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Contesting the Meaning, Permissibility and Use of Torture

Enhanced Interrogation Methods and the Norm against Torture

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Abstract

US President Donald Trump proclaimed during his election campaign that he would bring back waterboarding and 'a hell of a lot worse'. As far as we know, however, this threat never materialised during his time in office. This chapter argues that international law and being seen to act legitimately constrained Trump's policy aspirations with regard to proposed interrogation techniques. The prohibition against torture is a strong norm, institutionalised in international law that influences US government decisions. To make the argument, this chapter looks at the 'torture memos' which show that former President George Bush's administration not only tried to frame its policy (practically) as in line with international law but also conceded (normatively) that it should be doing so. The main argument is that discussions about the legality of US actions with regard to interrogation methods reflect the importance of international law for policy decisions. The rule of law matters and it has an impact on the Trump administration that has not been able to construct a convincing argument that 'torture' is a lawful way of gathering intelligence that the government can pursue legitimately.

Discussions surrounding the use of torture as part of official state practice in the United States resurfaced in 2016 when Donald J. Trump proclaimed during his election campaign that he would bring back waterboarding and 'a hell of a lot worse' (Johnson 2016. 'Trump Says "Torture Works", Backs Waterboarding and "Much Worse"'. *Washington Post*, February 17.). As far as we know, however, this threat never materialised during his time in office because as former CIA director, Michael Hayden said at the time, 'if Trump is serious about waterboarding terrorists, he'd better bring his own bucket' because the CIA is not going down that road again (Woolf 2016).

To understand these dynamics, it is instructive to look at discussions related to former President George W. Bush's use of torture as part of his 'enhanced interrogation' programme following the 9/11 terrorist attacks. It has become clear in recent years that torture and prisoner abuse were widespread and 'the product of a systematic policy expressed in explicit instructions to the interrogators of the US Armed Forces and the CIA to obtain "actionable intelligence"' (Heine 2011, 573). An inquiry by the Senate Armed Services Committee in December 2008 found that:

> the abuse of detainees in U.S. custody cannot be simply attributed to the actions of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of legality, and authorized their use against detainees.
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> (Senate Armed Services Committee 2008)

This finding was further supported by the 2014 Report on the CIA's Detention and Interrogation Programme that was issued by the Senate Select Committee on Intelligence (United States Congress 2014). The Report showed that CIA officers and contractors conducted interrogations using techniques such as stress positioning, walling, slapping, dietary, sleep and temperature manipulation and waterboarding. In addition, the CIA systematically subjected suspected terrorists to 'extraordinary renditions', transferring them to secret prisons in which they were brutally tortured by allied intelligence services in countries such as Afghanistan, Egypt, Jordan, Libya, Morocco,

Pakistan and Syria. As one American official put it, 'We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them' (Priest and Gellman 2002).

However, the Bush administration did not publicly boast about torture. Instead, it went to considerable lengths to legally defend its controversial security programmes (Sanders 2018). Legal advisors, particularly in the Office of Legal Counsel (OLC) at the Department of Justice (DOJ), became key players in the development and execution of security policy. Facing a risk-averse CIA, the administration solicited legal advice to provide the agency with a 'golden shield' (Mayer 2008). The so-called 'torture memos' show that rather than violating international law by denying the anti-torture norm existed, the Bush administration tried to use legal provisions to justify its interrogation methods.

This chapter explores reactions and debates following the publication of the memos to show the impact such contestation of the anti-torture norm has on international law. The chapter focuses on the United States because of its position as (arguably) the most powerful state in the international system with a capacity to reinterpret norms. Even though states are formally equal in international law, and possess the same legal rights as one another, power becomes relevant when assessing actual state interpretations of law. This means that decisions taken by the United States as powerful actor in the international system carry more weight than similar actions taken by less powerful states. Other states might follow the US' lead because, 'once dominance is regarded as legitimate – and thus turns into authority – obedience is no longer based on calculation, but on conviction that it is necessary and right' (Krisch 2005, 374).

In this way, the United States can act as norm setter, trying to construct a permissive normative order, which reflects its own interests. At the same time, however, the United States remains embedded in the overall system and is not independent of it. Contestation of international legal concepts is therefore not limitless. Even though 'a single powerful state can, by its unilateral behaviour, undermine a legitimated rule. It cannot replace it with no-rule (or "anarchy") but it can provide a competing interpretation of the rule and then attempt to institutionalize it through legitimation' (Hurd 2007, 202). By examining the debates surrounding the anti-torture norm in the context of the Bush administration, this chapter argues that such contestations are important for at least two reasons. Firstly, they do not mean the end or dissolution of the anti-torture norm. The United States did not deny the existence of laws banning torture but tried to re-interpret them. Crucially, however, it failed to generate a new shared understanding that would justify its approach. This was mainly because of the established legality of the norm. Secondly, debates surrounding the anti-torture norm clarified and strengthened the prohibition of torture and its shared understanding of it. For instance, Former President Barack Obama signed limits to interrogation methods into the National Defense Authorization Bill of 2016 which included a clause that clarified that interrogation techniques are limited to those that are authorised by the Army Field Manual (which shall not include techniques using force; and they shall be public). All these issues made it harder for President Trump to re-institute torture as part of official policy of US counterterrorism interrogation programmes.

This chapter starts by outlining the position of the anti-torture norm in international treaty as well as customary law before proceeding to analyse the Bush administration's justifications for using what they termed 'Enhanced Interrogation Techniques (EITs)'. As this volume's introduction sets out, rules that govern certain practices are open to reinterpretation and contestation. [xx] Contestation takes place over what is appropriate behaviour in each context which means that previously accepted meanings of norms are questioned and can lead to new justifications for actions. Contestation centres on the meaning of the norm in the eyes of different actors. For example, a norm might be ambiguous. It may also not have an agreed upon intersubjective meaning. In the present case, justifications for

EITs were mainly based on arguments of necessity and emergency exemptions but evolved along the lines of Cohen's three forms of denial. As will be further discussed below, these are literal denial ('nothing happened'), interpretive denial ('what happened was actually something else') and implicatory denial ('yes, something happened, but it was justified'). The chapter demonstrates that contestation over a norm's meaning-in-use does not always and inevitably result in a weakening of the norm but that such renewed argumentation over its application can also help strengthening it (Wiener 2017). The chapter closes with an assessment of how such debates and resulting (legal) changes impeded President Trump from fulfilling his campaign promise to 'bring back torture'.

The Torture Convention and Relevant Case Law – Formal Validity and Legality

Trump's explicit endorsement of torture during the 2016 presidential campaign was striking, not because torture is unprecedented in American history, but because politicians rarely advocate grossly illegal actions.[1] Without question torture is just that, the prohibition of torture is a norm that is established and institutionalised in the international community in several ways. The right not to be tortured is integrated into the International Covenant on Civil and Political Rights (ICCPR). Article 7 sets out that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Furthermore, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is ratified by 147 states (including the United States) and provides binding treaty law.

The prohibition of torture is a *jus cogens* (or peremptory) norm which means that it allows no exception or deviation from it through any other international law. Article 2 of the CAT clearly states: that 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'. There is also a great body of relevant case law that further confirms the status of the anti-torture norm. For instance, in the *Pinochet III* (1999) decision, the House of Lords ruled that torture was an offence with *jus cogens* character. In US domestic law, the anti-torture norm is established by constitutional norms, the Uniform Code of Military Justice, the federal anti-torture statute, and more recent legislation such as Section 1045 of the National Defense Appropriation Act (NDAA) of 2016. The latter clarifies that all interrogations undertaken by US officials must be consistent with the limitations set out in the Army Field Manual, which include bans on waterboarding (interrupted drowning), beatings and sexual humiliation. This shows that the law is clear – torture is unlawful and there can never be any exceptions that would justify its use.

However, to determine the role the anti-torture norm plays in international politics it is necessary to establish how the norm's actual meaning is enacted in relations between states. This means that while the anti-torture norm might be agreed upon in international law, 'the actual meaning of this norm may differ in the actual contexts of norm implementation' (Wiener 2009). The discussions that ensued amidst the publication of the torture memos during the presidency of George W. Bush show even established norms can be contested. Unsurprisingly, international law gets challenged during times of crises and political emergencies and particularly when they impact on national security considerations. The terrorist attacks of 9/11 and the subsequent 'war on terror' are such crisis situations that provided the US government with a framework in which to justify its conduct based on a narrative of emergency exception. For example, Bush set out that in relation to treatment of detainees held at Guantanamo Bay, 'as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva' (United States Department of State 2002). This very carefully chosen wording left considerable room for interpretation, because

‘military necessity’ was used to justify a range of questionable actions taken by the US army and the government over the years to come. The way detainees were interrogated became very controversial when more allegations of torture surfaced.

Human Rights and the Emergency Exception

The US government argued that 9/11 meant that an unprecedented crisis had arisen that justified the suspension of some fundamental human rights, because the ‘war on terror’ constituted a new kind of war that required novel mechanisms including new interrogation techniques. As Alberto Gonzales, in a draft memo to Bush set out in January 2002, ‘in my judgment, this new paradigm, renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions’ (Gonzales 2002).

The Bush administration argued that this extraordinary situation made the use of EITs necessary for reasons of self-defence and to protect national security even though these methods were considered by some of the agents involved as ‘borderline torture’ (Statement of FBI Agent Ali Soufan 2009). This was based on a familiar ‘lesser evil’ argument in which a lesser evil of suspending human rights of a few might be necessary to secure human rights of the many by defeating the greater evil of terrorism. ‘In the constructed dilemma of weighing the rights of one group against the rights of the other group, the answer is obvious: the identifiable norm hierarchy is based on the norm of state security and the belief that the “terrorists” do not have the right to full human rights protection’ (Liese 2009, 42).

As outlined above, however, human rights in international law do set limits to the way counterterrorism actions can be conducted legally. The fact that the torture prohibition is a peremptory norm with firm status in international law was one of the main reasons why the United States attempted to reinterpret what ‘torture’ actually meant under the unique circumstances presented by the ‘war on terror’.

The US government did not openly challenge the existence or validity of international law and its absolute prohibition of torture. It rather publicly asserted the opposite, reaffirming its commitment to these principles. In a statement on the UN International Day in Support of Victims of Torture in June 2004, President Bush, for instance, claimed that:

> The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.
>
> (Bush 2004)

Such statements were of course partly window-dressing on part of the presidency, paying lip service to established human rights standards. The challenge to the absolute prohibition of torture was more subtle. As argued, the Bush administration did not contest the validity of the anti-torture norm itself, but it rather challenged its content, practice, and meaning-in-use. It did not openly violate or breach international law but tried to utilise it to justify its policy decisions. EITs were justified with reference to international legal provisions with an attempt to change their content in the process. Justifications were done along a continuum of Cohen’s (1996) classification of different forms of denials. In the first phase of ‘literal denial’, the administration maintained that no torture was being committed. This became increasingly hard to defend, however, following accounts of prisoner abuse

in Abu Ghraib and Guantanamo Bay as well as growing evidence that these were not actions of a 'few bad apples' but amounted to systematic abuses of human rights.. This led to the second phase, that of 'interpretive' denial. which includes the use of words such as 'enhanced interrogations', 'increased pressure phase' to frame actions as being different from torture. By using such euphemisms, the government argued that its actions were justified and in line with the Torture Convention as well as other legal mechanisms that set out the anti-torture norm (Cohen 1996). In this phase, the DoJ issued memos that sought to redefine 'torture' to only include the most severe acts. Attempting to redefine international law, the administration claimed that its interrogation methods did not actually amount to what would legally be considered 'torture'. Finally, increasing criticisms of this approach led to the 'implicatory' denial phase, in which the administration admitted it had made mistakes, but that necessity of 'exceptional' circumstances justified such actions. The main problem here lies in the politicisation of what 'exception' means rather than the exception itself.

Attempting Interpretive Denial of Torture

Two memos written on 1 August 2002 by then-Legal Counsel Jay Bybee were leaked to the media in 2004. Both include an extensive engagement with international law and show attempts to redefine existing legal obligations to give cover for government actions. The first memo was issued in response to a request by Alberto Gonzales, then Counsel to the President to prepare a legal opinion on interrogation standards as implemented by United States. That memo sought to redefine what torture meant in the context of the law and concluded that it only included the most extreme acts:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm or significant duration, e.g., lasting for months or even years… We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.
>
> (Bybee 2002a)

In order to constitute torture, Bybee argued, the pain must rise to such a level of severity 'that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions' (Bybee 2002a). In terms of psychological suffering, acts 'must cause long-term mental harm' (Bybee 2002a). This interpretation went further than what is generally accepted by more conventional readings of the CAT and allowed for more extreme measures (such as waterboarding) to fall into the 'not-torture' category.

The second memo (Bybee II) was addressed to John Rizzo (then Acting General Counsel of the CIA) who had sought advice on the permissibility of very specific interrogation methods of Al Qaeda suspects. This memo makes for a rather disturbing read as it examined different interrogation techniques in minute detail to determine whether they constituted permissible acts within international law. Bybee wrote that the CIA wished to 'move the interrogation into what you have described as an 'increased pressure phase' (Bybee 2002b) and concluded that none of the proposed methods constituted torture or a violation of existing legal provisions. For instance, Bybee argued that even though waterboarding constituted a threat of imminent death (which would be in line with his own definition of torture): 'In the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted, and the use of these procedures would not constitute torture within the meaning of the statute' (Bybee 2002b).

Both memos demonstrate clear attempts to justify certain actions with reference to international law. They frequently refer to the Torture Convention and international law to which the United States is a signatory. Hence, Bybee did not question the formal validity of the anti-torture norm or US legal obligations under the CAT. The challenge was much rather on the practice and meaning-in-use of the anti-torture norm to justify US policy decisions and actions with regard to interrogation methods. Both memos constituted forms of interpretive denial, advancing different interpretations of existing legal provisions. By redefining what actions constitute 'torture', the government could claim it was acting lawfully. In this way, they did not contest established law but instead, the Bush administration used existing legalisation to frame and justify its own policy.

Change of Direction and Dissenting Voices

Widespread media coverage and public outcry following the leak of the two Bybee memos forced the Administration to (at least to be seen to) distance itself from the legal advice given. The so-called Levin memo was issued in 2004 in an attempt at damage control. In this memo, Daniel Levin, then Acting Assistant Attorney General for the Office of Legal Counsel of the Justice Department, argued that 'Torture is abhorrent both to American law and values and to international law' (Levin 2004). He further wrote that 'national security' was not a valid excuse and that torture was always unlawful. The memo reaffirmed that the definition of torture that the United States adhered to was in line with the CAT and not the way it had been defined in the Bybee I memo. However, the Levin memo did not withdraw the view that the President had unchecked powers as Commander-in-Chief. It also did not restrict any of the specific techniques authorised in Bybee II which included waterboarding.

Following the publication of the memos, the Bush administration received widespread criticisms for its approach. International lawyers, such as Harold Koh, who later served as Obama's Legal Adviser to the Department of State described the memo as 'perhaps the most clearly legally erroneous opinion I have ever read' (The Economist, 2005). Similarly, Jeremy Waldron argued that the memo's provision 'amounts to a comprehensive assault on our traditional understanding of the whole legal regime relating to torture' (Waldron 2005, 1709). Furthermore, national and international political actors increasingly voiced their opposition to the Bush administration's approach.

Domestically, Bush faced criticisms in Congress, even from within his own party. Republican Senator John McCain, who had himself been tortured in a Prisoner of War camp, proposed an amendment to the 2006 Defense Appropriations Bill (Congressional Record October 5, 2005) that was eventually adopted by Congress with a 90-9 majority. The law, which became the Detainee Treatment Act (DTA), includes more humane, uniform standards for the interrogation of persons detained by the Department of Defense. Amongst other things, it contains provisions that require military personnel to employ US Army Field Manual guidelines whilst interrogating detainees that clearly prohibit the cruel, inhuman and degrading treatment or punishment of persons under the detention, custody or control of the United States Government. The DTA refers to the CAT as an international legal obligation as ratified (and therefore legally binding) in US domestic law.

International legal norms were again the focus of the discussions surrounding the memos, but the applicable law was interpreted with vastly different outcomes. References to international law and obligations towards the international community show a recognition of the framework's existing normative constraints on purely interest-based policy making. Criticisms towards the Bush administration's approach were, therefore, another instance of contestation of the anti-torture norm's meaning-in-use as well as its practice in international politics. International law was used as a reference frame by both sides even though Congress' interpretation was more clearly in line with

existing international consensus. Congress members emphasised the need and urgency to stay within the parameters of the existing framework. As Senator Graham (R), for instance, stated:

> The Bybee memo was an effort by people at the Justice Department to take international torture statutes that we had ratified and been party of and have the most bizarre interpretation basically where anything goes. It was an effort on the part of the Department of Justice lawyers to stretch the law to the point the law meant nothing.
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> (Congressional Record: October 5 2005)

In addition to Congress, criticisms even from Bush's inner political circles became increasingly public. In February 2006, Philip Zelikow, then Counsellor to Secretary of State Condoleezza Rice, argued that:

> almost all of the [interrogation] techniques in question here would be deemed wanton and unnecessary and would immediately fail to pass muster unless there was a strong state interest to use them (…) Under American law, there is no precedent for excusing treatment that is intrinsically 'cruel' even if the state asserts a compelling need to use it.
>
> (Zelikow 2006)

The White House attempted to destroy all copies of the memo (see Zelikow 2009), presumably because it was aware that it was moving on extremely thin legal ice. Furthermore, it is likely that the administration did not want to openly admit to having been challenged and given conflicting legal opinions at the time.

Resistance to Bush's contestation of the anti-torture norm was not just confined to domestic actors. It came from the international community as well. In 2005, then-UN High Commissioner for Human Rights Louise Arbour (2005) issued a statement in which she acknowledged that 'an illegal interrogation technique, however, remains illegal whatever new description a government might wish to give it'. She furthermore emphasised the importance of the rule of law because 'the law provides the proper balancing between the legitimate security interests of the State with the individual's own legitimate interests in liberty and personal security' (ibid).

In 2007, the International Criminal Tribunal for the Former Yugoslavia (ICTY) similarly rejected the US' unilateral attempts to reinterpret international legal provisions. It held that:

> even if the U.S. executive branch determined that, for an act causing physical pain or suffering to amount to torture, it must "inflict pain … equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death", this would not suffice to make pain of such intensity a requirement for conviction under customary international law. No matter how powerful or influential a country is, its practice does not automatically become customary international law.
>
> (ICTY 2007)

Engaging in Implicatory Denial of Torture

Such criticisms and pushback made clear that attempts of interpretive denial failed, which led the administration to move to the final phase - that of implicatory denial. Rather than basing

justifications for actions on re-interpretations of existing legal provisions, the administration moved towards framings of necessity and emergency exemptions. In 2009, Steven Bradbury, then Acting Assistant Attorney General, wrote a memo that showed a marked shift in the legal advice's rhetoric. He distanced the OLC from certain opinions and propositions that had been made in the aftermath of 9/11 and argued instead that actions had been necessary under the given circumstances. This is in line with implicatory denial strategies, in which any wrongful conduct is justified with reference to exceptional circumstances:

> The opinions addressed herein were issued in the wake of the atrocities of 9/11, when policy makers, fearing that additional catastrophic terrorist attacks were imminent, strived to employ all lawful means to protect the nation. In the months following 9/11, attorneys in the Office of the Legal Counsel and the Intelligence Community confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure. (Bradbury 2009).

In addition, Bradbury's memo clarified that the President did not have absolute powers and that Congress could not be side-lined. This shows that previous attempts to change the meaning of the anti-torture norm were not accepted even within sections of the US government acting at the time. Bradbury clearly tried to distance the OLC from several contested opinions, rationalising them as actions done under unprecedented and dangerous circumstances. Engaging in 'implicatory denial', he admitted that even though some actions were wrong, they could be rationalised in the given context. As Cohen argues, 'a strong form of contextualization is to assert that the particular circumstances in which the country finds itself are so special that normal standards of judgment cannot apply' (1996).

Obama and the Torture Report

Once President Barack Obama took office in 2009, he rescinded OLC authorisation for interrogation methods and reversed the Bush administration's policy on torture. He emphasised the importance of international legal obligations including the Geneva Convention as well as the CAT, showing that the US challenge to the anti-torture norm was a temporary, rather than an ongoing long-term strategy.

In 2014, the Senate Select Committee on Intelligence issued a 6700+-pages long report that examined the CIA's Intelligence and Detention Programme. It concluded that torture does not work and that the CIA's interrogation methods were 'not an effective means of acquiring intelligence or gaining cooperation from detainees' (United States Congress 2014). Furthermore, the report identified several failings, amongst others that the CIA misled the government about the necessity of certain measures as well as their effectiveness. Such claims were challenged by several actors, including Bush and Cheney, who asserted they were always fully briefed about the interrogation techniques. Cheney, for instance, said that 'I think that's all a bunch of hooey. The program was authorized. The agency did not want to proceed without authorization, and it was also reviewed legally by the Justice Department before they undertook the program' (cited in Baker 2014). Following the release of the Report, then President Obama admitted that some of the interrogation methods amounted to torture, arguing that 'in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks. We did some things that were contrary to our values… And when we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line' (The White House 2014).

However, the memos' legal rationalisations ensured impunity and there have (so far) been no high-level prosecutions for torture. The Justice Department declined to prosecute, based on the 2005 Detainee Treatment Act that immunised officials acting on good faith legal advice. Controversially, Obama argued that 'this is a time for reflection, not retribution' (The White House 2009). There have been numerous calls to establish at least an independent commission to investigate the role of individuals in giving legal advice authorising torture practices, but those calls have so far gone unheeded.[2]

The Trump Administration's Approach

Discussions surrounding the Bush-era torture programme are important in the context of why the Trump administration could not (at least officially) bring back torture. The law has always been clear that torture and inhuman and degrading interrogation techniques are illegal. What the discussions surrounding the torture memos further clarified, however, is how torture is defined in international law and also that there can never be any exceptional circumstances that would justify its use. Furthermore, rescinding the second Bybee memo that examined CIA interrogation methods in minute detail means that there can be no doubt that techniques such as waterboarding constitute torture and are therefore unlawful. And as the 2014 Senate Report unequivocally concluded, torture does not work which makes it much harder to gain support for the opposite argument (United States Congress 2014).

Shortly after Trump's election, a draft Executive Order on Detention and Interrogation of Enemy Combatants was leaked to the press (2017a). The Order called for the reinstatement of the interrogation programme of high-value detainees as well as the use of CIA operated 'black sites' outside the United States However, Trump faced considerable domestic as well as international pressures against restarting the controversial programme, which the Order recognised as a 'significant statutory barrier' (Miller 2017).

Domestically, the anti-torture norm has been further institutionalised in US law through legislation such as the 2016 National Defense Authorization Act (NDAA) which codifies Obama's Executive Order that ensures lawful interrogations. There is little to no support in Congress for resuming the CIA interrogation programme and several people from across the political spectrum have openly spoken up against Trump's rhetoric. Senator John McCain, for instance, reaffirmed that 'the president can sign whatever executive order he likes. But the law is the law' (Lee et al. 2017). Former Attorney General Jeff Sessions said during his confirmation hearing that the law forbids waterboarding and any other form of torture (Lichtblau and Apuzzo 2017). Former Defence Secretary James Mattis and CIA Director Gina Haspel, who was herself implicated in post-9/11 black site interrogation, have pledged not to re-authorise torture (Miller 2017; Haspel 2018). The CIA has said that it will not engage in these kinds of methods again (Woolf 2016). Military leaders equally spoke out against torture, citing their 'commitment to the rule of law and to the principles embedded in our Constitution. Our servicemen and women need to know that our leaders do not condone torture or detainee abuse of any kind'.[3]

Internationally, state leaders have indicated that open challenges to international law banning the use of torture will not be tolerated. German Chancellor Angela Merkel, for instance, stated: 'Germany and America are bound by common values - democracy, freedom, as well as respect for the rule of law and the dignity of each and every person, regardless of their origin, skin color, creed, gender, sexual orientation, or political views. It is based on these values that I wish to offer close cooperation' (Faiola 2016). Similarly, the UK's then-Prime Minister Theresa May made clear that the United Kingdom would not share intelligence with states practicing torture (Watts 2017).

Despite pronunciations to the contrary, the law is clear and has been further clarified through contestation: torture, waterboarding and inhuman and degrading interrogation techniques are illegal. Efforts to contest the prohibition of torture have reinforced, rather than undermined the norm. 'A president cannot implement a command that his subordinates will not obey. Despite Trump's rhetoric, the draft torture order was not issued and is not the law. Once internalized, the anti-torture norm is not so easily ousted' (Koh 2017). At times, former President Trump signaled awareness of these constraints, arguing he would pursue 'everything within the bounds of what you're allowed to do legally' (Masters 2017). Perhaps because he did not appear to have a meaningful plan to undo the explicit restrictions of the 2016 NDAA, nor a legal strategy to reinterpret its provisions, these bounds remain limited.

On 2 February 2017, a revised Executive Order (Savage 2017) that was circulated to National Security Council staff members reflected the backlash to the initial draft. The revised Order did not propose to reinstate Bush's very limited understanding of torture or to revoke Obama's Order that all interrogations needed to adhere to Army Field Manual. Instead, the Order recognised that the limits to interrogation techniques that are signed into US law were a 'significant barrier' to the resumption of the CIA interrogation programme.

Conclusions

The debates surrounding the anti-torture norm are important for several reasons. There will always be attempts to circumvent rules and to justify actions by pushing international law to its limits. Law is not static. It is a process that adapts and needs to adapt to changes. The Bush-era torture memos opened a conversation about the legal boundaries of interrogation methods and techniques that led to renewed argumentations about the anti-torture norm. The debates showed how international law was used as justification for policy decisions and actions. This was not an open and direct challenge to the international law's validity, but instead, it was an instance of norm contestation which needs to be seen within its context. The 'extraordinary' crisis of the 'war on terror' led to a conflict between norm implementation (i.e., as ratified into domestic law) with norm compliance (i.e., actual policy decisions and practice). The Bush administration failed to generate new shared understandings necessary for normative change. This was partly due to the legality of norms advanced in the memos but also pushback against the 'whatever it takes' approach to combat terrorism.

The memos and the debates resulting from them show the strength and resilience of the anti-torture norm and the way it has been internalised in international law. They confirmed not only the absolute prohibition of torture, i.e., that no exception to the rule is allowed, but they also clarified its application. Furthermore, the process of contestation highlighted the importance of international law as a reference frame for policy decisions. Law was not simply cast aside as irrelevant. As I have shown, the Bush administration justified the use of torture in terms of an extraordinary and unprecedented threat to the American way of life that could only be dealt with by approving harsher interrogation methods. This does not mean the demise of the anti-torture norm, because the United States did not question or deny the existence of the norm or international laws as such – it much rather tried to reinterpret established rules. These discussions did not lead to a weakening of the norm, but '[p]erhaps ironically, instead of further undermining the weak shared understanding supporting the prohibition of torture that existed in 2001, events over the years from 2005 to 2009 have ultimately reinforced that shared understanding, potentially making the anti-torture rule stronger' (Brunnée and Toope 2010, 250).

The United States aimed to shape the system according to its preferences and interests. Undoubtedly, it was strategic in its use of international law to justify its conduct, trying to further strengthen its

position in the international system and not acting outside of it. Even though the Bush administration attempted to undermine the established anti-torture norm, it was not successful in the longer term. The administration faced domestic as well as international opposition to its policies and it had to change its rhetoric following public pressure after the memos were leaked. There was very little support for the administration's broad interpretation of torture and President Obama reversed all the policies related to torture that were advanced by his predecessor.

Undoubtedly, President Trump's rhetorical support for torture has been unsettling and it has not been without impact. His advocacy for controversial interrogation methods increased cultural support for torture among Trump's domestic political base and emboldened abusive leaders around the world. International legal norms require ongoing buy-in and practical engagement to be meaningful. Continued contestation of the absolute prohibition of torture puts international law on the defensive and creates political space for other advocates of extra-legality to assert themselves more boldly. It threatens to shift the middle ground, making previous right-wing policies seem moderate in comparison.

However, there are also reasons for (cautious) optimism. Trump was not, as far as we know, able to revive the Bush administration's torture programme and he was constrained in his ability to deliver on rhetorical promises in this area. The United States needs legal legitimacy to advance its own interests, it cannot single-handedly change international law but needs to persuade others to follow its lead. The United States' position as most powerful state can only exist if it continues to engage with international rules and norms which include the prohibition of torture. Previous administrations used international law to legitimise their actions. This was done because they recognised to varying degrees that the US position as the most powerful state is enhanced when it acts with the support of the international community and that this support is often tied to appeals to legal conformity. Strategic legal engagement allows the United States to reinterpret established provisions not only to make its own policies fit international law but also to alter legal norms to its own advantage. When it succeeds down that path, the United States can build a more permissible normative order that is reflective of its own interests. Trump's often outrageous rhetoric and attacks on international law might arguably have had the opposite effect: they mobilised significant pushback and reinvigorated commitments to norms and laws, which ultimately made the anti-torture norm stronger.

Notes

References

1999. Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division). House of Lords.

Prosecutor v. Radoslav Brdjanin (Appeal Judgement). 2007 No. IT-99-36- A. International Criminal Tribunal for the former Yugoslavia (ICTY).

2009. Statement of FBI Agent Ali Soufan at Torture Hearing. Senate Judicial Committee. Washington.

2017a. "Draft Executive Order on Detention and Interrogation of Enemy Combatants." *The Washington Post*.

2017b. “Letter from 176 Retired Generals and Admirals to President-Elect Trump on the Use of Torture.” *Human Rights First*, 11 January 11, 2017.

Arbour, Louise. 2005. *Human Rights Day Statement by UN High Commissioner for Human Rights Louise Arbour*. New York, NY: United Nations High Commissioner for Human Rights.

Baker, Peter. 2014. “Dismissing Senate Report, Cheney Defends C.I.A. Interrogations.” *The New York Times*, December 8, 2014.

Björkdahl, Annika. 2002. *From Idea to Norm: Promoting Conflict Prevention*. Lund: Lund University.

Bradbury, Steven G. 2009. *Memorandum for the Files: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*. Washington, DC: Office of the Principal Deputy Assistant Attorney General.

Brunnée, Jutta, and Toope, Stephen J. 2010. *Legitimacy and Legality in International Law: An Interactional Account*. Cambridge: Cambridge University Press.

Bush, George W. 2004. *Statement on United Nations International Day in Support of Victims of Torture*. Government Printing Office. https://www.govinfo.gov/content/pkg/WCPD-2003-06-30/html/WCPD-2003-06-30-Pg824.htm

Bybee, Jay S. 2002a. “Memorandum for Alberto R.” Gonzales Counsel to the President: Standards of Conduct for Interrogation Under 18 U.S.C. §§2340–2340A. In *Justice*, edited by U. S. D. O. Washington, DC: Office of the Assistant Attorney General.

Bybee, Jay S. 2002b. “Memorandum for John Rizzo, Acting Counsel of the Central Intelligence Agency: Interrogation of Al Qaeda Operative.” In *Justice*, edited by U. S. D. O. Washington, DC: Office of the Assistant Attorney General.

Byers, Michael. 1995. “Custom, Power, And the Power of Rules: Customary International Law from an Interdisciplinary Perspective.” *Michigan Journal of International Law*, 17: 109–80.

Cohen, Stanley. 1996. “Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims.” *Human Rights Quarterly*, 18: 517–43.

Congressional Record. October 5, 2005. Department of Defense Appropriations Act, 2006. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_record&docid=cr05oc05-19.

Faiola, Anthony. 2016. “Angela Merkel Congratulates Donald Trump – Kind of.” *The Washington Post*, November 9, 2016.

Finnemore, Martha, and Sikkink, Kathryn. 1998. “International Norm Dynamics and Political Change.” *International Organization*, 52: 887–917.

Fisk, Kerstin, and Ramos, Jennifer M. 2014. “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm.” *International Studies Perspectives*, 15: 163–85.

Gonzales, Alberto R. 2002. “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban.” Washington DC: Department of Justice.

Haspel, Gina. 2018. “Statement for the Record: Senate Select Committee on Intelligence.” *Central Intelligence Agency*, May 9. https://www.cia.gov/news-information/press-releases-statements/2018-press-releases-statements/gina-haspel-ssci-statement-for-the-record.html Heine, Jorge 2011. “Politics as Usual? US Torture Practices 2001–2008 and Transitional Justice.” *International Studies Review*,13: 570–578.

The White House. 2009. “Statement of President Barack Obama on Release of OLC Memos.”. Washington, DC: Office of the Press Secretary. https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-release-olc-memos

The White House. 2014. Press Conference by the President. August 1, 2014, http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president.

Hurd, Ian 2007. “Breaking and Making Norms: American Revisionism and Crises of Legitimacy.” *International Politics*, 44: 194–213.

Hurrell, Andrew. 2000. “International Law and the Changing Constitution of International Society.” In *The Role of Law in International Politics*, edited by M. Byers. Oxford; New York, NY: Oxford University Press.

Johnson, Jenna 2016. “Trump Says ‘Torture Works’, Backs Waterboarding and ‘Much Worse.’” *Washington Post*, February 17. https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html

Koh, Harold. 2017. “The Trump Administration and International Law.” *Washburn Law Journal*, 56: 413–70.

Krisch, Nico. 2005. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law*, 16: 369–408.

Lee, Carol E., Bravin, Jess, and Harris, Shane. 2017. “Trump Faces Criticism Over Prospect of Enhanced Interrogation Techniques.” *Dow Jones Institutional News*, January 25, 2017.

Levin, Daniel 2004. Memorandum for James B. Comey, Deputy Attorney General: Re: Legal Standards Applicable Under 18 U.S.C. §§2340–2340A. In *US Department of Justice*. Washington DC: Office of the Assistant Attorney General.

Lichtblau, Eric., and Apuzzo, Matt. 2017. “Jeff Sessions Says He Would Be Independent and Stand Up to Trump.” *The New York Times*, January 10, 2017.

Liese, Andrea. 2009. “Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment When Countering Terrorism.” *Journal of International Law and International Relations*, 5: 17–47.

Masters, James. 2017. “Donald Trump Says Torture ‘Absolutely Works’ – But Does It?” *CNN*, January 26, 2017.

Mayer, Jane. 2008. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York, NY: Doubleday.

Miller, Greg. 2017. “White House Draft Order Calls for Review on Use of CIA ‘Black Site’ Prisons Overseas.” *The Washington Post*, January 25, 2017.

Priest, Dana., and Gellman, Barton. 2002. “US Decries Abuse but Defends Interrogations.” *The Washington Post*, December 26, 2002.

Risse, Thomas., Ropp, Stephen. C., and Sikkink, Kathryn. (eds.) 1999. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press.

Senate Armed Services Committee. 2008. *Inquiry into the treatment of detainees in US custody.* Washington DC, 11 December, http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf

Sanders, Rebecca. 2018. *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror*. New York, NY: Oxford University Press.

Sands, Phillippe. 2008. *Torture Team: Deception, Cruelty and the Compromise of Law*. London: Allen Lane.

Savage, Charlie. 2017. “White House Pulls back from Bid to Reopen C.I.A. ‘Black Site’ Prisons.” *The New York Times*, February 4, 2017.

The Economist. 2005 “Civil liberties: Just a few bad apples?” 20 January. https://www.economist.com/united-states/2005/01/20/just-a-few-bad-apples

United States Department of State. 2002. Presidential Memorandum: Humane Treatment of al Qaeda and Taliban Detainees. Washington DC February 7. https://www.aclu.org/legal-document/presidential-memo-feb-7-2002-humane-treatment-al-qaeda-and-taliban-detainees

United States Congress. 2014. Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program. Redacted version.

Waldron, Jeremy. 2005. “Torture and Positive Law: Jurisiprudence for the White House.” *Columbia Law Review*, 105: 1681–750.

Watts, Joe. 2017. “Theresa May Could Withhold Intelligence Sharing with Donald Trump’s CIA If It Adopts Torture Techniques.” *The Independent*, January 26, 2017.

Wiener, Antje. 2009. “Enacting Meaning-in-Use: Qualitative Research on Norms in International Relations.” *Review of International Studies*, 35: 175–93.

Wiener, Antje. 2017. *Contestation and Constitution of Global International Relations*. Cambridge: Cambridge University Press.

Woolf, Christopher. 2016. “Ex-CIA Director to Trump: ‘Bring Your Own Bucket’ If You Want to Waterboard.” *The World*, February 29, 2016.

Zelikow, Philip. D. 2006. *The McCain Amendment and U.S. Obligations Under Article 16 of the Convention Against Torture*. Washington DC. Unclassified State Department Memo. https://nsarchive2.gwu.edu/news/20120403/docs/Zelikow%20Feb%2015%202006.pdf

Zelikow, Philip. D. 2009. “The OLC ‘Torture Memos’: Thoughts from a Dissenter.” *Foreign Policy*. https://foreignpolicy.com/2009/04/21/the-olc-torture-memos-thoughts-from-a-dissenter/.

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[1] During the campaign to select the Republican presidential candidate, a couple of others promised to use controversial interrogation methods, such as waterboarding, arguing they did not constitute torture. See for instance Ted Cruz https://www.theguardian.com/us-news/video/2016/feb/06/donald-trump-ted-cruz-waterboarding-torture-republican-debate-video and Carly Fiorina https://www.theguardian.com/us-news/2015/sep/28/carly-fiorina-endorses-waterboarding.

[2] Several calls have been made by NGOs, such as Human Rights Watch and the Centre for Constitutional Rights, to criminally investigate Bush and other senior officials (including Cheney and Rumsfeld) for their role in authorising torture. However, Obama remained firm that no such investigation will be held. For a detailed account of the involvement of high-ranking members of the Bush administration in authorising torture and their subsequent attempts to cover their tracks, see Sands 2008. *Torture Team: Deception, Cruelty and the Compromise of Law,* London, Allen Lane.

[3] Among other public pressure points, a joint letter from 176 generals and admirals helped to put Trump's cabinet nominees on the record against torture. See 2017b. Letter from 176 Retired Generals and Admirals to President-Elect Trump on the Use of Torture. *Human Rights First*, 11 January.