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Torture and the politics of legitimation in international law

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1. Introduction

All manifestations of political power eventually lead to questions about their legitimacy. The institutions of international human rights aspire to have power over governments and over individuals, and to the extent that they succeed the legitimacy of their authority is worth investigating. How and when can political authority be justified as legitimate, and what consequences follow from it? These questions are increasingly addressed to international law and organizations as a consequence of a perceived shift in the location of political power from the state to a more decentralized model of "governance without government" (Clark 2005; Hurd 2007; Lindseth 2010).[1] The institutions of domestic democratic governance are widely credited with providing legitimacy to the modern state, and the transfer of political authority from democratic states to nondemocratic international rules or bodies reopens the legitimacy problem anew.

Human rights laws and courts have seen tremendous growth since the 1980s. The power of these institutions leads directly to inquiries into their fairness, their accountability, and their foundation, all of which are in some form questions about legitimacy. However, most discussion of the connection between human rights rules and legitimacy has focused on the particularly narrow question of how legitimation might increase compliance. In other words, what institutional arrangements might be made in order to increase state compliance with the set of desirable human rights obligations? This is a question of institutional design and it is at the heart of much of the recent literature at the intersection of international law

[1] "Governance without government" in the international context comes from Rosenau & Czempiel (1992).

and political science (Hafner-Burton, Victor, & Lupu 2012; Koremenos, Lipson, & Snidal 2003; Simmons 2009).[2] It operationalizes legitimacy as a causal factor that might change state behavior toward compliance, and then seeks to manipulate it as a variable in ways that will contribute to higher levels of compliance. This leads to debates over which set of human rights can be seen as legitimate, and what institutional arrangements are legitimate in order to realize them.[3] The pursuit of international human rights through international law is premised on the idea that legitimation of the rules or human-rights institutions is a step toward better compliance by states.

The crucial link behind such thinking is the supposition that widespread belief in the legitimacy of an international rule will lead to greater compliance with that rule. This is a conventional assumption in literature on legitimacy in international politics and law – Thomas Franck, for instance, includes compliance in the definition of a legitimate rule – and yet it gets little attention, either empirical or conceptual.[4] This paper gives some reason to question this view of the link between legitimation and compliance. It examines the practical life of the antitorture regime in recent years and shows how the Bush administration in the USA constructed a pro-torture practice inside the antitorture legal institutions. The antitorture rules have a high degree of international legitimacy but the case shows that this does not preclude rule-violation. The legitimacy of the rules does indeed shape state behavior, and so it is consequential, but these consequences are not measurable in terms of changing state behavior from violation to compliance. The politics of legitimation around torture are more complicated: the Bush administration used the antitorture regime, accepting its legitimacy, to justify and authorize a policy of torture. It constructed ambiguity in the regime in order to fit its preferred policy within the rules. The legitimacy of the rules in the eyes of their audience was essential to making this work, since it shaped how violation was conducted and framed.

The problem that interests me is how legitimacy is conceived in social science scholarship. Legitimacy is widely defined in relation to rule

[2] On the existence of a "compliance gap" at the heart of international law and organization, see Luck & Doyle (2004).

[3] On the first, see for instance Benhabib (2008), on the second see for instance Christiano (2011).

[4] Franck says, "A partial definition of legitimacy adapted to the international system could be formulated thus: *a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively*" (Franck 1990: 16, emphasis in original).

compliance, as either a socializing force that induces actors to comply with a rule (Hurd 2007), or as a moral and psychological reason for an actor to choose to comply with a rule (Buchanan & Keohane 2006), or as an influence on costs and benefits that makes compliance the rational, profitable choice (Voeten 2005). These approaches leave no room to understand a case where rules appear to be widely accepted as legitimate and are also subject to noncompliance by those who believe in their legitimacy. In other words, these approaches deny agents the capacity to think, act, and choose in the presence of a legitimated rule or norm. To understand the politics of legitimation in such a case requires decoupling legitimacy from compliance, and therefore requires rethinking how legitimacy relates to rules, interests, and state behavior. These are the goals of this paper.

I divide the argument into three sections. The first examines the content of the legal regime against torture and its relevance to US behavior in the 2000s. This is largely contained in the Convention Against Torture (1984) and the Geneva Convention of 1949.[5] I make a case that these rules have a high level of legitimacy in the international community, including in the US government. Given the unmeasurable nature of legitimacy this case can only be tentative, but I believe it is nonetheless strong and more plausible than any alternative. The second section then discusses US behavior toward these rules under George W. Bush, emphasizing the effort to fit the practice of torture within the legal rules that forbid it. The legal arguments that they provided are elements in a politics of legitimation, and rest on the ability to use the rules instrumentally to legitimate a political choice – that is, it requires that legitimacy and agency exist simultaneously, and so cannot be understood in the conventional scholarly framing of legitimacy. The third section outlines an approach to international law and politics that can understand how legitimacy may coexist with rule-violation. States value being seen as complying with their international legal obligations, as evidenced by the widespread practice of using international legal arguments in public diplomacy. International law provides the resources out of which these justifications are made, and in this process it is inevitable that states will present competing and perhaps even irreconcilable understandings of the content of international law. Contested claims about compliance are endemic to international law, as they are to all law, and in the

[5] "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," 1984, at www2.ohchr.org/english/law/cat.htm. Geneva Conventions at www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp. Of special relevance below is the Third Convention: "Convention (III) Relative to the Treatment of Prisoners of War," 1949, at www.icrc.org/ihl.nsf/FULL/375?OpenDocument.

absence of a judicial institution they are likely to remain unresolved. The rule of law in world politics encompasses these controversies: states believe in the importance of rule-following even where they cannot agree on what actions constitute rule-following. In such a world, the power of the rules is evident in their use by states, independent of judgments regarding what constitutes compliance with them.

2. Torture in international humanitarian law

The universe of international human rights law and norms contains many prohibitions on torture. These vary in their legal status from the hortatory to the compelling. The Universal Declaration of Human Rights includes the very clear statement that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Art. 5). This was repeated in, among other places, the American Convention on Human Rights of 1969 and the International Covenant on Civil and Political Rights of 1976.[6] These are specific incarnations of the more general statement in the United Nations Charter that its member states "reaffirm faith in fundamental human rights."[7] However, none of these treaties frame their subject in terms of specific legal obligations that are binding on their signatories and so they are not of a type that can be complied with or violated – they describe what they see as the aspirations of the signatories.

The key documents for contemporary legal debate on torture are the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), adopted in 1984 after negotiations in the UN General Assembly, and the Geneva Convention of 1949, particularly Article 3 on the treatment of people in non-international conflicts. The CAT defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him … information or a confession, punishing him … or intimidating or coercing him …, when such pain or suffering is inflicted by or at the instigation of … a public official or other person acting in an official capacity.
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> (Art. 1)

[6] "The American Convention on Human Rights," 1969, at www.oas.org/juridico/english/treaties/b-32.html/. The ACHR is open to members of the Organization of American States. "International Convention on Civil and Political Rights," 1976, at www2.ohchr.org/english/law/ccpr.htm.

[7] *Charter of the United Nations* Preamble, see also Article 56.

It requires that signatory states "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (Art. 2) and "ensure that all acts of torture are offenses under its criminal law" (Art. 4).

The Geneva Conventions of 1949 prohibit "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (3rd, 3(i)a) and "outrages upon personal dignity, in particular, humiliating and degrading treatment" (3rd, 3(i)c). These apply in cases of declared war among contracting parties (Art. 2) as well as in conflicts of a noninternational character (Art. 3). This is the set of treaties that includes the three earlier Geneva Conventions (of 1864, 1906, and 1929) and adds a fourth, and has been ratified by every member of the United Nations – this makes it the centerpiece of international human rights law as it applies to behavior in the context of war and other armed conflict.

Both documents are in the form of an inter-state treaty, which means that the obligations that each contains are legally binding on the states that accept it and are not legally relevant to any other state or any other kind of actor. Public international law has traditionally been understood as having only states as its subjects and does not regulate the conduct of individual persons (though pirates may be seen as holding special status under international law). This is relevant in this context because it means that there is a gap between the international prohibition of torture and the legal position of the individuals whose conduct is presumably ultimately of interest to the law. To get from a public international law commitment against torture to an obligation that is binding on individuals as such, whether private or public officials, requires a bridge from public international law to either domestic law or international criminal law.

For the Convention Against Torture, this bridge is provided by its Article 4. By requiring that torture be made a criminal offense in the domestic law of its signatory states, the CAT exploits existing domestic legal regimes in order to impinge on the torturer as an individual. In this way, Article 4 of the CAT fills the legal gap between the domain of inter-state public international law and the regulation of the behavior of individual persons. For the Geneva Conventions, the gap is bridged by Article 1, which is common across all four of the conventions, and reads: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." This again is done with domestic legislation and military codes of conduct binding on the states' military personnel.

The operation of this domestic implication was recently explained for the CAT in the 2012 decision of the International Court of Justice (ICJ)

in the case of *Belgium v. Senegal*.[8] The Court decided that Senegal committed a harm to Belgium by not prosecuting Hissène Habré for crimes covered under the Torture convention. Habré is the former president of Chad who has been living in Senegal for several years despite evidence of his responsibility for torture while in office. The ICJ reached several interesting conclusions in its decision: first, on jurisdiction, it found that the disagreement between Belgium and Senegal over how the CAT should be implemented was indeed a "legal dispute" and thus the Court's jurisdiction was activated; second, on substance, it found that Senegal's failure to act against Habré amounted to a violation of its promises to other CAT signatory states; and finally, it found that Belgium, as one of these states, had its international legal rights harmed by that violation and so was in a position to bring the matter to the ICJ in a contentious case. The judgment demands that Senegal use its domestic criminal institutions to prosecute Habré for torture, or that it extradite him in accordance with the CAT. The case shows the path by which the international obligation taken on by the government in signing the CAT is executed through changes in the domestic criminal codes, and also how this remains an international obligation over which the ICJ exercises oversight authority.

Other international human rights instruments can be compared on how they do or do not deal with this gap. The Genocide Convention, for instance, includes an obligation for domestic legal internalization. It requires that its States parties "enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions" of the Convention which criminalize genocide and set the terms for investigating and punishing those who commit it (Art. V). This puts the crime of genocide into the domestic criminal codes of all signatory states. The Rome Statute of the International Criminal Court is revolutionary because it relies on a very different means to bridge between international law and domestic individuals: it creates a new kind of international legal authority with "jurisdiction over natural persons pursuant to this statute."[9] The ICC treaty includes the promise by the States parties that they will consent to their citizens, as well as foreigners within their jurisdictions, being prosecuted by the ICC directly under certain conditions. This (arguably)

[8] *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), www.icj-cij.org/docket/files/144/17084.pdf.

[9] *Rome Statute of the International Criminal Court*, Article 25(1).

amounts to a new category of public international law where the subject is an individual person rather than a state. The ICC and the CAT can be contrasted with other instruments in which no effort is made to bridge between states' obligations to each other and the legal standing of individuals. For instance, there is nothing in the UN Charter or the ICCPR or the Universal Declaration of Human Rights that requires that individuals refrain from, or be punished for, acts of torture – in each of these instruments, the commitment against torture is made as a promise (or an aspiration) of states *inter se*.

The bridge between international law on torture and US domestic law is accomplished in several ways. For the Geneva Convention, this is done with the War Crimes Act of 1996, which makes grave breaches of the Conventions into federal crimes. In the domain of torture more broadly, the formal language of "torture" is used in US criminal law only to refer to acts committed abroad, while much of the substantive behavior that the CAT is concerned with within the USA falls under the Eighth Amendment to the US Constitution. The Criminal Code defines torture as "an act committed by a person under the color of law specifically intended to inflict severe pain and suffering" (18 US C. §2340), when the act was committed abroad. When committed inside the USA, these acts fall under the constitutional prohibition on "cruel and unusual punishments." The same acts committed by private actors without any connection to the purposes of the state (i.e., without "color of law" or "an official capacity") would be covered by general criminal laws against assault, murder, etc. Police brutality in Chicago, for instance, cannot be prosecuted as "torture" strictly speaking because it is domestic (Human Rights Watch 1998).

The antitorture regime represents an archetypal piece of traditional international law in the classical sense: these are explicit black-letter treaties that have effect as a result of state consent. It is relatively clear as treaty-law goes as it sets down what Liese considers to be a "non-derogable and absolute" prohibition (Liese 2009: 21). The purpose of these instruments is to induce compliance by government authorities, and they therefore fit into a very traditional frame in the legal architecture in world politics: public international law in the inter-state model. They are designed to change the costs and benefits that states face as they consider how they might use force against individuals in their custody, and specifically to increase the political costs of using torture. This is consistent with conventional accounts of the philosophy of international law, of how the international rule of law is generally understood, and

with the "compliance model" of law in international relations.[10] The rules are also clearly designed for a nonideal world: the CAT treaty anticipates that violations will occur and sets rules about states' responses to instances of torture.[11] Most of its articles deal with the obligations of states when acts of torture are committed, either by their officials or against their citizens. These are rules that are grounded in the practical realities of inter-state relations.

The legitimacy of these rules also seems well established. Even accepting that it is impossible to measure legitimacy in international society with any confidence, several streams of evidence suggest that these rules are seen as highly legitimate by states and activists. For instance, both are among the most widely ratified human rights instruments: the Geneva Convention by 194 jurisdictions and the Convention Against Torture by 147. And even groups that are not qualified to ratify them (such as sub-state military forces) often make explicit statements about their commitment to the rules they contain – actors actively seek out affiliation with the rules, seeking no doubt some political legitimacy that they believe is attached to them.[12] There is little dissent from the idea that the rules are binding on the states that have accepted them and that they are both normatively and legally good; that is, they are accepted as important legal commitments by states, and they are endorsed as reflecting normative progress in world politics.[13] For instance, Louise Arbour, the UN High Commissioner for Human Rights, was likely speaking the majority opinion when she recently said that the "absolute ban on torture … [is] a cornerstone of the international human rights edifice."[14] When controversies arise over torture in international law, it is generally focused on how to make governments follow them more faithfully rather than whether they should exist or not. There is essentially no controversy over the rules themselves and no mobilization to abolish or limit them – all discussion is about their implementation, extension, or enforcement. The absence of controversy is unlikely to be "artificial" in the sense of being a result of either the exclusion of dissent

[10] On the international rule of law, see Chesterman (2008). On the "compliance model," see Howse & Teitel (2010).

[11] See the introduction to this volume on the importance of nonideal theorizing of international human rights.

[12] See for instance Interim Transitional National Council of Libya (2011).

[13] On antitorture rules as evidence of moral progress in world politics, see for instance Jolly, Emmerij, & Weiss (2009).

[14] Louise Arbour "On Terrorists and Torturers" (Statement by the UN High Commissioner for Human Rights, 7 December 2005) cited in Liese (2009).

by the imposition of political power or the fundamental irrelevance of the rules.[15]

Perhaps most telling among the evidence for the legitimation of antitorture laws is the fact that those who argue in favor of "coercive interrogation" or "exceptional measures" work hard to differentiate these from torture itself. Michael Ignatieff is representative of this position, with his argument that torture should be outlawed *and* (not "but") the government should be allowed to use coercive interrogation measures in certain circumstances or with special bureaucratic or political procedures (Forsythe 2011: Ch. 7; Ignatieff 2004). A different route to what might be the same outcome is taken by Alan Dershowitz who argues that torture is rightly outlawed in international law *but*, since it continues to be practiced by states, we should require that it be used only according to certain bureaucratic or political procedures (i.e., warrants to permit torture must be obtained first) so that the practice is accompanied by greater accountability (Dershowitz 2003). Both arguments begin with strong statements in defense of the illegality of torture, even though their consequent claims either endorse it in practice or are premised on its continuation. This supports the conclusion that the ban on torture is very nearly universally endorsed.[16]

All of these elements point to the conclusion that the obligations they contain are well legitimated among states, scholars, and activists, even if this conclusion can only be tentative and provisional.

3. Literature on legitimacy, and connection to compliance

The conventional understanding of legitimacy in social science would predict that this legitimacy should translate into faithful compliance with the rules. The scholarly literature maintains that legitimacy is naturally related to compliance: compliance is often modeled as a consequence of legitimacy (for instance, Hurd 2007; Voeten 2005), and legitimacy is often sought as a mechanism for increasing compliance or for reducing opposition (for instance, Bjola 2005; Buchanan 2007). This is evident across the spectrum of scholarship, and originates in the sociological literature from which the

[15] These are noted in the introduction to this volume as possible reasons (alongside legitimacy) for why a rule might exist without controversy.

[16] A case for its incompleteness could be premised on the following voices in US politics: *New York Times* (2011). However, much of the debate in American political discourse is over whether specific practices such as waterboarding constitute torture or not, which is distinct from the question of whether torture itself is permissible.

IR literature is derived: it is present in Max Weber's view of legitimacy, in Jürgen Habermas's model of communicative action, in John Gaventa's theory of acquiescence and social power, in consent theory, in democratic theory, and beyond. A rule that is legitimate is said to be more likely to induce compliance by actors.

The legitimacy literature in IR arrives at this conclusion by two distinct paths, reflecting competing visions of how to study legitimacy in social settings. A subjective tradition defines legitimacy as the belief by an individual that a rule or structure has rightful authority. This traces back to Max Weber's sociological theory of legitimacy, in a "descriptive" rather than "normative" attitude. It begins from the premise that legitimacy rests in the ideas held by an actor about their social surroundings. These ideas may be shared among many in a community, but it is reducible to an individual belief: because individuals behave differently toward rules that they believe are legitimate, the existence of a belief about legitimate rule has important consequences for aggregate social and political systems.[17] An objective tradition begins by asking what kinds of rules or structures are deserving of these beliefs, and it therefore posits external normative criteria, often derived from moral philosophy, to judge whether a rule or institution can be called legitimate. Common among these criteria are versions of democratic procedures or substantive goals such as fairness or respect for human rights. This view suggests that outside observers can judge the legitimacy of a rule by observing its content, or its genealogy, or its relationship to the governed.[18]

The subjective tradition has an affinity with behavioral studies in social science, and focuses on how people (or states) behave in the face of political authorities that they believe to be legitimate (or illegitimate). The objective tradition has more in common with normative philosophy, and has the power to second-guess people's own beliefs about the legitimacy of the institutions around them. For instance, Tom Tyler, following the subjective tradition, investigates when and why people in the USA obey laws and decisions that do not favor them (Tyler 1990). He finds that people are more likely to follow the law when they have faith in the legitimacy of the process that produced it. He does not ask whether these beliefs are justified. By contrast, Allen Buchanan suggests that a government should only be considered legitimate when it meets certain standards for the treatment of its citizens, regardless of how the population feels about it (Buchanan

[17] For instance, Gaventa (1982) on the behavioral consequences of the third face of power.
[18] For instance, Doyle (2011) on when preemptive force should be considered legitimate.

2007). This is characteristic of the objective approach – Buchanan posits a set of morally valuable criteria and then uses them to judge whether a government should count as legitimate.

The traditions coexist because each can illuminate the blind spots of the other. The objective approach is only as compelling as the moral criteria that it begins with, and these are endlessly contested in political philosophy. The subjective approach takes seriously people's beliefs about their political surroundings but provides no critical resources for assessing those beliefs; political leaders routinely try to legitimize their rule to their subjects, and they may succeed even if outsiders find the regime abhorrent. The two therefore mean very different things when they conclude that a rule or institution is legitimate, and these differences often keep the sides from talking clearly with each other.

They agree, however, that compliance is naturally connected to legitimacy. The objective tradition suggests that agents have a moral or political reason to comply with legitimate rules (a "duty to obey"), while the subjective tradition finds empirical evidence that they in fact do comply with them more than rules without legitimacy. Conversely, rule-violation is in this view evidence of the absence of legitimacy. As Schaffer, Føllesdal, and Ulfstein (this volume) note, "if a treaty … fails to secure its objective to a certain minimum extent, it risks losing normative legitimacy: individuals and other actors may no longer regard themselves as bound to comply." Rules and institutions, it is said, lose their legitimacy and thus their power if they are routinely violated, just as law loses its bindingness through desuetude. Thus, increasing the legitimacy of a rule is said to increase the likelihood that it will be respected in the policy choices of states, which motivates the search for strategies of legitimation which might cause this to happen.

4. Legitimacy and the rules on torture: the US case

The laws on torture however do not fit this model. The rules apparently have a high degree of legitimacy in both the objective and subjective senses, and yet their near universal acceptance by states as rules that represent the "good" has not produced universal compliance. Many states that have accepted either or both of these treaties have nonetheless used torture in violation of their commitments. Torture remains an option that is used with some frequency by governments and their agents. It can be found in almost all settings of political power – it appears in the practice of all kinds of regimes, including democracies and dictatorships, and it is used in the pursuit of all kinds of political objectives, foreign policy, domestic, and

other.[19] Of course, this is no different than many other international rules, perhaps all rules: we expect some degree of noncompliance by the parties. The question of interest in this article is how the apparent rule-breaking relates to the apparent legitimacy of the rules. The fact of the continuing and extensive practice of torture despite the antitorture legal regime might be evidence that the rules are in fact not seen as legitimate, or that the rules are not consequential, or that legitimation and compliance are distinct concepts without a natural affinity. This section pursues this third possibility – I suggest that international rules such as those on torture do gain power by being widely seen as legitimate but that this power cannot be gauged by its contribution to rule-following or compliance. Noncompliance of a type can coexist with legitimated rules without undermining the concept of legitimacy. The key is to take a more sophisticated approach to the relationship between agents and structures in social settings.

The tension between rule and practice in this case is notable for many reasons. Most importantly, the failure to forgo torture is a compelling humanitarian catastrophe for the victims and a political and legal disaster for the perpetrators (Center for Victims of Torture 2006). It also points to important questions about the weakness of international treaties and enforcement (Hathaway 2007). For the present article, I am interested in the relationship that it reveals between legitimacy and noncompliance. What does it mean for the politics of legitimation that a rule so apparently well legitimated is also violated at a nontrivial rate?

The US government under George W. Bush consistently maintained its claim to compliance with international law on torture. Mr. Bush famously said in 2005 "we do not torture." By way of explanation, he suggested that "there's an enemy that lurks and plots and plans to hurt America again. And so, you bet we will aggressively pursue them. But we will do so under the law" (Bush 2005). This reflects a deep-seated commitment to the idea of the rule of law in world politics, and to an important self-perception that US foreign-policy interests are naturally aligned with the demands of the rule of law. Similar claims to inherent rule-following are evident in other areas of US international policy, including the legality of killing Osama bin Laden (Holder 2011), the ban on aggressive war (Hurd 2011a), and the use of robots in war (ASIL 2010). In all these cases, the state appears certain of the legality of its behavior and provides an explanation for how the relevant international rules are coincident with its underlying interests.

[19] See for instance the CIRI Human Rights Dataset at ciri.binghamton.edu. Also Rejali (2009).

The tenure of George W. Bush as president of the United States is often characterized as being indifferent or hostile to the rules of international law, of "lawlessness" and of perpetrating an "attack on international law" or the "dramatic rejection of international legal constraints" (Liese 2009; Sands 2008; Slaughter 2008). And concomitantly, many have interpreted Barack Obama's presidency as including a "return" to international cooperation and international law (for instance, Kelly 2009). With respect to torture specifically, the Bush administration enacted policies regarding interrogation of prisoners in blatant violation of its international legal commitments.[20] It did this in secret at first, but continued under new political and legal justifications once it was exposed (Forsythe 2011; Mayer 2008). There is little doubt that these actions, and perhaps the policy-making that backed them up, constituted grave breaches of the Geneva Convention (assuming the USA was in a condition of war or armed conflict) and violations of the Convention Against Torture, meaning that those who approved and executed them put themselves in legal jeopardy under the war crimes provisions of the US criminal code and other US statutes.

However, it is equally true that the Bush administration invested heavily in explaining its behavior, and it used the existing international laws on torture as the framing around which it construed these explanations (Bradley 2009). These arguments have been widely rejected as legally unsound, but they are significant in the politics of legitimation of international human rights. The investment made in situating US policy within the law shows that the international legal architecture on human rights was indeed important to the Bush administration. The gap between law and practice in this case cannot be understood simply as a powerful state choosing to violate rather than comply with the rules. The naïve distinction between "rules" and "interests" that often characterizes debates about international law in IR is not sustainable.[21] The case therefore suggests a more nuanced view of the relationship between states, rules, and behavior.

As evidence of US torture became public, the US offered three kinds of legal arguments to substantiate its claim to rule-compliance: it said, first, that prisoners in US custody did not qualify for the legal protections of the

[20] This is documented in, among other places, Center for Constitutional Rights (2006); Forsythe (2011); Sands (2008). As I argue below, the US sought to create ambiguity over whether its actions qualified as torture as a matter of international law; this does not preclude acknowledging the existence of torture as a factual matter.

[21] For a classical statement of this distinction, see Keohane (1997) who posits norm-following as an alternative to interest-following. The same instinct to separate interests and norms as motivations for action underlies March & Olsen (2008).

antitorture regime set out above; second, that the particular practices of US interrogations, including waterboarding, did not satisfy the standard of "torture" in international and domestic law; and finally, that the US constitution allowed the President to supersede international law *in extremis*. These arguments used the resources of the international legal regime on torture in order to construct explanations and justifications for American policy that would reconcile US behavior and the rules. It represents an appeal to international law in general, and a reinvestment in the rules prohibiting torture in particular, done in the service of avoiding legal responsibility for rule-violation. The case helps to show in conclusion that the practice of international law is at once constraining on states and irrevocably political.

The first claim was essentially about jurisdiction, and rested on the argument that the individuals that the USA was holding as a result of its "war on terror" were not of the types described as qualifying for protection under any of the Geneva Conventions. This argument was developed by the now-notorious legal team in the Office of Legal Counsel at the Department of Justice in 2002, who wrote advice for the President in January 2002 which the President adopted in February of that year (Bush 2002). It said that conflict with al-Qaeda was outside the scope of the Geneva Conventions because it was neither inter-state nor noninternational, and so the legal terms in the Third Geneva Convention were not relevant to prisoners captured in that conflict. No American behavior toward these people could violate the rules because the individuals were not within the jurisdiction of the rules. Further, it argued that while the war in Afghanistan *was* within the terms of the Third Convention, individuals fighting against the USA there did not qualify as prisoners of war under the Convention – they were not organized as a militia, with uniforms and command structure, and they did not themselves abide by the laws of war, said the USA (Bradley 2009: 63). To accommodate both sets of people, then the US created the new category of "illegal enemy combatant." It understood this new category as excluded from both the Geneva Convention protections guaranteed to combatants in inter-state war and those guaranteed to "irregulars" and fighters in non-international wars. There was therefore no legal requirement, they said, to follow any particular course of protection for their rights.

The second claim arose from close readings of the Convention Against Torture, the US Criminal Code, and other regulative documents on torture. The argument here was that the behaviors of interest to the USA, including beating, waterboarding, mock execution, and animal threats, were not encompassed by the term "torture" in these legal instruments. The content

of "torture" was instead said to be limited to those acts which produce pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death," or produce mental harm that persists for months (Bybee 2002). At the same time, the US took the view that to qualify as torture, the torturer had to "have the intent to inflict severe pain or suffering," as opposed to inflicting pain incidental to the intent to acquire information. For US domestic law, Justice Antonin Scalia of the Supreme Court later offered the view that these might not constitute violations of the Eighth Amendment either since they were not primarily intended as "punishments" relevant to that Amendment (BBC News 2008). Thus, one by one the behaviors of interest to the USA were identified and excluded from operative legal definitions of torture for US personnel, and then bundled under the heading of "enhanced interrogation techniques."

Finally, the administration maintained that under some circumstances the US President was not bound by the international legal commitments taken on by the United States. The Bybee memo suggested that the President was essentially unregulated by Congress or by international law in his commander-in-chief duties such that the treatment of detainees in the "war on terror" was at his discretion (Bybee 2002; Yoo 2006).[22] This also applied, it said, to the behaviors of subordinates to the President who were acting on his instructions. The constitutional position of the President relative to other legal institutions meant that the torture prohibitions were not constraints on his authority nor on the behavior of his agents. This has generated a great deal of discussion among scholars of US constitutional law, overwhelmingly critical (for instance Koh 2006). However, its function in the political debates over torture was to find space within the rule of law where that which was banned by the rules could be practiced without violating them.

Each of the arguments has met with fierce criticism in the USA and elsewhere. Each fails in the face of either logic or law, and none is currently the operative position of the US government. But this does not mean they are unimportant – as Abbott and Snidal note, "legalization entails a specific form of discourse, requiring justification and persuasion in terms of applicable rules and pertinent facts" (Abbott & Snidal 2000: 429). The

[22] This is different than the argument about a kind of "state of exception" in which the President is given discretion to violate the law. For instance, Jack Goldsmith defended the proposition that torture could be legal in situations "in which the President believed that exceeding the law was necessary in an emergency." Goldsmith, *The Terror Presidency*, 2007: 148, cited by Scharf (2009: 349).

American government in this case was committed to remaining within the framework of "legalized" politics in this sense. In what follows, I am interested in how these arguments made use of the international regime on torture, and in their cumulative effect in the politics of legitimation. This is distinct from the legal persuasiveness of the arguments themselves, and shows why we should not dismiss these arguments as merely self-serving gloss on self-evidently illegal behavior. It is true that they constituted self-serving justifications overlaid on rule-breaking, but this cannot be used to dismiss their political impact: they have important social consequences precisely because of how they invoke legal resources in the service of political ends.

The various legal defenses of torture generated by the Bush administration all present US behavior as consistent with the legal framework of international society. Together, they constitute a pattern in which individuals who are highly motivated to avoid the constraints of international law find it appealing to appear committed to operating within the constraints of international law; this might be a matter of superficial strategic calculation, or a deep-seated self-image as a rule-following agent, or some other combination of motivations. Regardless of the motivation, the observable consequence is a stream of rule-following justifications around apparently rule-breaking behavior. It constructs new ambiguity about the meaning of compliance within the legitimated norms and institutions of international human rights. The US-torture case takes a stark example of apparent non-compliance and sees in it the pervasive power of rule-compliance and a generalized rule-of-law ideology.

5. Implications

Three things are evident in the practice of the United States toward torture under George Bush.

First, it is clear that the leading voices in the Bush administration wanted US officials to be unlimited in their freedom to treat the prisoners as they wanted (Sands 2008; Scharf 2009). They were highly motivated to use physical violence against people under their control. But they also appear to have believed that this desire could be consistent with the legal framework around the treatment of detainees. They endorsed the prohibition on torture at the same time that they wanted US torture to be legal.

The international laws on torture gave them the tools to construct a legal space within the antitorture regime in which torture would be legal. The laws were being used as an instrument to insulate behavior

from legal responsibility, in reverse of how law is usually understood. The more conventional model of the rule of law suggests that the law defines acceptable behavior and that actors should (though may not) modify their conduct to suit. In the torture case, the meaning of compliance was shaped around the policy – I argue elsewhere that this is in fact the normal condition for the rule of law in world politics (for instance, Hurd 2011a and 2012). The torture case supports the point made by Scott Veitch, that law organizes irresponsibility for harm as much as it does responsibility for harm. It "facilitate[s] the dispersals and disavowals of responsibility that together may be seen to constitute the practices of irresponsibility" (Veitch 2007: 3). The law in the torture case was used to create categories that insulated behavior from legal responsibility. This may well have been in part motivated by the desire to protect the decision-makers themselves and others from criminal liability in the USA or elsewhere – the legal justifications were preemptive in that they could answer any later complaint about criminal behavior. They were also intended to place US foreign policy and national interests within the frame of rule-following for international politics.

Second, it shows the pervasive power of the rule of law as an ideology in international affairs. The idea that foreign policy is and should be organized according to known rules is a central piece of the narrative of contemporary international politics. For but one example, Barack Obama said in his Nobel speech, "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct … [E]ven as we confront a vicious adversary that abides by no rules … the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength" (Obama 2009). John Ikenberry has argued that the post-WWII international order is characterized by its commitment to international rules rather than bare power politics: it is a rules-based system, a fundamental change from previous eras (Ikenberry 2011).

The rule of law rests on the idea that the rules are fixed and known, and can therefore be used to differentiate between lawful and unlawful conduct (for instance Tamanaha 2007). Its premise is that the gap between rule-following and rule-breaking is knowable, either because it can be read directly from the rules themselves or because it is authoritatively decided by a judicial institution. Knowing that gap then makes it possible to make judgments about the behaviors of actors: the rule of law is what makes it possible for Madeleine Albright, among others, to distinguish "law-abiding" countries from "rogue states" and "terrorists" (Albright 1997).

The torture case provides an example of a situation where the difference between compliance and noncompliance is not knowable in the way that is necessary for the rule of law idea to work in its traditional form. In this case, and in other instances where the difference between compliance and noncompliance is contested in international relations, all actors can unite around the importance of rule-following and all can claim their own behavior as compliant, but the rules are insufficient to resolve the differences over these claims. The rules themselves may be thoroughly legitimated and may have been internalized by a wide range of states, and yet state behavior may frequently not match the rules. The "problem" in such cases is not an insufficient amount of legitimation or socialization,[23] nor the triumph of "interests" over "norms" (for instance Guzman 2008), but instead the fact that the legitimation of the rules does not in itself imply or create consensus over the meaning of compliance. States do not agree on what constitutes a violation of the rules and the system of international law is not able to resolve their disagreements. The study of international law needs therefore to consider the impact of law outside of the "compliance" paradigm.[24]

States continue to invest in showing that they are complying with the rules rather than violating them. They appear to believe that there are social rewards from rule-following, and this suggests that the rules are powerful even when the meaning of compliance is contested. The rules on torture have evident power over states, and their legitimacy is fundamental to that power, but neither the power of the rules nor the difference that legitimation makes can be assessed by examining compliance by states because it is the meaning of compliance that the parties are arguing over. Instead, the legitimacy of the rules is evident in how states explain and understand their behavior. It shapes the justifications that states make about themselves and their interests. This is a significant manifestation of legal power, distinct from debates over the meaning of compliance.

This leads to the third implication, which deals with the issue of what international law is for. The standard answer is that it distinguishes rightful conduct from forbidden conduct, as suggested by the rule of law model in domestic legal theory (Bingham 2010; Chesterman 2008; Tamanaha 2008). This view is traditional in IR and international legal scholarship (for instance Hafner-Burton, Victor, & Lupu 2011), and in this spirit

[23] On socialization, see Checkel (2007).

[24] For suggestions in this direction see Howse & Teitel (2010); Hurd (2011b).

Hedley Bull said that the job of the international lawyer is to "state what the rules of international law are" to her government (Bull 1977: 150). This may be possible in settings where there exist institutions that provide definitive rulings on rule-breaking and rule-following, for instance in a dispute heard by the International Court of Justice where the court's decision is decisive.[25] But it cannot be the case for the antitorture regime, and many other questions of international law, where disagreements about the meaning of legal terms will not be decided by a competent authority. In such settings, the parties will disagree on the meaning of compliance and their interpretations are inseparable from their preferences over the substance of the dispute. The strategic use of international law as a legitimating device is likely to occur wherever powerful political interests intersect with the categories of international law and there are no authoritative judicial institutions with jurisdiction to resolve conflicts. The list of substantive disputes that have this feature is long – for instance: debates over the legality of the use of force, either for self-defense or for humanitarian purposes (Hurd 2011a); the self-serving efforts by the USA to construct a legal regime that will permit its practice of using aerial drones against individuals;[26] the competing arguments around the legal effects, if any, of the doctrine Responsibility to Protect (Bellamy, Davies, & Glanville 2010). In these cases, disparate elements of law and of state practice are advanced by competing activists in support of their positions, all pursuing the legitimation that comes from being seen as compliant with international law. These practices show the importance that states attach to compliance with their legal obligations, and at the same time show that disagreement will be endemic over the meaning of compliance, the interpretation of state behavior, and the connection between the two.

The public nature of international legal resources means that claims regarding compliance by a state are met by counter claims also built from these resources. For most disputes, there is no authoritative body to reconcile them and so the diplomatic interaction over it does not produce greater consensus over the rules.[27] The literature on argumentation and persuasion

[25] This does not require that we believe that the court resolves all ambiguity – clearly that is not possible. All it requires is that the court be in an institutional position of authority to provide interpretations of legal questions that are legally final.

[26] See for instance Mazzetti (2012) and the subsequent debate at www.lawfareblog.com/tag/mark-mazzetti/.

[27] Hurd (2011b) argues that international diplomacy consists of competing legal arguments that do not necessarily lead to consensus.

through law tends to assume that these interactions will contribute to reducing the amount of disagreement over the question.[28] The process of deliberation and discussion is a problem-solving device, it is said, because it causes the parties to narrow their differences. The torture case contradicts this assumption, both in practice and in theory: in practice, it shows how a great deal of high-stakes diplomacy can go on around a legal controversy without the underlying issues being resolved, and the importance of the process is not contingent on the development of a consensus over the matter; in theory, the case shows how the USA used legal argumentation as an instrument to legitimate a highly controversial policy, and its strategy depended on the availability of competing interpretations of the law. Neither in practice nor in theory is a consensus over the core question the logical outcome of the process.

The role of international law must be understood without presuming a consensus over the content of "compliance" and "noncompliance." In this vein, Peter Lindseth has said of EU law that "the very nature of public law has itself deeply evolved. It has become less a system of rules marking seemingly clear lines between 'valid' and 'invalid' exercises of authority, as classical understandings of … the rule of law might have demanded. Instead, public law has evolved toward something more focused on 'the allocation of burdens of reason-giving,' or … 'accountability' " (Lindseth 2010: 21–22). The role of international law is best described in terms from Harold Koh: "by imposing constraints on government action, law legitimates and gives credibility to government action" (Koh 2010). Law legitimates, even if we can't agree on its content.

The instrumental use of law is analogous to how "science" is often used as a political instrument in environmental politics. Charlotte Epstein, for instance, has argued that controversies over whale hunting are often fought on the terrain of claims about science at the International Whaling Commission. The pro- and anti-whaling members of the IWC reach for data on whale stocks and movement as resources to construct justifications for their policies. Both sides behave as if "the provision of perfect scientific knowledge will resolve all remaining disagreements, because it will unequivocally reveal the appropriate, rational course of action with regard to a natural resource and the environment at large" (Epstein 2008; Hurd 2012). In Epstein's case, science is a tool in the politics of legitimation, much like law is a tool to justify or criticize behavior around the

[28] See for instance Johnstone (2011), following Habermas.

antitorture regime. Both law and science can be powerful legitimating devices when they are put to work in defense of a political position.

6. Conclusions

In this paper I use recent American behavior around the rules on torture to examine the politics of legitimation. In doing so, I contribute to a better understanding of the relationship between international law, human rights, and legitimation. When the USA was breaking the rules on torture, it also did two other things: it claimed that it was not breaking the rules, and it provided an interpretation of international law with which it sought to substantiate its claims. The first reaffirmed its commitment to the rule of law in world politics in general and the importance of compliance in specific, while the second argued that terms of compliance with the rule on torture should be understood in such a way that US behavior was not a violation. International law in this case was a tool used in legitimation contests among political actors. All sides claimed to be operating within the international rule of law, and this caused their disagreement to be framed as a fight over the meaning of compliance. The case shows why legitimacy cannot be equated to compliance – since compliance is essentially contested – and how the distance between the two concepts makes it possible to see the political power that is carried by the instrumental use of international law.

The behavioral output of a legitimated human-rights treaty is not necessarily respect for its substantive terms. This is at one level a depressing conclusion, since it means that the strategies of legitimation argued over by activists and scholars may not be reliable devices for improving the situation of those who might become victims in the future. However, it sustains the view that the laws are indeed powerful, even over powerful states and over nonaccountable leaders – the need to justify oneself according to the rules makes those leaders dependent on those rules and on their self-serving legal arguments about compliance. This dependence makes them vulnerable. Their arguments can be met with counter-arguments drawn from the same resources, and the political (and legal) costs of being seen to lose this argument can be high. Where there exist institutions to organize this accountability, such as the ICC or national criminal courts willing to claim jurisdiction, the practical life of international rules can be compelling on individuals. This is not impeded by the fact that even well-legitimated rules contain within them the possibility of endless competing interpretations of compliance and noncompliance.

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