

REMARK: PRESCRIBING A LEGAL METHODOLOGY FOR THE PREVENTION OF TORTURE

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LexisNexis Summary

... From a legal point of view it is not difficult to prescribe the methodology for the prevention of torture: Make sure that, quoting Article 1 of Convention Against Torture ("the Convention"), every "public official or other person acting in an official capacity" from the president--and, particularly in the case of the United States, the vice president and the secretary of defense--down to the lowliest private or cop on the beat is, first of all, fully aware of the absolute prohibition of torture and the consequences of violating this prohibition. ... In the words of Philip Zimbardo, the social psychologist famous for the Stanford prison experiment in which students on summer break were turned into virtual torturers, "If you give people power without oversight it is a formula for abuse." ... Despite the fact that the Rome Statute of the International Criminal Court follows the example of Nuremberg in exempting no one from the reach of the law, some prosecutors are still reluctant to depart from the principle that, in the words of Jonathan Swift, "laws are like cobwebs, which may catch small flies but let wasps and hornets break through." ... In the most recent example, the procureur de la republique in Paris dismissed a torture complaint against Donald Rumsfeld on the ground that he had been advised by the Ministry of Foreign Affairs that a secretary of defense is entitled to immunity for life for official acts performed during his tenure of office. ... It is alive and well in the United States in the form of the Alien Tort Claims Act, despite determined attempts to kill it by the Bush administration. ... A number of countries, mostly in Europe, have passed universal jurisdiction laws and some prosecutions have been successful: In Spain, whose attempt to prosecute Pinochet sent judicial shockwaves throughout the world, Argentine torturers have been convicted and imprisoned. ... Afghan warlords have been convicted of war crimes in Britain and of crimes against humanity in the Netherlands. ... He distinguishes between scarring torture, which leaves marks and occurs mostly in authoritarian States, and stealth torture, which leaves no marks and is practiced largely by democracies. ... It demands this of the torturer, placing the victim outside and beyond any form of compassion or empathy, but also demands of everyone else the same distancing, the numbness, on the part of those who know and close their eyes, those who do not want to know and close their eyes, those who close their eyes and ears and hearts. ... Until we figure out a way to stop this failure of the imagination, preventing torture will be difficult if not impossible.

Text

[*225] In this panel we have both the easiest and the hardest assignment. The easiest because as lawyers we can simply say torture, and what some euphemistically call "ill treatment," are absolutely forbidden in all circumstances. Therefore, we must see to it that those who order, condone, or practice torture and ill-treatment are held to account and duly punished. But as fellow human beings of torturers, we have some difficult questions to answer: Why is torture practiced? Are torturers entitled to sympathy? How can the sense of wrong, which is somehow present in every person, be made to trump the mistaken sense of duty, or of national security, which leads to torture?

From a legal point of view it is not difficult to prescribe the methodology for the prevention of torture: Make sure that, quoting Article 1 of Convention Against Torture ("the Convention"), every "public official or other person act-

ing in an official capacity”¹ from the president--and, particularly in the case of the United States, the vice president and the secretary of defense--down to the lowliest private or cop on the beat is, first of all, fully aware of the absolute prohibition of torture and the consequences of violating this prohibition. This requires more than the perfunctory one-hour lecture on the Geneva Conventions for members of the armed forces and its functional equivalent for police recruits. The Universal Declaration of Human Rights and the Convention should also be part of this indoctrination which, to the best of my knowledge, is not the case today. (Parenthetical question: Did Bush, Cheney, and Rumsfeld get any of this education before Abu Ghraib?)

Second, given the porousness of memory, periodic refresher [*226] courses would seem to be indicated for those who may find themselves in a position to order, condone, or commit acts of torture or “ill treatment.”

Third, supervision is of the essence. In the words of Philip Zimbardo, the social psychologist famous for the Stanford prison experiment in which students on summer break were turned into virtual torturers, “If you give people power without oversight it is a formula for abuse.”² Zimbardo also said, at a recent conference in Monterey, “The power is in the system. It’s not bad apples, but bad barrel makers.”³

Fourth, whistle-blowing must be protected and encouraged, particularly in the military, where going over the head of one’s immediate superior tends to lead to opprobrium and can even lead to punishment.

Fifth, immunity for higher-ups--including highest-ups--has got to go. Despite the fact that the Rome Statute of the International Criminal Court follows the example of Nuremberg in exempting no one from the reach of the law,⁴ some prosecutors are still reluctant to depart from the principle that, in the words of Jonathan Swift, “laws are like cobwebs, which may catch small flies but let wasps and hornets break through.”⁵ In the most recent example, the *procureur de la republique* in Paris dismissed a torture complaint against Donald Rumsfeld on the ground that he had been advised by the Ministry of Foreign Affairs that a secretary of defense is entitled to immunity for life for official acts performed during his tenure of office.⁶

Sixth, the principle of universal jurisdiction, which, if universally applied, would make perpetrators of the most heinous crimes subject to prosecution or civil suit anywhere in the world, is still in its embryonic stage. It is alive and well in the United States in the form of the Alien Tort Claims Act,⁷ despite determined attempts to [*227] kill it by the Bush administration.⁸ In other countries, which are more inclined to look to criminal than civil litigation, the record is mixed. A number of countries, mostly in Europe, have passed universal jurisdiction laws and some prosecutions have been successful: In Spain, whose attempt to prosecute Pinochet sent judicial shockwaves throughout the world, Argentine torturers have been convicted and imprisoned.⁹ Afghan warlords have been convicted of war crimes in Britain¹⁰ and of crimes against humanity in the Netherlands.¹¹ Hissene Habre, the former dictator of Chad, was arrested in Senegal in 2005 on an arrest warrant issued in Belgium and his case is slowly, and

¹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2, P 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) [hereinafter Convention].

² *U.S. Expert Blames System for Abu Ghraib Abuses*, TAIPEI TIMES, Mar. 1, 2008, at 7.

³ *Id.*

⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9.

⁵ THOMAS ROSCOE, *THE WORKS OF JONATHAN SWIFT* 555 (Derby & Jackson ed.) (1861).

⁶ Press Release, Ctr. for Constitutional Rights, France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint (Nov. 26, 2007), available at <http://ccrjustice.org/newsroom/press-releases/france-violation-law-grants-donald-rumsfeld-immunity%2C-dismisses-torture-comp>.

⁷ [28 U.S.C. § 1350](#) (2000).

⁸ DOJ Argues for Narrow Interpretation of Alien Tort Statute, 26 *INSIDE U.S. TRADE* 8, Feb. 22, 2008.

⁹ Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 *B.C. INT’L & COMP. L. REV.* 419, 438 (2002).

¹⁰ Sandra Laville, *UK Court Convicts Afghan Warlord*, THE GUARDIAN, July 19, 2005.

¹¹ HUMAN RIGHTS WATCH, *UNIVERSAL JURISDICTION IN EUROPE - THE STATE OF THE ART*, 71 (Vol. 18 No. 5D) (2006), available at <http://www.globalpolicy.org/intljustice/universal/2006/0606univjuris.pdf>.

one hopes surely, moving toward trial in Senegal.¹² On the other hand in Germany, which probably has the best universal jurisdiction law of any country, more than fifty complaints have been filed under that law--including two against Rumsfeld--and not a single one has led to prosecution so far.¹³

Seventh, investigation must be swift and thorough and prosecution must be fair but vigorous. In this connection, I wish to mention a particular difficulty facing investigators which is highlighted in Darius Rejali's just published monumental work, *Torture and Democracy*.¹⁴ He distinguishes between scarring torture, which leaves marks and occurs mostly in authoritarian States, and stealth torture, which leaves no marks and is practiced largely by democracies.¹⁵ He also lists, in an appendix, seventy forms of stealth or clean torture.¹⁶

Let me conclude with a few words about the hard part of this assignment. Within the past three weeks, three articles have appeared, which should be read by everyone concerned, with the question of how men and women, who might strike them as perfectly nice people, wind up committing or being complicit in the most objectionable forms of treatment of other human beings. One has already been mentioned by two previous speakers: in the [*228] *New Yorker*, it's about Sabrina Harmon, the woman who took the Abu Ghraib pictures.¹⁷ The second is in the German magazine, *Stern*. In its English edition, there is a long interview with Lynndie England, the woman with the dog leash.¹⁸ The third is published in *Mother Jones* under the title *Am I a Torturer?*¹⁹ It is about Ben Albright, a reservist assigned to softening up duty at another prison in Iraq.²⁰ What is amazing about this triad of articles is the common thread running through them that can be summarized as follows: There were no rules; there was no supervision; there was active encouragement and commendation from superiors who knew what was going on. After the fact, there was indifference or support from the communities to which the three returned in the United States; although in retrospect they all realized what they had done was wrong.

How could this happen? The closest I've been able to come to an answer is what Ariel Dorfman says in his forward to *Torture*, a collection of essays edited by Sanford Levinson.²¹ "Torture," says Dorfman,

is, of course, a crime committed against a body. It is also a crime committed against the imagination. Or rather, it presupposes, it requires, it craves the abrogation of our capacity to imagine others' suffering, dehumanizing them so much that their pain is not our pain. It demands this of the torturer, placing the victim outside and beyond any form of compassion or empathy, but also demands of everyone else the same distancing, the numbness, on the part of those who know and close their eyes, those who do not want to know and close their eyes, those who close their eyes and ears and hearts.²²

Until we figure out a way to stop this failure of the imagination, preventing torture will be difficult if not impossible.

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¹² Editorial, *The Cost of Justice*, THE GLOBE AND MAIL, Sept. 17, 2007, at A14.

¹³ HUMAN RIGHTS WATCH, *supra* note 11, at 63-70.

¹⁴ DARIUS REJALI, *TORTURE AND DEMOCRACY* (Princeton University Press, 2007).

¹⁵ *Id.*

¹⁶ *Id.* at 553.

¹⁷ Philip Gourevitch & Errol Morris, *Exposure: The Woman Behind the Camera at Abu Ghraib*, THE NEW YORKER, Mar. 24, 2008, http://www.newyorker.com/reporting/2008/03/24/080324fa_fact_gourevitch (last visited Nov. 1, 2008).

¹⁸ Lynndie England, "Rumsfeld Knew," STERN, Mar 17, 2008, <http://www.stern.de/politik/ausland/Lynndie-England--Rumsfeld-/614356.html> (last visited Nov. 1, 2008).

¹⁹ Justine Sharrock, *Am I a Torturer?*, MOTHER JONES, Mar./Apr. 2008, at 42.

²⁰ *Id.*

²¹ Ariel Dorfman, *Foreword* to SANFORD LEVINSON, *TORTURE: A COLLECTION* 8-9 (Oxford University Press, ed. 2004).

²² *Id.*