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The Anti-Torture Norm and Cooperation in the CIA Black Site Program

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Does the interstate cooperation in the CIA black site program imply the anti-torture norm was severely degraded in the war on terror? Most scholarship on the CIA black sites suggests yes by focusing on the outcome of the program – that active cooperation led to torture. This paper argues alternatively that a focus on the process of cooperation provides a better means to assess the strength of the anti-torture norm. Using the Senate report on the CIA's detention and interrogation program, this paper argues that anti-torture norm had continuous causal effects on the interstate cooperation that are currently unrecognized in the literature.

Keywords: torture, rendition, CIA, black sites, war on terror

Introduction

On 3 December 2014, the United States Senate Select Committee on Intelligence released its initial findings and conclusions on the CIA's Detention and Interrogation Program. This report widely criticized the conduct of the CIA and their agents at various "black sites," the colloquial name for CIA detention and interrogation facilities housed outside of the United States. The report was a thorough rebuke of the CIA's black site program. Not only did it point out problems in the administration of the program and accused the CIA of misleading other departments of the US government, but in arguably the most damning finding, it found that the enhanced interrogation program was 'not an effective means of acquiring intelligence or gaining cooperation,'¹ striking at the very purpose of the program itself.

The Senate report is the latest public blow to the CIA's rendition program, which abducted and transported terrorist suspects to CIA black sites or to states that tortured them by proxy for the United States. For human rights activists concerned with the state of international human rights norms, it worryingly falls in line with previous investigations of the rendition program that discovered webs of cooperation between the United States and other states in the abduction, transport, and torture of terrorist suspects. The number of states agreeing to host these black sites where the CIA was free to torture detainees, believed to include Poland, Romania, Lithuania, Thailand, and Afghanistan, should be of particular concern. Several of these states are liberal democracies – states thought most likely to uphold

¹ Senate Select Committee on Intelligence, "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program," 3 December 2014, 2.

fundamental human rights – and as such this conduct questions the integrity of the prohibition against torture. If these states are freely willing to host CIA facilities that torture prisoners, then what does this say about the strength of the anti-torture norm?²

This article seeks to arrive at an updated conclusion to this question given the information contained in the Senate report. It should be said that the question itself is reasonably neglected – most of the writing on the CIA black sites has failed to consider what this conduct might tell us about the state of the international anti-torture norm. The CIA black site scholarship, alternatively, has by and large focused on the legal implications of the program, the domestic politics surrounding the decision making, or the plight of individual prisoners.³ When the subject of inter-state cooperation arises, the existing literature uses the cooperation of the partner states primarily to demonstrate their ethical culpability. As Malinda Smith argued, ‘governments across Europe and elsewhere knew about these sites and the interrogation techniques that took place inside them and, thus, were complicit in human rights abuses.’⁴ Others such as J. D. Boys used the cooperation to point out the hypocrisy of the cooperating states.⁵ As Richard Aldrich put it succinctly, ‘European politicians, faced with the classic dilemmas of conducting counter-terrorism in a liberal society, have dealt with this by playing to public opinion with their criticisms of American covert activity; meanwhile they have approved discreet cooperation with the very same programmes.’⁶ Still other scholars

² Throughout the paper the term norm is defined in a social constructivist sense as a ‘standard of appropriate behavior.’ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 891.

³ See, for instance, Jonathan Stevenson, "Exceptional Abhorrence," *Survival: Global Politics and Strategy* 57, no. 1 (2015); Kenneth Roth, "Obama Should Now Prosecute the Torturers," *The Washington Post*, 13 December 2014; Lisa Hajjar, "An Assault on Truth: A Chronology of Torture, Deception, and Denial," in *Speaking About Torture*, ed. Julie A Carlson and Elisabeth Weber (New York: Fordham University Press, 2012), 27-31; Mark Danner, "Now That We've Tortured: Image, Guilt Consequence," in *Torture: Power, Democracy, and the Human Body*, ed. Shampa Biswas and Zahi Zalloua (Seattle: University of Washington Press, 2011), 54-61; David P Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11* (Cambridge: Cambridge University Press, 2011), 142-61; Jonathan Hafetz, *Habeas Corpus after 9/11* (New York: New York University Press, 2011), 46-67; John Parry, *Understanding Torture: Law, Violence, and Political Identity* (Ann Arbor: University of Michigan Press, 2011), 175-82; Mark Danner, "US Torture: Voices from the Black Sites," *New York Review of Books*, 9 April 2009; Mark Denbeaux and Jonathan Hafetz, *Guantanamo Lawyers: Inside a Prison Outside the Law* (New York: New York University Press, 2009), 361-98; Michael Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond* (New York: Pluto Press, 2007), 135-56.

⁴ Malinda S Smith, *Securing Africa: Post 9/11 Discourses on Terrorism* (Farnham: Ashgate, 2010), 209. See also Alan Clarke, *Rendition to Torture* (New Brunswick, NJ: Rutgers University Press, 2012), 10, 14, 162, 64-66.

⁵ James D Boys, "What's So Extraordinary About Rendition?," *The International Journal of Human Rights* 15, no. 4 (2011): 596.

⁶ Richard J Aldrich, "US-European Intelligence Co-Operation on Counter-Terrorism: Low Politics and Compulsion," *The British Journal of Politics and International Relations* 11, no. 1 (2009): 123.

noted that the United States provided financial incentives to some of these states in return for the use of the sites, only heightening the accusation that their actions were ethically suspect.⁷

This framing paints a very bleak picture of the strength of the anti-torture norm, implying that these states were active partners in the detention and torture of numerous individuals. If this is the case, it demonstrates a massive failure of human rights socialization over a fundamental right, torture, across states that should be the most likely to uphold these rights. Moreover, these webs of cooperation might also signal that many states believed that the anti-torture norm had been sufficiently weakened by the war on terror that they were unlikely to face serious repercussions for their defection. This worry, that the war on terror has damaged the international anti-torture norm, is certainly not new. For instance, in a 2005 report by then United Nations Special Rapporteur on Torture Manfred Nowak, he argued that 'For the first time since World War II, this important consensus [on torture] of the international community seems to have been called into question by some Governments in the context of their counter-terrorism strategies.'⁸ The fact that many states actively cooperated with the CIA in the black site program only heightens this concern that states have too easily ignored fundamental human rights norms in their persecution of the war on terror.

This paper argues, conversely, that the silver lining to an otherwise depressing report on CIA conduct from the Senate shows that this framing of the black site program, which feeds into our perceptions of the strength of the international anti-torture norm, is too negative.⁹ This is not to say that collusion with the United States did not occur, or that states were simply unaware of what the United States was doing. Instead, this paper argues that although cooperation occurred, the anti-torture norm had a significant causal effect that is otherwise unrecognized in the current literature.¹⁰ The fundamental problem in the current literature on the CIA black sites that prevents a similar interpretation is a determined focus on outcome – that certain states cooperated and torture occurred. This focus on outcome, consequently, drives a very negative assessment of the state of the anti-torture norm. However, if we wish to truly understand what the CIA black site program tells us about the state of the norm, we

⁷ Laleh Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Stanford: Stanford University Press, 2012), 136.

⁸ Manfred Nowak, "Statement of the Special Rapporteur on Torture, Manfred Nowak to the 61st Session of the U.N. Commission on Human Rights," 4 April 2005.

⁹ In addition to speaking directly to our understanding of the black site program, this argument also adds to recent literature that supports the idea that the War on Terror had far less effect on the international human rights system than initial commentators believed, see Vincent Charles Keating, "Contesting the International Illegitimacy of Torture: The Bush Administration's Failure to Legitimize Its Preferences within International Society," *British Journal of Politics and International Relations* 16, no. 1 (2014); Jack Donnelly, "International Human Rights since 9/11: More Continuity Than Change," in *Human Rights in the 21st Century: Continuity and Change since 9/11*, ed. Michael Goodhart and Anja Mihr (Basingstoke: Palgrave Macmillan, 2011).

¹⁰ Note that the understanding of causal here is taken from the critical realist literature, which understands causation as the particular powers of ontologically real ideational forces, see Milja Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (Cambridge: Cambridge University Press, 2008), 168-73, 78-87.

are better to consider process rather than outcome.¹¹ That is, the key question needs to be transformed from *whether* these states cooperated in the black site program to *in what way* did these states cooperate over time? In asking this alternative question, the Senate report provides us with crucial information that paints a picture not of states actively cooperating in the CIA rendition program, but states that cooperated only through continuous diplomatic pressure and financial assistance to sustain what were often volatile arrangements.

To make this argument this paper proceeds in two steps. First, it provides an overview of the current understanding of the CIA black sites and the controversies surrounding them, moving to a theoretical argument concerning the importance of considering process in addition to outcome if we want to understand the strength of the anti-torture norm. Second, it suggests that despite the ability of the CIA to procure these sites through the cooperation of many foreign governments, there is significant evidence that the CIA was greatly hindered by human rights concerns. As such, the state of the anti-torture norm, even with respect to a secret program enacted soon after 9/11, was far stronger than the current literature suggests.

The Anti-Torture Norm and CIA Black Sites

The general public has been aware of the existence of CIA black sites since the December 2002 publication of a *Washington Post* article on black sites in Afghanistan.¹² It was not until November 2005, however, that the media first reported that the CIA was hiding and interrogating al Qaeda captives in Eastern Europe, where they were permitted to use 'enhanced interrogation techniques.'¹³ A week after these revelations, *The New York Times* published a classified 2004 CIA report, initially written in early 2002, that featured a list of 10 interrogation techniques for high-value detainees, including methods generally considered to constitute torture such as waterboarding.¹⁴ As such, both the bulk of the program and the seriousness of the torture allegations was a secret from the public for a period of over four years after 9/11.

Even if they did not know directly, there is little possibility that the leadership of the states involved could not have foreseen that some type of abuse could take place in these facilities. There was no shortage of evidence throughout this four-year period that something more than simple interrogations or detention might be taking place. From the very beginning, the tone of the Bush administration signaled that the United States was willing to go beyond the normal bounds of conduct. Days after September 11, Vice President Cheney went on a

¹¹ The examination of the process of human rights violations has been taken up with other elements on the War on Terror, see Vincent Charles Keating, *US Human Rights Conduct and International Legitimacy: The Constrained Hegemony of George W. Bush* (New York: Palgrave Macmillan, 2014); Andrea Birdsall, "'A Monstrous Failure of Justice'? Guantanamo Bay and National Security Challenges to Fundamental Human Rights," *International Politics* 47, no. 6 (2010).

¹² Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *The Washington Post*, 26 December 2002.

¹³ Dana Priest, "Cia Holds Terror Suspect in Secret Prisons," *ibid.*, 2 November 2005.

¹⁴ Douglas Jehl, "Report Warned C.I.A. On Tactics in Interrogation," *The New York Times*, 9 November 2005.

major television news program to declare that, 'We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world.'¹⁵ Even major spokespersons for the Democratic opposition, such as Senator John Kerry, argued that special means were necessary, arguing that 'when you're at war, there are some tough methods that on occasion have been employed and are permissible that are short of torture.'¹⁶ Major media outlets in 2001 suggested that both the FBI and CIA were looking into 'trust serums' and rough interrogation techniques.¹⁷ The media scrutiny over the treatment of prisoners at Guantanamo Bay in a 2002 *Daily Mail* article gave these issues a visual form with the famous photos of the detainees in orange jumpsuits.¹⁸ Throughout 2002 several stories were printed that suggested that harsher techniques, including sleep deprivation, temperature variation, stress positions, and humiliation was being used by the United States on detainees to extract information.¹⁹ In an oft-quoted display of this changed attitude, Cofer Black, in charge of counter-terrorism at the CIA, argued before the House and Senate Intelligence Committees that 'After 9/11, the gloves came off.'²⁰ So even before the revelations of Abu Ghraib that solidified the image of torture at the hands of US officials, there were many public indications that the Bush administration was willing to explore the boundaries of what might be deemed acceptable conduct in order to gain intelligence in the war on terror. Given the severity of torture within the international human rights system, properly socialized government officials would understand that they had a duty to ensure that no such activities were taking place in light of this ongoing discourse.²¹ Claiming that they simply had no oversight and turning a blind eye demonstrates a failure of socialization into the anti-torture norm.

There is also evidence that the black site program at times required extensive cooperation with the host states, so there is little doubt that at least some key elements within their administrations knowingly participated. This reached far beyond simply giving permission to host the black sites. According to a Council of Europe report, the CIA would file fake flight plans that would make it look like the flights were going elsewhere. For example, once flights entered Polish airspace, the aviation authority would secretly help the plane to land at an airport near the detention site without creating any public documentation. They would also file a one-way flight out of the country in order to obfuscate the real nature of the flight.²² Given the necessity of these fairly complicated cooperative arrangements, as David

¹⁵ "Meet the Press," *NBC*, 16 September 2001.

¹⁶ "Live Event," *Fox News Network*, 25 October 2001.

¹⁷ Jason Burke, "The Secret War: Behind the Lines," *The Observer*, 4 November 2001; Walter Pincus, "Silence of 4 Terror Probe Suspects Poses Dilemma for Fbi," *The Washington Post*, 22 October 2001.

¹⁸ Stephen Glover, "Even the Ss Were Treated Better Than This," *Daily Mail*, 15 January 2002.

¹⁹ "Glance: U.S. Tactics Draw Fine Line," *Associated Press Online*, 28 April 2002; "US Considered Allowing Zubaydah to Be Tortured for Information," *The White House Bulletin*, 8 April 2002; "A Clear and Present Danger; Al-Qaeda," *Economist.com*, 17 September 2002; Mark Forbes and Marian Wilkinson, "Voices from the Shadows Predict Horrors to Come," *The Age*, 19 October 2002; Doug Saunders, "U.S. Walks a Fine Line to Make Prisoners Talk," *The Globe and mail*, 17 September 2002.

²⁰ Priest and Gellman, "U.S. Decries Abuse."

²¹ This duty to prevent torture is covered by Articles 2(1) and 5(1) of the Convention Against Torture.

²² Jane Mayer, "The Black Sites," *The New Yorker*, 13 August 2007.

Forsythe put it, 'It is unlikely that secret CIA interrogation centers could have existed in Europe ... without some knowledge and cooperation by at least some European security managers.'²³

We are thus left with a situation where there is a great deal of information suggesting that the United States was prepared to engage in potentially torturous methods and little doubt that active cooperation occurred between the United States and the states hosting the CIA black sites. On the face of it, and in line with much of what is written in the literature, this is an exceptionally damning indictment of the cooperating states and throws up large questions about the strength of the anti-torture norm within the international human rights system.

This assessment is largely driven by a focus on outcome found in much of the literature, that states knowingly cooperated and facilitated torture. This focus is certainly understandable because of the nature of the human rights violation. The prohibition against torture, from the Universal Declaration of Human Rights onwards, is absolute, that '*No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.*'²⁴ It is *jus cogens* or pre-emptory, meaning that there can be no justification for the use of torture in any situation. As the Convention against Torture puts it, 'no exceptional circumstances whatsoever ... may be invoked as a justification of torture.'²⁵ Furthermore, this prohibition is so strong that any treaty that might accommodate torture, or even the international transfer of prisoners for the purposes of torture, would be automatically considered null and void under the Vienna Convention on the Law of Treaties.²⁶ There is simply no middle ground in the understanding *jus cogens* rights by definition. Since there is no possibility of derogation, from a legal perspective the process through which a government arrived at the decision to torture does not matter, since there is no possibility of excusing the action due to exceptional circumstances.

This legal framework that focuses solely on the binary outcome of whether a government chose to torture or not torture is replicated in much of the political writing on the subject. Major quantitative studies on whether norms have effects on torture treat the presence or absence of torture as the dependent variable, sometimes with additional nuances on the exact level of torture should it exist.²⁷ More qualitative and normative arguments

²³ David P Forsythe, "United States Policy toward Enemy Detainees in the "War on Terrorism"," *Human Rights Quarterly* 28, no. 2 (2006): 483.

²⁴ United Nations, "The Universal Declaration of Human Rights," (1948): Article 5. *Emphasis mine*

²⁵ "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," (1984). The reason for torture being *jus cogens* has been explored recently by scholars who argue that this level of prohibition arises from the liberal abhorrence to intentional suffering, see Kamila Stullerova, "Rethinking Human Rights," *International Politics* 50, no. 5 (2013); David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91, no. 6 (2005).

²⁶ Erika de Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law," *European Journal of International Law* 15, no. 1: 98-99; Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*," *The European Journal of International Law* 19, no. 3 (2008): 496.

²⁷ Michael J Gilligan and Nathaniel H Nesbitt, "Do Norms Reduce Torture?," *Journal of Legal Studies* 38, no. 2 (2009); Oona A Hathaway, "Why Do Countries Commit to Human Rights Treaties?," *The Journal*

about torture in the war on terror also tend to stress the necessity and absoluteness of the prohibition itself, reflecting the high degree of moral revulsion at the practice. As Eugene Robinson stated in an editorial in the *Washington Post*, 'The "debate" over torture is almost as grotesque as torture itself. There can be no legitimate debate about the intentional infliction of pain upon captive and defenceless human beings.'²⁸ Rosemary Foot also focusses on the *jus cogens* argument in her E. H. Carr Memorial Lecture, claiming that, 'the torture convention allows for no derogation because torture has been recognized as a most profound violation of human dignity.'²⁹ As a consequence, when considering the effects on US derogation from the anti-torture norm, she speaks about 'how unrestrained many governments believe themselves to be when the most powerful state in the international system elevates counter-terrorist action above other values. Torture and other forms of abuse become commonplace and often more openly so.'³⁰ The implicit model in this statement seems to be that once the United States decides to abandon its support for the prohibition against torture, other states simply either follow suit or revert back to previous habits. The focus is on the change in the propensity to commit (or not commit) torture itself – and not on the process through which these states might negotiate such a change. Finally, the existing literature on the black sites, as previously mentioned, tends to focus on the torture done to detainees and its lasting effects or interrogates the legal reasoning used by the Bush administration. This certainly helps to publicize the instances where torture occurred to reinforce the moral revulsion we should have at the practice, but it also treats the outcome as the most important element of investigation.

To reiterate, given the strict moral and legal prohibitions against the use of torture it is not surprising that the primary focus of scholarship and advocacy concerns uncovering and criticizing those events where torture occurred. However, the problem with focusing on torture as an all-or-nothing phenomenon – that either a state chooses to torture or aid in torture, or it does not – prevents us from painting a more complicated picture about norms concerning torture and the nature of human rights more generally. Specifically, and it hides the dynamics at play that might help us to understand the severity of the problem itself. States might decide to torture, and there is no question that this is ethically indefensible. However, in line with much of the constructivist literature that stresses the importance of analysing social processes,³¹ the way in which these states proceed is equally as important to study if we want to understand the strength of the prohibition against torture itself.

of Conflict Resolution 51, no. 4 (2007); "Do Human Rights Treaties Make a Difference?," *The Yale Law Journal* 111, no. 8 (2002).

²⁸ Eugene Robinson, "The U.S. Met Evil with Evil," *The Washington Post*, 12 December 2014.

²⁹ Rosemary Foot, "Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era," *International Relations* 20, no. 2 (2006): 132.

³⁰ "Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era," *International Relations* 20, no. 2: 140.

³¹ Though this scholarship is bountiful, some of the more important works are Thomas Risse, Stephen C Ropp, and Kathryn Sikkink, eds., *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013); Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," in *The*

Focusing on process expands the range of possibilities in state interaction regarding the prohibition against torture. For instance, at one extreme, the prohibition against torture could be socialized to the extent that it becomes a taken-for-granted norm. As such, its reproduction on the part of the state leadership becomes automatic, taken-for-granted, and habitual.³² The norm acts as a filter that removes certain possibilities from the table altogether.³³ States whose leadership have internalized the anti-torture norm will simply never cooperate with the United States. This type of socialization reflects the *jus cogens* nature of the anti-torture norm itself, which stresses that there is no acceptable reason to engage in torture. Were these the only actors in international politics, human rights activists could sleep easily knowing that the anti-torture norm was as secure as its legal and moral prohibition reflects.

We know, however, that there are many individuals within positions of political power that are not completely habituated into the anti-torture norm. This does not mean that they 'support' torture *per se*, only that they will consider the anti-torture norm to be part of a consequentialist analysis that includes both the value they place in the anti-torture norm itself *and* the possibility of external sanction should their derogation be discovered.³⁴ Where this is the case, there are variables in play that are irrelevant where the anti-torture norm is habitually socialized.

First, there is room for these individuals to be convinced by others that the circumstances are currently such that torture might be permitted, both in terms of the arguing against the moral prohibition of torture and arguing that the current strength of the international anti-torture norm is less than they perceive. Second, there is the potential for more coercive forms of interaction whereby the benefits to cooperation, or the costs to non-cooperation, are increased above their reservations over whether torture should be used.³⁵

Power of Human Rights: International Norms and Domestic Change, ed. Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999); Finnemore and Sikkink, "International Norm Dynamics and Political Change," 898; Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

³² Ted Hopf, "The Logic of Habit in International Relations," *European Journal of International Relations* 16, no. 4 (2010); Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction; Finnemore and Sikkink, "International Norm Dynamics and Political Change."

³³ Christopher Kultz, "How Norms Die: Torture and Assassination in American Security Policy," *Ethics and International Affairs* 28, no. 4 (2014): 428.

³⁴ "How Norms Die: Torture and Assassination in American Security Policy," *Ethics and International Affairs* 28, no. 4 (2014): 429. This difference between actors who have internalized the norm and those who respond to its existence echoes Jeffrey Checkel's argument that norms both constrain and constitute the interests of actors, see Jeffrey T Checkel, "International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide," *European Journal of International Relations* 3, no. 4 (1997).

³⁵ Reflecting the often-cited difference between logics of consequences and logics of appropriateness, see James G March and Johan P Olsen, "The Institutional Dynamics of International Political Orders," *International Organization* 52, no. 4 (1998).

However, since these individuals are also aware that they reside in domestic and international political environments where the use of torture might not be appreciated, they not only need to struggle with their own internal beliefs and the pressures placed on them by the United States, but with the political consequences of facing electoral or diplomatic punishment³⁶ or social stigmatization³⁷ should they decide to help facilitate the torture.

These individuals will be open to the possibility of violating the norm, but also will act in such a way that they signal their awareness of the norm itself by either requiring incentives for cooperation or other types of diplomatic assurances. The more that they have either internalized the norm and/or³⁸ believe it to be strong, the more they will require these incentives and the more difficult it will be for the United States to establish stable cooperation. Likewise, individuals that do not subscribe to the norm at all and believe it to be weak will be the most more likely to enter into stable cooperative relationships without many inducements. In sum, a state led by individuals who have not internalized the anti-torture norm might violate it, but the violation itself does not unto itself mean that the norm has failed to have a causal effect on the outcome. To understand whether this is the case or not with respect to the CIA black sites, we need to examine the process through which cooperation occurred.

A final component necessary to understand the strength of the anti-torture norm concerns not only an analysis of the nature of the cooperation between states, but also in how this cooperation changes over time. If the individuals' support for the norm is weakened through the cooperation and/or they believe the strength of the international norm itself to be weakened, then we should expect fewer problems in the cooperative relationship over time and less need for inducements – and vice versa.³⁹ As such, there are two questions that can be asked that can help us to understand the strength of the anti-torture norm in light of the CIA black site programme: does the cooperation seem reasonably stable with the need for few necessary inducements on the part of the United States or does it not, and does the stability of the relationships seem to increase or decrease over time?

This indication of the strength or weakness of the anti-torture norm is only augmented in the case of the black site program since it was run in near secrecy for almost four years. Ian

³⁶ This affects even the most powerful of states. As Jason Ralph noted in his review of *The Torture Papers*, the 1000 pages of legal argument demonstrate that even if the Bush administration preferred not to see itself as bound by international law, even it certainly did not 'ignore' it and was therefore aware of its potential consequences. Jason Ralph, "America's 'War on Terror': Making Sense of the 'Troubling Confusion'," *The International Journal of Human Rights* 10, no. 2 (2006): 182.

³⁷ Ayşe Zarakol, "What Made the Modern World Hang Together: Socialisation or Stigmatisation?," *International Theory* 6, no. 2 (2014).

³⁸ Note that both *and* and *or* are possibilities since there are two separate effects: being partially convinced that it is the wrong thing to do and the belief that negative political consequences will arise from breaking the norm. Unfortunately demarcating the causal effects of each is impossible given the data at hand, which is why these two effects are grouped into one category because of their similar effect.

³⁹ This analysis of conduct over time is similar to previous discursive analyses of the overall anti-torture norm in the War on Terror, see Keating, "Contesting the International Illegitimacy of Torture: The Bush Administration's Failure to Legitimate Its Preferences within International Society."

Hurd has already noted that secrecy allows states to temporarily avoid the costs of acting in an illegitimate manner,⁴⁰ which can be very useful for those breaking human rights norms. But the character of the secret cooperation can also give us an indication of the state of the anti-torture norm more than can the character of open cooperation, exactly because there are no immediate costs to breaking the norm when secrecy is available. As such, secrecy presents the best possible structural condition to break norms, only augmenting any observations of state hesitancy to cooperate with the United States.

In summary, the process of norm violation over time, particularly during periods of secrecy when states are not facing the possibility of immediate sanction, becomes as important as the violation of the norm itself if we want to understand the strength of the anti-torture norm. If these states initially cooperated freely, or did so increasingly, then we might be able to claim the possibility of a reverse cascade or reverse norm spiral.⁴¹ This result would then reinforce the perspective that we obtain if we only consider the outcome of the defections – that it represents a massive failure of human rights socialization. However, if states cooperate with a great amount of reservation such that the United States had to expend a great effort to sustain this cooperation, particularly when the program is secret, we can make a claim that the effect of the human rights system is much stronger than we would think had we only considered the defections themselves.

The Senate report on the CIA black site program, despite its negative tone with respect to the program itself, provides a good amount of information necessary to make a claim concerning this issue.⁴² It shows not only that the CIA had constant problems maintaining interstate cooperation while the program remained secret, but also that these problems became significantly worse after the program was revealed to the public – effectively ending sustained cooperation with almost all of their partners. As such, despite the fact that many

⁴⁰ Ian Hurd, "Breaking and Making Norms: American Revisionism and Crises of Legitimacy," *International Politics* 44, no. 2-3 (2007): 210.

⁴¹ Regina Heller, Martin Kahl, and Daniela Pisoiu, "The 'Dark' Side of Normative Argumentation - the Case of Counterterrorism Policy," *Global Constitutionalism* 1, no. 2 (2012); Diana Panke and Ulrich Petersohn, "Why International Norms Disappear Sometimes," *European Journal of International Relations* 18, no. 4 (2011); Ryder McKeown, "Norm Regress: US Interventionism and the Slow Death of the Torture Norm," *International Relations* 23, no. 1 (2009). It is not a foregone conclusion that the anti-torture norm resisted a norm cascade as we can clearly see this process in US domestic politics. Despite the revelations of the 2014 Senate report studied in this paper and its conclusion that definitively argued against torture, one Washington post-ABC News poll found that 58% of Americans believe that torture is often or sometimes justified, and 59% supported the methods used by the CIA with 53% believing that it produced information that could not be gained any other way Adam Goldman and Peyton Craighill, "A Majority of Americans Support Harsh Cia Methods, Poll Finds," *The Washington Post*, 17 December 2014.

⁴² Importantly, there is little dispute over the nature of the interstate cooperation, unlike many other elements that were strenuously objected to in the minority senate reports, see Senate Select Committee on Intelligence, "Minority Views of Vice Chairman Chambiss Joined by Senators Burr, Risch, Coats, Rubio, and Coburn," 20 June 2014; "Additional Minority Views of Senator Coburn, Vice Chairman Chambliss, Senators Burr, Risch, Coats, and Rubio," 2014; "Senators Risch, Coats, & Rubio Additional Views," 2014.

states cooperated with the CIA to host the black sites, there is little evidence that they did so easily, pointing to either their own struggles with the anti-torture norm and/or their belief that it is a strong norm that will lead them to incur costs should the program be revealed.

Cooperation with the CIA Black Site Program

The first major issue suggesting that cooperation was not automatic concerns the number of times the CIA had to offer financial incentives to foreign governments into accepting the sites.⁴³ The report's conclusion suggests that 'to encourage governments to clandestinely host CIA detention sites, or to increase support for existing sites, the CIA provided millions of dollars in cash payments to foreign government officials.'⁴⁴ This fact is also reflected in the discussion of individual sites. For instance, at Detention Site Green⁴⁵ the host government made requests for financial support in exchange for the continued functioning of the facility.⁴⁶ When the CIA decided to create Detention Site Black in 2003, CIA Headquarters asked the CIA Station in one of the countries to 'identify ways to support the [REDACTED] in Country [REDACTED] to "demonstrate to [REDACTED] and the highest levels of the [Country [REDACTED]] government that we deeply appreciate their cooperation and support" for the detention program.'⁴⁷ The CIA Station subsequently put together a multi-million dollar 'wish list,' to which CIA Headquarters eventually authorized several million more than what was requested for the "purposes of the [REDACTED] subsidy".⁴⁸

Similarly, in the creation of what is likely Detention Site Violet the CIA 'also offered \$[REDACTED] million to the [REDACTED] to "show appreciation" for the [REDACTED] support for the program,' which ultimately led to the approval of the expansion of the CIA facility.⁴⁹ In the interim, the CIA continued to funnel money into the country, with the report stating that

⁴³ "Committee Study," 139.

⁴⁴ "Committee Study," 16.

⁴⁵ Although there is no official confirmation of the locations of each of the color-coded detention sites, it is believed that Detention Site Green was located in Thailand, Detention Site Blue at Stare Kiejkuty Base in Poland, Detention Site Violet was located in Lithuania, Detention Site Black was located in Romania, Detention Site Cobalt was likely the Salt Pit in Afghanistan, and Detention Site Brown was likely also in Afghanistan, see Amnesty International, "Annual Report," (2015); Toby Harden, "Brutality by the Cia," *The Sunday Times*, 14 December 2014; Wassana Nanuam, "Prayut Dodges New Torture Questions," *The Bangkok Post*, 18 December 2014; Monika Rebala and Sara Miller Llana, "Cia Torture: How Much Did Poland Know, and When Did It Know It?," *The Christian Science Monitor*, 10 December 2014; Noa Yachot, "'A Train Wreck Waiting to Happen'," American Civil Liberties Union, <https://www.aclu.org/blog/human-rights-national-security/train-wreck-waiting-happen-shocking-stories-senates-torture-repo>.

⁴⁶ Senate Select Committee on Intelligence, "Committee Study," 23-24.

⁴⁷ "Committee Study," 97. Similarly, in another section of the report a CIA Station is asked to 'think big' and create a 'wish list' about how CIA Headquarters could support elements of a hosting country. These subsidy payments eventually totaled in the tens of millions of dollars, some of which was delivered in boxes of one hundred dollar bills, see "Committee Study," 140.

⁴⁸ "Committee Study," 97.

⁴⁹ "Committee Study," 99.

'the CIA and [REDACTED] developed complex mechanisms to [REDACTED] in order to provide the \$[REDACTED] million to the [REDACTED].'⁵⁰

So there is a good deal of evidence that the CIA paid out tens if not hundreds of millions of dollars in support to governments or elements of governments in exchange for the hosting of the black sites. Moreover, CIA headquarters recognized the link between this financial support and cooperation. In 2003, they asked one CIA station to 'advise if additional funds may be needed to keep [the facility] viable over the coming year and beyond,' because 'we cannot have enough blacksite hosts, and we are loathe to let one we have slip away.'⁵¹ Providing financial incentives to black site hosting governments not only occurred, but was seen as an important element in ensuring cooperation, even while the black site program was secret.

Giving money to foreign governments itself is not enough to make a claim that human rights norms were in effect. One could make an argument that the smaller states might see this simply as an opportunity to gain side-payments for cooperative behaviour. No doubt this has some credibility. In order to suggest that the costs paid by the CIA for the maintenance of their program might have arisen from norms against torture, we need to explore the political dialogue that took place at the same time – coming both from the partner states and in the CIA's own awareness of the problems that the anti-torture norm might create.

One of the first pieces of evidence comes from how one state, likely Poland, wanted the CIA to sign a Memorandum of Understanding covering the roles and responsibilities of the CIA, which the CIA did not sign but instead offered money in compensation. Even after the facility was operational and money had changed hands, this state still initially rejected the transfer of particular prisoners to this site, including Khalid Shaykh Muhammad. This decision was only reversed after active diplomatic intervention and an additional financial incentive of millions of dollars.⁵² Likewise in the state hosting Detention Site Green, the CIA faced widespread domestic political opposition to the program even prior to any public revelations of the program and given ongoing fiscal support. The report argues that the site would have been closed much earlier if it had not been for continued lobbying by the chief of the Station.⁵³ Finally, the mixed messages sent from the United States over whether the International Committee of the Red Cross (ICRC) should be granted access to the detainees created tensions in the bilateral relationships between the United States and hosting states, particularly given the pressure the ICRC was putting on these governments for access.⁵⁴ In sum, there are several indications in the Senate report that these states had concerns with the program that were manifested in requesting formal agreements concerning roles and responsibilities, caution over the transfer of certain prisoners, and outright internal political opposition, at times linked to pressure from humanitarian international organizations – even though the program at this point was not known to the public.

⁵⁰ Ibid.

⁵¹ "Committee Study," 140. footnote 842

⁵² "Committee Study," 74.

⁵³ "Committee Study," 23-24.

⁵⁴ "Committee Study," 120.

In addition to the responses of the partner states themselves, there is a good deal of evidence that members of the United States government themselves were aware of, and concerned about, breaking the anti-torture norm. Several diplomatic concerns were raised over the detention sites themselves. For instance, in August 2003 a US ambassador, likely to either Romania or Lithuania, wanted to contact the State Department about the CIA detention facility because of the 'potential impact on our policy vis-à-vis the [country's] government.'⁵⁵ The US ambassador furthermore requested a high-level document that included a statement that the interrogation techniques met with legal and human rights standards.⁵⁶ These concerns over anti-torture norms also spanned to questions of legal liability. Counterterrorism Center Legal specifically warned about potential legal action against CIA employees in states that might 'take a different view of the detention and interrogation practices employed by [the CIA],' arguing that there are particular sets of countries that the CIA should avoid because of this possibility.⁵⁷

The United States was additionally concerned over the effect of potential leaks on the hosting states. A report from J Cofer Black, the Director of Counterterrorism, to the Director of Central Intelligence argued in October 2001 that the probability of exposure was only to increase over time, and that this could 'inflame public opinion against the host government',⁵⁸ threatening the cooperation necessary to ensure the continuation of the facility itself. In a subsequent 2002 discussion the rendering of Abu Zubaydah to what was eventually Detention Site Green it was noted that '[i]f AZ's prescience does become known, [it is] not clear what the impact would be.'⁵⁹ Furthermore, when a media organization learned that Abu Zubaydah was in the state, the CIA station chief argued that any revelation would be damaging to the bilateral relations, would likely decrease the possibility that Abu Zubaydah would be allowed to remain in the country, and would decrease the possibility that the country would accept the detention of future detainees.⁶⁰ As it was, even though the media did not choose to reveal the location of Abu Zubaydah, the fact that the information could be revealed led to the decision to close the site.⁶¹ In sum, individuals within the CIA understood that there could be

⁵⁵ "Committee Study," 97.

⁵⁶ Ibid.

⁵⁷ "Committee Study," 74.

⁵⁸ J Cofer Black, "Approval to Establish a Detention Facility for Terrorists," 25 October 2001.

⁵⁹ Senate Select Committee on Intelligence, "Committee Study," 22. *Insertions mine*.

⁶⁰ "Committee Study," 24.

⁶¹ Ibid. Interestingly, issues of human rights and the mistreatment of prisoners proved to be significant in the opposite direction as well. This was confirmed in a 2004 incident when tensions arose between a host state and the CIA because some of the CIA detainees in a host state facility claimed that they could hear cries of pain from other detainees. A likely government official stated that the bilateral relationship was being tested by these claims which, according to the report, led the state to request the CIA to remove all CIA detainees from the country. When the CIA approached elements within the host state later in the year about the mistreatment of detainees within the facility, the state officials saw the CIA as 'querulous and unappreciative recipients of their [REDACTED] cooperation.' This led to the degradation in overall intelligence cooperation between the two states, and eventually the CIA detainees were transferred out of the state in 2005. "Committee Study," 141-42.

considerable problems generated by any potential revelation of the black site program, were worried about the legal consequences on CIA agents participating, and faced opposition and questioning from other members of the US government, all suggesting in line with the partner state behavior that there was an awareness or partial internalization of the anti-torture norm that made cooperation difficult – even in the initial years of cooperation when the program between all partner states but Afghanistan was secret.

Despite the continued secrecy, these problems seemed to be only exacerbated by the torture scandals in April 2004. As such, by early 2005, the CIA was looking for a strategy out of the black site program, citing ‘unstable relations with host governments and its difficulty in identifying additional countries to host CIA detention facilities.’ With respect to one particular country, the CIA director argued that ‘Our liaison partners who host these sites are deeply concerned by [REDACTED] press leaks, and they are increasingly skeptical of the [U.S. government’s] commitment to keep secret their cooperation.... A combination of press leaks, international scrutiny of alleged [U.S. government] detainee abuse Is eroding our partners’ trust in U.S. resolve to protect their identities and supporting roles.’ He continued to argue that if a long-term plan was not developed, then the United States should expect most of the host countries to formally request the closure of the facilities they host, as hosting these sites had a ‘huge risk’ attached to them. At the very least, public exposure would likely prevent even existing facilities to take on additional detainees.⁶² Similarly, in a March 2005 CIA talking points memo for the CIA director, they noted that ‘continuation of status quo will exacerbate tensions in these very valuable relationships and cause them to withdraw their critical support and cooperation with the [U.S. government].’⁶³

As the *Washington Post* summed up, ‘media exposure, bureaucratic fights and disputes with foreign governments had all taken a substantial toll’⁶⁴ by early 2005. This was not a program that was unproblematically accepted by the host states that had no qualms about violating the anti-torture norm. Indeed, the record provided by the Senate Intelligence Committee shows us the exact opposite – that in order to successfully operate this program the CIA had to constantly negotiate a political minefield with their partner states and spend a great deal of money to secure this cooperation. All states involved, including the United States, seemed to operate in a way suggesting that they were either personally torn by violating the torture norm and/or were at least aware of the possibilities of running afoul of the diplomatic consequences, and this clearly made cooperation significantly more difficult for the United States than it would have been if the War on Terror had fundamentally undermined the anti-torture norm. Additionally, there is evidence that the United States itself was not only concerned about the potential ramifications should the program become public, but also the potentially negative consequences this could have on the states themselves and the bilateral relations with them. Even with presence of secrecy that would otherwise potentially help

⁶² "Committee Study," 150.

⁶³ "Committee Study," 151.

⁶⁴ Greg Miller and Adam Goldman, "Report Charts Cia Prisons' Rise, Fall," *The Washington Post*, 12 December 2014.

states to avoid the costs of acting in an illegitimate manner with respect to the anti-torture norm, there were significant problems present.

The revealing of the black site program in November 2005 thus became the final nail in the coffin. The publication of the *Washington Post* article immediately resulted in a demarche to the United States from at least two states, one of whom argued their contribution could be in jeopardy.⁶⁵ The CIA instantly understood that there was a fundamental problem with their conduct with respect to international human right norms. A CIA cable argued that 'if another shoe were to drop,' then there would be 'considerable ramifications for U.S. relations with [REDACTED] on a number of issues that depended on U.S. credibility in the area of human rights.'⁶⁶ In addition to potential problems arising in their general diplomatic relationships, the CIA also expected that the foreign services that helped them to conduct missions would no longer be 'as aggressive or cooperative.'⁶⁷ For instance, one state that presented a formal demarche to the U.S. government was concerned about the effect that the press reports would have on radical elements within the state that might lead to increased hostility toward the hosting government. The strain that the scandal placed on the bilateral relationship was mentioned in diplomatic meetings between the two states as late as 2009, where the government mentioned that if future cooperation with the CIA were to happen, assurances would be needed.⁶⁸ Officials in another state explicitly expressed their 'deep shock and regret,' and were upset not only in the CIA's inability to keep the program secret, but also in the lack of forewarning for President Bush's September 2006 public disclosure of the program. The CIA station in this state also believed that there was a serious blow to the bilateral relationship.⁶⁹

These concerns turned out to be well-founded. The state hosting Detention Site Black demanded and obtained the immediate closure of the site.⁷⁰ The revelation also created wider problems in intelligence cooperation. In April 2006, one government prohibited providing information that could lead to the rendition or detention of al-Qaida or other terrorists to U.S. Government custody for interrogation, citing that they believe the International Covenant on Civil and Political Rights prohibited them from aiding or assisting these CIA operations.⁷¹ Even states that continued to host black sites tightened up on their cooperative behaviour, creating large problems for the CIA. For instance, the CIA could not get the necessary cooperation for one detainee, Ahmad al-Hawsawi, to go to a local hospital. This forced the CIA to seek assistance from three third-party countries to provide medical care to al-Hawasawi and four other detainees with acute medical problems, costing the CIA tens of millions of dollars. These ongoing medical issues eventually resulted in the closing of Detention Site Violet some time in 2006, with the remaining detainees transferred to Detention Site Brown.⁷² This problem in

⁶⁵ Senate Select Committee on Intelligence, "Committee Study," 152.

⁶⁶ Ibid.

⁶⁷ "Committee Study," 153.

⁶⁸ Ibid.

⁶⁹ "Committee Study," 74-75.

⁷⁰ "Committee Study," 153.

⁷¹ Ibid.

⁷² "Committee Study," 154.

agreeing on the provision of emergency medical care also arose in another state where the CIA attempted to construct a facility. In this case, the inability to establish protocols for emergency medical care close to the site was a significant enough problem for CIA Headquarters to argue that the facility should not be activated unless this problem was solved.⁷³ In the end, the CIA had invested at least one hundred million dollars to construct the new facility, which was never used. Instead, press reports about the interrogation program forced the CIA to give possession of the new facility to the government of the state.⁷⁴

In an attempt to save the program given these diplomatic problems, the CIA continued to rely on large financial incentives to persuade other states to construct new sites to deal with the “[d]windling pool [REDACTED] partners willing to host CIA Blacksites.”⁷⁵ In at least once case, the report argues that despite the fact that financial incentives had been paid to help facilitate the cooperation, the states involved were concerned not with whether the CIA holding terrorists in the facilities, but with whether or not torture would be used. The CIA eventually did not detain any individuals in the state.⁷⁶

In summary, after the program was made public by the *Washington Post*, the problems facing the CIA in maintaining the program increased dramatically to the point that it was exceptionally difficult for the CIA, even with large resources and a clear internal belief as to the value of these sites, to maintain stable cooperative relationships. Many governments immediately ceased cooperation, and those that continued were far from openly supportive. Finally, when the CIA attempted to approach new states to host sites offering similar financial incentives, at least some directly confronted them over the potential for human rights abuses. All in all, there is little evidence that the anti-torture norm became weaker over time. In fact, the evidence seems to find for the opposite conclusion – that the states reacted as if it were a strong norm, minimizing their exposure to potential allegations of defection from the norm as soon as they could and actively querying the potential for future defection.

Conclusion

There is little question that the United States and its black site partners defected from the *jus cogens* anti-torture norm in their prosecution of the war on terror. Most of the literature on the black sites explores important issues surrounding this defection, including the legal disputes, the domestic politics behind these decisions, and the effect that these decisions had on the detainees who were tortured. Given this defection and the severity of the offenses, on the face of things it might seem that the war on terror had indeed done considerable harm to the right not to be tortured.

This focus on the outcome of the cooperation that led to the torture of the detainees is understandable given that there is no possibility to legally derogate from the torture norm. Since there can be no excuse for torture, the means through which it occurred is irrelevant in a

⁷³ "Committee Study," 155.

⁷⁴ "Committee Study," 156.

⁷⁵ "Committee Study," 154.

⁷⁶ "Committee Study," 154-55.

legal sense. However, as this paper has argued, if we stop the analysis at this point – the recognition that cooperation occurred that facilitated torture – we fail to recognize the underlying strength of the anti-torture norm that can be seen through its causal effects in the process of cooperation between the United States and the states hosting the black sites. If we wish to know whether the conduct undermined the anti-torture norm, it is necessary to not simply consider the defections themselves, but to look into the process through which the violations occurred.

The recent Senate report on the CIA's Detention and Interrogation Program, though quite damning to the CIA itself, gives us a good deal of new evidence that international human rights norms were in play and affecting outcomes from the outset of the program until its completion. In other words, despite the fact that the CIA was able to cooperate with these states to set up black sites that facilitated torturous interrogation methods, there is little evidence to suggest that the host countries unproblematically cooperated. Instead, the report suggests that the CIA constantly found itself facing difficulties in acquiring and maintaining these facilities. Importantly, even while the sites were secret, there is evidence from the conduct of the cooperating states and internal discourses in the CIA itself that all actors were worried about the potential effects of violating the anti-torture norm. Because of this fear, the CIA faced numerous diplomatic and fiscal costs to keep their facilities running. After the exposure of the black site program, cooperation became almost impossible, with existing partners breaking cooperative ties, and new potential partners querying about torture directly.

In sum, considering the process through which the derogations occurred gives us a more optimistic sense of the strength of the international anti-torture norm even when states are acting covertly. However, this optimism must be nuanced. So long as the anti-torture norm is not habituated in the leadership of all states, there exists the possibility of defection. Furthermore, a state like the United States, with bountiful resources, might still feel it worthwhile to pay significant costs if it feels utilizing torture to be worthwhile. However, the recognition of these high costs that in this case yielded hesitant and unstable cooperation, despite the diplomatic pressure and financial incentives, offers us a glimpse of the serious impediments that exist because of the causal effects of the norm against torture.

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