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But we don't call it 'torture'! Norm contestation during the US 'War on Terror'

Abstract

International law has become the reference frame that establishes legitimacy for international encounters, but paradoxically and at the same time international law itself has become increasingly contested. This paper analyses the relationship between norm acceptance and norm implementation and examines an instance of norm contestation in the context of the US 'war on terror'. The focus is on the use of torture or 'enhanced interrogation methods' during the Bush Presidency. The so-called 'torture memos' that were made public in recent years shed light on different arguments that were used by the government at the time to justify their actions and to show that they were in line with existing international legal obligations. The paper seeks to assess the validity of international agreements by analysing compliance and actual meaning ('meaning-in-use') of fundamental international human rights norms that are being contested through different interpretations and usages on the domestic level.

Keywords

Torture; Law and Norms; Human Rights; Norm contestation

The paper analyses a central puzzle that exists in two opposing yet concurrent developments: more and more international human rights laws and standards are negotiated and agreed upon between states but at the same time, such obligations are circumvented when they are perceived to impact on national interests (especially with regard to national security). It examines the relationship between norm acceptance and implementation (i.e. human rights as agreed upon and codified in international law) and norm compliance by looking at the contested interpretations of established standards. As Wiener and Puetter (2009, p. 3) rightly argue, international law is increasingly used as a reference frame for the legality of policy decisions, but paradoxically and at the same time, it is international law itself that is increasingly contested.

The focus of this paper is on the use of torture or 'enhanced interrogation methods' in the context of the US 'war on terror'. The so-called 'torture memos' that were issued during the Bush presidency show different arguments that were made by the government to justify their conduct and to demonstrate that these actions were in line with existing international legal obligations. The paper employs Wiener's approach of analysing the 'meaning-in-use' of the prohibition of torture as an international human rights norm by examining compliance and how the norm is being contested through different interpretations and usages on the domestic level. At the same time, the paper also utilises Brunnee and Toope's similar approach of an interactional account of international law that focusses on the practice of existing legal norms. The overall argument of the paper is that rather than simply ignoring its international legal obligation, the Bush Administration went to great lengths to justify its conduct *within* existing international law, attempting to make their conduct appear to comply with legal obligations. As Alvarez rightly argues, officials did not ignore law but they systematically misinterpreted and 'tortured' it "so that everyone can feel clean." (Alvarez, 2005-2006, p. 178) The memos attempted to twist international law and misconstrued various treaty obligations to make policies 'fit'. By referring to already embedded international legal standards, the administration thereby shaped and also clarified the shared understanding of the anti-torture norm.

The paper starts with a brief outline of the argument's main analytical framework that is used to evaluate developments of the anti-torture norm before looking at different memos that were written by members of the Bush administration offering

legal advice on interrogation methods. The paper will also evaluate resistance to these memos on the domestic and international level as well as the 2014 Torture Report. It closes with a brief assessment what the torture memos as well as opposition to them mean for the anti-torture norm and whether they led to normative changes taking place. The paper looks at norm contestation and norm resistance and argues that rather than weakening the absolute prohibition of torture, the 'torture memos' clarified and thereby arguably strengthened the norm in the longer term.

Norms and International Law

The starting point of this present analysis is the idea that the rule of law as well as human rights norms exist and that they can be enforced globally. International law is 'the collection of rules and norms that states and other actors feel an obligation to obey in their mutual relations and commonly do obey. (...) Rules are formal, often written, expectations for behavior, while norms are less formal customary expectations about appropriate behavior that are frequently unwritten.' (Henderson, 2010, p. 5) A number of norms are institutionalised on a global level through international legal provisions, but their actual implementation on the national level is always dependent on interpretation and cultural contexts. Brunnee and Toope (2010) in their highly influential approach of an 'interactional account' of international law argue that legal obligation is created through three elements: shared understanding, criteria of legality and also a practice of legality. They suggest that practice plays a central role in international law that has so far not been taken into account enough by IR scholars. They therefore "invite IR scholars to focus their

analysis of international law's impact on the role of practices of legality, rather than relying on purely formal indicators of law." (Brunnée & Toope, 2011, p. 316)

This paper focusses on the final aspect - that of practice - to determine the position of the absolute prohibition of torture in the international community in the context of the US 'war on terror' in particular. Looking at the practice of legal norms works well with Wiener's (2008) terminology of examining the 'meaning-in-use' of particular norms, i.e. the way norms are being interpreted and applied in particular situations. Such 'cultural validation' of applying international law in domestic specific contexts leads to increased shared understanding that in turn shapes law. Questions of norm implementation and contestation are particularly pertinent in the area of human rights because agreements on different human rights standards exist (i.e. a shared understanding) and they are increasingly incorporated in international law (i.e. they satisfy criteria of legality), but their consistent enforcement does not necessarily follow (i.e. the practice of legality).

International legal obligations are at times challenged when they are perceived to impact on important national interests, such as national security considerations. The question that arises is why states aim to legitimise their conduct with reference to international law rather than ignoring it entirely. This is a challenge to a predominantly realist view of international law that tends to argue that states only ever act out of self-interest and choose to ignore international law if it conflicts with national values.¹

The 'War on Terror' is an important example to illustrate this complex relationship between norm acceptance and norm implementation. The controversies over the alleged use of torture by the US administration during the 'War on Terror' and its justifications in the 'torture memos' are an important instance of norm contestation. The torture memos are particularly insightful, 'because norms by definition embody a quality of "oughtness" and shared moral assessment, norms prompt justifications for action and leave an extensive trail of communication among actors that we can study' (Finnemore & Sikkink, 1998, p. 892)

During the 'War on Terror', a number of policy decisions with regard to detainees and interrogation methods were justified with reference to existing international law. The Bush administration's interpretation of those laws and obligations arising from them, however, were challenged by various actors (even within the Administration itself) that advanced a different understanding of the meaning and content of these particular norms. The content and actual meaning ('meaning-in-use') of the anti-torture norm as a legal rule was being contested through different interpretations and usages on the domestic level. The key question is whether the agreed upon human rights standards that have come under attack by the Bush administration's policy decisions are resilient enough to withstand such challenges.

The Torture Convention and relevant case law – formal validity and legality

In line with Finnemore and Sikkink's norm life cycle model, the prohibition of torture can be said to have reached the third and final phase of 'norm internalisation'. The cycle consists of three stages: it starts with the emergence of a new norm, followed

by its diffusion and cascade towards greater acceptance, and completes with the internalisation of a new norm as a fully incorporated rule. Full norm internalisation means that 'norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.' (Finnemore & Sikkink, 1998, p. 895)

The prohibition of torture is a norm that is established and institutionalised in the international community in a number of 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 117 states (including the US) and provides binding treaty law.

The prohibition of torture is a *jus cogens* norm which means that it allows no exceptions 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 decision in 1999, the House of Lords ruled that torture was an offence with *jus cogens* character.²

Even though treaty and case law seem to be clear, to determine the role this norm plays in international politics it is necessary to establish how the norm's actual

meaning (i.e. its definition/rule etc.) is enacted in relations between states. This means that while the norm 'abstention from torture' might be agreed upon in international law 'the actual meaning of this norm may differ in the actual contexts of norm implementation.' (Wiener, 2009, p. 177) The events of 9/11 and the subsequent 'War on Terror' provided the US government with a framework in which it could justify its conduct based on the emergency exception. It is an instance of norm contestation that is instructive because as Wiener rightly argues: "the challenge for research on compliance with norms consists of how to assess contestation as both a conflictive process and hence a potential problem, on the one hand, and as a possibility to enhance social recognition and ultimately the legitimacy of an international agreement, on the other. Both aspects come to the fore once norms are contested." (Wiener, 2008, p. 39)

Human Rights and the Emergency exception

The US government argued that 9/11 meant that an unprecedented crisis situation had arisen that justified the suspension of some very fundamental human rights. This is in line with Carl Schmitt's understanding of exceptionalism, 'the exception is that domain within jurisprudence in which decision-making "cannot be subsumed" by existing norms.' (Johns, 2005, p. 619) The Bush administration, for instance, suspended the Geneva Conventions for prisoners held at Guantanamo Bay, arguing that the 'War on Terror' constituted a new kind of war that required novel mechanisms including new interrogation techniques. Alberto Gonzales, in a draft memo to Bush set out in January 2002 that '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 enhanced interrogation methods (EIT) - that were considered by some of the agents involved as 'borderline torture' (*Statement of FBI Agent Ali Soufan at Torture Hearing, 2009*) - necessary for reasons of self-defence and to protect national security. The government fell back on a familiar 'lesser evil' argument that is often invoked by states fighting terrorism. It is based on the reasoning that a lesser evil of suspending *some* human rights might be necessary to defeat the greater evil of terrorism. A choice needs to be made between 'two evils' in order to be able to defend national security. 'In the constructed dilemma of weighing the rights of one group against the rights of the other group, the answer is obvious [omitted FN]: 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, p. 42)

Human rights in international law, however, do set limits to the way counterterrorism actions can be conducted. National security considerations might be used to justify compromising human rights, but this is problematic as some human rights (especially those considered to be fundamental ones) are based on the idea that they are *universal*. They are afforded to individuals because they are human beings and they are therefore independent of context, time and space. As Ignatieff rightly argues: 'the abridgements of the rights of a few are easy to justify

politically when the threat of terrorism appears to endanger the majority. Rights exist, however, to set limits to what fearful majorities can do.' (Ignatieff, 2002, p. 1139)

An even stronger, *legal* argument (as opposed to a predominately moral one) against the setting aside of particular human rights is that some rights are absolute and have the status of non-derogable rights. As argued above, this includes the prohibition of torture which is a peremptory norm that clearly stipulates that there can be no exceptions to that prohibition. The fact that torture has such a firm status in international law was one of the main reasons why the US attempted to reinterpret what 'torture' actually meant and that a deviation from a very *narrow* reading of the CAT was justified under the unique circumstances presented by the 'War on Terror'.

The US government did not openly challenge the absolute prohibition of torture *per se* - rather the opposite. In his statement on the U.N. 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, p. 1168)

The US government also continued to emphasise the importance of upholding liberal values and freedom in the 'War on Terror' as well as the assertion that it had always been a pioneer and defender of human rights. Such statements are 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 and focussed on different justification and interpretations of the actions in question rather than contesting the overall validity of the CAT and the anti-torture norm as an accepted international legal provision. In short, the Bush Administration contested and challenged the content, practice and meaning-in-use of torture as an established human rights norm – not the validity of the norm itself.

The US government sought to change the meaning of the anti-torture norm through redefining what torture actually means, but - as will be argued later - this change was not accepted by the international community and also a number of different actors within the US government. The Bush administration sought to justify its actions with reference to international law, but in line with Cohen's classification of different forms of denials, the argumentation shifted along a continuum of: 'literal denial (nothing happened); interpretive denial (what happened is really something else); and implicatory denial (what happened is justified).' (Cohen, 1996, p. 522)

Once the US administration could no longer *literally* deny (due to increasing evidence to the contrary) that torture did not happen systematically and was committed by only a few 'bad apples', it moved to a form of interpretive denial. *Interpretive* denial includes the use of euphemisms, such as 'enhanced interrogations', 'increased pressure phase' rather than torture; actions that the government saw justified and as being in line with the Torture Convention as well as other legal mechanisms that set out the anti-torture norm. (Cohen, 1996, p. 22)

Mounting criticisms of this approach, however, forced the administration to move to the final form of *implicatory* denial, arguing that its actions had been justified due to 'necessity' or 'exceptional' circumstances presented by the challenges of the 'war on terror'. The main issue here lies in the politicisation of what 'exception' means rather than the exception itself.

The 'Torture memos' - Defining torture³

The first and most controversial in a series of memos was written on 1 August 2002 by Jay Bybee in response to a request by Alberto Gonzales, Counsel to the President, to prepare a legal opinion on interrogation standards as implemented by US. The Bybee memo sought to redefine torture to only include 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, p. 1)

The main focus of the interpretation was on the words 'severe' and 'intentional' which were redefined in the memo. 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, p. 6) In terms of psychological suffering, acts 'must cause long-term mental harm.' (Bybee, 2002a, p. 13) 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.

Jay Bybee sent a second memo (Bybee II) which was addressed to John Rizzo (then Acting General Counsel of the CIA) to give advice on the permissibility of specific interrogation methods of al Qaeda suspects. In this memo, different interrogation techniques were examined in great detail to determine whether they would fall 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, p. 1) and concluded that none of the proposed methods could be considered to constitute torture or a violation of Section 2340A. Discussing the use of the waterboard, for instance, Bybee argued that even though it 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, p. 15) Similar to the first memo, this second memo relied heavily on international law and attempted to justify interrogation methods under it. There was also the reaffirmation what 'torture' meant in the context of the policy in question.

Both memos demonstrate a clear attempt to justify certain actions with reference to international law. They frequently refer to the Torture Convention and international law that the US signed up to. Bybee did not question the formal validity of the anti-torture norm or the fact that the US had legal obligations under the CAT, the

challenge was much rather on the interpretation of what torture actually means and how it can be defined. The practice and meaning-in-use of the norm were challenged to justify US policy decisions and actions with regard to interrogation methods.

Both memos did not attempt to openly challenge established international norms and provisions that prohibit torture, but *interpretively* denied torture was happening by advancing different interpretations of the existing framework. By changing the interpretation of what 'torture' entailed, the government could claim that it did not fall afoul of established standards. The anti-torture norm itself was seen by the US government as an established element in international law and an attempt was made to use existing legislation to justify the administration's actions and own policy goals.

This approach is not without its critics, however. Harold Koh, Dean of Yale Law School and prominent international lawyer, for instance, describes the memo as 'perhaps the most clearly legally erroneous opinion I have ever read.' ("Civil liberties: Just a few bad apples?," 2005) Similarly, Waldron argues that the memo's provision 'amounts to a comprehensive assault on our traditional understanding of the whole legal regime relating to torture.' (Waldron, 2005, p. 1709)

The 'Torture memos' - Presidential powers

In addition to redefining torture, the first memo also reaffirmed the very broad powers of the President as Commander-in-Chief:

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. (Bybee, 2002a, p. 31)

The memo stated that 'in wartime it is for the President alone to decide what methods to use to best prevail against the enemy.' (Bybee, 2002a, p. 38) Bybee argued that necessity and self-defence could be used as possible defences to justify certain interrogation methods that fall outside international law to gain information necessary to eliminate threats to the US.

Similarly, on 14 March 2003 John Yoo wrote a memo in which he argued that the US was not bound by customary international law and that the President could suspend it if he felt the necessity to do so. He further argued that the President's Commander-in-Chief powers were absolute and trumped international law:

it is important to emphasize that the President can suspend or terminate any treaty or provision of a treaty. (...) Any presidential decision to order interrogation methods that are inconsistent with CAT would amount to a suspension or termination of those treaty provisions. (Yoo, 2003, p. 47).

These memos that gave the President absolute powers ignored ongoing constitutional debates about what powers the President has or has not got in wartime.⁴ The arguments much rather aimed to demonstrate that the US President could choose to be bound by international law and that he could opt out of it if he deemed it necessary.⁵ This is a case of clear norm contestation as the CAT sets out in Art. 2.2 that 'no exceptional circumstances can be invoked as a justification for

torture'. Yoo could embark on this line of argument, however, because the article is not incorporated in section 2340 i.e. into US *domestic* law related to torture:

Given that Congress omitted CAT's effort to bar a necessity or wartime defense, we read section 2340 and the federal criminal statutes applicable to the special maritime and territorial jurisdiction as permitting the defense [of necessity and self-defence]. (Yoo, 2003, p. 76)

Change of Direction

The first Bybee memo was leaked to the Washington Post in December 2004 with the others becoming public shortly after. The widespread media coverage and public outcry that followed, forced the Administration to (at least to be seen to) distance itself from the Bybee and Yoo memos.

The so-called Levin memo was issued in 2004 shortly after the press leak in an attempt of damage control. In this memo, Daniel Levin, 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, p. 1) He wrote that

This memorandum supersedes the August 2002 memorandum in its entirety. Because the discussion in the memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was – and remains - unnecessary, it has been eliminated from the analysis that follows. Considerations of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture. (Levin, 2004, p. 2)

Furthermore, the Levin memo made clear that 'national security' was not a valid excuse and that torture was *always* unlawful. He reaffirmed that the definition of torture that the US adhered to was in line with CAT and not the way it had been

defined in the Bybee memo. Crucially, however, the memo did not withdraw the view that the President had unchecked powers as Commander-in-Chief and it also did not restrict any of the specific techniques authorised in Bybee II which included water boarding.

John Yoo continued to insist that Presidential power could not be constrained by treaty even after the controversy became public. He argued that the President could override CAT in case he was acting in defence of the nation. In an interview with the *New Yorker* in 2005, he argued that 'Congress doesn't have the power to tie the President's hands in regard to torture as an interrogation technique.' And further: 'it's the core of the Commander-in-Chief function. They can't prevent the President from ordering torture.' (Mayer, 2005) This is a very controversial line of argument as Congress certainly believes it has powers to control the President. During a Congressional debate, for instance, a number of members of Congress expressed their opposition to the assertion that the President had unchecked powers during war time. Senator Kennedy for instance argued:

The President is not an emperor or a king. His administration is not above the law or accountability, and he is certainly not infallible. The single greatest criticism of this administration's detention and interrogation policies is that it failed to respect history, the collective wisdom of our career military and State Department officials, and that it holds far too expansive a view of executive authority. In short, the White House suffers from the arrogance of thinking they knew best and abandoning the long-standing rules. (Congressional Record: October 5, 2005, p. S11076)

Dissenting Voices

After the Torture Memos became public, more and more dissenting voices even from within the Republican Party and the Bush Administration itself came to the fore.

On 5 October 2005, Senator John McCain proposed an amendment to the 2006 Defense Appropriations Bill to ban the U.S. military from using torture. The legislation, which became the Detainee Treatment Act (DTA) includes more humane standards for the treatment of prisoners in the 'war on terror' by setting out uniform standards for the interrogation of persons under the detention of the Department of Defense. Among other things, it contains provisions that require military personnel to employ US Army Field Manual guidelines while interrogating detainees, and prohibits the 'cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government.' The DTA specifically refers to international legal obligations such as the Torture Convention as ratified into US national law and defines cruel, inhuman or degrading treatment as defined in the CAT.

McCain argued that the recent memos were confusing for soldiers on the battlefield and that it should not be expected from them to make their own judgements as to what conduct was permissible and what wasn't. He argued for more clarity in the guidelines, closing any legal loopholes:

I can understand why some administration lawyers might have wanted ambiguity so that every hypothetical option is theoretically open, even those the President has said he does not want to exercise. But war doesn't occur in theory, and our troops are not served by ambiguity. (Congressional Record: October 5, 2005, p. S11062)

He further argued that prisoner abuse harmed (rather than helped) US efforts in the 'war on terror', because it led to bad intelligence and it also threatened the safety of US troops captured by the enemy. McCain criticised the administration for applying the CAT narrowly excluding foreigners held outside US territory, arguing that 'what all this means is that America is the only country in the world that asserts a legal right to engage in cruel and inhuman treatment.' (Congressional Record: October 5, 2005, p. S11063)

A number of other senators similarly urged Congress to take action to clarify interrogation guidelines, arguing that it was important for the US to continue in its role as moral leader and not be tempted to abandon its own values including its respect for human rights. A during the debate much cited letter by Captain Fishback, Major at the US Army, questioned: "Some argue that since our actions are not as horrifying as Al-Qaeda's, we should not be concerned. When did Al Qaeda become any type of standard by which we measure the morality if the United States?" (Congressional Record: October 5, 2005, p. S11076)

Similar to the arguments employed in the torture memos, Congress also drew upon existing international norms in its reasoning, but it did so with vastly different interpretations and outcomes. This demonstrates that the anti-torture norm has been internalised in international law but it also shows the norm's contested meaning-in-use and difficulties attached to its practice in international politics. International law is used as a reference frame to justify policies and arguments from

both sides even though Congress' interpretation of existing provisions is more in line with international consensus. A number of members of Congress emphasised this need to stay within the existing normative and legal framework and adhere to international human rights laws accepted by the US. For instance, Senator Graham (R) stated that

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. (Congressional Record: October 5, 2005)

Such references to international law and obligations towards the international community show a clear recognition of normative constraints on purely interest-based policy making that are imposed by the existing framework.

The DTA was eventually passed with an overwhelming majority of 90-9. However, even though the DTA was purportedly designed to protect detainees from abuse by providing uniform standards for interrogation, in his signing statement, Bush awarded considerable discretionary powers to the President:

the executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power. (Bush, 2005)

This statement reinstated the earlier provision of the Authorisation of Military Force (AUMF) which gives the President unrestricted powers to exercise his authority in times of war to protect national security. The President reasserted his powers to supersede existing legal obligations to focus on national security based calculations,

even though the DTA emphasises the need to stay in line with existing norms. He attempted to continue to undermine the anti-torture norm despite opposition even from within his own party.

Domestic and international resistance to the normative challenge

In February 2006, Philip Zelikow, Counsellor to Secretary of State Condoleezza Rice wrote a critical memo about the administration's approach towards torture. He was clear that even though he was in no bureaucratic position to offer advice, he felt strongly about putting forward an alternative view to the OLC memos demonstrating that not all lawyers would agree with the Bybee and Yoo approach. The White House attempted to collect and destroy all copies of the memo, (Zelikow, 2009) but it survived and was made public in April 2012.

In this memo, Zelikow argued that

almost all of the 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, p. 4)

In his memo, he looked at different occasions of wartimes within US history and argued that there were no precedents in World War II, the Korean War, the Vietnam War or any other conflict in which similar interrogation methods had been authorised – even if prisoners were deemed to be unlawful combatants. He concluded that 'several of the techniques, singly or in combination, should be

considered 'cruel, inhuman, or degrading treatment or punishment' within the meaning of Article 16' (Zelikow, 2006, p. 6) of the CAT.

This memo clearly shows that the Bush administration faced some opposition even within its own party to its interpretation of existing international legal obligations. The fact that Zelikow was ordered to destroy all copies of his memo is telling as well. It shows that the Bush administration was aware of the very thin legal ice it was treading on and did not want to be openly challenged about it by admitting that it had been given conflicting legal opinions at the time.

Resistance to the challenge to the meaning-in-use of the anti-torture norm also came from the international community. A number of statements and court decisions show that the international community did not agree with the US's attempts to single-handedly change the meaning of the anti-torture norm. For instance, in 2005 the UN High Commissioner for Human Rights, Louise Arbour, issued a statement in which she acknowledged that the 'War on Terror' challenged human rights standards, but that 'an illegal interrogation technique, however, remains illegal whatever new description a government might wish to give it.' She further argued that the rule of law is important in such times as '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.' (Arbour, 2005)

In addition the ICTY held in 2007 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 "Prosecutor v. Radoslav Brdjanin (Appeal Judgement)," 2007, p. §247)

Shifting Rhetoric – The Bradbury Memos

Such mounting criticisms and pressures from Congress, Supreme Court and the international community led to a clear shift in the Administration’s overall rhetoric. A memo written by Steven Bradbury for John Rizzo on 20 July 2007 showed a marked shift away from interpretive denial of reinterpreting the meaning of torture (‘what we do isn’t torture’) towards what Cohen calls implicatory denial (‘our actions are justified under the current circumstances - yes, it was cruel, but it was necessary.’). Justifications for certain actions were therefore no longer based on a different interpretation or definition of torture, but on the fact that they were *necessary* due to exceptional circumstances.

In the first of two memos, the CIA sought legal clarity/permission for six enhanced interrogation techniques.⁶ The memo set out that since 2001 the CIA had used ‘what the President described as an “alternative set of procedures” – and what the Executive Branch internally has referred to as “enhanced interrogation techniques”.’ (Bradbury, 2007, p. 1) These techniques had been authorised by the Executive and executed in a manner they ‘determined to be safe, effective, and lawful.’ (Bradbury, 2007, p. 1) Bradbury justified the previous use of EIT by arguing that ‘the President

has stated that the use of such techniques has saved American lives by revealing information about planned terrorist plots.’ (Bradbury, 2007, p. 1) This line of argumentation is different to previous memos in that Bradbury acknowledges that actions were cruel, but that they were necessary in the given circumstances. They were justified by the President exerting his Commander-in-Chief powers and citing necessity and self-defence.

Bradbury argued that the legal landscape had changed considerably, however, since the passing of the DTA which prohibits cruel and inhuman treatment of anyone in the custody of the US ‘regardless of location and nationality.’ (Bradbury, 2007, p. 2) This is an important change as the Executive’s policy used to be limited to US citizens or detainees on US territory. Bradbury also referred to previous Supreme Court decisions that held (contrary to Bush) that Common Article 3 of the Geneva Conventions applied to the current conflict. (“Hamdan v Rumsfeld, Secretary of Defense et al.,” 2006) ⁷

Bradbury concluded that none of the proposed techniques violated the DTA or the War Crimes Act. He argued that to reach the high legal threshold of cruel and inhuman treatment, the conduct in question must be considered to ‘shock the conscience’. This test ‘requires a balancing of interests that leads to a more flexible standard than the inquiry into coercion and voluntariness ... and the governmental interests at stake may vary with the context.’ (Bradbury, 2007, p. 30) The suggested techniques were therefore evaluated within their context and were also justified with a lesser evil argument – weighing up security interests against the need to

protect human rights. Bradbury found that the proposed CIA techniques were justified within the context of the interest to protect the US from terrorist attacks.⁸

On 15 January 2009, Steven Bradbury wrote a second memo in which he distanced the OLC from certain opinions and propositions that were made by the OLC in the aftermath of 9/11. Again in line with an implicatory denial reasoning, he justified any potential wrongful conduct with reference to the 'extraordinary' 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, p. 1)

He clarified that certain propositions related to the allocation of authorities between the President and Congress in matters of war and national security did not reflect current views of the OLC. He also moved away from the idea that the President had absolute powers by arguing that 'the President, like all officers of the Government, is not above the law.' (Bradbury, 2009, p. 3) Furthermore, he wrote that 'the prior opinion of this Office suggesting that Congress has no role to play concerning the prosecution of enemy combatants is incorrect.' (Bradbury, 2009, p. 5)

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 a number of contested opinions, rationalising them as actions done under extraordinary circumstances and a time of

great danger. 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, p. 532)

It is important to note that it has become clear in recent years that torture and prisoner abuse took place systematically, rather than by a few ‘rogue’ individuals. These actions were ‘the product of a systematic policy of expressed in explicit instructions to the interrogators of the US Armed Forces and the CIA to obtain “actionable intelligence”.’ (Heine, 2011, p. 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. (Senate Armed Services Committee, 2008, p. xii)

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.

The post-Bush era – Obama and the 2014 Torture Report

A few days after taking office, on 22 January 2009, incoming President Barack Obama issued an Executive Order that revoked Bush’s July 2007 Order, announcing that Common Article 3 of the Geneva Conventions applied and that all interrogations

of individuals in custody of the US have to comply with the CAT and other relevant laws. He further stated that detainees should not be subjected to any treatment that was not part of the Army Field Manual. Obama reversed the Bush administration's policy on torture which makes it clear that the US challenge to the norm was a temporary, rather than a long-term, ongoing strategy. Controversially, however, Obama also announced that no one would be prosecuted for their role in the alleged torture of detainees. He argued that 'this is a time for reflection, not retribution' (The White House, 2009) and that those who carried out the interrogations acted in good faith based on legal advice from the Justice Department. This is controversial as there have been numerous calls for establishing at least an independent commission to investigate the role of individuals in giving legal advice authorising torture practices.⁹

On 29 July 2009, the Office of Professional Responsibility (OPR) found that Bybee and Yoo committed professional misconduct when violating their 'duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.' (Office of Professional Responsibility, 2009a, p. 11) This verdict was further toned down by the Associate Deputy Attorney General who argued that Bybee and Yoo 'exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments.' (Margolis, 2010, p. 68) As the OPR report had set out, 'poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may have not violated or acted in reckless disregard of a clear obligation or standard.' (Office of Professional Responsibility, 2009b, p. 19) Both these assessments failed to

deal with the real problem of the issue, however: they did not consider the legality of the conduct that was authorised by the memos but solely focussed on the *manner* Yoo and Bybee arrived at their assessments. As Cole argues, this was 'almost certainly because doing so would have implicated not only John Yoo and Jay Bybee, but all of the lawyers who approved these methods over the five-year course of their application.' (Cole, 2010)

It has become increasingly difficult to defend inaction in light of the Senate Select Committee on Intelligence's 2014 Torture Report that highlights a number of failings from different CIA as well as government officials with regard to their detention and interrogation programme.¹⁰ Because as Alvarez rightly points out: "when government lawyers torture the rule of law as gravely as they have done here, international as well as national crimes may have been committed, including by the lawyers themselves." (Alvarez, 2005-2006, p. 223) The Senate Report set out that one of its key findings was that the CIA provided inaccurate information to the Department of Justice, thereby impeding a proper legal analysis of the CIA's Detention and Interrogation programme. Even though the Report argues that the OLC had been misled about the effectiveness of the techniques, this is inconsequential to the legal advice that was given as this was based on assessing the *legality* of different actions and not their possible outcomes (i.e. their effectiveness). The CIA might have exaggerated the 'necessity claim' but that had no direct bearing on the way international law was used to assess different techniques by government lawyers.

Furthermore, the Report's assertion that the administration was misled has been challenged by a number of sources including Bush and Cheney who maintain that they have always been fully briefed about CIA interrogation techniques. Referring to the Report, Cheney said: "I think that's all a bunch of hoey. 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." (Baker, 2014) Similarly, former and current CIA Directors issued joint a statement, maintaining that their programme saved lives: "The president approved the program. The attorney general deemed it legal. The CIA went to the attorney general for legal rulings four times--and the agency stopped the program twice to ensure that the Justice Department still saw it as consistent with U.S. policy, law and our treaty obligations. The CIA sought guidance and reaffirmation of the program from senior administration policy makers at least four times. We relied on their policy and legal judgments. We deceived no one." (Tenet et al., 2014)

Conclusions

The debates surrounding the anti-torture norm are important for a number of reasons. They show how a very fundamental human rights norm was challenged by the US and how international law was used as justification for certain policy decisions and actions. It was not an open and direct challenge to the CAT's validity, but an instance of norm contestation which needs to be seen within its context. But even throughout the whole period of norm contestation, the US continued to claim that it was at the forefront of human rights while at the same time challenging one of its fundamental norms. In its argumentation, 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 US did not question or deny the existence of the norm and international laws themselves – it much rather tried to reinterpret established rules. Much rather than showing the demise of the norm, the discussions surrounding the anti-torture norm reaffirmed the *absolute* prohibition of torture and clarified its application. It can be argued that “perhaps 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 & Toope, 2010, p. 250)

The debates and memos also show, however, the importance of international law as a reference frame for policy decisions as it was not simply cast aside, but all actions were justified with reference to existing international legal obligations. The anti-torture norm is established in international law that has been ratified on the national level in US law but its actual implementation proved to be dependent on the interpretation of context. The ‘extraordinary’ crisis situation of the ‘War on Terror’ led to an instance of norm contestation whereby norm implementation (i.e. ratified in national law) conflicted with norm compliance (i.e. actual policy decisions and practice).

As Brunnee and Toope rightly argue

the US government for a time became an active 'norm entrepreneur' in seeking to alter two distinct aspects of the international prohibition on torture: first, that torture was outlawed in all circumstances (leading figures in the administration argued that the president retained absolute discretion to use all means necessary to protect US citizens from terrorism); and second, that torture could be defined to allow waterboarding and other techniques that did not produce pain equivalent to the spasms of death or 'organ failure'. (Brunnée & Toope, 2010, pp. 249-250)

They failed, however to generate shared understandings necessary for normative change. This was partly due to the legality of norms advanced in the memos and also popular opinion against the 'whatever it takes' approach to combat terrorism.

Contra McKeown (McKeown, 2009) who argues that the anti-torture norm might be in the way towards regression, this paper concludes that even though the Bush administration attempted to undermine and 'regress' the established 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 public support for the administration's broad interpretation of torture and Obama reversed all of the policies related to torture that were advanced by his predecessor. The anti-torture norm was challenged, but a 'crisis of legitimacy' of the norm on the international level has not materialised. As Brunnee and Toope argue, even though the norm is rhetorically strong and practically weak, it is also in a period of normative transition. They argue that "the reassertion of a robust shared understanding that the prohibition of torture is necessary, and that it should be absolute, is building." (2010, p. 269) This clearly shows the circle of the influence practice and norm contestation have on the norm itself: norm contestation and the challenge to the

anti-torture norm's validity lead to new shared understanding and thereby a further shaping of the law.

A reassessment of the practice of the anti-torture norm during the Bush administration is also evident in the reactions to new revelations related to the programme and also the 2014 Torture Report. On 1 August 2014, Obama admitted that some of the EITs amounted to torture. He said 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 further: "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. And that needs to be -- that needs to be understood and accepted. And we have to, as a country, take responsibility for that so that, hopefully, we don't do it again in the future." (House, 2014) There are calls for clearer standards to close any possible loopholes¹¹ which shows that practice and cultural validation can lead to new shared understandings that in turn shape law.

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¹See for instance (See for example: Goldsmith & Posner, 2006 and) and (Adamson & Sriram, 2010).

²Other decisions to the same effect include: House of Lords – A (FC) and others v. Secretary of State for the Home Department, 2005 (at 33-34); Supreme Court of Canada - Suresh v. Canada, 2002 (at 62-64); UN Torture Committee, 23 November 2003 (at 1 & 5); and ICTY – Furundzija, 1998 (at 154)

³For 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)

⁴There is a long standing debate over what kind of powers the President has in wartimes under the US Constitution. War powers are divided between the legislative and the executive branches of the US government. Article I, Section 8 of the Constitution gives Congress the powers to declare war. Article II, Section 2 gives the President the power to direct troops as Commander-in-Chief. Some argue that this provisions gives the President unchecked powers, but others counter that there are limits to these powers. They argue that presidential power in wartime is essentially based on 'civilian supremacy' over the military rather than giving additional powers in times of emergency.

⁵This reminds of Richard Nixon's famous quote: 'When the President does it that means it's not illegal.' (Interview with David Frost, 6 April 1977)

⁶Unlike the 2005 memo that sought permission for ten interrogation methods, these six did not include waterboarding.

⁷The Military Commission Act (MCA) that followed this Supreme Court decision leaves interpretation of Common Article 3 to the President.

⁸Bradbury cited several members of Congress as giving their support to this finding. This was disputed by John McCain, however, who argued that one of the techniques (sleep deprivation) amounted to a form of torture and that he would therefore oppose it. (Scherer & Ghosh, 2009)

⁹A number of 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, but Obama remains firm that no such investigation will be held.

¹⁰Overall, it is interesting to note that the Torture Report focusses mainly on criticising the CIA for using torture because it was ineffective as a tool to gather intelligence rather than because it torture is illegal.

¹¹At the time of writing, Senator Dianne Feinstein is planning to propose a series of recommendations to prevent the future use of torture by the government.