomo Goren made a powerful case against the May 20, 1985 release of 1150 imprisoned terrorists in exchange for three Israeli soldiers held by Ahmad Jibril's Popular Front for the Liberation of Palestine. Basing himself on rulings by Maimonides, Nahmanides, Rashba, Me'iri and the *Shulhan Arukh* among others, R. Goren argued that the "price" of the exchange was exorbitant even if the hostages' lives were in danger.[42] Moreover, he asserted that even *Tosefot,* who appeared to tolerate an excessive payment for a hostage, would not do so in the case where the price involved not money but rather the release of terrorists who could further endanger the community.[43] Nevertheless, in spite of the case he had made, R. Goren felt that the fact that the hostages were Israeli soldiers represented a special circumstance: the State had an obligation to free those who were captured in the course of carrying out its orders, regardless of cost.[44] It can be inferred, however, that in the case of the Entebbe hostage-taking, he, like R. Bleich, would not have supported yielding to the terrorists' demands.

Not all rabbis followed R. Goren in distinguishing between releasing terrorists to secure the freedom of military hostages and doing so to free civilians. For example, R. Avraham Kilav argued that the prohibition against releasing terrorists in exchange for hostages was all-encompassing. He asserted that "we are in a continual state of war with the terrorists, and it is a principle of war that we do not allow danger to soldiers to be an overwhelming factor in military decisions."[45] To support his view, he cited Nahmanides' commentary on Deuteronomy that discusses conditions in which those afraid of death are dismissed from the ranks of the fighting force.[46]

Yet that very discussion in Deuteronomy points to a very real concern about soldiers' morale, and the impact of an individual's skittishness upon the psychology of his military unit. As the Torah puts it: "Let him go back to his home lest the courage of his comrades flag like his" (literally, that he should not soften the hearts of his brothers as his heart [has softened]."[47] The Torah's dictum is one that has been widely accepted in all militaries for millennia.

Military leaders have seen high morale not only as a characteristic of successful fighting troops, but as a major cause of that success.

It was recognition of the compelling importance of troop morale, and its impact upon force effectiveness, that impelled R. Yuval Sherlow to permit the exchange of four hundred prisoners for three soldiers held hostage. R. Sherlow acknowledged that, in principle, *halakhah* forbids such exchanges even when life is endangered because of the future danger that the freeing of terrorists would engender. In that regard he appeared to reject R. Yosef's hypothesis that prison would alter the terrorists' behavior and instead seemed inclined to adopt R. Bleich's position. Nevertheless, in R. Sherlow's view what ultimately mattered was not only the unique status

[41] R. Yosef, *op. cit.*, p. 473.

[42] R. Shlomo Goren, *Sefer Torat ha-Medinah* (Jerusalem: Idra Rabba, 1996), pp. 426-27, 31-32.

[43] *Id.*, pp. 434-35. R. Goren argued that the only solution was to impose the death penalty on terrorists; his advice has not been heeded.

[44] *Id.*, pp. 435-36.

[45] Kilav, "Releasing Terrorists," p. 210.

[46] *Id.* R. Kilav does not cite chapter and verse. It appears he is referring to Nahmanides' statement that "in the natural course of things in all wars people die even among the victors" (on Deuteronomy 20: 5)

[47] *Id.* 20: 8.

of the armed forces as agents of the State, as R. Goren had postulated, but, equally important, the necessity "to protect the future morale of the military."[48]

R. Sherlow's rationale reflects modern military analysis in general and the nature of the IDF in particular, and it goes to the heart of what it takes to have an effective military. It is not merely that the State has an obligation to its troops, as R. Goren postulated. Rather, "military leaders have long seen high morale not only as a characteristic of successful fighting troops, but as a major cause of that success."[49] This recognition has grown markedly in recent years, especially since the World War II victories of British Field Marshals Montgomery, Slim and Wavell.[50] Morale is especially crucial to the performance of the IDF, which has a small standing army and is outnumbered by its potential enemies.[51] Thus, for the military to continue to function as an effective fighting force, it is critical that everything be done to preserve both individual and unit morale, including making exceptions to what *halakhah* appears to mandate under other circumstances.

Whether a released terrorist will resume his or her violent behavior comes into play when evaluating the permissibility of prisoner abuse

The rulings by Rabbis Goren and Sherlow clearly indicate that circumstances relating to terrorists may be unique, particularly when they involve the military. The obligation to provide for the military differs from the obligations affecting ordinary citizens, and the need to ensure that military morale remains high can trump considerations that might apply in other circumstances. These factors, as will be shown, also affect evaluation of the permissibility of torture when imprisoned terrorists are involved.

R. Eliashiv's Rulings and the Risks Posed by Terrorists

R. Ovadia Yosef's view that priority should be given to dealing with an immediate threat over a potential future threat has drawn important support in a more recent case that was brought to the attention of R. Sholom Yosef Eliashiv. R. Eliashiv, currently recognized as the leading halakhic decisor for the *Haredi* community, was asked to comment on a case involving two guards, one of whom who had been seriously wounded by a terrorist. The terrorist then disappeared into an adjacent Jewish settlement. The soldier who had not been hit had to make a most difficult choice: should he remain in place and attend to his wounded comrade, or should he pursue the terrorist, who might wreak havoc in the Israeli township and leave his partner to die?

R. Eliashiv ruled that the unscathed soldier should remain behind to attend to the wounded guard. The latter's life was clearly in danger and it was imperative to save him. On the other hand, a number of factors rendered the danger to the community considerably less than certain and otherwise warranted tending first to the wounded soldier.

First, it was not at all clear that the soldier would apprehend the terrorist even if he gave chase. In the meantime his comrade would die. Moreover, even if he were to find and confront the terrorist, the terrorist might kill him first. In addition, there were other security forces that were pursuing the terrorist to apprehend him. On the other hand, no one but the healthy guard could save the wounded soldier. Finally, it was uncertain whether the

[48] Moreshet, "*She'eilot Uteshuvot* On Line," http://www.moreseht.co.il/web/shut2.asp?id=31319. It is noteworthy that R. Shlomo Zalman Auerbach permitted soldiers even to risk their lives to retrieve their dead comrades due to the negative impact on their morale should they conclude that they too would be abandoned if they perished on the battlefield. Cited in R. Yehuda Zoldan, "*Histakenut Le-Tzorech Hava'at Hallelei Milhamah Li-Qevurah*," *Tehumin* 25 (5765/2005), p. 424.

[49] Frederick J. Manning, "Morale," in Dupuy, et. al. eds., *International Military and Defense Encyclopedia*, p. 1858.

[50] For an extended discussion see Reuven Gal, "Unit Cohesion," in *id.*, pp. 2821-25.

[51] Dr. Gal was director of the Israeli Institute of Military Studies.

terrorist would actually kill anyone else—an assumption that underlay R. Bleich's critique of R. Yosef.[52] As will be outlined below, the critical question of whether it should be assumed that a released terrorist will resume his or her violent behavior comes into play when evaluating the permissibility of prisoner abuse.

On another occasion, R. Elyashiv was asked whether it was permissible to kill a suspicious-looking character who might be a suicide bomber. The case in question involved a bus driver whose route through the Jordan Valley had been subject to terrorist attacks. A man attempting to board the bus displayed behavior patterns attributable to a suicide bomber. Could the driver shoot to kill?

How do you make a prisoner talk if you do not torture him?

R. Elyashiv responded that unless the driver was certain beyond any shadow of doubt that the putative passenger was not Jewish, he was not permitted to kill him. The driver would be permitted to wound the would-be assailant, even if it appeared that he might be Jewish, if the suspect's behavior truly provided a basis for the driver to conclude that he might be a suicide bomber.[53] If, however, there was an insufficient basis for suspecting that the man boarding the bus was a suicide bomber, he could not be physically harmed.

R. Eliashiv's rulings clearly indicate that one must account for any elements of doubt (*safeiq*) that might affect responses by the military or civilians to potential or actual terrorists and their activities. In particular, his ruling regarding terrorist recidivism raises important questions about the assumptions that might be made when interrogating imprisoned terrorists. While the *sfeiqot* themselves can be said to apply only to the particular cases he addressed, R. Eliashiv's evocation of the principle of accounting for doubt has important implications for evaluating the military utility of harsh treatment of prisoners. These will be addressed below.

Is Physical Abuse Permitted In Jewish Law?

The treatment of imprisoned terrorists poses a special challenge for *halakhah*. It views terrorists as a particularly noxious enemy; even R. Yosef, who appears to hold out hope for a terrorist's rehabilitation, nevertheless is prepared to circumvent a number of statutes to prevent terrorists from taking lives.[54] Moreover, the status of prison itself is ambiguous in Jewish law.[55] Finally, what *halakhah* might mandate with respect to killing terrorists may not be directly applicable to situations where they are imprisoned and subject to harsh interrogation. Nevertheless, a number of the foregoing considerations regarding both the nature and context of responses to terrorist activities and the framework for responding to potential acts of terror, whose certainty cannot be forecast, could affect the calculus of whether and under what circumstances the physical abuse of imprisoned terrorists might be permissible in Jewish law.

There is no doubt that, over the centuries, many have seriously asked, as a leading Iraqi notable told a member of the short-lived (2003-2004) Coalition Provisional Authority, "how do you make a prisoner talk if you do not torture him?"[56] Yet, as a first principle, it is clear that wanton abuse is not permitted by *halakhah* under any circumstances. R. Sherlow asserts that the blanket prohibition on such abuse, and indeed, the guiding principles for

[52] Yosef, *op. cit.*, p. 473.

[53] *Id.*

[54] See *Responsa Yehaveh Da`at* vol. 5, no. 55 (Jerusalem: 5743/1983), where R. Yosef permits female teachers to bear arms, and even dress like men, in order to forestall terrorist attacks.

[55] See R. Sholom D. Lipskar, "A Torah Perspective on Incarceration as a Modality of Punishment and Rehabilitation, "*Jewish Law Articles*, http://www.jlaw.com/Articles/PrisonerRights.html), and Harary, "Incarceration".

[56] Rory Stewart, *The Prince of the Marshes: And Other Occupational Hazards of a Year in Iraq* (New York: Harcourt, 2006).

the treatment of prisoners, derive from the biblical laws of *yefat to'ar*, the so-called "beautiful captive" discussed above and described in Deuteronomy chapter 21.[57]

Turning to the question of a prisoner who might possess valuable information related to the nation's security, R. Sherlow then adds that if such information might save lives, there is no doubt that the prisoner can be subjected to maximal pressure. Even so, R. Sherlow delimits just what is meant by such pressure: "Of course we are commanded to deal with every individual with due respect, and it is explicitly forbidden to degrade him, since it is written, "precious is the man who was created in God's image." [58]

At first blush, R. Sherlow's guidelines appear to be internally inconsistent. How can so-called "maximal pressure" be applied even as a man is "respected"? The answer, of course, is that degradation, whether through extreme physical abuse or even along the lines of the now-notorious photos associated with the treatment of prisoners at Iraq's Abu Ghraib prison is simply not permitted. Indeed, Vladimir Bukovsky's experience sheds light on the acceptable limits of "maximal pressure." Bukovsky, the former Soviet prisoner, notes

The distinction between torture and CID is ridiculous.

that the practices lumped together in the more frequently used term, "cruel, inhumane or degrading (CID) treatment" (which some policy makers seem prepared to tolerate at least to some degree and which could be confused with "maximal pressure") is no different from torture pure and simple. "As someone who has been on the receiving end of the 'treatment' under discussion," he writes," let me tell you that trying to make a distinction between torture and CID techniques is ridiculous."[59] "Maximal pressure" must therefore be something less than CID, since it is difficult to argue with someone who been at the receiving end of CID that it somehow is not torture. Bukovsky and others have pointed out that CID seeks to destroy self-respect and human dignity.

Considerations of human dignity do not exhaust the bounds of what might be permissible during prisoner interrogations. To begin with, there is the question of dealing with uncertainty (as opposed to the "ticking bomb", which will be discussed below). It was uncertainty about the future behavior of imprisoned terrorist suspects that prompted both R. Yosef's ruling regarding prisoner exchanges and R. Eliashiv's ruling with respect to the wounded soldier and the escaping terrorist. Of course, those rulings address a different set of circumstances. Nevertheless, given the biblical injunctions against degrading even the idolater, the question of uncertainty must be addressed when contemplating the use of physical pressure against a putative terrorist.

It is arguable that in the case of a prisoner who might be the source of vital intelligence regarding future terrorist attacks, a number of uncertainties could militate against pressure of any kind, much less "maximal pressure." Such pressure could have the opposite of its intended effect, i.e., that the desired intelligence would *not* be obtained, or worse still, as will be discussed below, that it would serve as a rallying cry for new recruits to the terrorist cause. Thus, while the uncertainties in question are not identical to those cited by Rabbis Yosef and Eliashiv, the principle underlying them—maximal protection of Jewish lives—is identical.

Those in charge of extracting information from a prisoner who is a presumed terrorist first must demonstrate a real basis for assuming that he/she possesses information that can help foil a future

[57] Deuteronomy 21:18.

[58] Moreshet, "*She'eilot Uteshuvot* On Line," http://www.moreshet.co.il/web/shut2.asp?id=16652

[59] Bukovsky, "Torture's Long Shadow," p. B1. It is noteworthy that the NKVD was succeeded by the now better-known KGB and was preceded by the czar's *Okhrana*. Torture was a standard *modus operandi* for all three organizations.

terrorist attack. It has often been found that, in fact, some prisoners who are arrested as part of large sweeps prove to be only innocent victims of circumstance: They were merely in the wrong place at the wrong time

Moreover, even if those captured are known terrorists, they may simply be foot soldiers in organizations that have become increasingly highly compartmented. In other words, such prisoners may never have had access to plans or information of any kind other than for the particular attack they undertook and in the course of which they were captured. It is to these sorts of prisoners that R. Yosef most likely refers when he speaks of the reforming nature of prison.

Terrorists train themselves to provide false or misleading information

Second, if the prisoner does possess information about future plans or attacks, it is not always clear that he or she will actually provide it, even when faced with the prospect of torture or undergoing torture. It is well known that terrorists train themselves (as do key individuals in the armed forces of the West) to provide false or misleading information when subjected to forcible means of interrogation.

As the above-noted case of R. Akiva and those of others of his fellow *asarah harugei malkhut* (the ten great rabbinic martyrs) indicate, torture is an ineffective means of breaking a prisoner's will. Moreover, with respect to the talmudic assertion that Hananiah, Mishael and Azariah preferred death to torture, and, if confronted with the latter, would have worshipped Nebuchadnezzar's idol, *Tosafot* argue that they would have contemplated doing so only because the statue was really meant to honor the king, rather than a deity. Had it been a true idol, *Tosafot* assert, they, like R. Akiva, would have been impervious to the suffering inflicted upon them.[60] Such behavior is analogous to that of prisoners who provide misleading information to avoid torture; after all, the Babylonians would have assumed the three righteous men were at last capitulating, when in fact their behavior (much like those of the *conversos* in Spain two millennia later) was an insincere artifice.

Third, even if there were some way to ensure that whatever information a prisoner volunteered under duress would prove to be true, that information might not embody what is termed "actionable intelligence." That is to say, the information might not be of any use in foiling a future attack. Indeed, former American prisoners of war, such as Tom Moe and Senator John McCain argue that, as Senator McCain has put it, "abuse of prisoners often produces bad intelligence because under torture a person will say anything he thinks his captors want to hear—whether it is true or false—if he believes it will relive his suffering."[61] Senator McCain recalls that when "physically coerced to provide my enemies with the names of the members of my flight squadron, *information that had little if any value to my enemies as actionable intelligence* [my emphasis]...I gave them the names of the Green Bay Packers' offensive line."[62]

Moreover, circumstances might have changed since the terrorist was caught and incarcerated and an attack might no longer be imminent. Indeed, circumstances might have changed *precisely because* that terrorist was caught. Such a development would be akin to R. Eliashiv's surmise that, for whatever reason, an escaped terrorist might not kill again.

Alternatively, the intelligence might not be actionable because it is not timely. This might be due to several factors. For example, the terrorist's parent organization may have revised its plans prior to, or during, the terrorist's capture, but also prior to his or her being aware of a change of plans. Whatever the reason, the information provided by the terrorist would prove to have been

[60] *Tosafot* acknowledges that the text in Daniel appears to refer to a real idol, but does not modify the basic argument.

[61] Senator John McCain, "Torture's Terrible Toll," *Newsweek* (November 21, 2005).

[62] *Id.*

made available too late to prevent another terrorist attack.

It is arguable that unless all of the foregoing uncertainties can be disposed of, R. Sherlow's legitimation of the use of maximal pressure may not be applicable. For that sort of pressure is meant to yield something useful, and it is not at all clear that anything useful will be forthcoming. On the contrary, it is the view of senior intelligence specialists that it is far more effective to engage a suspect rather than physically pressure him or her in order to obtain critical information necessary to forestall future attacks.[63] This is particularly the case with respect to hardened terrorists who have undergone rigorous training and therefore behave more like professional military people. As Charles Zuhoski, another former prisoner of war, who, like John McCain was a Navy pilot shot down over Vietnam, recalled: "people were always ready to sign confessions under torture, but nobody provided real information that could be used. We learned how to lie."[64] So do terrorists in their training camps.[65]

War is an area of modern social behavior that ethics as a discipline has failed to successfully regulate.

A second set of considerations arises from the possibility that physical abuse could lead to the death of a prisoner. This has allegedly been the case on a number of occasions during the Iraq insurgency, all of which are currently under investigation. R. Shlomo Goren, citing the biblical case of Simon and Levi's attack on the men of Shekhem, as well as the behavior of the kings of Israel, argues that there is a "moral imperative appropriate to questions of human life, even in the cases of non-Jews or idolaters."[66] The "teaching of the pious" is based on the divine attribute of mercy, which should be followed even during war, even if it contradicts the attribute of law."[67]

Similarly, R. Michael Broyde has written that "frequently Jewish law will conclude that certain activity is completely legal, but is not ethically correct." He adds that war is an area of modern social behavior that "ethics as a discipline has failed to successfully regulate" and that it is forbidden to "use more force than is minimally needed."[68] While R. Broyde's latter observation could apply in the case of almost all imprisoned terrorists, his view and that of R. Goren would appear to apply most directly to cases where a purported terrorist might actually be the victim of a larger "sweep," or might be a "foot soldier" who might well change his ways upon release from prison.

R. Yehuda H. Henkin argues that killing a bound or chained prisoner is a *hillul ha-Shem*—a desecration of God's name. He offers two distinct reasons for his ruling. First, the international community might not understand that a seemingly odious practice was permitted under Jewish law. As an example, he cites the case of Joshua's decision not to kill the Gibeonites after they tricked him into signing a treaty with them. R. Henkin observes that, strictly speaking, the Gibeonites, as one of the Seven Nations of Canaan, should have been subject to extermination. Nevertheless, he asserts,

[63] Interview with a former Director of the National Security Agency, September 2005

[64] Interview with author, August 2006

[65] In this regard, they differ from ordinary criminals who might crack under pressure from police interrogators.

[66] It would seem that there is a contrary biblical example, i.e., Samuel's execution of the Amalekite king, Agag. But it is arguable that the treatment of Agag cannot be a precedent for relations with other nations since Jews are commanded to exterminate all Amalekites. Samuel was therefore simply implementing a death penalty that should have been carried out on the battlefield.

[67] See R. Shlomo Goren, "Combat Morality and the *Halacha*,"in Rosenfeld, ed. *Crossroads*, Vol. I, pp. 223- 226 (the quotation is from p. 225), and p. 231.

[68] Michael J. Broyde, "Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition," *Jewish Law Articles* (http://www.jlaw.com/Articles/war1.html), p. 2 and *id.*, (http://www.jlaw.com/Articles/war3.html), p.1.

Joshua was motivated by a concern for protecting God's good name. He therefore avoided taking extreme measures against the Gibeonites because "other idolaters would erroneously believe that Israel violated its treaty, even if it did not actually do so."[69]

R. Henkin then proceeds to describe a second category of desecration of God's name. In this case, the international community may understand that certain actions or practices are permitted to Jews. Nevertheless, if that community derides the practice in question, that too constitutes a *hillul ha-Shem*. R. Henkin cites Rabban Gamliel's ruling that it is prohibited to rob an idolater even under circumstances in which Jewish law might permit such behavior so as to prevent idolaters from besmirching the Torah by terming it "shoddy."[7]

While R. Henkin focuses on killing a bound or restrained prisoner, he notes more generally that there certainly is an issue of *hillul ha-Shem* with respect to any sort of practice that evokes universal condemnation by "the nations, their scholars and their governments."[71] As noted at the outset of this essay, torture has been banned by the Geneva Conventions. It also has been proscribed by numerous international human rights treaties, as well as the 1984 United Nations Convention Against Torture. Israel is a signatory to several of these agreements, including the 1984 Convention, whose first article 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.[72]

It is therefore arguable that not only physical abuse that might lead to death, but *any* form of abuse that violates internationally recognized (and ratified) standards of behavior outlined in international conventions to which Israel is a signatory, could also be banned on the grounds of *hillul ha-Shem* and on the basis of *dina de-malkhuta dina*, since in signing the Convention Israel adopted it as part of its own laws to which its soldiers must conform.[73]

There is an issue of hillul ha-Shem *regarding any practice that evokes universal condemnation.*

R. Henkin is not the first to argue that injuring a Gentile amounts to *hillul ha-Shem*. As Chief Rabbi of Israel, R. Yitzchak Halevi Herzog stated bluntly that "in a case of *hillul ha-Shem* it is certainly forbidden to injure a gentile. This [*hillul ha-Shem*] is the most severe prohibition, punishable only by death."[74] R. Herzog extended this principle even to the case of financial harm, "in contemporary times

[69] Yehuda Herzl Henkin, *Responsa Bnei Banim* Vol. III (Jerusalem, 1997), p. 193.

[70] *Id., p. 194.*

[71] *Id.*

[72] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When ratifying the Convention, Israel made declaration, under Article 28, that it did not recognize the competence of the Committee against Torture to investigate allegations of widespread torture within its boundaries.

[73] Although there was a serious halakhic dispute regarding the permissibility of disobeying orders to uproot Jewish families from Gaza, that was an entirely different issue that went to the heart of a soldiers' religious beliefs. It would be difficult to posit that even the most vociferous advocates of resisting orders with respect to the Gaza withdrawal would argue that a soldier could violate Israeli law against torture because of his religious beliefs.

[74] Itamar Warhaftig, "R. Herzog's Approach to Modernity," in Moshe Z. Sokol, ed., *Engaging Modernity: Rabbinic Leaders and the Challenge of the Twentieth Century* (Northvale, NJ: Jason Aronson, 1997), p. 287.

[75] *Id.*

when all financial interaction is public knowledge."[75] Moreover, following R. Herzog's logic, physical harm of a gentile, which violated Israel's solemn international undertakings, likewise could not be assumed to remain hidden from public view for long; it too would therefore qualify as a blatant *ḥillul ha-Shem*. Importantly, R. Herzog specified that his prohibition applied especially to Christians and Muslims, as the terrorists Israel and the West face are overwhelmingly Muslim and occasionally Christian.[76]

Prisoner abuse also runs afoul of another principle, that of *eivah*, or the incitement of hostility against Jews. As in the case of *ḥillul ha-Shem*, the need to avoid *eivah* can, according to some views, override biblical prohibitions such as those related to the Sabbath.[77] Moreover, like *ḥillul ha-Shem*, practices that outrage non-Jews can generate universal condemnation and hostility in today's era of instantaneous communications.[78] As Professor Rosemary Foot writes, "it has become a cliché that communication technologies now make it far harder to hide evidence of abuse; ease and speed of transportation and communication make it possible for a wide audience to know what is going on inside particular countries."[79] Reports of such abuse would be, indeed are, telecast and re–telecast not only on stations such as al-Jazeera and al-Arabiya, but on international cable networks throughout the world, further stoking hatred against its perpetrators. The threat of reprisals would not be limited to Israel alone, but could take place wherever Jews can be found.[80]

These *halakhic* observations, as well as the importance of taking account of any *sfeiqot* that would militate against the use of torture, are consistent with historical analysis of the uncertain utility of harsh measures against imprisoned terrorists. Such analysis indicates that the uncertainties inherent in mistreating prisoners who may not, in fact, be leading terrorists or useful sources of information create an additional major problem: They "tend to create martyrs and to give nourishment to the terrorist campaign."[81] This observation would, of course, apply even more strongly in the event of a prisoner's death as a result of abusive treatment. In other words, not only would the mistreatment of prisoners prove ineffective in pursuing operations against them; it actually would be counterproductive, creating new dangers to more lives.

Halakhic observations are consistent with historical analysis of the uncertain utility of harsh measures against imprisoned terrorists.

On the other hand, states that recognized the inherent risks that mistreatment of prisoners posed for their overall objectives against terrorism, and reversed course as a result, found more success in meeting those objectives. As Adam Roberts has argued, "those who suggest that humane treatment is a relatively unimportant issue—and those...who argue that torturing prisoners is a way to combat terrorism—do need to address the criticism that ill-treatment and torture have in the past provided purported justifications for the resort to terrorism,

[76] *Id.* See also Harav Yaakov H. Charlap, "*Ḥillul ha-Shem ke-gorem bi-Pesiqat Halaḥah*," *Teḥumin* 25 (5765/2005), especially pp. 392-98.

[77] Rashba, cited in Yisrael Meir Lau, *Yaḥel Yisra'el* Vol. II, 3rd ed. (Jerusalem: 1994), p. 377, argues that it a Jewish doctor or midwife may violate the Sabbath to help a non-Jewess give birth because of the potential *eivah* resulting from a failure to do so. *Eivah* could engender life-threatening hostility, and even a possible threat to life is sufficient to justify a Sabbath violation.

[78] It may be argued that condemnation of Jewish practices such as *milah* or *sheḥitah* would not serve as a reason for their abandonment, and that condemnation of torture might likewise be ignored. The harsh treatment of non-Jewish prisoners differs in two major respects, however: First, it is not inherent to the Jewish religion. Second, it affects non-Jews directly in a way that *milah* and *sheḥitah* do not. A good summary discussion of *eivah* may be found in the *Intsiqlopediyah Talmudit*, vol. I, cols. 488ff.

[79] Rosemary Foot, "Human Rights in Conflict," *Survival* 48 (Autumn 2006), p. 115.

[80] *Id.*, p. 378. R. Lau notes that R. Shlomo Zalman Auerbach agreed with his view.

[81] Roberts, "The 'War on Terror,'" p. 111.

and also discredited the anti-terrorist cause."[82] Ultimately, he concludes, "the torture and ill-treatment of detainees...is, to quote Talleyrand, worse than a crime: it is a mistake."[83]

The "Ticking Bomb"

It is clear that there is a strong halakhic case against any form of abuse of prisoners in all but the most isolated of instances. In the first place, as the case of the suspicious character boarding the Jordan Valley bus demonstrates, *halakhah* proscribes killing anyone who is not actually caught committing an act of terror. Moreover, unless a prisoner is known to possess accurate, timely and actionable information, one must account for the mitigating impact of uncertainties surrounding the prisoner's value as an intelligence source. Third, the abuse, much less the death, of a prisoner would create a *hillul ha-shem* and generate *eivah*, with its concomitant threat to the Jewish community worldwide.

But what of the "ticking bomb?" Do the foregoing considerations apply to a prisoner who is known to have accurate, timely, and actionable information that, if revealed to his captors, could prevent an imminent terrorist attack? A number of secular experts argue that even in this case torture will prove of little use. The premise underlying the use of torture is that it is an effective means of eliciting information. Critics of torture would argue that even in the case of a "ticking bomb," terrorists undergoing torture will ensure that they do not reveal critical information to their captors.

As noted above, that is exactly what Senator McCain said he did. Similarly, former prisoner of war Tom Moe recalls that when severely beaten he tried to buy time: "I had to get out of the ropes, collect my thoughts and still do nothing, and perhaps muster a bit more strength to still do nothing or at least moderate what would happen."[84] By the time he was ready to confess, he had been beaten to near death and his captors decided he was no longer worth the trouble. In the meantime, however, he had wasted a lot of their time. If a bomb were ticking, the kind of resistance he and Senator McCain displayed would certainly have made it impossible for their captors to respond to the planned incident in a timely manner.

The dilemma posed by the "ticking bomb" is one that seemingly defies solution.

The recollections of Senator McCain and Mr. Moe would appear to underscore the assertion by Professor Mary Ellen O'Conner, a leading opponent of torture under any circumstances, that "there is no credible evidence of an actual ticking-bomb case leading to useful intelligence on an impending attack."[85] Yet former Israeli military officials have asserted, including to this writer, that torture has indeed been effective in such situations.

The dilemma posed by the "ticking bomb" is one that seemingly defies solution. As Harlan Ullman, a respected defense analyst and former Swift Boat commander during the Vietnam War (in the vicinity of My Lai, the scene of the notorious massacre) points out:

> In an age of mass destruction weapons, the dilemma of permitting or banning extreme interrogation measures in exigent circumstances cannot easily be resolved. Suppose, for example, a U.S. military unit captures an enemy combatant that intelligence believes has information on a pending attack that could kill hundreds, or even tens of thousands. What is the responsibility of the unit to pry that information loose by any means necessary in order to protect the greater good?[86]

[82] *Id.*, pp. 111-12.

[83] *Id.*, p. 126.

[84] Tom Moe, "Pure Torture," *Notre Dame Magazine Online* (Winter 1995-96), http://www.nd.edu/-ndmag/moew95.html.

[85] See Marc Perelman, "Experts Debate 'Ticking Bomb' Torture," *Forward* (December 23, 2005), p. 1.

[86] Harlan Ullman, "Needed: A Code of Conduct for the War on Terror," *U.S. Naval Institute.Proceedings* CXXXII (January

Ullman characterizes this dilemma as "a tough question, with no simple answer." However, it is arguable that in this circumstance *halakhah* takes a different view. As R. Michael Broyde claims, "there is no logical reason that *halakhah* would categorically prohibit duly authorized wartime torture as a method for acquiring information otherwise not available, in order to save lives in the future."[87] If indeed it is known that a given prisoner possesses information that will certainly lead to the prevention of an imminent terrorist incident, there is a strong case that the terrorist is no different from any other potential attacker, in which case two halakhic imperatives might apply.

It is the Jewish interrogator who is an accessory to whatever tragedy might result.

The first is the biblical injunction of "*lo ta`amod al dam rei`akha*" (neither shalt thou stand idly by the blood of thy neighbor).[88] As R. Goren, citing Maimonides' dictum in *Mishneh Torah, Hilkhot Rotseaḥ*, notes, "morally one is obligated to take all feasible measures to prevent injury to others not only if one has been formally appointed to do so, but in any case where it is possible."[89] Moreover, in failing to act, one specifically responsible for the community's safety "shall bear responsibility for the results if he fails to discharge his obligation in a satisfactory manner."[90] In this sense, it is the Jewish interrogator who is an accessory to whatever tragedy might result from his/her inaction.[91]

A second consideration might be that of *ha-ba le-horgekhah hashkem le-horgo* (preempt a would-be killer by killing him first).[92] While generally applicable to an individual's right of self-defense, this principle also can be applied when the state acts in defense of both itself and its citizens. In effect, the government is "acting as an agent for individuals who will be attacked."[93]

Finally, it may also argued that a prisoner who is a "ticking bomb" has the status of a pursuer (*rodef*) since he or she has the ability, by electing to reveal or not reveal vital intelligence information, to forestall a terrorist attack or bring about the death of Jews. Indeed, in such circumstances, the imprisoned terrorist would have a greater direct impact on the life or death of individual Jews than would terrorist leaders, who, some assert, fall under the category of *rodef*.[94] Unlike the latter, the individual terrorist could be linked directly to a specific incident about to take place.

While there is certainly a risk that the prisoner will provide inaccurate or untimely information, the fact that he or she has been connected to such an incident connotes that the authorities will be in a position to discern whether the information they are being provided fits with that which they already possess. If there is indeed a fit, the authorities will have met the strict standard set forth by R. Moshe

2006), p. 10.

87 Michael J. Broyde, "Jewish Law and Torture," *The Jewish Week* (July 7, 2006), http://www.thejewishweek.com/top/editletcontent.php3?artid=5183.

88 Leviticus 19:16. See Maimonides, *Mishneh Torah, Hilkhot Rotseaḥ* 1:14.

89 Goren, "Combat Morality," p. 226.

90 *Id.*, p. 230.

91 The interrogator would be subject to heavenly rather than judicial punishment, however.

92 *Sanhedrin* 72a; *Berakhot* 58a, 62a.

93 Rosen, "Does Ariel Sharon Consult His Rabbi?," p. 41. See also Harav Chaim David Halevi, *"Din 'ha-ba le horgekha hashkem lehorgo' be-ḥayyenu ha-zibburiyim,"Tehumin* 1 (winter 1980), especially p. 346: "Because of the defense of the nation, it is permitted to launch a war against an aggressor like Midyan" employing the principle of *ha-ba le-horgekha.*

94 Rosen, above, n. 93. pp. 40-41. Rosen's argument suffers from the same flaws that undermine his reasoning from the case of one who places a dog or snake upon someone with the intent to kill; namely, it allows for no change of heart by the actual killer. Such a critique could also apply to the case of the imprisoned terrorist who provides information about an imminent plot, though as noted in the text, the very imminence of such a plot indicates a more direct relationship between the prisoner and the outcome of a specific attack than that between a terrorist leader, who provides general guidance, and any given terrorist operation.

Feinstein, i.e., that a *rodef* may only be killed (or in this case be placed in a situation where death might result), if the threat he or she poses "approaches certainty" (*karov le-vadai*).[95] Thus, in addition to the danger being clear and present, there must exist a unique discriminator that would not normally apply in cases where torture is contemplated. The ambiguities that R. Yosef notes—in particular that the prisoner might never again attempt a terror attack—would certainly not apply in this case.

It is difficult to justify torture in any circumstance, even that of the "ticking bomb."

From a military and security perspective, the prisoner would qualify as an accomplice to an upcoming murder. *Halakhah* at times treats accomplices as a guilty of capital crimes, and in this regard does not appear to distinguish between Jews and non-Jews. Writing about battlefield circumstances in which the enemy is clearly not Jewish, R. Broyde notes that "it appears that one who assists in the murder, even if they are not actually participating in it directly is not 'innocent'; see comments of Maharal of Prague on Genesis 32. From this passage in Maharal one could derive that any who encourage this activity fall within the rubric of one who is a combatant."[96]

Might the principles of *lo ta`amod al dam rei`akha*, *ha-bah le-horgekhah*, and *rodef* justify measures so extreme as to cause a prisoner's probable death? One could argue that they might. After all, as R. Bleich points out, there exists a strong halakhic argument to support capital punishment even of terrorists who otherwise would remain in prison for life, who are unlikely ever to strike again and who have not been proven to be accomplices of future murderous activity. Nevertheless, because it is true that bringing a prisoner to death's door could take some time, it would seem difficult to justify extreme measures of torture in any circumstance, even that of the "ticking bomb," if it is as all likely that the prisoner, in spite of the harsh measures to which he or she is subjected, could delay a truthful confession beyond the point at which the resulting intelligence would be immediately actionable, particularly given the certain universal outcry that the death of a prisoner would engender (not to mention the fact that the intelligence would die with the prisoner).

Implications for Non-Jewish Military Forces

The foregoing discussion and the vastly larger halakhic literature that has been cited only indirectly, focuses on the practices of a Jewish army. It also would apply to Jews serving in the army of any state that is a signatory to the Geneva Conventions. Indeed, it is arguable that the same values that drive Jewish behavior in these circumstances would apply with equal force to

[95] R. Moshe Feinstein, *Iggerot Mosheh: Hoshen Mishpat* vol. 2, (Bnai Berak, 1985), No. 69b, p. 297. It is arguable that R. Feinstein set a very high standard for determining the status of a *rodef* because he was addressing the issue of abortion, specifically, the permissibility of an abortion when the mother's life was in danger. He determined that only if the child's head had not yet appeared, could one abort, on the grounds that the fetus was considered to be a *rodef* relative to the mother. He ruled, however, that abortion was only permitted if the doctors were virtually certain (*karov le-vadai*) that the mother would not survive the birth. On the other hand, if there was only a concern (*hashash*) that she would not survive, R. Feinstein would not sanction an abortion. See also his expanded discussion of this issue in *id.*, no. 71, pp. 302-303. R. Feinstein argues in the latter responsum that the ban on abortion applies to Jews and non-Jews ("sons of Noah") alike, although the penalty for the latter is death. He also compares the ban on abortion to other bans such as suicide and placing his fellow before a wild animal that is poised to assault him.

[96] Broyde, "Fighting the War," (http://www.jlaw.com/Articles/war3.html), pp. 1 and n. 32. R. Broyde adds that "It would appear difficult, however, to define 'combatant' as opposed to 'innocent' in all combat situations with a general rule; each military activity requires its own assessment of what is needed to wage this war and what is not. Basing himself on talmudic cases relating to the placing of a dog or snake on a victim, and of killing someone by throwing a stone in the air at a 45 degree angle, Rosen argues that those who 'brainwash' suicide bombers are themselves guilty of a capital crime. ("Does Ariel Sharon consult his Rabbi?, pp. 36-39). His reasoning is faulty, however, since a human's ability to reason certainly distinguishes him or her from a rock, or even a dog or a snake. Indeed, he acknowledges that "the Mishnah recounts that if any free will may be exercised on the part of another, even an iota, then liability will not be imposed" (p. 37). Since there have been cases of suicide bombers not completing their missions—whether from reasons of remorse or

states that embody democratic values, especially as it is in the context of military activity by such states that Senator McCain and other have argued against the employment of torture to elicit information from prisoners.

Torture is a counterproductive exercise that dehumanizes those who practice it. As Vladimir Bukovsky, points out, "every Russian czar after Peter the Great abolished torture upon being enthroned, and every time his successor had to abolish it all over again...Long experience in the use of these 'interrogation' practices in Russia had taught them that once condoned, torture will destroy their security apparatus. They understood that torture is the professional disease of any investigative machinery." His explanation for this phenomenon is straightforward: "when torture is condoned, the [investigative] service itself degenerates into a playground for sadists. Thus in its heyday, Joseph Stalin's notorious NKVD became nothing more than an army of butchers terrorizing the whole country but incapable of solving the simplest crimes."[97]

When torture is condoned, the service degenerates into a playground for sadists.

Violating international norms of decency toward prisoners undermines what Winston Churchill called "the Great Democracies." The United States in particular sees itself as a missionary democracy. In the words of Ronald Reagan, it is "the City on the Hill." As recent events have demonstrated, the abuses at Abu Ghraib and elsewhere have undermined America's claims both for its own moral leadership and for the superiority of the democratic way of life. They have also further exacerbated opposition to the American intervention in Iraq, and provided Israel's enemies another opportunity to link the intervention in Iraq with Israeli treatment of Palestinians.[98]

Thus, beyond inflicting damage to Western prestige and influence, torture could also lead to reprisals, both within the Middle East and outside it, against Americans and Britons in general, and against American and British Jews in particular, even if torture is perpetrated by non-Jews. It is therefore arguable that Jews in America, Britain and elsewhere are mandated to lend their voices to those who would ensure zero tolerance for the kinds of abuse that have made headlines in Iraq and Afghanistan, and Guantanamo Bay in the past two years.

In a memorandum dated June 28, 2006 reporting on his visit to the detention facility at Guantanamo, General Barry McCaffrey, US Army (ret.) described the Detention Center as "the most professional, firm, humane and carefully supervised confinement operation" that he had ever visited. Nevertheless the abuses that took place in the first 18 months of the war on terror not only led to widespread condemnation, but also "caused enormous damage to U.S. military operations and created significant and enduring damage to U.S. international standing...Most of these abuses...were a clear departure from our former commitment to the rule of law and the strong U.S. military belief that treatment of those under our control should mirror the expectations we would have for our U.S. personnel under similar conditions of vulnerability. Finally, we actually wanted to be better than those we opposed."[99]

It is noteworthy that General McCaffery is a retired four-star general who held the highest attainable military rank since the retirement of the five-star officers who served in World War II. As such, his memorandum belies what some may interpret as a blanket contention by R. Broyde that "torture is permissible and consistent within

fear—it is difficult to argue that they are automatons, even when they have strapped ammunition to their bodies.

[97] Bukovsky, "Torture's Long Shadow," p. B4.

[98] Dana H. Allin and Steven Simon, "America's Predicament," *Survival*, LXVI (Winter 2004-05), p. 24.

[99] Barry R. McCaffrey, General, USA (ret.), "Academic Report-Trip to JTF Gunatanamo, Sunday June 18-Monday June 19, 2006," (June 28, 2006).

halacha in *all* [my emphasis—D.S.Z.] situations where there is a proper and thoughtful military chain of command (the higher up one goes the more thought tends to get put in) and no other reasonable alternative is available."[100] Indeed, McCaffery is not alone among senior officers to hold this view.[101] The whole notion of a more "thoughtful" chain of command that might permit prisoner abuse flies in the face of American military reality, where significant and increasing command authority has devolved to field and even company-grade officers.

General McCaffery's views demonstrate that torture and abuses are as deadly, if not more so, for those who perpetrate them than for those who suffer from them. Such abuses are operationally and morally deleterious. As R. Arnold Resnikoff, a former Navy chaplain who currently serves as advisor to the Secretary of the Air Force wrote in the after-math of 9/11: "in the rivers of Vietnam, I learned to value *outrage*, because it reminded me I was still human, not yet numb to pain and horror. *Rage* was what I feared, for it could destroy the humanity I still cherished. Rage destroys our moral compass—and allows us to be manipulated by those who want us to lose our way."[102] Or, as I wrote in the same collection of essays, "What was common to both conventional and unconventional warfare in ancient Israel was the fact that the rules of engagement reflected higher values, not merely human emotion. That fact remains valid today, both in Israel and, as terrorism has spread to the United States, in this country as well."[103] Jews, who believe and proclaim that they provide the world with its moral compass must be especially forceful in ensuring that the military forces that confront evil do not sink to its level. In so doing, Jews everywhere can help to bring about the day, for which they yearn in their *Yomim Nora'im* prayers, that *kol ha-rish`ah kula ke-ashan tikhleh*—all evil will be truly eliminated, blown away as so much smoke.

[100] Broyde, "Jewish Law and Torture," *op. cit.*

[101] Other senior officers who protested the use of torture and opposed any relaxation or redefinition of Senator McCain's legislation included John W. Vessey, USA (ret.), former Chairman of the Joint Chiefs of Staff (letter to Senator McCain, September 12, 2006), General Colin L. Powell, former Secretary of State and like Vessey, a former Chairman of the Joint Chiefs (letter to McCain, September 13, 2006) as well as nearly three dozen other retired senior officers from all four branches of the military (letter from General Joseph Hoar, USMC (ret.) et. al. to The Honorable John Warner, Chairman and the Honorable Carl Levin, Ranking Member, Senate Armed Services Committee, September 12, 2006). See also William H. Taft IV, "A View from the Top: American Perspectives on International Law after the Cold War," *The Yale Journal of International Law* 31 (Summer 2006), especially pp. 506-508. Mr. Taft was General Counsel, and later Deputy Secretary of Defense and Acting Secretary of Defense, in the Reagan Administration, as well as Legal Advisor to the State Department, 2001-2005.

[102] Arnold E. Resnicoff, "Rules for Our Sake, Not Our Enemies," *Living Words IV: A Spiritual Source Book for an Age of Terror* (Sh'ma/JFL, 2002), p. 17.

[103] Dov S. Zakheim, "In Judaism There Are Always Rules," ibid., p. 14.