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Contesting the International Illegitimacy of Torture: The Bush Administration's Failure to Legitimate its Preferences within International Society

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Abstract

This article examines the effect of Bush administration's human rights preferences during the war on terror with respect to torture by analysing a large-n sample of public legitimation strategies of both the United States and other members of international society. The article asks two questions: first, has the defection of the United States from these human rights norms led to a 'norm cascade' that delegitimized the norms? Second, did the material preponderance of the United States help it to legitimate its preferences in international society? The article argues that despite initial ambiguity in the response to the Bush administration's preferences from key liberal states, there is little evidence by the end of the Bush administration's term that a core group of states supported their preferences, nor did its material preponderance help the Bush administration to legitimate its position.

Introduction

In response to the terrorist attacks of 11 September 2001, many states enacted counterterrorism policies that explicitly presupposed a reduction or elimination of human rights protections in the name of security. These policies were not only enacted by states with perennial human rights problems, but also by states within the liberal western zone, the same states that had contributed significantly to the expansion and entrenchment of the international human rights system since the end of the Second World War (Dunne 2007, 270; Landman 2006, 124). Of these policies, human rights advocates were particularly troubled with the Bush administration's support for, and use of 'enhanced interrogation techniques,' particularly given the accusations of torture and mistreatment that followed in their footsteps. This concern was no doubt justified since torture, together with cruel, inhumane and degrading treatment, is arguably one of the most serious violations of human dignity.¹ The prohibition against torture is entrenched as a fundamental right, or a right with highly legalised norms in international society, reflecting this ethical concern (Dunne 2007, 270).

Despite the seemingly well-established status of torture as a non-derogable right, Ryder McKeown (2009) argued that 9/11 caused a domestic norm cascade whereby torture, which had been largely condemned by US elites and in public opinion, was not just openly discussed and advocated within the public sphere by political elites, but also commanded a significant minority of

public support, even after the revelations of Abu Ghraib.ⁱⁱ David Forsythe (2011, 91) argued that the paucity of domestic opposition to the Bush administration's enhanced interrogation techniques meant that torture was effectively a national policy up to 2005. The evidence for McKeown and Forsythe's arguments is significant. The Bush administration produced a well-documented legal justification for interrogation techniques that arguably constituted torture (Greenberg and Dratel 2005; Forsythe 2011, 65-67, 82-89). This was reflected in practice through detainee abuse, particularly at the hands of the military and the CIA.ⁱⁱⁱ This abuse eventually led to domestic legal changes favouring a slightly more expansive definition of torture than that which was originally championed by the Bush administration,^{iv} but the legislative debates over what acts should constitute torture, and were therefore illegal, were sometimes based on relatively small differences of opinion.^v Despite Congress passing laws prohibiting torture and the Bush administration tightening interrogation restrictions, the Bush administration refused to support the non-derogable character of torture, claiming alternatively that it should be able to use special techniques if the situation warranted it, arguing that necessity could negate potential criminal liability.^{vi} The Bush administration's wilful and coordinated changes to interrogation policy, and the subsequent public shift in attitude in support of such matters, are well-researched.^{vii} This shift presents a pressing problem for human rights activists who would prefer a return to a stronger domestic consensus against the use of torture, particularly given fears of what policies might become acceptable should another major terrorist attack be successful.

However, there is a larger issue concerning whether the Bush administration's defection from fundamental human rights norms had damaging effects on the international norms against torture. Specifically, was this domestic norm cascade matched by an international cascade, whereby the use of torturous methods became legitimate within a key group of states, leading to the possibility of widespread internalisation within international society? There are two reasons why activists might be particularly worried that it was the United States that defected from the torture norm. First, the United States has played a central role in determining the scope of human rights norms from World War II onwards (Evans 1996, 8). Given this role, the United States could have a similar influence in its defection. Second, some scholarship suggests that material power might help states to legitimate their preferences within international society. The Bush administration's preference for a more lenient definition of torture could thus pose a serious challenge to international norms prohibiting torture should it be able to leverage its material preponderance to legitimate its human rights preferences.^{viii}

As problematic as the domestic norm cascade is for human rights activists, if it were matched by a similar one internationally, then not only would they need to worry about the direction of future US policy, but also the effect a more normalised conception of torture would have on the policies of other states within international society, particularly states who might otherwise refrain from such behaviour. Some scholars have already voiced their concern that this might be the case. In 2007, Tim Dunne (2007, 284) argued that US conduct could lead to a norm cascade in which torture in the name of anti-terrorism becomes acceptable within international society. Other authors argued that it could also degrade the international human rights and humanitarian system in general (Fitzpatrick 2003, 242; Skogly 2009, 830). Ryder McKeown, who argued that such a norm cascade occurred domestically, hedged his bets by claiming that this would weaken the international norm, but then contended in the next sentence that recent scholarship

‘effectively argued that a crisis of legitimacy within the United States does not necessarily constitute a crisis in the norm itself.’ (2009, 19-20)

Alternatively, if such a norm cascade were unsuccessful internationally, then not only would there be less concern over the general use of torture within the rest of international society, but these norms might influence the United States to abstain from torture despite the domestic norm cascade. Julie Harrelson-Stephens and Rhonda Callaway (2009, 450) took up this argument by claiming that the effect of US conduct was not negative on the whole because the institutionalisation of human rights among other Western states was able to uphold the regime absent the United States.

This article contributes to this debate by analysing the practices of legitimacy between the Bush administration and the rest of international society to ascertain whether the United States was successful in legitimating its preferences regarding enhanced interrogation techniques, particularly given its material preponderance. Legitimacy is a useful lens to study the possibility of norm change because even though it appears that the allegations of torture were limited within the western liberal zone to the United States, we still might worry that the Bush administration was successful in weakening the torture norm. Other states might not have acted similarly because US interrogation measures were sufficient to meet their needs. Thus, instead of waiting to see whether other liberal states similarly engage in torturous methods,^{ix} by scrutinising the practices of legitimacy within international society concerning the use of enhanced interrogation techniques this article can provide evidence to support or oppose the assertion that the United States, through its conduct and advocacy, created an international norm cascade favouring its definition of torture. This article argues that, contrary to the fears expressed by some scholars, there is little evidence of a norm cascade corresponding with Bush administration preferences within international society. However, Harrelson-Stephens and Callaway’s contention that the other Western states will uphold the human rights regime absent the United States cannot be fully supported either, because until the final few years of the Bush administration these states reacted ambivalently towards US legitimation strategies compared to other members of international society.

This article proceeds by discussing legitimacy in international relations, particularly the contested relationship between legitimacy and material power. It then outlines the method used to collect and analyse the empirical data. Finally, it provides an account of the evolution of the legitimation strategies of both the Bush administration and other members of international society, using these to demonstrate the strength of the thesis.

Norms and Legitimacy in International Society

In his classic study of the function of legitimacy in society, Max Weber (1968, 11, 213-215) argued for the existence of legitimacy, as ‘custom, personal advantage, purely affectual or ideal motives of solidarity’ could not completely explain why specific commands are obeyed within a community. Agents can be oriented to believe in the existence of a legitimate order, where they act according to a set of norms that they follow, ‘not because they think it will serve some exogenously given end, but because they think the norms are legitimate and therefore want to follow them.’ (Wendt 1999, 272-273)^x The legitimacy of any ideational structure exerts a compliance pull or capacity to obligate.

Though a hypothetical absolute, empirically one uses the idea of legitimacy to understand relative pull or obligation (Franck 1990, 26, 205-206).

Ian Clark (2005, 12) argued that international society is an important testing ground for legitimacy since it lacks the coercive sovereign of domestic politics that would otherwise help to maintain order.^{xi} One of its functions is to encourage actors to obey or resist an institution or rule over and above calculations of self-interest (Clark 2005, 5; Hurd 1999, 379). Given this function, particularly in the way that it can obligate compliance through either the internalisation of the norm or increasing the costs of defection, actors have an interest in legitimating their private beliefs when they are not highly socialised into particular norms. For this to happen, Clark (2005, 3) argued that an actor must engage in *practices of legitimacy*. These are empirically reflected in the deliberation of norms and a search for a tolerable consensus within a particular distribution of power.

Though Clark asserted that both discourse and material power are important in the practices of legitimacy, the existing scholarship on the relationship between legitimacy and material power is contentious. Ian Hurd (2005, 501), for instance, argued that the compliance pull of legitimacy is so strong that even a hegemon cannot be seen as violating the “rules of the game” too often. Norms will bind hegemons to the extent that they either value the legitimacy that legitimate conduct gives them or abhor the costs of illegitimate conduct. Additionally, Reus-Smit (2007, 165) argued that power itself cannot generate legitimacy. Material power might inspire feelings of anxiety or fear, but unless there is agreement on acceptable conduct between the hegemon and the rest of the states, there is no legitimacy. Specifically with respect to the United States, Reus-Smit warned that it is a mistake to think that ‘America’s unparalleled material resources can be translated into political influence unproblematically.’ (Reus-Smit 2003, 423)

Alternatively, other scholars argue that materiality can have large effects on the practice of legitimacy. First, material factors dictate the edge of feasible action for any state (Wendt 1999, 111). Materiality therefore may allow some states to take costs that other states could not absorb, and as such, powerful states may be less dependent on acting with respect to legitimate norms. Second, a powerful state might also be able to legitimate its own preferences more easily than other states. By routinely violating the original norm and offering competing interpretations, the state can make it increasingly difficult for the norm to be reaccepted, particularly if it is willing to invest its material capacity to promote the new norm (Ikenberry and Kupchan 1990, 57; Philpott 2001, 26; Hurd 2005, 501; Hurd 2007, 202). Given the powerful ‘lock-in’ effects should the attempted norm cascade proceed to internalisation, where the norm becomes a taken-for-granted aspect of life outside of general political debate, Stephen Brooks and William Wohlforth argued that, ‘the massive potential long-term benefits of winning legitimacy for the new practices it favors may induce a far-sighted hegemon to accept considerable near-term costs and risks.’ (2005, 517-518) Thus, ‘even if acting unilaterally seems costly in the short run, if it helps lead to new rules, norms, or institutions the hegemon favors, then it might pay off in the long term.’ (Brooks and Wohlforth 2005, 518) If this is the case, it is clear that there is a potential threat for international human rights and humanitarian norms from the domestic norm cascade. If the United States were able to absorb the costs of the initial illegitimacy of its conduct long enough to legitimate its own preferences with enough states, or force other states into the new norm until it was normalised, this could lead to the prospect of an international norm cascade that Dunne and others feared.

Method

To analyse the practices of legitimacy this paper infers conduct based on rhetorical action. Coined by Frank Schimmelfennig, rhetorical action is the ‘strategic use of norm-based arguments’ that occurs in an institutional environment where ‘political actors are concerned about their reputation as members and about the legitimacy of their preferences and behavior.’ (Schimmelfennig 2001, 48) Schimmelfennig (2001, 64) argued that rhetorical action is particularly important where international structures cannot enforce compliance and where there is little chance that there will be negative domestic responses to actions illegitimate in the international community. The torture norm meets both of these conditions. Like all human rights norms, there are relatively few legal means to ensure that states comply with their treaty obligations outside of verbal critique. Additionally, the successful domestic norm cascade ensured that a significant minority, sometimes a plurality, of the US population supported the use of torture, greatly reducing the domestic political costs arising from the implementation of the policy.^{xii}

According to Schimmelfennig, though states are technically free to defend their sovereign interests, there are limits to these strategic manipulations:

First, to the extent that the standard of legitimacy is clearly and unambiguously defined as well as internally consistent, it becomes difficult to rhetorically circumvent its practical implications. Second, actors must be careful not to lose their credibility as community members when manipulating social values and norms. Above all they must avoid creating the impression that they use values and norms cynically and inconsistently. (Schimmelfennig 2001, 65)

Importantly, actors under social pressure to conform to legitimate norms do not necessarily change their interests, but may only refrain from illegitimate behaviour to avoid its costs – rhetorical action does not assume successful persuasion as an explanation for compliance (Schimmelfennig 2001, 65).^{xiii}

To analyse US legitimization strategies, I structured the analysis around the four tactics provided by Justin Morris et al. for states who wish to defect from legitimate norms. First, as discussed above, there is *secrecy*, where the state conducts the illegitimate act without the knowledge of other actors. If the actions remain secret, then the state has successfully avoided the costs of illegitimate behaviour. If not, then the state pays costs for the illegitimate action and potential damage to its reputation for its hypocrisy had it also openly supported the norm. Once public, the state has a second option of *overt violation*, where it breaches the norm without attempting to legitimate its actions. If the norm is well-established, this will be a short term strategy as other states will challenge the norm violation, and even the most diplomatically isolated states routinely justify their illegitimate actions when challenged.^{xiv} Given that the state must engage in practices of legitimacy, the third tactic is *justification*, where the state claims that it is in compliance with the norm if “properly” interpreted. An example would be if the Bush administration claimed that it was acting legally, but with a significantly different understanding of the law than the rest of international society. Lastly the state can attempt *innovation*, where it actively argues for a change in the existing norms to match its preferences. This would occur if the Bush administration openly advocates, for instance, that torture should be allowed under particular circumstances instead of being *jus cogens* (Morris et al., 5-6).

To judge the responses of other members of international society, Hurd (1999, 390-391) suggested that there are three indicators that suggest that a norm either has or does not have legitimacy. The first is the rate of compliance. Relatively high rates of compliance are a prerequisite for legitimacy, although they are not sufficient as the compliance could be coercive. Second, and most important for this article, are the reasons given for the compliance. Political actors will justify their motivations for complying with or abandoning a prevailing norm. The reasons given for compliance and non-compliance can yield additional data to determine whether the action was caused by legitimacy. Third, we might examine how other actors within the international society respond to a norm or institution under threat. If they respond in a way that upholds the pre-existing norm, it is more likely that the norm or institution in question is considered legitimate. It must be noted that publicly-aired criticism, which will provide most of the data for this paper, is a relatively high-risk strategy since it potentially harms the bilateral relationship between the state or organisation and the United States (Apodaca 2006, 17-18; Forsythe 2006, 155; Donnelly 2003, 165-166). Such overt legitimisation tactics taken by actors demonstrates a willingness to absorb costs to uphold the institutionalised norm (Forsythe 2006, 156).

Instead of relying on a few legitimisation arguments that I claim to be typical, I included all public statements I found by the United States and other actors in international society.^{xv} With this strategy, this article is able to show how legitimacy strategies shifted over time and it limits the probability of cherry-picking particular discourses that are more representative of my political biases than of the intended strategies of the actors. I have omitted any statements made while officials were not in public office, as I am not interested in their private beliefs, but how these beliefs are strategically tempered by their knowledge of legitimate norms through rhetorical action. The data consisted of 322 articles collected from the Nexis database of periodicals. These were obtained by running a query for all articles that discuss US torture or mistreatment from 11 September 2001 to 20 January 2009 in the Nexis category "Major World Publications," with the addition of major US television and radio network transcripts. I then filtered these articles, keeping those that contained government officials or spokespersons for international organisations making legitimisation arguments concerning the potentially torturous nature of US interrogations.^{xvi} Legitimisation arguments that spoke to other human rights problems or referenced torture implicitly were excluded. For example, a discourse concerning the closure of Guantanamo would be excluded unless torture was mentioned explicitly, even if the discussion might indirectly pertain to perceptions of and reactions to torture. Though this limited the potential data to draw upon, it allowed a more independent examination of the torture norm given other potential human rights disagreements occurring at the time.^{xvii} Multiple legitimisation discourses in a single statement were all accepted – there was no judgement over whether one legitimisation strategy might be dominant over the others.

This data was then broken up into two categories of norm entrepreneurial arguments, legal, which explicitly referenced legal agreements or 'lawfulness,' and moral, which either attacked or defended the US interrogation program without reference to legal norms.^{xviii} I argue that differentiating between legal and moral legitimisation strategies is necessary due to the unique position of the law within international society. Alan James argued that legal frameworks encompass all activities that international society deems important for fear that non-codification would lead to ambiguity. Though it is clear that the law is broken by members of international

society, it still enjoys a special status as ‘the very centre of international society’s normative framework, supporting a structure of expectations without which the intercourse of states would surely suffer an early collapse.’ (James 1973, 67-68) This special status might arise, as Martti Koskenniemi (2005, 567) argues, because international law is a common language that allows states to transcend political and cultural differences, which gives members of international society, ‘a means to articulate particular preferences or positions in a formal fashion.’ (Koskenniemi 2005, 570)^{xix} If these ideas hold – that international law is a formal mechanism through which preferences can be presented in international society that holds a special status in creating structured expectations – then there is good reason to separate legal legitimation strategies from moral legitimation strategies. The use of legal legitimation strategies should indicate more of a commitment to the promotion or reproduction of a particular norm, and the lack of them might indicate that the state believes that it cannot properly legitimate its preferences internationally, at least not sufficiently to create the norm cascade necessary to change the international legal framework.

The analysis of the data rests on the following hypotheses of the relationship between legitimacy and material power outlined in the theory section. In general, where US legitimation discourses favour innovation, that is, where there is an open claim to change the norm, one can make the claim that this is a more likely indicator of an actor confidently pursuing a norm cascade than if they were to rely on justificatory legitimation discourses. Similarly, because of the special position of international law, legal legitimation discourses are more likely to signal a confidence in pursuing a norm cascade than are moral legitimation discourses. If the United States coercively enforced its conception of the norm, and subsequently caused a norm cascade as other members of international society became socialised into its preferences, then independent of the starting discourses of the states, which could be hostile, neutral, or accepting, a critical mass of states must become either more accepting or less hostile to the new norm over time, reflecting the progress of their socialisation.^{xx} Alternatively, should states be increasingly hostile to the preferences of the United States, then this would lend evidence that the United States was unsuccessful in creating an international norm cascade because, as Hurd argued, this demonstrates that states are openly reacting to the violation of a norm that they believe to be legitimate.

Given that the most serious evidence of detainee abuse, both in terms of frequency and severity, occurred between 2004 and 2005 with the revelations of alleged torture in Iraq and the secret CIA detention programme, the proceeding analysis is divided into three periods. The first period spans from the terrorist attacks of 9/11 to the beginning of the Abu Ghraib scandal. The second period spans between 2004 and 2005, when the majority of the scandals, including the CIA black sites, were publicly unveiled. The third period spans from 2006 to the end of the Bush administration, where there were no further publicly-revealed incidents of torture on the part of the United States. This division will allow us to see how international society reacted to initial claims of abuse and the subsequent unveiling of widespread abuse, finishing with the continued diplomatic repercussions of the abuse that occurred to the end of the Bush administration’s second term.

Contestations of Legitimacy

Given the hypothetical absolute legal prohibition of torture and the persistent media questioning over the appropriateness of the interrogation techniques used at Guantanamo Bay, the Bush administration was relatively successful in avoiding costs of its potentially illegitimate interrogation methods between 2001 and 2003. The Bush administration engaged in few moral legitimization discourses outside of stressing the unique threat posed by terrorism and promoting the idea that detainees were taught to lie about alleged acts of torture.^{xxi} Instead, the Bush administration focused on either denying the factuality of torture allegations^{xxii} or appealing to national security to avoid discussions of the interrogation techniques,^{xxiii} both of which led to no challenge by other liberal states. Some liberal states, in fact, argued that there was no evidence to support claims of mistreatment,^{xxiv} or argued that the United States, as a constitutional democracy, should not be judged in the same light as other human rights abusing states.^{xxv} Only a few states with poor human rights records argued that the United States was acting hypocritically given its supposed commitment to uphold the norm against torture.^{xxvi}

The Bush administration partially pursued a strategy of norm innovation through a legal argument that the Geneva Conventions, which prohibit torture, do not apply to the detainees.^{xxvii} It additionally claimed that detainee treatment was lawful with respect to international humanitarian law,^{xxviii} domestic law,^{xxix} or ‘international law’ in general,^{xxx} which might point to an additional justificatory approach as the administration claimed that its questionable actions were within the accepted norms if ‘properly’ interpreted. There was little engagement with the legal claims of the Bush administration among members of international society outside of a statement by the United Kingdom that the prisoners should be treated under the Geneva Conventions (Gardiner 2002), and Kofi Annan arguing that the prisoners should be treated according to international law (United Nations 2002).

The lack of serious engagement in the moral and legal legitimization strategies of the Bush administration by liberal states might indicate that there was some consensus that the United States was acting appropriately given the circumstances – at least appropriately enough to lead states to avoid incurring the potential costs of speaking out. This is particularly the case given that international organisations felt that there was enough information available to openly question whether the interrogation techniques used were permissible,^{xxxi} and warned against tradeoffs between human rights protection and counterterrorism.^{xxxii}

The period between 2004 and 2006 is important as the evidence of potentially torturous acts was overwhelming, fitting Hurd’s criteria of a “norm under threat” more than any other period in the Bush administration’s term. Instead of promoting overt norm innovation through legal legitimization, the Bush administration primarily used a policy of justification through moral legitimization. The Bush administration contended that its interrogation techniques were not torture,^{xxxiii} though administration officials also appealed to the inherent relativism in any definition of torture.^{xxxiv} The administration’s legitimization practices also exhibited the hallmarks of a justification strategy by claiming that the treatment of the detainees was respectful,^{xxxv} that torture was immoral,^{xxxvi} and occasionally that torture was ineffective.^{xxxvii} Finally, in response to the evidence of mistreatment, the administration argued that the mistreatment that had taken place was not systematic,^{xxxviii} and that all perpetrators of detainee mistreatment either were going to be brought to justice or, later on, had been brought to justice.^{xxxix} Augmenting this argument

concerning the non-systemic nature of the mistreatment were claims that it was not in the character of the United States to torture,^{xi} that liberal democracies do not cover up torture allegations,^{xii} particularly as they had an open media and were monitored by international organisations.^{xiii} At the same time, to provide the impetus for the contraction in the meaning of torture, the Bush administration argued that the exceptional threat of terrorism required good intelligence so that the state could defend its citizens, suggesting that new and effective methods might need to be employed.^{xiiii} This is an innovation argument whereby potentially torturous methods should be legitimate if they alleviate intelligence gaps in situations of emergency. So although the majority of legitimisation discourses were justificatory, the Bush administration was still willing to make arguments that directly suggest innovation to weaken the otherwise absolute torture norm.

This focus on justification strategy was also reflected within the Bush administration's legal legitimisation strategies, where it continued to stress that its treatment was in line with the Geneva Conventions,^{xliv} and, for the first time, international human rights law.^{xlv} There were also generalised statements that contended that the administration was acting in accordance with international law,^{xlvi} the law in general,^{xlvii} or a combination of international and domestic law,^{xlviii} all of which merely made the claim without explaining how this was the case. There were also some open attempts at moral and legal norm innovation. The Bush administration continued to promote the norm entrepreneurial idea that the detainees should not be covered under the Geneva Conventions.^{xlix} From the perspective of international human rights law, it argued that there were geographical limits to the applicability of the Convention Against Torture that did not correspond to Guantanamo Bay.^l

In sum, their legitimisation strategies suggest a primary policy of justification. The administration argued that it did not officially engage in torture – which was morally repugnant – yet instead of arguing outright that the torture norm should be changed, the administration argued that it should be upheld, though implicitly in a form that allowed for greater interrogation flexibility. However, there were still elements of norm innovation within both the moral and legal discourses, suggesting that the Bush administration was still serious in making permanent changes to international law and norms that would exclude certain people from the norm prohibiting torture altogether, instead of merely contracting the definition of what constitutes torture.

There was a mixed reaction within international society when reports of mistreatment surfaced, suggesting that the Bush administration was somewhat successful in legitimating its preferences given the *jus cogens* prohibition of torture. There were certainly states that made statements which could not be considered supportive of the Bush administration's actions. Some claimed that they were shocked by the abuse,^{li} called for investigations,^{lii} warned of the tradeoffs between counterterrorism and human rights,^{liii} or openly worried about the potential harm done to the international system by US conduct.^{liv} States with poor human rights records were particularly outspoken, and used the opportunity to openly characterise the US abuses as torture.^{lv} These states also suggested that the United States was therefore not in a position to reprimand them^{lvi} and should focus more on its own problems,^{lvii} sometimes explicitly because it had lost the moral high ground.^{lviii} International organisations were similarly hostile to US legitimisation claims. They called for investigations,^{lix} argued that the United States had lost its moral high ground because of the mistreatment,^{lx} and reminded the United States not to make trade-offs between counterterrorism

and human rights.^{lxi} Unlike all other actors within international society, some also openly contended that torture was ineffective as an interrogation method.^{lxii} All of these responses uphold freedom from torture as a fundamental right, suggesting that the Bush administration failed to legitimate its constricted definition of torture.

On the other hand, some states within the liberal zone echoed the moral legitimization discourses of the Bush administration, reflecting on how the extraordinary threat posed by terrorism might require new intelligence-gathering methods.^{lxiii} Other liberal states supported the Bush administration's claim that there was no systematic abuse, arguing that there were proper procedures in place to prevent abuse,^{lxiv} or claiming that the United States had given them reassurances that torture was not taking place,^{lxv} claims that should be taken seriously either because the United States was a democracy^{lxvi} or because their state had a good relationship with the United States.^{lxvii} There is also some evidence that states within the liberal zone did not want to publically engage with the issue. This is best demonstrated by Western government efforts to prevent Cuba from bringing a United Nations Human Rights Commission resolution to the table that would have called on the Commission to investigate conditions at Guantanamo Bay (Fowler 2004; Bassir 2004).

Very few states appealed to international law in their legitimization strategies. Some suggested that the US was not respecting international norms,^{lxviii} but few, and only those states with poor human rights records themselves, challenged the US interpretation of international law.^{lxix} Conversely, international organisations were significantly more active. They argued that US conduct did not respect international human rights law^{lxx} or international law in general.^{lxxi} Some reminded the United States of the doctrine of command responsibility in human rights abuses,^{lxxii} classified certain techniques used by the United States as being legally torture or tantamount to torture,^{lxxiii} and argued that the United States did not have the legal competence to define torture.^{lxxiv}

Though there was clear opposition from international organisations, some of the state discourses suggest a leniency towards US conduct that might reflect a norm that had been weakened by US conduct and legitimization strategies. This is particularly the case given that the states echoing the Bush administration legitimization strategies included several liberal democracies. However, a European diplomat speaking to the abuse in Iraq in 2004 noted that, 'It's very clear they want European governments to stop pushing on this. They were stuck on the defensive for weeks, but suddenly the line has toughened up incredibly,' (Henderson 2005) suggesting that the United States was putting pressure on its allies to prevent criticism. As such, coercion may partially explain the mixed messages. If this coercion explains the duality in response, then the primary question would be to see whether this ambiguity turns into acceptance over time, reflecting states voluntarily coming to the side of the Bush administration by being socialised into the coerced position.

Overall, the success of the Bush administration legitimization strategies in this period was mixed. Though it was successful where liberal states echoed its moral legitimization discourses, lending evidence to their legitimacy, there were also discourses from these states expressing shock or worry about the treatment. International organisations and states with poor human rights records, alternatively, came out uniformly against US legitimization strategies. Given the purported strength of the torture norm, the seemingly contradictory reaction by states within the Western

liberal zone suggests that this strength might be illusionary, either because the norm is not sufficiently socialised within the liberal zone or because US coercion was successful in preventing potential displeasure from being expressed. On the other side of the coin, the reaction by international organisations and states with poor human rights records points to some strength in the norm. Following the logic of rhetorical action, even if the states with poor human rights records were hypocritical in their criticism, it still indicates that they believed the norm to be of sufficient strength to be of strategic use against the United States.

Between 2006 and 2008, the moral legitimisation strategies of the Bush administration focussed on the utility and professionalism of the interrogations,^{lxxv} stressing that they produced actionable intelligence.^{lxxvi} There were still a few officials who attempted to legitimate a state of exception,^{lxxvii} some reinforcing the unusual danger of the detainees.^{lxxviii} For the first time the Bush administration directly claimed that it did not use torture.^{lxxix} It continued to argue that torture was immoral,^{lxxx} but at the same time made statements that either challenged the idea of a firm definition of torture or gave exceptionally vague definitions of what would constitute torture.^{lxxxi} Members of the Bush administration even suggested, though not explicitly, that waterboarding was not torture.^{lxxxii} These moral legitimisation discourses point much more strongly to a justification strategy where torture is impermissible, but certain acts should not be considered torture because of their utility in obtaining intelligence. The Bush administration also ended all appeals to international law. Instead, it focussed on legitimating its position through appeals to the domestic legality of the interrogations.^{lxxxiii} This abandonment of legal legitimisation strategies based on international law, the emphasis on the utility and professionalism of the interrogations, and a move to the direct denial of torture claims suggests that the Bush administration had abandoned any norm innovation previously present with its justificatory strategies.

There was a noticeable drop in supportive legitimisation strategies across all sections of international society. Only Australia continued to openly support US practices, arguing that sleep deprivation did not constitute torture and continuing to assert that assurances had been given that the United States did not torture detainees (Butterly and Veness 2006). States with poor human rights records continued to air their previous claims, including that the United States commits torture,^{lxxxiv} that the United States was therefore not in a position to reprimand them,^{lxxxv} and that the United States had lost its moral high ground.^{lxxxvi} International organisations also expressed their concern at allegations of abuse,^{lxxxvii} called for further investigations,^{lxxxviii} argued that the United States had lost its moral high ground,^{lxxxix} and worried that US conduct might have negative effects on the international human rights system.^{xc} Perhaps more problematically for the United States, some states within the western liberal zone started changing policy to reflect the risk of the United States mistreating detainees in its custody.^{xc} This suggests that contrary to the coercion model of norm development, in which reactions of illegitimacy or neutrality are eventually replaced with reactions of legitimacy, states were becoming less accepting of US conduct. The cohesion of the core group of states necessary for a norm cascade seemed to be falling apart, suggesting that the United States was finding itself increasingly in a position of illegitimacy with respect to its preferences.

Conclusion

Despite the initial success of the Bush administration in avoiding significant criticism over its interrogation techniques, as its term progressed there is evidence that its ability to translate this into a norm cascade was not successful. This is certainly the case with respect to the administration's attempts at norm innovation, where not only is there no recorded support for its preferences, but even its own open support for its preferences was eventually abandoned. Whether the Bush administration's justificatory strategy to contract the meaning of torture was successful is less clear, although several observations suggest that here too it was unsuccessful. First, international organisations exhibited a fervent opposition to the possibility of loosening the torture norm throughout the Bush administration term, demonstrating their utility in promoting human rights norms in the face of the more ambiguous reactions from liberal states. Second, the United States faced constant criticism from states with poor human rights records, particularly from the Abu Ghraib scandal onwards. While their own complicity in human rights violations makes these claims hypocritical, it does demonstrate that they believed the norm was strong enough to be useful in their aims to discredit the United States. Additionally, their discursive actions, even if solely strategic, reproduced the norm prohibiting torture.^{xci} Third, though some liberal states were ambiguous in their initial reaction towards US abuse, they began to change their detainee policies in the last period to reflect the risk of abuse on the part of the United States. Instead of moving from an ambiguous position to one of acceptance, as the coercion model implies, the opposite occurred. These three observations together point to a trend over the course of the Bush administration where the number of agents within international society willing to contest its preferences increased, which is certainly not suggestive of a norm cascade in the Bush administration's favour. Finally, the retreat to legitimation through domestic instead of international law only hurt the Bush administration's chances at bringing about a norm cascade, and might indicate that it was aware of its inability to legitimate its personal preferences internationally and shifted its strategy to avoid the costs of openly contesting the norm, though this larger claim must be tempered with the knowledge that the Bush administration also faced increased domestic opposition during this time.

There is thus no evidence that the conduct of the Bush administration led to a norm cascade with respect to its torture preferences, which would have required at a minimum a key group of states or international organisations to reflect the legitimation strategies of the United States. From Dunne's perspective in 2007, the prospect of norm cascade might have seemed more worrisome given the mixed reaction from liberal states to the prisoner abuse scandals. However, other than Australia, liberal states stopped supporting US legitimation strategies, and instead joined an increasing trend of contestation concerning US conduct. In the same vein, McKeown's contention in 2009 that the United States' action could weaken the norm is not supported by the data. Alternatively, Harrelson-Stephens and Callaway's argument in 2009 that the European states will uphold the norms in the face of US defection has some merit, but only towards the end of the period. European states were latecomers to opposition, with international organisations and, perhaps ironically, states with poor human rights records, exerting the most discursive pressure on the United States to conform to the torture norm.

Finally, given the material preponderance of the United States, the ample evidence that it was interested in and enacted policies that reflected a significantly reduced definition of torture, and some evidence of coercion among its European allies, the Bush administration's inability to legitimate its preferences seems to indicate that materiality was not sufficient to bring about a norm

cascade in this case. However, this does not mean that US material power was of no use. On the contrary, there is some evidence that it was effective in mitigating public criticism from other western states, which might explain the dual nature of their reactions in 2004. However, other than this, the material position of the United States was insufficient to legitimate its position and therein significantly change the norms of torture.

There is no question that the post-9/11 security environment allowed the United States to temporarily relax its human rights standards, particularly given its ability to pay the costs of its illegitimate behaviour. However, there is little evidence that the torture norm became less entrenched in international society. Though this might be good news to human rights activists who might otherwise fear the effects of a successful international norm cascade, the case study also demonstrated that other states within the liberal core, when faced with coercive influences from the materially preponderant state, were not always willing to immediately speak out against severe human rights violations. As such, it suggests that although present, the international prohibition of torture is possibly more fragile than many might wish; only reinforcing the need for continual scrutiny and vigilance to ensure that it is upheld.

ⁱ For a discussion of why torture is considered to be particularly heinous within a liberal framework, see (Sussman 2005)

ⁱⁱ It is important to note that a norm cascade does not imply the dominance of a new norm. Instead, it means that there are a key group of actors supporting the norm, leading to the possibility of its “internalisation” should the continued development of the norm go unimpeded, where it becomes a taken-for-granted part of social life. See (Finnemore and Sikkink 1998)

ⁱⁱⁱ For evidence of abuse see (CBS 2004; Sullivan 2005; Schmitt and Marshall 2006)

^{iv} Forsythe argues that the 2005 US Detainee Treatment Act and the 2006 *Hamdan v Rumsfeld* Supreme Court judgement helped to alleviate some of the more serious abuse of prisoners, see (Forsythe 2011, 115)

^v For instance, one Congressional debate was over whether torture should be defined as ‘serious’ or ‘severe’ pain, see (Smith and Babington 2006)

^{vi} For instance, the Bush administration attached a signing statement to the 2005 US Detainee Treatment Act stating that the provisions would be interpreted in light of the President’s role as Commander in Chief in order to ‘[protect] the American people from further terrorist attacks.’ (Bush 2005) Also, despite the official closing of the CIA black sites after the 2006 *Hamdan* decision, the administration admitted that similar sites opened up seven months later. The President later vetoed a bill that would have explicitly prohibited the CIA from waterboarding prisoners and a spokesperson claimed in 2008 that waterboarding was legal under certain circumstances. (Honigsberg 2009, 183-184)

^{vii} For the most recent and comprehensive summaries of the domestic politics that led to the acceptance of enhanced interrogation techniques and the subsequent widespread use of abusive techniques, see (Pfiffner 2010; Forsythe 2011)

^{viii} The term material preponderance is taken from Christian Reus-Smit, who defined it as the, ‘huge size and technological advantage of the US military, the scale and dynamism of the US economy ... and the critical intersection between these faces of material power.’ (Reus-Smit 2003, 423)

^{ix} As suggested by (McKeown 2009, 20)

^x See also (Hurd 1999, 381)

^{xi} For a similar argument, see also, (Franck 1990, 21)

^{xii} Public support for the use of torture ranged from the high thirties to the low fifties, but stayed in the mid-forties even after the Abu Ghraib scandal had occurred. See for example (Lubrano 2003; Koring 2005; Klobucher 2006; Worsnip 2008)

^{xiii} See also the discussion concerning this argument in relation to international human rights in (Foot 2000, 10)

^{xiv} See for example, (BBC Monitoring Asia Pacific 2010)

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- ^{xv} For reasons of space, I have limited the number of sources in this article. Where possible, I have only included major administration officials and removed multiple statements made by the same official or state within the same year. However, the full data is available in *REDACTED*
- ^{xvi} In accordance with English School usage, international organisations refer only to the intergovernmental organisations of states, and not non-governmental organisations.
- ^{xvii} Importantly, this paper concerns US interrogation techniques that potentially constituted torture, and excludes any debate over the practice of rendering detainees to other states for the purposes of torture.
- ^{xviii} This distinction is taken from (Clark 2005, 18, 20, 209; Philpott 2001, 21-22)
- ^{xix} Similarly on international law as a 'continuing process of authoritative decisions' made 'within the framework of established practices and norms' see (Higgins 1968, 58-59)
- ^{xx} Again, according to Finnemore and Sikkink, a norm cascade requires 'a critical mass of relevant state actors to adopt the norm.' (Finnemore and Sikkink, 895)
- ^{xxi} Donald Rumsfeld: (James 2002) John Ashcroft: (Senate Judiciary Committee 2001)
- ^{xxii} President Bush: (CNN 2003) Donald Rumsfeld: (U.S. Department of Defense 2002b)
- ^{xxiii} President Bush: (NBC News Transcripts 2006) Condoleezza Rice: (CNN 2004; *The Australian* 6 December 2005) Donald Rumsfeld: (U.S. Department of Defense 2002a)
- ^{xxiv} United Kingdom: (Sparrow 2002) Australia: (BBC Monitoring Asia Pacific 2003a)
- ^{xxv} Germany: (BBC Worldwide Monitoring 2002)
- ^{xxvi} Iran: (BBC Monitoring Middle East 2001; BBC Monitoring Middle East 2002) China: (BBC Monitoring Asia Pacific 2003b)
- ^{xxvii} Donald Rumsfeld: (*The Washington Post* 17 January 2002)
- ^{xxviii} Scott McClellan: (Cooperman 2002)
- ^{xxix} President Bush: (CNN 2003)
- ^{xxx} Donald Rumsfeld: (U.S. Department of Defense 2002b)
- ^{xxxi} Mary Robinson: (*Le Temps* 14 February 2002) The OAS Commission on Human Rights: (Griffiths 2003) Committee Against Torture: (Griffiths 2003) Sergio Viera de Mello: (Capdevila 2003)
- ^{xxxii} Kofi Annan: (Buncombe 2002) Mary Robinson: (*Le Temps* 14 February 2002)
- ^{xxxiii} Donald Rumsfeld: (U.S. Department of Defense 2004)
- ^{xxxiv} Porter Goss: (ABC 2005a) Alberto Gonzales: (Hentoff 2006)
- ^{xxxv} President Bush: (Brown 2005) Colin Powell: (Laville and Britten 2004) Donald Rumsfeld: (Fox News 2005)
- ^{xxxvi} President Bush: (Watson 2004) Colin Powell: (*CNN.com* 5 May 2004) John Ashcroft: (Bender 2004)
- ^{xxxvii} Donald Rumsfeld: (Fox News 2005) John Ashcroft: (Bender 2004)
- ^{xxxviii} President Bush: (Allen 2004)
- ^{xxxix} President Bush: (*CNN.com* 6 June 2004) Donald Rumsfeld: (Shanker 2004; Fox News 2005; Fox News 2006) Condoleezza Rice: (*CNN.com* 5 May 2004; Harding 2005)
- ^{xl} President Bush: (Office of the Press Secretary 2004; ABC News Transcripts 2006)
- ^{xli} President Bush: (*CNN.com* 6 June 2004; Alberts 2006) Condoleezza Rice: (*CNN.com* 5 May 2004) Donald Rumsfeld: (Shanker 2004)
- ^{xlii} President Bush: (Allen and Balz 2004)
- ^{xliiii} President Bush: (Alberts 2005) Vice-President Cheney: (*CNN.com* 20 November 2005) Condoleezza Rice: (CNN 2004; *Canberra Times* 7 December 2005) Alberto Gonzales: (ABC 2005b) Donald Rumsfeld: (Fox News 2005)
- ^{xliiv} Condoleezza Rice: (Bernstein 2005)
- ^{xli v} President Bush: (CNN 2005) Condoleezza Rice: (Borger 2005)
- ^{xli vi} President Bush: (NBC 2005) Vice President Cheney: (CNN 2006a) Colin Powell: (ABC 2004)
- ^{xli vii} President Bush: (Alberts 2005) Alberto Gonzales: (Lichtblau 2005)
- ^{xli viii} President Bush: (CNN 2006a) Condoleezza Rice: (CNN 2004; Knowlton 2005) John Ashcroft: (Bender 2004)
- ^{xli x} President Bush: (Stevenson 2004) Condoleezza Rice: (Bernstein 2005) Colin Powell: (ABC 2004)
- ⁱ Alberto Gonzales: (Eggen and Babington 2005)
- ⁱⁱ Switzerland: (*China Daily* 10 May 2004) Denmark: (BBC Monitoring Europe 2004b) South Africa: (BBC Monitoring Africa 2004) Indonesia: (BBC Monitoring Asia Pacific 2004e) Iran: (BBC Monitoring Middle East 2004b) Cuba: (BBC Monitoring Latin America 2005) United Kingdom: (Brogan 2004) Spain: (Knowlton 2004)
- ⁱⁱⁱ Italy: (BBC Monitoring Europe 2004g) Australia: (BBC Monitoring Asia Pacific 2004a) Czech Republic: (BBC Monitoring Europe 2004f) Nicaragua: (BBC Monitoring Latin America 2004b) Japan: (BBC Monitoring Asia

- Pacific 2004f) Germany: (BBC Monitoring Europe 2004e) Denmark: (BBC Monitoring Europe 2004a) South Africa: (BBC Monitoring Africa 2004) Indonesia: (BBC Monitoring Asia Pacific 2004e) UK: (Buncombe 2004)
- ^{liii} Germany: (*The Australian* 7 December 2005; BBC Monitoring Europe 2006a) France: (Milbank and Priest 2004) Austria: (BBC Monitoring Europe 2005b) The Netherlands: (Kraleev 2005)
- ^{liv} Germany: (BBC Monitoring Europe 2004c) Austria: (BBC Monitoring Europe 2005b)
- ^{lv} Iran: (BBC Monitoring Middle East 2004a; BBC Monitoring Middle East 2005a) China: (BBC Monitoring Asia Pacific 2003b; BBC Monitoring Asia Pacific 2005b) Myanmar: (1 April 2004) North Korea: (BBC Monitoring Asia Pacific 2005c) Vietnam: (BBC Monitoring Asia Pacific 2005f) Zimbabwe: (*Africa News* 1 April 2004)
- ^{lvi} Iran: (BBC Monitoring Middle East 2005a) North Korea: (BBC Monitoring Asia Pacific 2005d)
- ^{lvii} China: (BBC Monitoring Asia Pacific 2004c; BBC Monitoring Asia Pacific 2005a)
- ^{lviii} Myanmar: (BBC Monitoring Asia Pacific 2004b) Zimbabwe: (*Africa News* 1 April 2004) Cuba: (BBC Monitoring Latin America 2004a) North Korea: (BBC Monitoring Asia Pacific 2005c) Eritrea: (BBC Monitoring Africa 2005) Vietnam: (BBC Monitoring Asia Pacific 2005f) Venezuela: (Cody 2005) Russia: (Cody 2005) Indonesia: (BBC Monitoring Asia Pacific 2004d) China: (*Xinhua* 18 May 2004; BBC Monitoring Asia Pacific 2005b; Kahn 2006)
- ^{lix} Louise Arbour: (Edwards 2005) The ICRC: (Tayler 2004) Special Rapporteur on Torture: (Flynn 2005, 39) European Officials: (Freeman 2005)
- ^{lx} Louise Arbour: (Edwards 2005) The ICRC: (Tayler 2004) Special Rapporteur on Torture: (Flynn 2005, 39) European Officials: (Freeman 2005) Manfred Nowak: (Mackay 2005)
- ^{lxi} Theo van Boven: (Cushman 2004) The ICRC: (*Le Temps* 5 November 2005) Mary Robinson: (*Le Temps* 14 February 2002)
- ^{lxii} Louise Arbour: (Arbour 2005)
- ^{lxiii} The United Kingdom: (Foreign and Commonwealth Office 2005) Australia: (Probyn 2005; Butterly and Veness 2006) Belgian Foreign Minister on the Gymnich: (BBC Monitoring Europe 2005a)
- ^{lxiv} Germany: (BBC Monitoring Europe 2004c) Czech Republic: (BBC Monitoring Europe 2005c) UK: (Brogan 2004; Grey 2004) Australia: (Probyn 2005)
- ^{lxv} Denmark: (Brinkley 2005) Belgium: (BBC Monitoring Europe 2005a) Czech Republic: (BBC Monitoring Europe 2005c) France: (Bennhold 2005) Germany: (*The Irish Times* 9 December 2005) Australia: (Butterly and Veness 2006) UK: (Foreign and Commonwealth Office 2005)
- ^{lxvi} Germany: (BBC Worldwide Monitoring 2002; BBC Monitoring Europe 2004d) Spain: (BBC Monitoring Europe 2004h) Hungary: (BBC Monitoring Europe 2004i)
- ^{lxvii} Germany: (*The Australian* 7 December 2005) Czech Republic: (BBC Monitoring Europe 2005c)
- ^{lxviii} Denmark: (BBC Monitoring Europe 2005d) South Africa: (BBC Monitoring Africa 2004) China: (*Xinhua* 18 May 2004) South Africa: (BBC Monitoring Africa 2004)
- ^{lxix} North Korea: (BBC Monitoring Asia Pacific 2005e) Iran: (BBC Monitoring Middle East 2005b)
- ^{lxx} The Committee Against Torture: (Flynn 2005, 37)
- ^{lxxi} Theo van Boven: (Cushman 2004)
- ^{lxxii} Louise Arbour: (Arbour 2005) Theo van Boven: (*Le Temps* 13 May 2004)
- ^{lxxiii} The UN Special Rapporteur for Torture: (Chamberlain 2005) The ICRC: (Lewis 2004; *CNN.com* 10 May 2004)
- ^{lxxiv} Louise Arbour: (Arbour 2005)
- ^{lxxv} President Bush: (Eggen 2008; Fox News Network 2007; ABC News Transcripts 2006)
- ^{lxxvi} President Bush: (Myers 2008; ABC News Transcripts 2006)
- ^{lxxvii} President Bush: (ABC News Transcripts 2006)
- ^{lxxviii} President Bush: (ABC News Transcripts 2006) Dick Cheney: (Shane 2008) Alberto Gonzales: (Hentoff 2006) Donald Rumsfeld: (Fox News 2006)
- ^{lxxix} President Bush: (ABC News Transcripts 2006; CNN 2007) Vice President Cheney: (CNN 2006a) Condoleezza Rice: (CNN 2006b) Donald Rumsfeld: (Fox News 2006)
- ^{lxxx} President Bush: (CBS 2006) Alberto Gonzales: (Hentoff 2006) Condoleezza Rice: (Kirkup 2006)
- ^{lxxxi} Alberto Gonzales: (Hentoff 2006)
- ^{lxxxii} President Bush: (Waugh 2008) Vice President Cheney: (CNN 2006a)
- ^{lxxxiii} President Bush: (*The Irish Times* 7 December 2005; ABC News Transcripts 2006) Vice President Cheney: (*CNN.com* 27 August 2008)
- ^{lxxxiv} Iran: (BBC Monitoring Middle East 2006) Sudan: (BBC Monitoring Middle East 2008b) China: (Kahn 2006; BBC Monitoring Asia Pacific 2007b) Cuba: (BBC Monitoring Latin America 2007; BBC Monitoring Latin America 2008) Russia: (*Spiegel Online* 6 April 2007)

^{lxxxv} Russia: (6 April 2007)

^{lxxxvi} North Korea: (BBC Monitoring Asia Pacific 2007a) Iran: (BBC Monitoring Middle East 2006; BBC Monitoring Middle East 2008a) Russia: (BBC Monitoring Former Soviet Union 2008) China: (BBC Monitoring Asia Pacific 2007b; Kahn 2006)

^{lxxxvii} The Committee Against Torture: (Savage 2006) Inter-American Human Rights Commission: (McCarthy 2006) UN Special Representative in Afghanistan: (Gawenda 2006)

^{lxxxviii} Manfred Nowak: (BBC Monitoring Europe 2006b) The Inter-American Human Rights Commission: (McCarthy 2006) The UN Committee Against Torture: (*The Irish Times* 19 April 2006)

^{lxxxix} Louise Arbour: (*Le Temps* 10 December 2007)

^{xc} Manfred Nowak: (Munro 2007) Louise Arbour: (Harrelson-Stephens and Callaway 2009, 445)

^{xc1} Spain: (Hamilos 2008) The Netherlands: (*The Gazette* 20 January 2008) UK: (Bonner and Perlez 2007; McVeigh 2008)

^{xcii} As Schimmelfennig argued, even statements that uphold a norm out of complete self-interest have future restraining power as states will be held to account for any perceived hypocrisy. See (Schimmelfennig 2001, 65)

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