

LEGAL ISSUES IN MEDICINE

Unspeakably Cruel — Torture, Medical Ethics, and the Law

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Torture is a particularly horrible crime, and any participation of physicians in torture has always been difficult to comprehend. As General Telford Taylor explained to the American judges at the trial of the Nazi doctors in Nuremberg, Germany (called the “Doctors’ Trial”), “To kill, to maim, and to torture is criminal under all modern systems of law . . . yet these [physician] defendants, all of whom were fully able to comprehend the nature of their acts . . . are responsible for wholesale murder and unspeakably cruel tortures.”¹ Taylor told the judges that it was the obligation of the United States “to all peoples of the world to show why and how these things happened,” with the goal of trying to prevent a repetition in the future. The Nazi doctors defended themselves primarily by arguing that they were engaged in necessary wartime medical research and were following the orders of their superiors.² These defenses were rejected because they are at odds with the Nuremberg Principles, articulated a year earlier, at the conclusion of the multinational war crimes trial in 1946, that there are crimes against humanity (such as torture), that individuals can be held to be criminally responsible for committing them, and that obeying orders is no defense.²

Almost 60 years later, the question of torture during wartime, and the role of physicians in torture, is again a source of consternation and controversy. Steven Miles, for example, relying primarily on government documents, has noted that at the prisons at Abu Ghraib, Iraq, and Guantanamo Bay, Cuba, “at the operational level, medical personnel evaluated detainees for interrogation, and monitored coercive interrogation, allowed interrogator to use medical records to develop interrogations approaches, falsified medical records and death certificates, and failed to provide basic health care.”³ The Red Cross, on the basis of an inspection of Guantanamo in June 2004, alleged that the physical and mental coercion of prisoners there is “tantamount to torture” and specifically labeled the

active role of physicians in interrogations as “a flagrant violation of medical ethics.”⁴

Bloche and Marks have reported, on the basis of their interviews with some of the physicians involved in interrogations at Guantanamo Bay and in Iraq, that the physicians believed “that physicians serving in these roles do not act as physicians and are therefore not bound by patient-oriented ethics.”⁵ Psychiatrist Robert Jay Lifton has suggested that the reports of U.S. physicians’ involvement in torture from Iraq, Afghanistan, and Guantanamo echo those of the Nazi doctors who were “the most extreme example of doctors becoming socialized to atrocity.”⁶ Nonetheless, the muting of the criticism of such torture prompted Elie Wiesel to ask why the “shameful torture to which Muslim prisoners were subjected by American soldiers [has not] been condemned by legal professionals and military doctors alike.”⁷

The United States has grown accustomed to setting the standard for the world in condemning torture as always criminal and always an inexcusable violation of human rights. It was therefore disturbing to watch the new U.S. attorney general, Alberto Gonzales, try to defend the administration’s policies on torture in the wake of the attacks on September 11, 2001, at a Senate panel hearing on his nomination this past January. The first question Gonzales was asked by Chairman Arlen Specter (R-Pa.) was, “Do you approve of torture?” Gonzales replied, “Absolutely not, Senator.”⁸ Two weeks later, the new secretary of state, Condoleezza Rice, pointedly refused to characterize forced nudity and simulated drowning as techniques of torture, insisting instead that “the determination of whether interrogation techniques are consistent with international obligations and American law [is] made by the Justice Department.”⁹ Until September 11, the United States had always and unequivocally condemned torture and those who engage in it, but since U.S. law on torture appears to be obscure to our highest officials charged with enforcing it, it is well worth reviewing.

TORTURE

In 1994, the United States ratified the international Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and followed that by enacting specific laws against torture. Even before this, Congress had passed the Torture Victim Protection Act of 1991. As the Supreme Court stated in 2004, this act provides “authority that ‘establishes an unambiguous and modern basis for’ federal claims of torture and extrajudicial killing.”¹⁰ The act provides that any person (including a noncitizen) can bring a civil action in U.S. courts against any other person who “under actual or apparent authority, or color of law, of any foreign nation” subjects a person to torture or extrajudicial killing. “Torture” is defined there, as in the Convention against Torture, as

any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person or for any reason based on discrimination of any kind.¹¹

Government-sanctioned torture is prohibited in the United States by the 5th Amendment to the Constitution (which has a prohibition against self-incrimination that was adopted specifically to prohibit the use of torture to extract confessions), the 8th Amendment (which prohibits “cruel and unusual punishment”), and the 14th Amendment. Torture is also a crime under state criminal statutes prohibiting assault and battery. An additional federal statute, which also follows the Convention against Torture, makes it a crime for any person “outside the United States” to commit or to attempt to commit torture, which is defined for this purpose as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.”¹²

This antitorture statute has recently been the subject of conflicting interpretations from the Department of Justice. After September 11, Justice

Department lawyers argued (wrongly) that the president, as commander in chief, has the authority to order the torture of prisoners and that, contrary to the Nuremberg Principles, obeying such an order is a valid defense against a charge of a war crime or a crime against humanity.¹³ The August 1, 2002, memorandum from the Justice Department to Alberto Gonzales, then legal counsel to the president, also concluded that to constitute torture under the statute, the pain inflicted “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹³ This memorandum, in which Justice Department lawyers acted more like private attorneys advising their clients (in this case, government officials) on how they might avoid prosecution under the antitorture statute (rather than advising them to follow the law), has been widely and rightly criticized. The Department of Justice withdrew the memorandum shortly after it became public in June 2004.¹⁴

One week before the hearing on the nomination of Alberto Gonzales to the post of attorney general, on December 30, 2004, the Justice Department issued a replacement memorandum that set forth its new interpretation of the antitorture law, which is much more consistent with the language of the law and U.S. policy. This memorandum begins by expressing the overriding theme of U.S. law on torture: “Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law . . . international agreements . . . customary international law, centuries of Anglo-American law, and the longstanding policy of the United States, repeatedly and recently affirmed by the President.”¹⁴ This is all to the good. Unfortunately, the memorandum also raises important issues of hypocrisy and secrecy, stating, in footnote eight, that prior opinions — still secret — approving various interrogation techniques “for [use with] detainees” are not affected by the replacement memorandum. One such opinion, prepared for the Central Intelligence Agency, is reported to authorize the use of 20 interrogation techniques, including “waterboarding,” in which a person is made to believe he or she will drown.¹⁵

President Bush said on June 30, 2003, that “torture anywhere is an affront to human dignity everywhere,” and on July 5, 2004, that “America stands against and will not tolerate torture. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it

everywhere.”¹⁴ The challenge for the administration — and for all of us — is to match actions to words.

THE RIGHTS OF TORTURE VICTIMS

Almost 25 years ago, William Curran devoted his “Law–Medicine Notes” feature in the *Journal* to the subject of torture.¹⁶ He reported on what was then a unique case, *Filartiga v. Pena-Irala*, in which the Second Circuit Court of Appeals in New York ruled that U.S. courts, under the Federal Alien Tort Statute (also referred to as the Alien Tort Claims Act), had jurisdiction to hear civil cases brought against torturers by noncitizens who were victims of that torture.¹⁷

The case involved a physician who brought suit in the United States against the inspector general of police of Asunción, Paraguay, for the torture and murder of his 17-year-old son. In his opinion upholding jurisdiction, Judge Irving R. Kaufman summarized universally accepted principles of international human rights law: “The torturer has become — like the pirate and the slave holder before him — *hostis humani generis*, an enemy of all mankind.”¹⁷ Judge Kaufman and his court could make law only for the Second Circuit, but in 2004, the Supreme Court answered the question of the reach of the Alien Tort Statute for the entire country. The case involved Humberto Alvarez-Machain, a Mexican physician.¹⁰

Officials of the Drug Enforcement Administration (DEA) believed that when one of their agents, Enrique Camarena-Salazar, was captured in 1985 in Mexico, tortured over a two-day period, and then murdered, Alvarez-Machain had been present and had used his medical skills to extend the interrogation and the torture. Demonstrating how strongly the U.S. government objected to physicians participating in torture, the DEA in 1990 took the extraordinary step of hiring Mexican nationals to kidnap Alvarez-Machain and bring him to the United States for trial. The kidnapping succeeded, but at trial Alvarez-Machain was found not guilty. After returning to Mexico, Alvarez-Machain brought an action against the United States under the Alien Tort Statute, alleging false arrest and arbitrary detention. Alvarez-Machain won at trial, and the Ninth Circuit Court of Appeals affirmed the decision.

In an opinion written by Justice David Souter, the Supreme Court reversed the award. Nonetheless, this opinion determined the meaning and reach of the Alien Tort Statute, enacted by Congress in 1789, which states in its entirety: “The dis-

trict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The question before the Court was whether, as the Ninth Circuit had ruled, this statute gave U.S. district courts the legal authority to hear a case like that brought by Alvarez-Machain in which the plaintiff alleges a “violation of the law of nations.”

The Court was unable to find any evidence that Congress in 1789 had specific violations of international law in mind but supposed that the most likely ones were Blackstone’s “three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” The Court then cited *Filartiga* as the beginning of “the modern line of cases.” The Court concluded that federal courts can determine just what the current “law of nations” is but instructed courts to be conservative in determining what international law requires: “We think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the feature of the 18th-century paradigms we have recognized [e.g., piracy].”¹⁰

In support of his position that his arbitrary detention was a violation of international law, Alvarez-Machain cited the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Court found that the Universal Declaration did not have the force of law and that “the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”¹⁰ Treaties and custom are the primary sources of international law. After treaties had been rejected as support for Alvarez-Machain, he was left to argue that arbitrary arrest and detention, like piracy, had attained the status of “binding customary international law.” Given its reluctance to recognize new causes of action, it is not surprising that the Court rejected Alvarez-Machain’s argument on the grounds that it “would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place.”¹⁰ The case thus stands for the proposition that a brief illegal detention is insufficient grounds for a claim in U.S. courts as a violation of international law.

The decision is more important for its statement that when acts are universally condemned by international law, such as state-sanctioned piracy,

torture, and murder, they can be the basis for a lawsuit under the Alien Tort Statute. The decision reaffirms the long-standing view of the Supreme Court that “the domestic law of the United States recognizes the law of nations.”^{10,18} In a case alleging torture, the Court would find torture a violation of international law both because it is universally condemned in international law and because the Congress has ratified the Convention against Torture and adopted a law authorizing individual lawsuits to be brought by victims of torture. Thus, under the Alien Tort Statute, the victims of torture at the prisons at Guantanamo Bay and Abu Ghraib, for example, may bring a claim against their alleged torturers in U.S. courts — and it should be expected that many will.

THE GENEVA CONVENTIONS

The road to torture at Abu Ghraib begins arguably with the president’s decision in February 2002 that the Geneva Conventions would not apply to “enemy combatants” jailed at Guantanamo Bay.¹⁹ This decision was made over the strong objections of then Secretary of State Colin Powell and without any meaningful input from the career lawyers in the armed services, all of whom objected to jettisoning the Geneva Conventions, an international treaty from which the United States had never before deviated. The reasons given for taking prisoners to Guantanamo was that the global war on terror was a “new kind of war” that made the Geneva Conventions inapplicable and that Guantanamo could and should be used as an interrogation center for suspected terrorists that was outside the jurisdiction and, thus, the oversight of U.S. courts.^{20,21}

It seems to have been assumed that if neither the Constitution nor international law applied in Guantanamo Bay, the administration could write its own rules of conduct for the prison, and it did. Secretary of Defense Donald Rumsfeld, for example, specifically approved types of torture that could be used in interrogations there, and he specifically involved physicians in it by requiring that prisoners have “medical clearance” before these techniques were applied to them.²² In the words of Rumsfeld’s directive, the new techniques can be used only after, among other things, “the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination).”²² These torture techniques made their way to Abu

Ghraib when the commander of the prison at Guantanamo Bay, General Geoffrey Miller, was transferred to Iraq in 2004.²³

According to the administration, the Geneva Conventions were to apply in Iraq. Had they been followed, the torture and abuse of prisoners at Abu Ghraib would not have occurred. The conventions not only prohibit torture and abusive and humiliating treatment of prisoners but also specifically protect physicians who follow medical ethics by reporting and refusing to participate in torture and abuse of prisoners.²⁴ The Independent Panel to Review Department of Defense Detention Operations highlighted professional ethics as the core consideration in the prevention of torture and abuse, stating that “all personnel who may be engaged in detention operations, from point of capture to final disposition, should participate in a professional ethics program that would equip them with a sharp moral compass for guidance in situations often riven with conflicting moral obligations.”²⁵ With regard specifically to physicians, “the Panel notes that the Fay investigation [by the Army] cited some medical personnel for failure to report detainee abuse. As noted in that investigation, training should include the obligation to report any detainee abuse.”²⁰

On June 28, 2004, the day before the Supreme Court decided the Alien Tort Statute case, the Court decided that under the statute, prisoners at Guantanamo could challenge their imprisonment in U.S. courts as well as bring civil claims for injury and abuse.²⁶ The Court thus rejected the position of the Bush administration, as stated in oral argument before the Ninth Circuit, that even were the United States engaged in “murder and torture” at Guantanamo, U.S. courts could not interfere. In another case that was decided on the same day, the Supreme Court ruled that a U.S. citizen who was captured on the battlefield in Afghanistan and initially held at Guantanamo before being transferred to the United States had the right to a fair hearing under the Constitution to contest his status as an “enemy combatant.”²⁷ In this opinion, the Court cited provisions of Geneva Convention III (concerning prisoners of war) as authoritative on the “law of war.”²⁷ More recently, a district court has ruled explicitly that the Geneva Conventions must be followed at Guantanamo.²⁸ In all these cases, the judicial branch of government has been much more articulate than the executive branch in condemning torture and upholding both U.S. and international law.

INTERNATIONAL AND MEDICAL ETHICS

As Telford Taylor argued at the Nuremberg Trials, the prevention of crimes against humanity, including torture, must be our primary goal. Torture remains widely practiced around the world, even though universally condemned. Amnesty International estimates that 150 countries currently practice torture. Torture is wrong under all circumstances, because it is cruel and degrading to humans and an extreme violation of human rights under international law. Jean-Paul Sartre's description of torture, written almost 50 years ago during the French–Algerian War, should resonate in the United States after the attacks on September 11: "Torture is senseless violence, born in fear."²⁹ Now that the president has proclaimed that torture is always wrong, we must return to the question of how to prevent it effectively during wartime when a high-level or low-level official believes that torture, although illegal, appears nonetheless to be likely to aid the war effort.

Preventing torture is everyone's business — but three professions seem to be especially well suited to prevent torture: medicine, law, and the military. Each profession has particular obligations. Physicians have the obligations of the universally recognized and respected role of healers. Lawyers have the obligations to respect and uphold the law, including international humanitarian law. And military officers have the obligation to follow the international laws of war, including the Geneva Conventions.

Americans need the blessings of both lawyers and physicians to justify torture. Professor of law Alan Dershowitz, for example, believes that we must accept that torture will be used in extreme situations and try to regularize its practice by requiring prior judicial approval of its use and limiting it to the infliction of "nonlethal pain" — such as "shoving a sterilized needle under the fingernail of a suspect."^{30,31} Both Dershowitz and the Fox television network's hit program *24* glamorize torture by portraying ticking-time-bomb scenarios in which a captured terrorist knows where a bomb will soon explode that will kill many innocent civilians.³⁰ Of course, medicalizing torture does not make it right or effective — even in such a situation. International terrorists have already gone beyond such scenarios by combining the bomb and the terrorist into a single entity, the suicide bomber.

The challenges of the war on terror present an opportunity for medical and legal professional or-

ganizations to work together transnationally to uphold medical ethics and international humanitarian law, respectively, rather than to search for ways to avoid legal or ethical dictates. In addition, the war on terror provides physicians and lawyers who are also military officers with an opportunity to clarify their roles in the military services and their obligations under international law and the U.S. Uniform Code of Military Justice.

Almost 30 years ago, Sagan and Jonsen observed in the *Journal* that because the medical skills used for healing can be maliciously perverted "with devastating effects on the spirit and the body," it is "incumbent upon the medical profession and upon all of its practitioners to protest in effective ways against torture as an instrument of political control."³² Such protest can help in the war against terrorism. Neither the use of torture nor violations of human rights, as another professor of law, the Jesuit Robert Drinan, has observed, will "induce other nations to follow the less traveled road that leads to democracy and equality," but the "mobilization of shame" and the "moral power" of example can do so.³³ Torture begins by dehumanizing the victim but ends by dehumanizing the torturer. As Telford Taylor put it at Nuremberg, "A nation that deliberately infects itself with poison will inevitably sicken and die."¹

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