

report concludes specifically that doctors who assist in the treatment of hunger-striking detainees have become agents of a coercive and counter-therapeutic procedure that for some detainees continues for months and years, resulting in untold pain, suffering, and tragedy for the detainees for whom they are medically responsible.

But I want to focus, to the extent that I can, on a particular feature, because this question doesn't just arise in an ethical or abstract vacuum. In Guantánamo I think there are two particular problems with the forced feeding regime, one related to motive and the other related to method.

First, as Walter suggested, the hunger strikers have no interest in dying. This is not a suicide mission. To the contrary, they are desperate to be returned home to their families and loved ones. They are engaging in a centuries-old form of protest, a protest over the injustice of having been in indefinite detention, up to 13 years in some cases, without the prospect of release or trial. So it is a principled, ethical stand and a protest, a peaceful protest involving the only thing they have control over—their ability to take food or not.

I think what's also important to remember is that the force feeder in this case is not some sort of neutral jailer administering some duly adjudicated sentence by a valid tribunal. The force feeder here is not a morally neutral actor. The force feeder here, the Department of Defense, is the very cause of the injustice, the very cause of the protest that is motivating the detainees. Rather than correcting the injustice as an ethical principle—which this jailer has the power to do, i.e., release or try these detainees—the jailer is doubling down on the injustice by engaging in forced feeding.

Second, as Walter suggested, the method of forced feeding in Guantánamo is particularly difficult, such that it appears gratuitously cruel. First, it doesn't happen at the point of imminent death. It is triggered under the regulations. If a detainee misses nine consecutive meals or if he is 85 percent of his ideal body weight, it happens twice a day, not once a day, often after a forcible cell extraction, which is a violent and humiliating experience. After the 2003 hunger strike, humiliating general searches were instituted before the extractions for the feeding. As Walter suggested, the detainees are strapped to the restraint chair, which is painful and humiliating.

What I think all this should demonstrate is that I am not particularly convinced that the Department of Defense is acting out of a humanitarian or ethical instinct here. I think the Department of Defense recognizes the moral and political nature of those protests and is seeking to stifle it and to break the fast, rather than to save lives. I think it's designed to preserve the legitimacy of Guantánamo, not necessarily the integrity of life. I think we see that, as Walter suggested, in the crackdown in 2003, in the imposition of solitary confinement for those who were engaged in a hunger strike, and in the 2003 media blackout instituted by the Department of Defense, so that it would not report on what was happening with the Guantánamo detainees.

## **NIGEL RODLEY**

Thank you, Baher. The next speaker on my list is Steve Xenakis.

## **STEPHEN XENAKIS**

Thank you. It's a privilege to be here; I appreciate listening to the conversation. As Sir Nigel said, I'm a psychiatrist. I'm a retired Army Medical Corps officer and have been a

brigadier general and have commanded a number of forces over the years. I have spent a good deal of time at Guantánamo since 2008.

I'd like to share with you my thoughts on that experience. The policy of the authorities at Joint Task Force Guantánamo (JTF-GTMO) to force-feed detainees by nasal gastric tube illustrates the gaps in their understanding of the mentality of the detainees, as Walter said, appreciating the stresses imposed on them and prerequisites for maintaining a constructive working relationship between guards and detainees. Furthermore, forced feeding completely undermines the physician-patient relationship by destroying the trust that is essential for all clinical treatment, including medical issues unrelated to forced feeding. It inappropriately engages physicians in the use of force against detainees.

The World Medical Association (WMA) has two ethical declarations on this subject: the Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman and Degrading Treatment (also known as the Declaration of Tokyo), and the Declaration of Malta on Hunger Strikers. The Declaration of Tokyo—the first dates from 1975—states:

Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner.

The physician's role includes evaluating the detainee's medical and psychological condition, discussing consequences of fasting and options for taking some nutrients, and monitoring the detainee's caloric intake, blood pressure, weight loss, and other medical consequences of fasting. The physician advises, counsels, listens, and assists the prisoner in clarifying his or her goals, desires, and decisions. To perform this role, there must be a true doctor-patient relationship based on trust. And that in fact, because of the conditions of confinement that Walter has talked about, is at this point highly unlikely and in my view rarely, if ever, occurs.

To establish trust, the physician must be clinically independent of the authorities. Doctors should not allow third parties to influence their clinical medical judgment nor allow themselves to be pressured to breach ethical principles, such as intervening medically for non-clinical reasons.

The prevailing opinion of experts is that hunger strikes are undertaken by persons who do not wish to die, as Baher said, but who are prepared to risk death in the hope that their demands may be met. Case-by-case evaluation, however, remains critical. The WMA has determined that forced feeding through the use of restraints is not only an ethical violation, but contravenes Article 3 of the Geneva Conventions. The ICRC has taken the same position.

The American Medical Association's position on forced feeding is this: every competent patient has the right to refuse medical intervention, including life-sustaining interventions. The government asserts the detainees are still agents of Al Qaeda and continue to engage in asymmetrical warfare. Their tactics include participation in hunger strikes. The basis for this assertion is not disclosed for reasons of national security. I contend that the government has engaged in subterfuge and distortion of the reality of conditions in the camps in propagating this assertion. It merely justifies inflicting harsh tactics in an attempt to break the will of the detainees and their disagreement with continued confinement. Medical personnel should refuse to participate in these tactics.

**NIGEL RODLEY**

Thank you, Steve. I am now going to turn to our last two speakers. I should point out that a former colonel in the Israeli Defense Forces, Pnina Sharvit Baruch, was supposed to be part of this panel and would have been part of the latter group of speakers who will be perhaps more explanatory, shall we say, of the forced feeding programs. Unfortunately, she had to pull out on short notice, so it is not for a lack of balance on the part of the organizers that you have had three speakers coming from one side and only two from the other. But those two, I am sure, you will soon see will make up for in quality what may have been lost in quantity.

So, first of all, over to Rachel. Rachel VanLandingham, you have the floor.

**RACHEL VANLANDINGHAM**

Thank you, Sir Nigel. Thank you, ASIL, Christina Cerna, Professor Larry Johnson from Columbia, and my esteemed colleagues for this opportunity to participate in this very important discussion. Since the theme of this entire conference is the effect of international law, I really do want to focus on what is the law, not just what is ethical in this area. My premise is rather straightforward, and it responds to the original query posed to the panel members of whether the forced feeding of Guantánamo Bay detainees is torture or cruel, inhumane, or degrading treatment.

According to the law of armed conflict (LOAC), which is the applicable law at Guantánamo, not only is forced feeding not per se cruel, inhuman, or degrading treatment, but I believe that the United States would be committing a most serious violation of Common Article 3 of the Geneva Conventions, analogous to a grave breach, if it failed to force-feed a Guantánamo Bay detainee when medically necessary to save his life. Why? The detaining authority in a non-international armed conflict, which all three branches of our government have found to exist, has a legal duty to preserve the life and the health of detainees in its care. Complementing this duty are the detainees' parallel rights under Common Article 3 and IHL customary international law to life and health.

Critically, the law of armed conflict contains another important legal provision, which is applicable here. That is the absolute prohibition regarding non-renunciation of rights by detainees, prisoners of war, civilian security detainees, and the explicit terms of Common Article 3, those *hors de combat* by reason of detention, i.e., the Guantánamo Bay detainees.

What this principle of non-renunciation of rights means in this situation is that Mr. Hasan and the other Guantánamo Bay detainees are prohibited by international law from renouncing their right to life and health while in detention. Why does the LOAC include this non-renunciation principle for those in detention? Because, in the words of the inimitable Jean Pictet, the scrivener of the Commentaries to the 1949 Conventions, the signatories to the Geneva Conventions recognized that "It is difficult, if not impossible, to prove the existence of duress or pressure in a detention setting." Therefore, the Geneva Conventions prohibit all renunciation of fundamental rights by detainees, including renunciations of the right to health and life. Ultimately, a hunger strike that proceeds past a certain point is such an illegal renunciation of rights because, of course, a prolonged hunger strike without external medical intervention inevitably leads to death.

Yet the voluntary nature of the detainee's so-called "right" to refuse nutrition all the way to and including the point of death (a right articulated as the manifestation of the principle of human autonomy, in the words of the Malta Declaration) is the very linchpin of this right. It is also the indispensable element to the concomitant claim that by ignoring the voluntary,

autonomous choice of a competent detainee to refuse medical treatment, it is inhumane to force-feed the starving detainee. Yet international humanitarian law finds that it is legally impossible to accurately discern this critical element of voluntariness regarding a detainee's decision to starve to death, and hence IHL instead prohibits that renunciation of that right to life.

So this non-renunciation principle, coupled with the legal duty of the United States as a detaining power to preserve and protect the lives of those in detention, equal the finding that involuntary feeding or forced feeding is not per se inhumane or otherwise violative of international law. It is actually required.

In conclusion, I'd like to state that while forced feeding is not per se inhumane, the detaining power is subject to certain restrictions. These restrictions were determined by the European Court of Human Rights when it was deciding last November whether the Swiss prisoner Bernard Rappaz could be force-fed. The Court found that it was not a violation of the European Convention of Human Rights and not cruel, inhumane, and degrading treatment to force-feed a prisoner or detainee, as long as the following conditions are met. One, there must be a determination of medical necessity to save the life and health of a prisoner or detainee. Two, appropriate procedural safeguards must be in place to validate that decision, which will remove some of the rightful concerns that Baher just mentioned—that the detaining authority, the one who wanted the prisoner in detention in the first place, is now saying that his or medical well-being requires forced feeding. Three, the interventions must be conducted in a humane way. Even the International Criminal Tribunal for the Former Yugoslavia found that forced feeding can be conducted in a humane way, which they found prior to ordering forced feeding in 2006.

#### **NIGEL RODLEY**

Thank you, Rachel. The last speaker on the panel is Bill Lietzau.

#### **WILLIAM LIETZAU**

Thank you. I am no longer in government, and so I am free to say whatever I want, but I probably will be taking somewhat of another side. I will follow up where Rachel left off with the legal discussion. I think really she started getting into the ethical discussion because, let's face it, nobody drafts our laws to be unethical. Those kinds of ethical considerations are built into everything that we do with the law. When we drafted the Geneva Conventions, we built in all those provisions that she was talking about—on making sure that we are not making rash decisions about important issues in the midst of an armed conflict when people's thoughts aren't always as logical as they should be. There are all kinds of examples of this throughout the Geneva Conventions. I think this plays into what I will then focus on as the ethical piece, because I think Rachel covered the legal piece. Under domestic law, and I would argue under international law, as well, there is really no issue here.

Ethically, where are we? I think it is important that people in this room understand at least the rough outlines of DoD's policy. In 2006 the Department of Defense sent down a committee of medical experts to look at the Guantánamo detainees specifically and to look at this issue of what our policy should be with respect to a hunger strike. We included the chair of the American Medical Association's Council on Ethics and Judicial Affairs, a physician Member of Congress, a prominent Muslim physician, a senior staff member on the President's Council on Bioethics, and a number of military medical professionals. These individuals came up with the policy that we have today, which is designed around preserving the life and health

of detainees. It was carefully crafted to be consistent with the law, because this is a law that has been challenged many times in the Bureau of Prisons, which has essentially the same policies. Of course, this law does involve objective criteria like Baher described, but the objective criteria are used by medical professionals to make their recommendations. They are not reflexive; if you miss this many meals, you do not suddenly have enteral feeding taking place.

You look at the conditions of the detainee, whether he or she has hypertension, diabetes, or some other medical condition that could be exacerbated by their particular fast situation. You look at their weight. You look at their physical status, and then you engage in all of the discussions that Dr. Xenakis listed. I think he was reading from the 1975 Tokyo Protocol, and I think the Malta Declaration has very similar recommendations as to what medical professionals should do in trying to explain to detainees where it hurts them and where it doesn't to be on this kind of fast. This process takes place every time there is a hunger strike. And it happens more and more frequently as you get to the point where it's possible or likely that there is going to be the nasogastric tube feeding.

I think the international humanitarian law/human rights law juxtaposition is important here. This policy issue is a "human rights" matter—which is dealt with both by HRL and by IHL. When looked at from a HRL perspective, I believe the answer comes out in favor of enteral feeding; though that can be debated. When looked at under IHL, the more relevant body of law, I believe the argument proceeds a fortiori in favor of enteral feeding.

Basically what you've got is the sanctity of life on the one hand, and undermining someone's autonomy on the other hand. When you get to the point where the doctor says, "We really need to do enteral feeding here," we are weighing in favor of preservation of life over personal autonomy. That discussion is dealt with quite a bit in the World Medical Association's declarations on this. Look back at the history. You are looking more than 20 years ago when people were being kept alive while being tortured, and they were being prevented from dying so that they could be tortured more. Those are not the circumstances today. And that's what led to some of those declarations. Right or wrong, there is a legitimate debate regarding weighing autonomy against preservation of life. I would say in a wartime scenario, you err on the side of preservation of life, for all the reasons Pictet gave in the *travaux* to the Geneva Conventions.

I will note, for instance, that U.S. Immigration and Customs Enforcement also uses the exact same procedures. So this debate should not be about what we do in Guantánamo. It should be about what the U.S. government in general does with detained people. But whatever we do with people detained in general, we should do it even more so at Guantánamo. We should be more careful in Guantánamo where detainees' competency in going on a hunger strike might be affected by the long years they may have been in detention and their resulting despondency. We need to be especially careful that these detainees might not be mentally competent to make the right decisions about their own lives.

## **NIGEL RODLEY**

Thank you to all the panelists. I will throw a question out in each direction and then also invite the panelists if they want to ask each other any brief questions, and I mean brief questions, not long responses to what they have heard, but a little bit of cross-dialogue here would be useful.

Let me start with those who are challenging either the principle of forced feeding or forced feeding as it applies in Guantánamo, and may I say that there are three threads to this

discussion. It may be useful for us at least to keep them in our heads as part of the complications. Is forced feeding ever justified against a conscious political protest of hunger striking? Is it justified in the way it is being done in Guantánamo? Is it justified in Guantánamo in that whole context of detention in Guantánamo? All those issues are in play in this discussion, and the question we were asked is just the abstract one, the first one I mentioned: Is forced feeding in response to hunger strikes a violation of the prohibition of torture and cruel, inhuman, or degrading treatment? So when all of us address the issues, it would be good if we could clarify which of those three dimensions we are addressing.

My question, first of all, to those who are challenging the principle of forced feeding, or the principle of forced feeding as it is applied in Guantánamo, is how you deal with the allegation, assuming there may be some substance to it. I must say that in my own work I have come across corporate decisions on behalf of prisoners whereby they feel obliged to stick to some kind of corporate ethos rather than exercise their own independent, individual judgment, if they feel able to at all. How do we avoid that issue being the one that determines a person's decision to hunger-strike, rather than a genuine autonomous reason of the sort that one would normally perhaps be thinking of protection?

Walter, do you want to start? Go ahead.

### **WALTER RUIZ**

You are asking basically how to build a safeguard to determine if a person is really making a decision based on their own autonomy versus driven by despair and hopelessness.

I can give you a practical, real-world example of how we tried to do that in Mr. al-Hawsawi's case very recently. We filed a motion to preclude the use of forced feeding on Mr. al-Hawsawi or, in the alternative, if it was determined that he was on a hunger strike-type protocol, that the attorneys would be given notice of that protocol, and that the protocol had been established. The reason for that was that we felt that over the course of time, we had managed to build a relationship of trust and respect with Mr. al-Hawsawi, and one of the things General Xenakis can speak to—and he did speak to—was the relationship of trust between patient and doctor. That hasn't always been the case in Guantánamo Bay.

When we addressed this issue in court, we told the judge that it would be an additional safeguard where a person who has an established relationship with some of these men, the ones that have legal representation, could actually engage them in a dialogue. As advocates, we have their interests at stake. That's the person we represent. So it was our position that we would be in the best position to assert and affirm that in fact this was somebody who was exercising his judgment in a manner that was consistent with rational judgment and that he wasn't being improperly influenced by, let's say, the popular opinion or peer pressure, for lack of a better term. The reality is that they are being influenced, and that influence comes from oppressive conditions that they see every day.

Our position was rejected, and it was essentially rejected because Mr. al-Hawsawi had not actually been force-fed, which obviously would have defeated the purpose of filing a motion, asking them to provide us with notice and an opportunity to engage the person we represent and whose interests are at stake from doing that.

The standard operating procedures in Guantánamo Bay include provisions that a physician is not ultimately the decision-maker. The physician just makes a recommendation to the commander of the base. The commander of the base then has to ask for permission from the commander of the Southern Command, who is based in Florida. So you are not seeing a situation where there is this imminence of somebody wanting to be force-fed or being

force-fed. In fact, the very standard operating procedure indicates that the government built in their own internal checkboxes and procedures before they did that. Unfortunately, they are not allowed to do that to representatives and to the attorneys who would be in a position to do that, having established a relationship, in my case, over four years, with somebody who has come to gather a measure of trust. Even with somebody who represented him for many, many years in uniform and who was a representative of the government that had treated him lower than the standards of international humanitarian law and in contravention of prohibitions against torture and degrading treatment to begin with.

So I think that is one way, Sir Nigel. I think one way is to provide an opportunity for representatives of these men to have meaningful conversations with them, to be on notice, to meet with their physicians.

We are not allowed to know who the doctors are. We are not allowed to meet with medical personnel. Now, I have practiced in just about every jurisdiction in the United States—regular, military, court-martials, state courts, and federal courts. I can tell you this is the first time that I have ever been unable to meet with a physician to discuss a condition that was of a concern about my client. It's offensive, to tell you the truth, because the physicians wear fake names. They will use fake names, such as "Freddy Krueger," and they think that this is somehow comical. So do the staff judge advocates. They are not allowed to wear their names, so they wear pseudonyms. And for the attorneys representing these detainees, we have to go through an attorney ourselves in order to request an opportunity to speak to our client's doctor.

We recently did that in Mr. al-Hawsawi's case where we were asking for a particular procedure. We were unsuccessful and were not granted access to the medical personnel. In the context of a forced feeding, I think in order to determine if in fact a detainee is acting on his own volition, it would be very helpful to have access to physicians and to be able to speak to them and to have a dialogue, but that is prohibited in Guantánamo Bay.

#### **NIGEL RODLEY**

Thank you very much for that, Walter. I will give Baher a chance to add anything to what Walter has already said.

#### **BAHER AZMY**

I think there should be a presumption that these individuals are acting rationally and autonomously in protest of their conditions. After all, it certainly maps to the reality of what the world perceives about injustice in Guantánamo, and that presumption, as Walter suggests, can be tested if it is in question through the use of advocates or judges.

In terms of the cooperation or group nature of the hunger strike, particularly the mass hunger strike in 2013, again the presumption for me there is that this is an act of fellowship and strength driven by autonomous choices by like-minded individuals who see solidarity in their unjust detention. Not everyone participated, although a majority did because of a moment of opportunity, a political opportunity for them. Many of them came off the hunger strike, some because of the uncomfortable conditions that were imposed on them as a result, others because they felt that they had gotten something out of the hunger strike, which was an address by the President of the United States to the fact that they were hunger-striking and the commencement of transfers out of Guantánamo. All of that seems to me like the actions of deeply principled and autonomous human beings.

**NIGEL RODLEY**

Thank you for that. Steve, jump right in.

**STEPHEN XENAKIS**

Just a couple of things. As a physician, I would like to speak to the issue of patients whom we think are making autonomous decisions in one way or another, decisions that we would judge as seriously compromising their lives or possibly ending in death—anorexics, people refusing chemotherapy, any number of serious illnesses where they have the autonomy to choose what their life will be like and what the course is going to be based on the circumstances that they are facing.

Now, when you look at the cases, the Institute on Medicine as a Profession (IMAP) did in fact go out to a number of cases. Their note was that there had been no hunger strikers who had died since the ten in Ireland, because the procedures are such that doctors who had a doctor-patient relationship with the hunger strikers were engaged early with them and were able to walk the strikers through the processes, and in fact the strikers did not sustain the strike, having made the point that they wanted to make. The issue here, as a physician looking in and in fact spending time with the hunger strikers, is that the procedures as they are laid out do not conform to what we see as standard practice.

First, there is no need to feed after nine missed meals. The hunger strikers take water, so that really does not compromise their physiological state for quite some time. Second, there are a host of ways that strikers can be engaged and involved in a way that they will reestablish their feeding. Unfortunately, none of these processes are being conducted down there. We feel, therefore, it is really a violation of our medical principles, even though there is this issue, as has been articulated, of the non-renunciation of life.

**NIGEL RODLEY**

Okay. I am now going to ask a similar sort of question to Rachel and Bill, but they can also use a little bit of time to respond briefly to what they have heard. They will also have a chance to wrap up at the end. My question, therefore, to Rachel and Bill is: Do doctors have to be forced to force-feed if their understanding of internationally agreed medical principles tells them that they should not be involved in forced feeding?

**WILLIAM LIETZAU**

Okay, thanks. I am in a very difficult position, because I am probably the one on this panel who has the greatest knowledge of the facts involved in Guantánamo. I don't want to get involved in a tit for tat on some of the factual claims that have been made here that are frankly just false. I don't want to go through all the details.

But with respect to the situation of the doctors down in Guantánamo, for instance, I don't know what the particular rule is that prevented Mr. Ruiz from talking to a doctor, but this is a free country. These doctors go back and forth. They are not there over years of time and unable to be talked to. There are hundreds of them in this country right now. They have First Amendment rights like everyone else does. You can talk to them. You can ask them these very questions about whether they have any problem with forced feeding, and you can talk to them about what happened down there.

I have talked to many of them. I have been enterally fed by them. I have asked them to do everything to me that they do to a detainee. Never once has one of the doctors I've talked



to described any kind of ethical concern that they have had with what they were being asked to do. This is what they were asking to do.

I just think it's important that we get the facts right. There is a legitimate ethical issue here over whether an autonomous person should be allowed to take himself farther than where our doctors in Guantánamo are allowing him to go. That's a legitimate ethical issue.

On that legitimate issue, I do want to comment that, yes, their autonomy is questioned. I'd question it right now. We maintain communications with those detainees, and it is absolutely true that they are in a military chain of command. In many cases, they are being ordered to do something that their superiors in Al Qaeda want them to do. Many times, because of the close relationship that our doctors have with them—and they absolutely do develop those relationships—the doctors are privately told, “Please enterally feed me. Please don't let me die. I don't want to. I want to do a peaceful protest,” as Baher described as what they want to do. They are doing a peaceful protest, and do you really question whether they don't have the right to do a peaceful protest? Would we have this panel here right now if they weren't successful in their peaceful protest? They have been absolutely successful. They were able to get their numbers up to 100 hunger strikers. They were able to get their numbers up to 40 people being enterally fed. That is exactly what they wanted. That's what they told us they wanted, and they succeeded. They were not being frustrated in their peaceful protest.

These policies didn't change from their previous hunger strikes. They chose to do this, so that they could make the case that they are trying to make, and if I were one of their lawyers, I would use this to try to help them to get their conditions made better, as well. I think they are doing a great job if you're representing somebody, but our job is to do what's right and that is, I think, what the U.S. government has been doing.

#### **NIGEL RODLEY**

Rachel, do you want to have a few words?

#### **RACHEL VANLANDINGHAM**

I've never been enterally fed, so I don't know how to follow that. To answer the strict question that Sir Nigel has posed regarding whether a doctor should be forced to contradict his or her own professional code of ethics, I think the answer is the same, whether it is a doctor or a lawyer. As lawyers and as doctors, we have professional codes of ethics, and if our employers are directing us or otherwise coercing us to go against those ethics, we have an ethical obligation to say no. But we have to be willing to pay the consequences of violating a direct order, which in the military is presumed to be legal until you show in court that it's not. No, you should never be forced to violate your ethics. But I would have to caution you to be very sure of what those ethical obligations are.

#### **NIGEL RODLEY**

Thank you, Rachel. That is a very helpful response, and I am glad you distinguished between the professional medical code of ethics and the individual's personal feelings of right and wrong. The presumption ought to be that a conscientious doctor will want to follow the medical ethical codes, both international and national. I believe the American Medical Association subscribes also to the same principles.

Okay. We will open the floor to the audience now for questions.

**AUDIENCE MEMBER**

I am Fionnuala Ní Aoláin, one of the Annual Meeting's Co-Chairs. I am from Northern Ireland and have been involved with Irish hunger strikers, as Nigel has been at various times. So I wanted to raise the following question. One of the factual dynamics in the Irish situations was that family members were involved both in the decision-making process and in having access to victims or to those who were hunger-striking and having access to doctors. There was a presumption by the British government that family members, as they would have in any medical situation, had a right of access, so that was the first point, and I would welcome your comments in that regard.

My second point is that I am interested in this discussion of "everybody's facts are everybody's facts." I will say, from dealing with hunger strikers in Northern Ireland, as Sir Nigel can also attest, that whether it's government perceptions of fact or the lawyers' perceptions of fact, no one has an absolute moral authority on facts. Your perception is entirely placed by the context you're in and the institutional setting in which you organize and whatever chain of command or whatever legitimacy you have from your own working situation. So I think we should be very careful in presuming either that the government has a full understanding of the facts or the situations of individuals, or that the lawyers representing these individuals don't fully see certain things. No one has a moral majority on the presumption of the facts, I think, in this situation or any such situation.

**AUDIENCE MEMBER**

I am Lesley Wexler, professor at the University of Illinois College of Law, and this question is for Rachel. I was hoping you could say a little bit more about how courts are construing the right to life in these cases, because you could imagine a contrarian interpretation of the right to life, which is more of a negative right to non-intervention by state actors but not a positive right for the state to intervene on the patient's behalf. If other people on the panel want to speak to that interpretation and where that might be located in the law, as well, I would find that helpful.

**AUDIENCE MEMBER**

I am Suzanne Lachelier, with the Chief Defense Counsel's Office with Military Commissions. My question is to Mr. Lietzau, but also to Dr. Xenakis and Ms. VanLandingham. If the doctors are in fact performing an ethical obligation and are acting in full compliance, then why the need to hide their identity? Even if they want to preserve their privacy or whatever, then why can't defense counsel access the doctors? Given that we are not given their names, we can't find them even when they come back to the States. If everything is all copacetic, why do the doctors have to hide? Thank you.

**NIGEL RODLEY**

Thank you very much. Again, I am at least aiming just to get all the questions on the table and then allow my colleagues to respond as they think fit and the short amount of time I will leave them. Does anybody else want to ask any questions or make any points?

**AUDIENCE MEMBER**

My name is Kristine Huskey of the University of Arizona and counsel on *Rasul* a long time ago. I started representing detainees in 2002 and working with Dr. Xenakis on those mass hunger strikes, so I'll just make a couple of points.

The first is, Bill, you talked about what the United States is doing with detainees and forced feeding everywhere. Well, the BOPs (Bureau of Prisons protocols) don't apply at Guantánamo, and by that, I mean maybe the forced feeding policies and regulations do but not all the other parts of the regulations, like access to families, which is something Fionnuala mentioned. More importantly, I think, than the question of what do lawyers have access to, is what do the patients/prisoners/detainees have access to? I think that's the biggest question. Do they have access to families? Do they have access to a religious leader of their choice?

If you read the BOPs, they say that family contact really matters because we believe in rehabilitation. So the question is: At Guantánamo, is that what we believe in? Are we giving the detainees everything they can to rehabilitate into society eventually? I think that is something to think about when you are talking about the policy there.

Rachel, I would like to push you a little bit on the principle of non-renunciation, which was briefly mentioned, i.e., the right to life, but also the right to be free from torture and degrading treatment, even if you don't believe that human rights apply there but only Common Article 3. I would like you to talk about that a little bit more, whether you think that applies.

### **NIGEL RODLEY**

Thank you very much, and that is, I think, it. I'm going to give each of the speakers a chance to respond to each of the points that have been raised, either from the floor or by each other, and I am going to do it in reverse order this time from the previous order. So I am going to start with Bill Lietzau. You have the floor.

### **WILLIAM LIETZAU**

Okay, thank you. I feel some obligation, since a lot of the questions would be on ones for me, I am going to have to answer them.

With respect to family members' involvement in decision-making, the detainees all have the ability to make phone calls home. They all have Red Cross messages. They all have Skype calling capabilities, so they can see the family members, as well.

I am going to go out on a limb because I'm not in government anymore. In Afghanistan and Iraq, we also provided family members access to the detainees, so that they could have meetings. I think that there was at one time a proposal from the ICRC that they would assist the U.S. government in opening that up, and I see no problem with having family members have access to detainees. I think that is part of a principled detention policy, especially one that has gone on as long as this one has.

That said, the doctors absolutely use family members, to the extent they can, to assist them in convincing a detainee not to engage in hunger strikes.

Again, we had the comments about facts. I don't think I've stated one fact that is not absolutely objectively verifiable. I haven't been throwing out facts that are debatable. The question came up, though, with respect to the doctors not being allowed to wear their names in Guantánamo. This is because no one is allowed to wear their names in Guantánamo. This is a war. If there were one thing I could do differently, personally, I would have called the detainees "prisoners of war" from the first second to make that clear. In the situation of a prisoner of war, you have got them viewing us and vice versa as enemies, and there is a threat to the people who interact with the detainees. In fact, some of the people who have had detainee contacts have received threats later on after they have left. So that might be in play here.

That said, there is nothing to stop those doctors from saying, ‘‘Hey, you can talk to us,’’ and if one of them is morally opposed, I encourage them right now publicly: Doctors, if you think you have been forced to do something morally inappropriate, speak up. Talk to these defense counsel.

This is a legitimate human rights question, but I return to my earlier point. Bureau of Prisons policy shouldn’t apply, because the same coercive atmosphere does not exist in a Bureau of Prisons situation. But that atmosphere does exist in a war. It does for these detainees. I can tell you right now, I could not morally or ethically hold the job where we allowed someone to hunger-strike to death under the conditions that I know they’re in. And I think we need to be careful as lawyers when we debate things like human rights law and which role it should play—even if ethical documents suggest that there is a right way to counterbalance competing interests, to never lose track of the fact that it’s about human rights. It is not just about preserving some norm that you think protects human rights law or something else. It is about the human rights of that individual. From my experience, everyone who has been involved in this process and the decisions associated with it has been doing so in a way that has been an attempt to protect human rights and the health and welfare of the detainees.

#### **NIGEL RODLEY**

Thank you very much, Bill. Rachel, your turn.

#### **RACHEL VANLANDINGHAM**

Common Article 3 was a triumph of human rights, and again, going back to the principles of international human law or the law of armed conflict, they represent a balance between military necessity and humanity.

Going to Lesley’s question regarding how the courts have construed the right to life and health under Common Article 3 vis-à-vis force feeding, they haven’t. That is one of the problems. The International Criminal Tribunal for the former Yugoslavia found, at least implicitly, that force-feeding a prisoner being held during his trial for a war crime was not cruel, inhumane, or degrading treatment, and the ICTY ordered it to be conducted. I think you have to look at the fundamental achievement of Common Article 3. Its purpose was to protect human beings from the ravages of war to the greatest extent possible, and part of that protection is not allowing them to decide they want to die in detention.

But Common Article 3 and the rest of the Geneva Conventions allows for abrogations or abridgements of human autonomy, personal autonomy. The right to life is not necessarily equal to the human dignity, the personal autonomy value that’s articulated in the Malta Declaration and the Tokyo Declaration. That can be abridged, and it’s being abridged every day. Detention is a form of abrogation of someone’s human autonomy, so I think we need to be careful and explicit about what values are being weighed. We need to review the fundamental premises of international humanitarian law. It is not the end-all, because, especially in a non-international armed conflict, IHL has gaps, and it needs to be filled in. Going back all the way to the Martens Clause, you look to principles of humanity, and those principles of humanity are found in human rights law.

But where it is clear—which it is in Common Article 3 and, I believe, the non-renunciation principle—you defer to that rule, and that rule protects human beings at its core. Thank you.

**NIGEL RODLEY**

Thank you, Rachel. Next speaker, Steve Xenakis. You have the floor.

**STEPHEN XENAKIS**

I just want to start by saying—and I’ve said this to Bill before—that we are absolutely watching different movies, and we’ve all spent a lot of time down there. Part of the problem is that there doesn’t seem to be a way of being able to get a consensus and to somehow have a glimpse of reality in a way that it can be a working reality. That’s at the core of what we do and how we handle the hunger strikers.

I will go to the first statement by the lawyer from Ireland. Let me just note that Kristine kidnapped me several years ago on this course and is holding me hostage regarding hunger strikers until I get it right. What I have found is that the BOP rules are shallow. Very few people have a lot of experience about what to do. So we as practitioners need to look at other parts of our practices to figure out what the right thing is to do here.

I have had to make decisions over 40 years of practice about whether to provide so-called “life-sustaining treatment” or withdraw life support for a hunger striker, and these decisions always involve the engagement of all the parties, including the striker and their family, as you heard happened in Ireland. Because these are tough questions, there has to be trust. There are multiple issues, and there are multiple people involved in the conversations, and they all have to bring that to bear when it comes to these life-sustaining decisions. That cannot happen at Guantánamo. Not once when I have asked to speak to a physician, not once when I have asked to look at the medical records of hunger strikers have I been allowed to see those records. I would want to see them because I know that I have blindness and limitations as a clinician, and I want to get the advice of other clinicians, who, by the way, rotate every six months. I think that when it comes to the fundamental doctor-patient relationship and trust, it is really hard to build that under those circumstances.

So the movie that I watch—and I know that I’ve got trifocals on—is a movie in which this can’t happen. The proper treatment that any of us would at all subscribe to, ethical as physicians, ethical as human beings, ethical in terms of being military officers, the conditions are not there for this to happen.

**NIGEL RODLEY**

Thank you very much, Steve. Next, Baher Azmy.

**BAHER AZMY**

A word about facts, which I think are interpretable in this context. First, with respect to access to family, there is no meaningful access to family in a way that is even remotely comparable to the example offered before in Northern Ireland. Sure, there are ICRC letters via the ICRC home. There are monthly phone calls. But there is simply no support network that we could use to have a supported and ethical conversation about withdrawing the so-called life support of the forced feeding regimen.

With respect to whether or not there was an attempt to stop the hunger strike, that seems fairly obvious, at least from the perspective of representatives of the detainees. As I mentioned, first, the Department of Defense stopped talking to the press about the number and conditions of individuals on the hunger strike, which does not speak to the transparency that is supposed to surround Guantánamo. Second, they started taking people out of the communal living

camps and putting them in solitary confinement, presumptively for no other reason than to break their capacity to continue to hunger-strike.

Referring to the conflict of interest I mentioned earlier, I think that when the jailer or the force feeder is the instrument of injustice that people are protesting against, as opposed to some neutral ethical actor, then I think we have serious reasons to question whether or not there are in fact genuine ethical protocols in place.

Finally, I'm not sure I heard Bill correctly, if he said the sort of shibboleth that all of these individuals are taking instructions from an Al Qaeda structure; if you didn't say that, I apologize. But I think we don't have time to debate that shibboleth. I would like to turn to the words of our clients and ask you: Is this an autonomous person? Is this someone who is articulating his political protest as if acting out of command structure from Al Qaeda?

Tariq al-Odah has been on a hunger strike since 2007 and has spent 22 hours a day in solitary confinement. He writes to my colleague:

Peace be upon you, and God's mercy and benediction to Attorney Omar and all those who are reading my words. Why am I on a hunger strike? A question I have asked myself many times, and I couldn't find a satisfactory answer. I do want to eat food just like all human beings. I forgot the taste of food, its saltiness, its sweetness. I've even forgotten the pungent smell of food that used to stay in my fingers after eating. Forced feeding has made me forget the taste of food. Eating has become a minor problem compared to all the other types of torture I am enduring, and the hunger strike represents only 5% of the torture I am enduring. I did not choose the venue of hunger strike, yet it was rather the unjust people around me with their cruelty who gave me no choice to do it. You might ask me the reasons for which I am still on a hunger strike. Even though I have not been able to achieve anything at all, one day I looked at my face in the mirror, and I was shocked. I would rather say saddened. I felt the mirror was looking at me as if it were asking me if that was really me, and I shook my head and said, "No. And I have no regrets." I felt as if somebody was asking me if I had any regrets. Therefore, my hunger strike has become a shield which would protect me. The hunger strike has nourished me in the sense of resistance and reminded me that the unjust cannot manipulate me as he pleases. He will not succeed in controlling me or controlling my destiny, for I am the one who controls it. Since I learned all these facts, I smiled at the mirror, and that is the reason for which I am on a hunger strike. And the question I should be asking myself became, "What is the point in eating?"

#### **NIGEL RODLEY**

Thank you for that, Baher. Walter Ruiz, over to you now.

#### **WALTER RUIZ**

Here is a fact. Guantánamo's legacy is one of shame and will always be a legacy of shame. That is one fact I have absolutely no fact or problem saying. It is a legacy of shame today. It will be a legacy of shame tomorrow, and it will be a legacy of shame in the future.

I reject the proposition that our government has always done things correctly and treated these men humanely, but I specifically reject the proposition and the allusion to government itself, because my version of government doesn't belong to a few actors who made decisions that set the conditions for degradation, for the lack of humanity, and for the torture and treatment that is a fact and will always be a fact in Guantánamo Bay, Cuba.

Our government belongs to all citizens, not just those who made decisions that were contrary to our most basic and dignified principles. It is these other actors, these other citizens who continue today to fight, based on the facts that we see every day when we go to court, when we travel to Guantánamo, when we're not making policy but are actually in the front

lines fighting this fight. The fact of the matter is that I submitted two medical records requests, two requests to meet with doctors within the last month—and they were both denied by the doctor, and they refused to meet. That’s a fact, and it can’t change.

Nobody—I guarantee you nobody—on this side has forgotten that this is about human rights, and to attempt to refocus our fight on human rights is almost more than I can stand, to tell you the truth. There is absolutely nobody in this room who knows that better than I do that it is about human rights, that it’s always been about human rights, and that it will continue to be about human rights.

The fundamental problem with the assertion of a denial of principles of life is that, as I indicated when I spoke earlier, these detainees are not rejecting their life. They are calling for life, for a meaningful life, and life is not just an existence. It is not having a body pumped full of fluid, so that you can maintain the flesh on the bones of the body. Those men have already been essentially killed by the way that we treat them. Their souls have been deprived, and they are essentially dead. That’s the kind of life we are talking about. They are not renouncing that. There is absolutely no intention of ever renouncing that, and so I think that that’s a fundamental flaw in that argument.

My hope is that there will come a day when this discussion or this debate will not only be unnecessary, because the answer is self-evident, but it will be seen as an anomaly. When we think about law and the legal profession and the opportunity to speak on behalf of people who can’t speak for themselves, we must remember that our laws affirm the consciousness and the morality of the society of that time. There have been times in the history of our nation when our Supreme Court Justices have affirmed that in fact human beings were chattel and human beings were property, and that “separate but equal” was fine because of the color of a person’s skin. Our laws and our institutions and lawyers debated that ad nauseam, as though it were some fact that needed to be debated.

Thankfully, we have moved beyond that. We have moved beyond debates about whether American citizens can be interned in camps because of their ancestry, whether only men should be permitted to vote, whether it is permissible to own human beings. All of these things were perfectly legal at one time. They are not any longer, thanks to the evolution of our law and the evolution of human rights.

My sincerest hope is that panels like these will not be necessary in the future, because the answer will be so unmistakably clear, and that it’s just not the way to do things.

Thank you for the opportunity.

### **NIGEL RODLEY**

Thank you, Walter.

[Applause]

Before asking you to thank all the panel, all of whom have contributed very important perspectives to our understanding of these issues, I just want to say a few words myself, coming slightly off the fence. First of all, what is the human rights law position in relation to the question asked, “Is forced feeding torture or cruel, inhuman, or degrading treatment or punishment?” And that is an abstract question. I just want to take it away from Guantánamo and actually how it’s played in Guantánamo at the moment and the issues surrounding that.

I would suggest that the preponderant view is that of the European Court of Human Rights in *Rappaz v. Switzerland* from last year. The court had to issue an inadmissibility decision because Rappaz ended his hunger strike without actually having been force-fed, but the court did say that if he had been force-fed, it might have been okay under Common Article 3.

This was a procedural, a “manifestly ill-founded” judgment by the court. It wasn’t the full bench or anything like that, which I think would have taken a rather more reasoned approach, especially if the forced feeding had actually happened.

Something very unusual happened last year. The Inter-American Commission of Human Rights, the UN Working Group on Arbitrary Detention, the UN Special Rapporteur on Torture, the UN Special Rapporteur on Human Rights and Counterterrorism, and the UN Special Rapporteur on Health all addressed the issue of Guantánamo and forced feeding. My own committee has addressed the issue of Guantánamo, and we have asked for it to be closed and for the internment to be closed. But we also called for medical ethics to be followed while it’s still happening. I have never seen a regional body and several UN bodies get together on a single issue and do so, and they were very clear that it is the right of the individual as a right. The right to life is a right. It’s not a duty.

A statement from Pictet in 1947 is probably not conclusive of what international human rights law has to say. I think it’s pretty clear that the issue of individual autonomy is one that has to be respected as long as it *is* individual autonomy. The problem is that we need to set up safeguards to ensure that it is individual autonomy that is being respected, individual will that is being respected, rather than something else. It is just a straight international human rights law approach to the issue.

Thank you, Bill, and I want to thank you all for being here, for participating, and to ask the audience to thank all the panelists for their really important contributions.

[Applause]