US HUMAN RIGHTS CONDUCT AND INTERNATIONAL LEGITIMACY

The Constrained Hegemony of George W. Bush

Vincent Charles Keating

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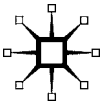

US HUMAN RIGHTS CONDUCT AND INTERNATIONAL LEGITIMACY

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Chapter 1

Introduction

There is little question that the terrorist attacks of 9/11 had profound effects on US foreign policy. There was almost immediate speculation after the attacks about whether they had "changed everything" within US foreign policy, and consequently in wider international relations. This speculation continues through a variety of introspective pieces to the present day.[1] Among the effects of the attacks, of particular concern to both human rights practitioners and activists was the Bush administration's propensity to prioritize national security over human rights—even rights that might be considered fundamental and non-derogable. The Bush administration opened prison camps at Guantanamo Bay to contain detainees who had neither access to the US judicial system nor status as prisoners of war under the Geneva Conventions.[2] The Bush administration claimed that these detainees must be placed in a different category from other prisoners of war, labeling them "unlawful" or "enemy combatants." As such, they did not have the same rights to judicial review of the lawfulness of their detention. US security agents and the military began to officially use "stress and duress" techniques in interrogations in Afghanistan, Iraq, and at Guantanamo Bay, techniques that increased in severity until the prisoner abuse scandals. The Central Intelligence Agency (CIA), in particular, used a highly controversial interrogation technique known as waterboarding against high-value al-Qaida operatives to elicit information from them. Finally, the United States rendered other suspected al-Qaida members to states such as Egypt, Jordan, and Syria for questioning, to let these states generate intelligence through means that would not be legal in the United States.

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Though many types of alleged human rights abuses were perpetrated by the Bush administration in the name of national security, this book argues that the denial of *habeas corpus*, torture, and rendition for the purposes of torture were the most serious. The right of *habeas corpus*, or the right to appeal the legality of one's detention before a judge, precedes all other institutions of judicial oversight, and its removal can aid states in committing further human rights abuses. When a state, either the United States or another state acting on behalf of the United States, inflicts grievous physical and psychological harm through torture, it is one of the most serious human rights violations that can be committed. The right not to be tortured is a fundamental right or a right with highly legalized norms in international society.[3] The severity of torture is thoroughly recognized in international law; it is not only addressed by major human rights treaties as a right to which no exceptions can be made, but it also has an entire international convention devoted to its prohibition.[4]

This new focus on counterterrorism at the expense of human rights was not limited to the United States. These policies arising from the war on terror, which focused primarily on mitigating the threat of future terrorist attacks, were reflected in the conduct of other states, which began to curb civil liberties such as freedom from arbitrary arrest and freedom of movement.[5] The focus on counterterrorism, particularly when it was accompanied by a reduction in human rights protections, was certainly worrying to Mlada Bukavansky, who in 2007 wrote,

> The perceived shift in US hegemony from a multilateral to a unilateral and more muscular strategy in foreign policy has yielded further contestation and resistance [from both the left and the right], either to the liberal democratic values the US and its allies purport to uphold, or to the perceived hypocrisy and corruption of those values by such policies as the invasion of Iraq and the "war on terror." Moreover, the manner in which a number of European governments have chosen to fight terrorism, by curtailing civil liberties and cracking down on immigration, further renders contestable liberal states' normative superiority.[6]

This concern was echoed by Tim Dunne, who argued in the same year,

> The post-9/11 period has prompted many to ask whether human rights values and policies were as deeply entrenched as supporters of the regime had hoped. What marks the contemporary challenge out as being of particular concern is that its centre of gravity is inside the liberal western zone. This

time the assault on the foundations of the regime is not from communist states who regard individual liberty as a bourgeois sham, or southern African states who want to exclude peoples on grounds of race, or even Asian states who believe community must precede liberty: the post-9/11 challenge is being led by western governments who openly question whether fundamental human rights commitments need to be changed or abandoned in the name of national security.[7]

Given the well-documented actions of the Bush administration that made controversial trade-offs between counterterrorism and human rights, and some evidence that these trade-offs were echoed internationally, this book seeks to determine whether the Bush administration, through either its defection from old norms or its active promotion of new ones, fundamentally harmed the international human rights system by creating a norm cascade in favor of their preferences. Given that norm change occurs through the discursive interaction among agents in international society, the primary research question is, therefore, was the United States successful in legitimating its conduct for torture, rendition for the purposes of torture, and denial of *habeas corpus* within international society?

This analysis is necessary for two reasons. First, the defection of the United States from what is considered appropriate conduct within international society could lead to a change in international human rights norms, particularly if it openly advocated for such a change. Though many liberal democracies curtailed some rights in their counterterrorism efforts, the Bush administration enacted policies that blatantly ran counter to established human rights norms to a degree that was unprecedented for liberal democracies at this time. This change is particularly important because the United States has played an important role in determining the scope of international human rights from World War II to the present.[8] Should it have equal influence in the opposite direction, then its defection from these norms could have serious consequences.

Some scholars have already voiced their concern that this might be the case with respect to torture. In 2007, Tim Dunne argued that American conduct could lead to a "norm cascade" where torture in the name of antiterrorism becomes acceptable practice.[9] Other authors argued that the conduct of the United States could degrade the international human rights system in general. For instance, Joan Fitzpatrick argued in 2003,

The human rights regime is menaced by potentially dramatic alterations in . . . the norms of humanitarian law. Human rights institutions have largely

conducted business as usual in the aftermath of September 11, albeit with a sense of dread, defensiveness, and political polarization. For many years sceptical, stand-offish, and self-righteous, the United States now exercises its hegemony more corrosively than ever on the international human rights regime.[10]

In 2009, Sigrun Skogly argued that there had been a reduction in the willingness of states to remain bound by international human rights law with respect to their counterterrorism strategies, suggesting a diminution in their commitment to protect human rights both domestically and, more importantly for the purposes of this book, internationally.[11] Similarly, Harrelson-Stephens and Callaway argued that since 9/11 the "US commitment to international norms has been undermined to the extent that it now openly violates certain international as well as domestic human rights."[12] Nevertheless, unlike the scholars cited earlier in the text, Harrelson-Stephens and Callaway contended that the effect of US conduct was not negative on the whole:

> The September 11th attacks can be viewed as an exogenous shock that has had a serious but not necessarily terminal effect on international human rights. While this affected the domestic resolve of the United States in support of international human rights, it appears that the institutionalization of human rights norms in Europe, as well as widespread acceptance of human rights, thus far has been sufficient to uphold the regime absent the hegemon. Certainly, states that were repressing their citizens prior to 9/11 have used the war on terror and subsequent human rights violations by the United States as justification for continued repression. Nonetheless, other major powers remain strongly committed to human rights, and more importantly, continue to expand the regime today.[13]

Given this disagreement among scholars over the effects of US human rights conduct in the war on terror, this book aims to provide an empirical analysis of whether the Bush administration was successful in causing a norm cascade within international society that favored their preferences.

Second, most international action taken against serious human rights abuses has involved states that were materially weak in comparison to the states that supported the human rights system. This is clearly not the case with the United States. Their defection, therefore, provides a good case study to analyze the dynamics of norm reproduction when the materially preponderant state in the system faces opposition over serious human rights concerns. Some scholars

such as Richard Falk argued that there is a "hegemonic logic" in the determination of international human rights, that the sole purpose of such norms is to advance the interests of the hegemon. Human rights regimes should therefore include only the rights preferred by the hegemon and its allies—any rights claims that would demand a change in domestic or foreign policy of the hegemon would not be accepted as legitimate.[14] If this is the case, then the introduction of *habeas corpus* restrictions and the use of techniques that arguably constitute torture might have effects that radiate out to international society because of the sheer material capabilities of the United States. Overall, scholars dispute the effect of materiality on norms, with some arguing that materiality explains all norms and others arguing that materiality and norms are somewhat independent but related in particular ways.[15] What seems to be more certain is that the United States, even independently of its economic and cultural influence, has a material advantage within international society that is unparalleled. As Kenneth Waltz noted, "Never since Rome has one country so nearly dominated its world."[16] Colin Gray agreed, going as far as stating that "when the United States wishes to act it is literally unstoppable by any combination of polities and institutions."[17] The question, therefore, is whether there is any evidence that the material position of the United States within international society helped it to either absorb the costs of defection or successfully promote a new standard of human rights in the face of the threat of terrorism.

This book will examine each of these issues in the three case studies through analyzing the interaction of legitimation strategies by the United States and other members of international society. If the legitimacy claims of the United States concerning their human rights conduct were accepted by most members of international society, then this would point much more strongly to the possibility of a norm cascade than if the majority of actors in the international system disputed their legitimation claims. Similarly, studying the way in which the United States attempted to legitimate its actions and probing the reactions of other members of the international community might provide some idea of the effects of materiality on this process, particularly if the United States fails to legitimate its position despite attempting to leverage its material advantage.

It must be noted at this juncture that this project excludes NGOs and other members, in English School terms, of "world society" from its analysis.[18] Though it is true that these organizations provided a constant normative critique supporting the existing human rights norms throughout the Bush administration, the focus of this project

is on the legitimation debates of other states and organizations created by states. This is delineated for a number of reasons. First, the claims by members of international society are likely to be more variable than those of human rights NGOs, many of which see their sole task as defending the international human rights system. International organizations and particularly states, on the other hand, have multiple and often contradictory goals that they must achieve to satisfy both their own internal political needs and those of international society. The likelihood of the United States being successful in legitimating its conduct with other members of international society is nontrivial, and therefore an interesting subject of study, whereas with NGOs the likelihood is close to nonexistent.

Second, though there is a great deal of literature surrounding the role of NGOs in the growth of international human rights, both international organizations and states are equal, if not more important, actors in some cases. According to Rosemary Foot, states have

> played a vital role in carrying the [human rights] message forward. It is the body that signs the convention and then produces the requisite domestic legislation. Operating externally, the state may create new human rights norms, and then utilize the diplomatic tools at its disposal to promote adherence to international standards on the part of other states in the system.[19]

International organizations may be used by states who may not wish to become openly involved in an issue for political or economic reasons. Thus, these multilateral institutions have a useful function in that they can send a message about legitimate or illegitimate behavior while minimizing the direct costs of open criticism that states might otherwise face.[20] Foot similarly argued that the UN human rights institutions have been "crucial to the elaboration and legitimation of human rights norms, and in providing a platform upon which governmental and NGO criticisms of abuse can be aired."[21] They are also actors unto themselves in the diffusion of norms through their promotion of gatherings between member states and subject experts, and in some cases through issuing reports that raise the profile of a subject of concern.[22] Work by Terrence Chapman suggests that the activity of international organizations has the ability to influence public opinion in states, which can constrain or influence leaders.[23] As such, members of international society are the more relevant actors given that the project seeks to address the effect that the United States had on international human rights norms, whose legal character can be influenced or even directly changed by their actions of members of international society.

The chapter structure of the book is as follows. Chapter 1 sets the theoretical stage for the analysis, justifying why we might use legitimacy to study this problem, reviewing the debates over the relationship between legitimacy and material power, suggesting how we might determine empirically whether a state has been successful in legitimating its case and reviewing the possible legitimation options that a state has given moral and legal thinking about the rights in question at the beginning of the Bush administration's first term. Chapters 2–4 are the empirical case studies of torture, *habeas corpus*, and rendition, respectively. Each of these chapters begins by reviewing the history of conduct and internal discourses for each human rights area during the Bush administration to show that there was intent to modify these norms. With this background, each proceeds to analyze the legitimation strategies of the United States and other actors in international society, looking for the patterns outlined in the method section that might tell us something about the relative strength of the norms involved and whether there is change in their strength over time that might signal that a norm cascade has occurred. Finally, the conclusion will review the case studies and attempts to draw some conclusions as to the relationship between the observations made and the theory outlined in Chapter 1.

Chapter 2

Norms and Legitimacy in International Society

The purpose of this chapter is to suggest how we might both theorize and measure the effects of the defection of the Bush administration from international human rights norms during the war on terror. It considers why we might use the theoretical framework of legitimacy to study changes in human rights norms, how the material capabilities of states might affect processes of legitimation to play a role in the defense or revision of these norms, and how we might go about making empirical claims that the norms have been successfully defended or successfully overturned. Finally, it reviews what existing moral and legal structures of legitimacy members of international society might draw upon in each case study.

Why Study Legitimacy?

The first question we need to consider is how to conceptualize the existence and transformation of human rights norms within the international system. Can the prohibition of torture, the right to *habeas corpus*, and the right to not be rendered for the purposes of torture be considered norms within international society, and how might we go about analyzing any transformation in the norms? This chapter will argue that legitimacy is a useful lens to study the possibility of norm change. Human rights, despite having a long tradition based on natural law, now tend to be seen as a particular set of norms, or intersubjective ideational structures, found within domestic and international societies.[1] They are *inter*subjective in the sense that they

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arise from the social interaction between two or more agents that leads both of them to believe in the existence of the norm. They are inter*subjective* in the sense that this belief is not objective reality—it has no existence outside of the mutual beliefs of the agents. If all agents stop believing in the human rights, then human rights disappear. Finally, they are ideational *structures* in the sense that, if ascribed to by a sufficient number of agents, their existence can influence the behavior of other agents independently of whether the agents believe they exist.[2]

Examining the practices of legitimacy helps us to operationalize the way that agents and ideational structures interact in international society. The legitimation activities of agents create or recreate the ideational structures. At the same time, this agency is shaped by existing ideational structures, as actors do not operate outside of their social context.[3] Though change in these ideational structures is always possible, compliance with a particularly entrenched social structure can become habitual, which stabilizes the reproduction of the social structure. On the other hand, because ideational structures are never completely entrenched, norms can also change through the agency of actors. Agents can carry private beliefs that differ from the current norm, and these private beliefs might lead them to try to change their ideational environment. This potential agency, combined with an exogenous shock to the system, can create what some academics call a "critical juncture," where competing idea sets have the freedom to challenge previous norms, in some cases replacing them.[4]

There is some fear that the terrorist attacks of September 11, 2001, might have created such a critical juncture, one that opened up the possibility to challenge then existing human rights norms and replace them with new norms preferred by the Bush administration. A norm cascade is a term coined by Martha Finnemore and Kathryn Sikkink, who argued that agents successfully change pre-existing norms in three steps. The first step is norm emergence, where elites promote a new norm that conflicts with an existing norm. The second is the aforementioned norm cascade, where compliance to the new norm becomes accepted by a core group of actors who continue to advocate for its adoption. The third is internalization, where the norm becomes a taken-for-granted aspect of social life.[5]

Analyzing the practices of legitimacy can help us to understand whether a norm cascade has occurred independent of the human rights conduct of other states. Even though it appears that the use of these methods were limited within the West to the United States, we might still worry that the Bush administration was successful in

weakening the international torture norm. Other states might not have acted in a similar manner to the United States—there is no British or French version of Guantanamo Bay, for instance—because they felt that the US counterterrorism measures that used torture, rendered suspects for the purposes of torture, or deprived detainees of *habeas corpus* rights were sufficient to meet their needs. Thus, instead of waiting to see whether other Western states similarly defect from human rights norms when the need arises,[6] we can analyze the practices of legitimacy within international society to support or oppose the assertion that the United States, through either its conduct or advocacy, created an international norm cascade favoring the acceptance of its counterterrorism measures. There is no doubt that this method cannot yield a definitive answer. But since it will certainly take decades to access the information that might provide a full account of the decisions taken by the Bush administration and their effects on the international human rights system as internal documents are declassified and memoirs written, examining this question through the lens of international legitimacy can provide a preliminary answer to this pressing question for both human rights scholars and advocates.

Studying Legitimacy in International Society

In his classic study of the function of legitimacy in society, Max Weber argued that "custom, personal advantage, purely affectual or ideal motives of solidarity" could not completely explain why specific commands are obeyed within a community. He claimed that the idea of legitimacy could fill this explanatory void, since agents could be oriented in a way to believe in the existence of a legitimate order.[7] Agents follow these norms, "not because they think it will serve some exogenously given end, but because they think the norms are legitimate and therefore *want* to follow them. To say that a norm is legitimate is to say that an actor fully accepts its claims on himself."[8] Though the idea of legitimacy is a hypothetical absolute, empirically it helps us to understand relative pull or obligation. As such we must see legitimacy as a matter of degree, and not as a binary attribute.[9]

Much of the scholarly literature dealing with legitimacy uses hierarchical domains for case studies.[10] However, Ian Clark has argued that the anarchical nature of the international system is an important testing ground for legitimacy since it lacks the coercive sovereign of domestic politics that would otherwise maintain order.[11] Clark and other scholars believe that legitimacy plays several key roles in the international system. First, it creates and defines the relevant

actors. Without the legitimacy of nationalist cohesion, for instance, states could only be understood as instrumental actors for some other domestic group—be it a dominant class or the collectivity of individual interests.[12] Second, in an anarchical system, legitimacy, together with calculations of potential punishment and self-interest, can explain whether it is likely that an actor will obey or resist an institution or rule. In other words, it helps to dictate what conduct is likely.[13]

The persistence of legitimacy as a factor in international society has been explained in two ways. The first, posited by Franck, focuses on the benefits of membership in international society. He argued that the rules of the international system

> obligate—to the extent that they do—primarily because they are like the house rules of a club. Membership in the club confers a desirable status, with socially recognized privileges and duties and it is the desire to be a member of the club, to benefit by the status of membership, that is the ultimate motivator of conformist activity.[14]

The second reason why legitimacy might persist as a factor within international society has to do with how it reduces system costs. As Clark argued, "High levels of legitimacy are associated with social stability, and a reduction of costs. In contrast, crises of legitimacy are reflected in social instability, or diminished political capacity, and create the need to resort to other inducements, including coercive measures, to secure compliance."[15] Christian Reus-Smit similarly argued that without the ability to use legitimacy as a method of compliance, actors can achieve compliance only through constant threat or bribery. All bases of power would necessarily be costly and unstable. The fact that actors participate in voluntary and non-self-interested compliance allows the international system to retain its stability and relatively low cost.[16] The importance of legitimacy can be empirically demonstrated in how states insist on adherence to rules where they have no direct interest. Frank notes that "a state which has no current claim based on another state's obligation may nevertheless perceive itself to have a very important stake in the principle that the obligation be discharged and the relevant rule applied."[17]

Though states are equal in a legal sense, and thus all are recognized as agents who can engage in the practices of legitimacy in international society, there are vast differences in their material capabilities. We thus need to consider whether or not the material preponderance of the United States could affect its ability to legitimate their position. Some scholars, such as Clark, have argued that power itself cannot generate

legitimacy. Material power might inspire feelings of anxiety or fear, but unless there is agreement on acceptable conduct between the hegemon and the rest of the states, there is no legitimacy.[18] Similarly, Hurd argued that the role of legitimacy in the international system is relatively strong, so strong in fact that even the hegemon cannot be seen as violating the "rules of the game" too often, as this "hypocrisy" will create diplomatic costs because of the illegitimacy of their conduct. The rule and norms of international society thus bind hegemons to the extent that they value the legitimation it gives them.[19] Where this is the case, they are limited to the plausible justifications for their actions that do not deviate too far from the international norms and ideas found within international society.[20] Which ideas or actors will be considered legitimate or illegitimate is primarily a matter of empirical study. However, Bruce Cronin and Ian Hurd suggested that legitimacy is broadly possible when an actor "is identified with purposes and goals that are consistent with the broader norms and values of its society."[21] On the other hand, acting in a legitimate manner can increase the overall power of even materially preponderant states.[22] This feature of legitimacy might be particularly critical with respect to human rights, since Donnelly suggested that they have an ideological appeal that appears to be relatively universal,[23] and this *a priori* legitimacy can serve as a check against the dominant material power of the United States in the period examined by the case studies.

Other scholars argue that materiality can play a more direct role in the practice of legitimacy. Stephen Brooks and William Wohlforth agree that ideational structures have a role in explaining international outcomes, even for materially powerful states, since "[i]f the hegemon tramples upon deeply held conventions, others might retaliate in ways that are very costly in terms of their near-term material interests."[24] However, they pointed out that materially powerful states might be able to leverage their material advantage in ideational negotiations. If a materially preponderant state wishes to change an existing international norm, it can more freely choose to ignore the complaints of the other members of international society and go it alone, with the hope that the other members who did not initially agree will eventually want to join the new status quo. Given the powerful "lock-in" effects, should the norm go beyond cascade to internalization, Brooks and Wohlforth argued that "the massive potential long-term benefits of winning legitimacy for the new practices it favors may induce a far-sighted hegemon to accept considerable near-term costs and risks."[25] Thus, "even if acting unilaterally seems costly in the short run, if it helps lead to new rules, norms, or institutions the hegemon

favors, then it might pay off in the long term."[26] If this is true, then the United States can leverage its material advantage, potentially to overturn even long-standing international human rights norms if it is willing to incur and absorb these short-term costs. Additionally, John Ikenberry and Charles Kupchan suggested that a materially preponderant state can use "positive inducement," where it uses either its economic or military power to directly induce elites in smaller states to change their policies, and once changed, these elites become socialized into the new order.[27]

There are thus two problems that need to be considered. The first is whether or not human rights were sufficiently institutionalized after the end of the Cold War, and thus might create costs for the Bush administration in their defection from these norms. The second is whether the material power of the United States might aid the Bush administration to either legitimate its preferences within international society, or at least make it able to withstand the costs of illegitimacy should the norm be institutionalized. Both of these problems can be addressed if we examine the problem from the perspective of international legitimacy. International legitimacy can provide not only a framework from which we can judge the relative institutionalization of a norm within international society, but also a theoretical lens to suggest whether or not the United States was successful in leveraging its material capacities in defense, or in support of, its preferences.

Legitimacy in International Politics

Legitimacy and Norm Change

To have their preferred ideational structures be considered legitimate, an actor in international society must engage in *practices of legitimacy*. Clark argued that this is empirically reflected in the deliberation of norms and a search for a *tolerable consensus* within a particular distribution of power.[28] When a state decides that it will break a norm, there are several different tactics that it can choose from. The first is *overt violation*, where a state breaches the norm without attempting to legitimate its actions. If the norm is well established, this will be a short-term strategy as other states will challenge the norm violation, and even the most diplomatically isolated states routinely justify their illegitimate actions when challenged. Given that the state must engage in practices of legitimacy, the second tactic is *justification*, where the state claims that it is in compliance with the norm if "properly" interpreted. In this case, the Bush administration might claim that it was

acting legally, but in terms of a significantly different understanding of the law. The state can also attempt *innovation*, where it actively argues for a change in the existing norms to match its preferences. This would occur if the Bush administration openly advocates, for instance, that torture should be allowed under particular circumstances instead of being *jus cogens*. Finally, there is *secrecy*, where the state denies that it is committing the acts that break the norm, usually because it cannot think of a way to justify its actions and wishes to avoid the costs of illegitimacy.[29]

As we can see from this list, states do not have to explicitly pursue norm revisionist strategies in order to change the norm. In addition to refraining from legitimation strategies in overt violation or using secrecy, powerful states might openly violate norms but claim that their actions are legitimate within the existing normative realm, creating pressure to expand the meaning of the norm. Material advantage functions here in a similar way by allowing the state again to resist any initial pressure to revert to the original meaning, until the norm expansion is agreed upon by international society, or by directly applying pressure on other states to conform with this new interpretation.

The use of secrecy and denial requires a little more unpacking, since these tactics are not legitimation strategies unto themselves, but instead allow states to avoid engaging in practices of legitimacy. Previous realist scholarship on secrecy tends to focus on its role either in protecting national security, as an unintended consequence of bureaucratic politics, or as a tool for elites to shape public opinion in their favor for purposes of state benefit or their own political survival.[30] Other scholars note that states use secrecy at times where "citizens cannot evaluate some policies and processes because the act of evaluating defeats the policy or undermines the process."[31] Few authors have attempted to consider how secrecy functions in relation to the norms of international society. In a rare example, Ann Florini suggested that transparency can sometimes aggravate conflict in the absence of universally shared or compatible norms, and in some cases, such as the case of Israel's secret nuclear capabilities, states might feel it better to let sleeping dogs lie.[32] This type of open secrecy might have resonance, particularly where both the United States and other members of international society might feel it better to avoid confrontation over the particular human rights norms. However, if this feeling is not shared, Hurd argued that secrecy can only be a temporary measure as it is a high-risk strategy because of the negative consequences of potential exposure.[33]

If secrecy is not used, then agents within international society will have to engage in processes of legitimation. In modern rational legitimation, agents need to give explicit rational explanations for their preferences. This act, however, opens up the preference to either confirmation or disconfirmation by other agents in the system.[34] Political elites play a special role in this process as they are incentivized to constantly legitimate their actions in terms that the populace will accept in order to remain in their position of authority.[35]

Method and Epistemology

This book uses Frank Schimmelfennig's theory of rhetorical action to understand the discursive practices of legitimacy in international society. Rhetorical action is the "strategic use of norm-based arguments" that occurs in an institutional environmental where "political actors are concerned about their reputation as members and about the legitimacy of their preferences and behavior."[36] It presupposes weakly socialized actors in a community that does not completely shape stable preferences. Actors still develop instrumentally egoistic interests that interact and conflict with the prevailing norms of the community.[37] Legitimacy, based on the identity, ideology, and values within the particular political community, "determines which political purposes and programs are desirable and permissible . . . [allocating] different degrees of legitimacy to the actors' political aspirations, preferences, and behaviors."[38] Actors, faced with this external constraint, are forced to argue to justify their goals on the basis of the pre-existing legitimate standards. Schimmelfennig argued that this phenomenon is particularly prevalent where international structures cannot enforce compliance and where there is little chance that there will be a negative domestic response to actions seen as illegitimate to the community.[39] The human rights norms that the Bush administration defected from meet both of these conditions. Like all human rights norms, there is relatively little means to ensure that states comply with their treaty obligations outside of verbal critique. Additionally, domestic opposition to torture, rendition, and *habeas corpus* was never sufficiently large to become politically problematic for the Bush administration.

Rhetorical action occurs in a number of ways. For instance, public shaming can be used as a mechanism of social influence where actors have previously declared their support for a norm that they are now attempting to avoid, even if this previous support was solely instrumental.[40] Shamed actors may downplay the values of

the community or bring up competing values that support their preferences. However, Schimmelfennig argued that there are limits to these strategic manipulations:

> First, to the extent that the standard of legitimacy is clearly and unambiguously defined as well as internally consistent, it becomes difficult to rhetorically circumvent its practical implications. Second, actors must be careful not to lose their credibility as community members when manipulating social values and norms. Above all they must avoid creating the impression that they use values and norms cynically and inconsistently.[41]

This leads to a position where members of the community can be entrapped in their own rhetoric, even if this rhetoric was previously solely self-interested. Importantly, actors under such social pressure do not necessarily change their interests, but may only refrain from illegitimate behavior—it is not synonymous persuasion.[42]

Complementing the theory of rhetorical action is the work by Quentin Skinner on norm change. Skinner argued that it is through "commending certain courses of action as (say) courageous or honest, while describing and condemning others as treacherous or disloyal, that we sustain our picture of the actions of states of affairs which we wish to either disavow or to legitimate."[43] The job of a norm entrepreneur, or what Skinner called an "innovating ideologist," is to show that some number of existing favorable terms can be associated with their preferred norms. These are used strategically in the hope that those who currently disapprove of the conduct might concede that this disapproval should be withheld.[44] He illustrated two strategies through which this reversal can occur. First, the norm entrepreneur might be able to describe their own actions in a way that would normally be interpreted as negative, but making it clear from the context that he is expressing it approvingly or at least neutrally. This can be achieved either by introducing new favorable terms into the language or by using a normally negative word in a neutral way.[45] Second, the norm entrepreneur could insist that despite the seemingly negative nature of his preferences, a number of favorable terms can be applied to his preferences as well. The aim is to argue that a term to be legitimated is being used in a normal way, while at the same time either ignoring the usual conflicts with other norms or expanding their meaning to encompass the preferred norm. This can be a difficult strategy, as it

> will fail if too many of the criteria are dropped, for in this case the fact that the term has undergone a "change in meaning" will become too obvious. But

it will also fail if not enough are dropped, for in this case the capacity of the term of cover and thus to legitimate new forms of social action will not have been extended after all.[46]

To judge the responses of the other members of international society to the Bush administration's legitimation strategies, this analysis will focus on three indicators that suggest that a norm either has or does not have legitimacy. First, there are rates of compliance to an institution or rule. Relatively high rates of compliance are a prerequisite for legitimacy, although they do not necessarily mean that there is legitimacy in the rule or institution.[47] Second, there are reasons given for the compliance. Political actors frequently justify their motivations for complying or abandoning a prevailing norm. Studying both the reasons given for compliance and non-compliance can yield additional data, particularly within the frameworks offered by Schimmelfennig and Skinner. Third, we might examine how other actors respond to a norm or an institution that is under threat. If they do respond, and do so in a way that upholds the pre-existing norm, it is more likely that the norm or institution in question is considered legitimate. Finally, we can argue for the logical necessity of legitimation through a process of elimination to show that legitimacy best explains the persistence of a particular social structure over other plausible methods of social control.[48]

It is important to remember when reviewing legitimation arguments that states practice legitimacy through two major tools, quiet diplomacy and public condemnation. Quiet diplomacy, or a confidential discussion held behind closed doors, can help maintain friendly relations, but is generally the least effective method for persuasion as there is generally little short-term loss for governments who ignore these arguments. It is very difficult to track and study these interactions, and this can lead to an underestimation of the amount of lobbying done on any particular issue. Publicly aired criticism, which will provide the most data for this study, can be used to shame governments in a manner suggested by Schimmelfennig and can be used in tandem with private diplomacy, for instance, the public statement after the private meeting. It is a more high-risk strategy, since these statements can create costs for the state issuing them, as there are potential negative diplomatic consequences in such acts.[49] Overt legitimation tactics taken by actors that run contrary to the Bush administration's position, therefore, demonstrate a willingness on the part of the actor to absorb costs for their preferred norm, particularly given the

material power of the United States.[50] Importantly, for a method that incorporates a model of rhetorical action, whether these arguments

> reflect the "true motivations" of the actors is irrelevant . . . rhetorical action will affect community members regardless of whether they have internalized a norm or simply fear for their standing in the community . . . whether or not political actors really mean what they say, they will choose their arguments strategically; and both opportunistic and truthful arguments have real consequences for their proponents and the outcome of the debate.[51]

Additionally, since "silencing" can be one of the outcomes with successful rhetorical action, the absence of legitimation strategies opposing those of the Bush administration will be an important indicator of its success.[52]

Finally, it is important to understand the ways in which previous research has identified the various classes of arguments through which actors structure their legitimation strategies. Both Clark and Daniel Philpott believed that legitimacy can be exercised within the international system in three different ways. The first way is as a procedural or legal phenomenon, or where legitimacy is derived from rules that are seen to originate from the proper source of authority. Second it can occur as a substantive or moral phenomenon, or legitimacy derived from rules that comply with extra-legal norms. Finally, it can occur as a constitutional phenomenon, where legitimacy is not derived from a rule but rather from the social expectations on what is proper conduct.[53] This last category is defined as "constitutional" because these ideas of behavior "constitute" the behavior of international society, for example, the historically observed norm of consultation among great powers or overarching ideas like the balance of power.[54] According to Clark, since these three types of legitimacy can pull in different directions, legitimacy is the political process by which actors attempt to reach a tolerable consensus that reconciles these three sources.[55] However, the problem with this typology is that it is unclear what the difference between the moral and constitutional categories is. Any activity that is said to constitute international society can exist only via shared norms. These shared norms do not come out of the ether—there must have been previous moral deliberation that structured the constitutional norms in ways that we see them now. As such, it is unclear what the difference between constitution and moral legitimating phenomena is, except in the former case we might expect these norms to be relatively entrenched.

This is a rather small difference, however, as ideational structures, even ones that seem relatively entrenched, can change over time. Given this, this project will proceed with only two categories—moral and legal—as I argue that there is insufficient empirical difference between the "constitutional" and the "moral" categories to separate them.

The differentiation between legal legitimation strategies, which include an appeal to some type of international agreement or lawfulness as a source of authority, from moral legitimation strategies, which do not, rests on the unique position of the law within international society. Alan James argued that legal and non-legal rules have different obligatory force, where the sense of obligation to the former is less than that of the latter. Legal rules, to an extent greater than non-legal norms, can "generate firm expectations about what will and will not be done."[56] Legal frameworks encompass all activities that international society deems important, for fear that non-codification would lead to ambiguity. Though it is clear that international law is broken by members of international society, it still enjoys a special status as "the very centre of international society's normative framework, supporting a structure of expectations without which the intercourse of states would surely suffer and early collapse."[57] This special status might also arise, as Martti Koskenniemi argues, because international law is a common language that allows states to transcend political and cultural differences,[58] which gives members of international society "a means to articulate particular preferences or positions in a formal fashion."[59] Similarly, Stephen Toope argued that international law is a "shared 'rhetorical knowledge' . . . [that is] persuasive within the contexts of shared basic understandings, and even more powerfully within structures of formal and informal institutions."[60]

If these ideas hold, that international law is a formal mechanism through which preferences can be presented between members of international society, and that international law holds a special status in creating structured expectations within international society, then there is good reason to separate legal legitimation strategies from moral legitimation strategies. The use of legal legitimation strategies should indicate more of a commitment to the promotion or reproduction of a particular norm, and the lack of them would likely indicate that the state believes that it cannot properly legitimate its preferences internationally, at least not sufficiently to create the norm cascade necessary to change the international legal framework. Within the framework of legitimation that is central to this book, legality holds a special place.

With respect to the potential for moral practices of legitimacy, the diversity in the ways in which human rights are conceptualized inevitably lead to situations where disputes occur, opening the door for actors to pursue legitimation strategies championing their preferred conceptions. There can be disputes over the source or nature of human rights, disputes over the utility of human rights, and disputes between different rights themselves. Moral legitimation strategies can be employed by agents arguing for the pre-eminence of one right, or way of understanding rights, over the other.

Functionally this book will treat all states and organizations as unitary actors. Though this simplifies the analysis, it is important to note that there are differences between individual and corporate actors. Corporate actors do not have the same level of unitary agency that individuals do. There is likely going to be more noise or fuzziness in the signals that they project.[61] Most modern organizations have relatively strong controls that keep their spokespeople "on message," but it is important to ensure that some type of consideration is given to unusual legitimation tactics as to whether they represent a subtle argument by the organization or an individual within the organization going slightly "off message."

The data for the book was collected primarily from the Nexis database of periodicals. The legitimation arguments were then sorted by whether or not the general discussion concerned torture, rendition, or *habeas corpus* specifically. General statements about human rights were excluded. Though this limits the overall pictures of human rights legitimation arguments, it is necessary in order to separate the statements into case studies for the purposes of comparison. I have taken a large-*N* qualitative approach, whereby instead of relying on a few legitimation arguments that I claim to be typical, I have included almost all statements made by the United States and other members of international society that occurred in the public media during this time. With the exception of minority discourses, which as discussed above could be a result of fuzziness in the message and not representative of the legitimacy strategies of the states or international organizations, all statements made by the Bush administration and other actors in international society that were found are included. With this strategy, I can show how legitimacy strategy shifted over time and can limit the probability of cherry-picking particular discourses that are more representative of any political biases than of the intentions of the actors.

The analysis of the data rests on the following hypotheses grounded in the theoretical discussion above. In general, where US legitimation

discourses favor innovation, that is, where there is an open claim to change a norm, this is a likely indicator of an actor confidently expressing their preferences than if they were to rely on justificatory legitimation discourses, which claim adherence to the norm, but only if "properly" interpreted. Similarly, because of the special position of international law within international society, legal legitimation discourses are more likely to signal a confidence in expressing their preferences than are moral legitimation discourses. This confidence could signal two things. First, it could signal that the Bush administration was acting as an overt norm entrepreneur, and therefore would be more likely to place coercive material resources behind the project of legitimation in a manner outlined by Brooks and Wohlforth. Second, it could signal that the norm is weak, and the Bush administration is reacting to a relative lack of opposition by making their claims surrounding their preferences stronger and more explicit. If this is the case, then one would expect to see either a consistent or an increasing proportion of legitimation claims falling into these categories. This latter hypothesis would operate independent of whether the Bush administration was interested in pursuing an openly norm entrepreneurial strategy.

To make the claim that the actions and discourses of the United States caused a norm cascade, where other members of international society became socialized into a new permissive norm, a critical mass of states must become either more accepting or less hostile to the new norm over time, reflecting the progress of their socialization.[62] Alternatively, should states be increasingly hostile to the preferences of the United States, this would lend evidence that the Bush administration was unsuccessful in creating an international norm cascade because, as Hurd argued, this demonstrates that states are openly reacting to the violation of a norm that they believe to be legitimate.

Before proceeding into the analysis of the practices of legitimation undertaken by the Bush administration and other members of international society, it is necessary to review the legal and normative background from which these debates originate in order to understand the ways in which these norms were either supported or modified. The following sections will review some of the most common moral legitimation discourses surrounding human rights, both for and against, and review some of the international legal structures that can be called upon to make judgments of the legitimacy or illegitimacy of actions by members of international society. Each section will also address the particularities of torture, rendition, and *habeas corpus*

within moral and legal thought where these exist. This will provide a background of pre-existing arguments that can be drawn upon to support moral and legal legitimation arguments.

Vectors of Legitimacy in International Human Rights

Status of Moral Human Rights Norms

In our contemporary understanding, human rights are possessed by individuals solely on the basis of being human. They are equal in nature and inalienable, meaning that everyone is endowed with similar rights that cannot be transferred or removed.[63] They are understood to be independent of ascriptively defined social roles, giving every individual "an irreducible worth that entitles them to equal concern and respect from the state and the opportunity to make fundamental choices about what constitutes the good life."[64] Rights claims are different from other categories of claims because they "focus on the right-holder and draw the duty-bearer's attention to the right-holder's special title to enjoy her right."[65] Rights are not routine interactions but an assertive exercise against a duty-bearer based on prior moral entitlement.[66] Rights have a special place in the moral life of the community as they have the ability to function in a unique way from other claims. Instead of pleading for a particular form of justice, a right is asserted. If the claim is not resolved successfully, the result is not disappointment but indignation, because rights are not just political claims, but are believed to be integral to one's status as a person.[67] The deprivation of the right allows the right-holder to make special claims that can override other moral, social, or utilitarian grounds for action; that is, rights can act as social "trumps" either for or against certain types of state action.[68]

Though this covers the core idea of human rights, there are competing schools of philosophical thought that diverge away from these commonalities with respect to the source of human rights. One such school, the natural law approach, can be traced back to Saint Thomas Aquinas. He argued that reason could lead us to understand the perfect law of God, which he called "the sharing in the Eternal law by intelligent creatures" or "natural law."[69] This was a law that all humans were equally subject to and that was independent of the laws of the state that could be "distorted by passion or bad custom."[70] Natural law is the starting point for our modern rights discourse, its

primary contribution being that it allows a cosmopolitan appeal from the reality of power relations to a higher authority from whom the rights could be asserted.[71]

Human rights were also theorized by other philosophers who did not completely agree with all aspects of the natural law approach. Instead of following the cosmopolitanism of Aquinas, Hugo Grotius posited that rights were only enjoyed through the moral obligations owed to fellow members of a community. These rights were not, in Grotius's sense, universal, but were rather communitarian in nature.[72] The spread of Protestantism augmented this communitarian view as it came with the claim that living in a moral community created a framework of mutual moral obligations.[73]

As both the cosmopolitan and communitarian human rights discourses grew in popularity, they attracted detractors who questioned whether the rights espoused were socially harmful. Edmund Burke, for instance, believed in a right to the basic elements of existence such as life, liberty, and freedom of conscience, but overall he thought the concept was "at best, a useless metaphysical abstraction and, at worst, subversive of social order."[74] Burke took issue with how rights would interact with politics, which he saw as a practical activity that involved making decisions in complex circumstances.[75] The rights derived from natural law took the complexities of politics and reduced them to a false simplicity, potentially deepening the antagonism of political opponents and reducing the potential for compromise. The correct way to think about rights, at least according to Burke, would be to view them as a progression of reason that had been tested against historical circumstance.[76] Jeremy Bentham was even more opposed to the use of rights, claiming that any conception of "*Natural rights* is simple nonsense . . . nonsense upon stilts."[77] Rights were too vague to be objectively evaluated and made the mistake of having principles precede consequences. Competing rights were especially problematic as there was no way to evaluate the best outcome.[78] Instead of prejudging any situation through these rights, the common good should be evaluated through a utilitarian calculus.[79] A modern version of the tension between the discursive absolute nature of rights and practical problems is exemplified in the dissent of Supreme Court Justice Robert Jackson in the 1949 case *Terminiello v. City of Chicago*, where he argued that "There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[80]

The philosophical history of human rights creates a diverse set of potential legitimation strategies for actors within the international

system that can be utilized in the case studies. This is especially the case with the critics of human rights, who, echoing Burke and Bentham, challenge the absolute idea of human rights for a more flexible policy based on political circumstances. In addition, the discussion above gives us some perspective on how to understand the underlying mechanisms that lead to conflict in human rights, especially in the division between communitarian and cosmopolitan thinking. If the predominant view is communitarian, that human rights are guaranteed only by the state for citizens, then removing rights from non-citizens is not as normatively problematic than if the predominant view is cosmopolitan in nature. This is also relevant in the reactions of other members of the international system to the conduct of the United States. Do they take a universal position on human rights, stressing natural law elements, or do they advance a more communitarian framework, stressing that there are national laws and norms that need to be adhered to?

Torture and Rendition

Torture and rendition for the purposes of torture have a special moral status that needs to be discussed separately. Several authors have attempted to explain why this might be the case. Keck and Sikkink argued that the special prohibition exists because the issue of bodily harm crosses cultural and ideological boundaries, making it easier to achieve the status of a stringent transnational norm.[81] David Luban argues that torture is an anathema in modern states because the rise of liberalism has made cruelty one of the most vicious of all vices.[82] As he puts it, "torture aims to strip away from its victim all of the qualities of human dignity that liberalism prizes,"[83] particularly "a vision of engaged, active human beings possessing an inherent dignity regardless of their social situation."[84] As such, torture is a liberal's worst nightmare, one of "tyrannical rulers who take their pleasure from the degradation of those unfortunate enough to be subject to their will."[85] Natan Sznaider suggested that this is why modern culture does not necessarily become as morally indignant over suffering unto itself, as it does the meaningless suffering that arises from its unjustified infliction through acts of cruelty.[86]

The link between liberalism, cruelty, and torture corresponds to the known data on levels of torture in particular states. Non-liberal democratic states use torture as a mechanism for social control—the Soviet Union under Stalin is a particularly good example of the use of torture to suppress political dissent.[87] However, this does not mean that mature democracies do not engage in torture. Particularly notable

here was France's use of large-scale torture in the 1960s to gather intelligence on Algerian and Chadian independence movements and the Israel's use of torture to gather information on potential terrorist threats.[88] So given how torture presents itself as abhorrent to liberal thought, how is it that liberal democracies slip into the practice?

Luban argues that there are four illiberal motives for torture that could never be legitimate to liberals, that of torture for the victor's pleasure, terror, punishment, and extracting confessions. All of these are backward-looking mechanisms, being either retributive, responding to a political circumstance, or about ratifying our knowledge of the past. However, the form of torture most practiced in liberal democracies is for intelligence gathering. As opposed to the first four, this is a forward-looking practice that advocates claim will prevent future evils. This functions to permit torture in two ways. First, it plays on the uncertainty of future events, particularly when the prospective events are relatively severe. This allows those with discursive power to project an elevated sense of overall risk. Second, states will argue that this type of torture is committed not for punishment or terror, where cruelty would be seen as antagonistic to the liberal project. Instead, supporters will argue that torturers are otherwise profoundly reluctant to torture, but only torture to prevent future catastrophe. This opens up the possibility for the normalization of torture in liberal democracies under particular circumstances.[89] In other words, it permits a situation where society can see torture not as an act of cruel agency, which is abhorrent to liberals, but as the necessary consequence of an overriding structure that forces the hand of the state into doing something it would not otherwise do.

If Luban is correct in his analysis, then this will serve as an observable limitation in the way that the United States can legitimate its activity in the torture case study. The rendition case study serves as an interesting counterpoint to see whether there is a difference between legitimating torture versus legitimating actions that cause torture via a third party. Additionally, whether these limitations extend beyond the torture case study into the *habeas corpus* case study might serve to demonstrate whether this effect is specific to torture, or perhaps applicable to grave human rights violations in general.

Status of Legal Human Rights Norms

The study of international human rights, unlike domestic human rights, is complicated by the *sui generis* nature of international law, particularly its relative lack of authoritative legislative and judicial

bodies that would otherwise decide what the law is. The absence of a central legislature means that international human rights law comes from many different sources, including international conventions, international customary law, and the opinions of well-respected jurists.[90] Like all law, international law comes in two forms. The first, known as "hard law" or "black letter law," refers to court judgments concerning the legality or illegality of particular circumstances based on previous cases. Hard law is relatively rare in the international human rights system compared to most domestic systems. In some cases, states do not want to undertake the costs of bringing perpetrators to justice; in others the political situation where the abuses took place is too fragile to sustain potentially divisive trials.[91] The second form of law is called "soft law." These are either legal rules that do not originate from or have not been tested by court decisions or norms that are not written law but are treated as law, conventionally known as customary international law.[92] The indeterminacy caused from a lack of hard law means that questions of legality within international law tend to function as a type of mechanism through which political positions are mediated in international society. Instead of working from the rules and principles of international law based on prior authoritative decision, international lawyers construct the argument to suit their clients to much more of an extent than is found in the domestic system. This does not mean that all arguments are completely relative or epiphenomenal to power relations, as existing legal agreements will likely structure the legitimation discourses to some degree. Given the importance of what these existing legal agreements are, the next few sections provide an overview of some of the areas of contestation within international humanitarian law and international human rights law, each reviewing the international legal frameworks governing the three case studies: torture, rendition, and *habeas corpus.*

International Humanitarian Law

Though humanitarian law has been greatly influenced by human rights law and theory, it developed independently, has a much longer history, and functions under very specific conditions.[93] The purpose of humanitarian law, as opposed to international human rights law, is to minimize unnecessary suffering during the course of a conflict or war by regulating what the enemy can do to persons in their power.[94] As Christian Tomuschat put it, international humanitarian law "is designed to ensure a minimal protection even during the most profound catastrophe of human society, namely war," where it "seeks to

salvage what realistically can be protected notwithstanding the clash of arms."[95] It is a *lex specialis*, or law that is triggered by special circumstances, at which point it prevails over *lex generalis*, or the generally applicable law—it is essentially a type of emergency law.[96]

The four Geneva Conventions, which in late 2005 became the first treaties in modern history to be ratified by every state in the world, are the principle instruments of international humanitarian law.[97] The purpose of the Geneva Conventions is to ensure that persons placed in *hors de combat*[98] are fairly and humanely treated by the enemy belligerents.[99] The 1977 Additional Protocols expand the protections of the conventions and allow for a greater union between international humanitarian law and international human rights law, but there is disagreement about whether the two branches of international law should be unified. The United States, in particular, has argued in the past that international humanitarian law should override international human rights law in periods of armed conflict.[100]

Meron noted that humanitarian law has traditionally had a reciprocal character that increased the incentives for states to participate, the rules being upheld when both sides in the conflict control their actions in roughly equal ways. It also functions better when each side shares the same values and there is symmetry in military capabilities.[101] There is no precedent for a *lex specialis* to take hold within international humanitarian law for a "war on terror," nor is there any customary international law that addresses this concept. However, according to the Geneva Conventions and the Additional Protocols, any armed conflict, either international or internal, is sufficient to invoke international humanitarian law. Importantly, Common Article 2 specifies that any intervention between the armed forces of two states is an armed conflict, independently of whether one or both states deny its existence.[102] However, whether this would apply to a conflict between a state and a non-state entity is not explicitly stated, as the text refers only to the relationships between "High Contracting Parties."[103]

Torture

For non-international armed conflicts, Common Article 3 sets out the basic rules:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . [t]o this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

. . .

(b) outrages upon personal dignity, in particular humiliating and degrading treatment;[104]

International humanitarian law differs from international human rights law in ways fundamental to the torture case study. For instance, in human rights law the definition of torture requires an agent of the state to do the torturing. In humanitarian law as determined by the International Criminal Tribunal for the former Yugoslavia, someone who tortures "privately" in a wartime situation is also subject to criminal responsibility under international law.[105]

Rendition

Until the terrorist attacks of September 11, 2001, there were no suggestions that the international transfer of prisoners should fall under international humanitarian law. This is significant to the ability of states to practice rendition because both extradition treaties and human rights law imposed much greater constraints to state action than those found in international humanitarian law.[106] Under Article 12 of the Third Geneva Convention, prisoner transfers can take place only to states that are parties to the convention. If this is not the case, then the Detaining Power must retake custody of the detainee and transfer them to a state where their rights will be respected.[107] However, the rights defined for unprivileged combatants are more limited than the rights of prisoners of war (POWs), and little is written on the irregular rendition of terrorist suspects or unlawful combatants.[108] Article 75 of the Additional Protocol of 1977 states that unprivileged combatants must be released and repatriated "as soon as the circumstances justifying the arrest, detention, or internment have ceased to exist," but does not address interstate transfer.[109] Neither is the subject addressed in Common Article 3 of the Additional Protocol of 1977.[110] Overall, the unclear legal position of rendition in international humanitarian law means that there is significant room for the interpretation of how renditions could operate during a state of war.

Habeas corpus

Article 21 of the Third Geneva Convention states, "The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned." This internment, according to Article 118,

can continue until "the cessation of active hostilities."[111] Under the Fourth Geneva Convention, dealing with Civilian Persons, Article 42 states, "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." As Hakimi noted, the difference between international human rights and international humanitarian law in this respect is because of their differing goals. In the humanitarian case, the detention is not about the punishment of the detainee; it is about removing the security threat that they would pose should they be able to rejoin the fight.[112] However, this is not unproblematic for US policymakers, as Article 43 continues:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision, if circumstances permit.[113]

Unlike in international human rights law where a court is required to oversee the lawfulness of detention, in international humanitarian law this can be either a court or an administrative board.[114] Additionally, the Additional Protocols state that a penalty cannot be exacted on a person within an armed conflict unless this person is convicted by an impartial and regularly constituted court.[115] Though the United States has not ratified this protocol, it is arguably customary international law due to the high degree of compliance with the rule internationally.[116]

The term "enemy combatant," introduced by the Bush administration in spring 2002, was not a legal term prior to the war on terror. The term "unlawful combatant" equally does not appear in the Geneva Conventions, but it was widely understood to apply to all combatants who are not lawful combatants. The legal justification for the term comes from a World War II Supreme Court case entitled *ex parte Quirin*, where the Supreme Court ruled that the president of the United States had the right to try captured German saboteurs by military commission. They came to this conclusion by arguing that

> [t]he law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial

and punishment by military tribunals for acts which render their belligerency unlawful.[117]

In this case, there is a distinction to be made between the enemy that fights according to the rules outlined in the Third Geneva Convention and those who do not. Examples include spies, saboteurs, or civilians who take direct part in the hostilities, all of whom are not authorized to be on the battlefield under international humanitarian law. They enjoy fewer protections than lawful combatants, but must be treated humanely.[118]

We can see from this discussion of humanitarian law that there are many opportunities for disagreement over whether or not particular actions taken by the government of the United States are legitimate. Added to this is the problematic reciprocal character of humanitarian law, which adds credence to claims by the US government that without reciprocation from their opponents, they do not have to follow the rules.[119]

International Human Rights Law

There are three key differences between the international human rights law and the international humanitarian law. First, international human rights law applies at all times except for situations of armed conflict, where humanitarian law applies. Second, international human rights law has traditionally been binding for states alone, while international humanitarian law binds parties in a conflict, be they state or non-state parties.[120] Third, international human rights law can be applied extraterritorially, as the International Covenant on Civil and Political Rights states, "[A]ll individuals within [a state's] territory and subject to its jurisdiction"[121] are covered by the covenant, and thus Guantanamo Bay, Iraq and Afghanistan could be considered subject to the jurisdiction of the United States.

Despite the fact that the creation of the United States started with the claim that all men are born with certain unalienable rights, the relationship between the United States and international human rights law has not been straightforward. The United States has long seen these documents as merely restatements of existing US law, but where they deviate from US law in either text or interpretation, US officials have usually appealed to the superiority of their domestic law. The argument here is not so much over whether international human rights are universal and binding in the United States, but rather who it is that has the authority to identify these rights and enforce

them against violations.[122] Some of the arguments over international jurisdiction, such as that of the International Criminal Court, have revolved around the fact that non-liberal democracies will be involved in the judicial process.[123] Recent Supreme Court jurisprudence has used international treaties to decide on domestic human rights cases, but not without controversy.[124]

Torture

The prohibition against torture has a special status among international human rights norms, though the definition of what constitutes torture is less clear. In addition to treaty language granting universal jurisdiction, the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights declare that the right not to be tortured is a non-derogable right, or a right that a state can never take away, even in exceptional circumstances.[125] As such, potential state torturers face two obstacles. First, they can never use any special prevailing conditions as a defense for torture. Second, because of universal jurisdiction any signatory of the convention can legally prosecute them for the crime at any subsequent point should the victim be a citizen of the state in question or if the suspected perpetrator pays a visit to a signatory state.[126] The second problem is particularly important, because the Convention Against Torture was the first treaty to apply the principle of universal jurisdiction in human rights abuses where states opened their officials up to the legal possibility of being prosecuted in another state. In addition, it has widespread acceptance in international society, as it was adopted by the UN General Assembly by unanimous agreement and as of July 2013 had been ratified by 153.[127]

However, there is no widespread accepted definition of what constitutes torture. Conceptual vagueness is a well-known legal problem, and as Landman argued, actions within the "penumbra of uncertainty" will lead to contestation over whether they fall into the category of torture or not.[128] This problem is reflected in some of the case law on torture. For example, the European Court of Human Rights (ECHR), in the case *Ireland v United Kingdom*, argued that the application of the word "torture" is limited to "extreme, deliberate and usually cruel practices." The case concerned the interrogation of suspected Irish Republican Army (IRA) members by the United Kingdom, where British interrogators forced them to stand against a wall for long periods, hooded them, subjected them to constant noise, and deprived them of sleep, food, and drink. The ECHR ruled that although the five techniques applied in combination were inhuman

and degrading, "they did not occasion suffering of the particular *intensity* and *cruelty* implied by the word torture."[129] This differentiation between "inhuman and degrading treatment" and "torture" offers the possibility for some interrogation techniques to be classified as the former rather than the latter, and thus be the subject of legitimation strategies.[130] This is particularly the case given that the overarching moral stigma against torture should lead most states to declare that they do not engage in the activity, while at the same time attempting to shift the definition of what constitutes torture through political pressure.[131] This is only further muddied by the fact that when the United States signed the Convention Against Torture, they did so reserving the right to interpret what is defined as cruel, inhuman, and degrading punishment in light of similar prohibitions in the Constitution of the United States, particularly the Fifth and Eighth Amendments.[132]

Rendition

The UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment imposes restrictions on the transfer of persons to states where they are likely to face torture.[133] Article 3 states that the determination to render should be made according to both the human rights record of the receiving state and other relevant considerations. The latter category would likely include assurances by the state that it will not torture the rendered detainee, so long as there is some mechanism for the enforcement of this claim.

However, this clause can lead to legal indeterminacy. For instance, it does not provide guidelines for how these considerations should be weighed. When the United States ratified the Convention Against Torture, it claimed that this determination would be linked to a test of whether it were "more likely than not" that a person would be tortured—the domestic standard used in US courts. Under this procedure, it would be possible for rendition to occur to a state with a record of torture if torture were determined to be less likely under the particular circumstances. Despite this apparent leniency, if the rendition were part of a conspiracy by a US official to commit torture via the rendition, that is, if there were an intention to put the detainee in a position where he or she would likely be tortured, this conduct would certainly be illegal under the Convention Against Torture.[134]

The practice of rendition also has consequences for consular relations between the rendered detainee and his or her state of citizenship. Normally under Article 36 of the Consular Relations Treaty, nationals of a particular state are given the right to communicate freely with

their consular officials.[135] In addition, if they are subject to an "international wrong," the consular officials can exercise diplomatic protection. This classically was understood as a "denial of justice," which now is defined as an injury "consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil."[136] However, this is usually only exercised after local remedies are exhausted, provided that the remedies are not futile and that consular officials are given prompt notice that foreign nationals were detained.[137]

The practice of rendition also creates problems in the diplomatic protection of dual nationals. Normally if one state renders a citizen of a second state to a third state, the second state can intervene and seek relief for the rendered person. This becomes more difficult when the rendered person is also a citizen of the third state.[138] In the case of dual nationals there is a rule of "non-responsibility"; that is, if a citizen is detained in one of the states to which they hold nationality, the other state cannot intervene. This is enshrined in the 1930 Hague Convention, and although only a few states have ratified it, it is regarded as customary international law. Given the nature of the states to which the United States rendered most detainees, this is particularly problematic. Revoking one's own citizenship of a state as a means to gain consular representation from another state can be particularly difficult in the case of Morocco, Jordan, and Egypt, which all require that the government pre-approve any renunciations of nationality. Other nationalities, such as Syrian, are perhaps impossible to renounce, particularly if the detainee is of military age.[139]

We can see that identifying the legality of rendition can be problematic within international human rights law, which sets the stage for disagreements over how, if at all, it should be conducted. The divisions over what constitutes torture over and above mistreatment, the standard on determining the likelihood of torture, and the territorial applicability of the treaty provide scope for disagreement and therein legitimation claims about the proper interpretation of the law.

Habeas corpus

Unlike torture, *habeas corpus* is a derogable norm under international human rights law according to Article 9 of the United Nations International Covenant on Civil and Political Rights (ICCPR).[140] It is legally possible to suspend *habeas corpus* because international law does not forbid administrative or preventive detention, only arbitrary administrative detention. As such, states can practice administrative detention under certain conditions, specifically a public declaration of

a state of emergency justified as the result of "exceptional circumstances." The type of oversight necessary for a legally legitimate state of emergency is outlined in the ruling of the case *Silva v. Uruguay*, where the Human Rights Committee ruled that

> [a]lthough the sovereign right of a State party to declare a state of emergency is not questioned, . . . by merely invoking the existence of exceptional circumstances, [a state] cannot evade the obligations which it has undertaken by ratifying the Covenant . . . the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts . . . If the respondent Government does not furnish the required justification . . . the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant.[141]

If a state meets these conditions, they can legally suspend *habeas corpus* under the ICCPR. According to both legal precedent and declarations from the Special Rapporteur on States of Emergency, this is the only way a state can legally practice administrative detention.[142] Even when the suspension of *habeas corpus* is lawful, the state that declared the emergency does not have unlimited liberty to detain people and must still respect the norms of proportionality and nondiscrimination in their actions.[143] Additionally, the 1993 UN Working Group on Arbitrary Detention argued that because any time spent in executive detention must be subtracted from the latter sentence when the case comes to court, any claim to indefinite executive detention is automatically arbitrary, and therefore unlawful. The only way such a detention can avoid being arbitrary is if it leads to a legal process where a sentence is handed out, from which the time already served is subtracted.[144]

These legal rules were updated by the 2001 General Comment Number 29 of the Human Rights Council, which took a much firmer line on the issue of *habeas corpus* just prior to the terrorist attacks on September 11, 2001:

> As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations . . . . In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.[145]

The important element here is their reasoning that since the most supreme state of emergency, that of war, does not allow for a detention

without review, neither should any state of emergency. In addition, since *habeas corpus* prevents the abuse of other non-derogable rights, the Human Rights Committee ruled that it therefore cannot be derogated from itself. This complicates the legal situation to the extent that any state party regards relatively recent commentary by the Human Rights Council as authoritative given the more permissive past.

The Inter-American Court of Human Rights adopted a similarly stricter policy regarding the suspension of *habeas corpus* over a decade before the Human Rights Council decision, having ruled in a 1987 Advisory Opinion that various rights and, importantly, "the judicial guarantees essential for the protection of such rights,"[146] were non-derogable in a state of emergency. This opinion was based on a similar judgment that the "writs of *habeas corpus* and of 'amparo' are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society," concluding that "These legal remedies may not be suspended in emergency situations."[147] In addition, the judicial proceedings surrounding a *habeas* claim must be within a framework of due legal process as defined in Article 8 of the American Convention on Human Rights.[148]

Thus, though there is not an absolute ban on the removal of *habeas corpus* as there is with torture, support for such an idea has been strengthening over time among international organizations. This case presents an interesting dynamic given that there is some difference between two international organizations, the United Nations system and the Organization of American States system, as to the maturity of the prohibition.

Conclusion

The purpose of this chapter was to outline how we might go about answering the central research question of this book. Given the pressing nature of the question, that the Bush administration, through its conduct or advocacy, might have done fundamental damage to the international human rights systems by creating a norm cascade in favor of its preferences, and given that much of the data that might help us determine the motivations and decisions of actors within the Bush administration and other states in international society is unlikely to be forthcoming soon, analyzing the practices of legitimacy within international society might be a fruitful way to make an initial judgment on the question. The chapter reviewed the purpose and practice of legitimacy within international society, particularly considering the

potential effects of material preponderance on a state's ability to legitimate its preferences. In addition, it considered how we might go about analyzing the situation empirically—what is it that we might look for to make the determination either that the Bush administration caused or did not cause a norm cascade? Finally, the chapter reviewed the state of moral and legal legitimation arguments at the point that the Bush administration came into power in order to provide a background to the ideational environment that that actors found themselves in.

The next three chapters consider the ongoing interaction between the Bush administration and the rest of international society with respect to torture, *habeas corpus*, and rendition for the purposes of torture, using the theoretical and methodological frameworks developed here. In each case, I will proceed by looking at the evidence for mistreatment and any internal discussions that might lend evidence to the intent of the Bush administration, and, using this, will then analyze the evolution of the process of legitimation between the Bush administration and the rest of international society.

Chapter 3

Torture

Introduction

The international legal agreements that prohibit the bodily harm defined by the term "torture" are particularly stringent and well entrenched. A basic protection against torture is enshrined in the post–World War II human rights agreements, and with the adoption of the 1984 Convention Against Torture, which has over 100 state signatories who have additionally passed domestic legislation to comply with its mandate, the prohibition of the use of torture became one of the most well-established human rights norms in existence.[1]

Despite this general agreement within international society against the use of torture, the Bush administration faced numerous accusations of torture, particularly in its choice to use what it called "enhanced interrogations" for intelligence-gathering purposes. These accusations are particularly problematic if one considers that the United States traditionally supported the prohibition against torture to a degree over and above other human rights commitments. The Convention Against Torture was signed and ratified by Ronald Reagan and George H. W. Bush, respectively,[2] both of whom came from a political party that has traditionally avoided "idealism" in international affairs, instead having a tendency to "judge international agreements and institutions as means to achieve ends."[3] This was particularly striking since the United States, which has a history of rejecting treaties that are seen to breach US sovereignty, not only agreed to the implementation of universal jurisdiction, but openly advocated for it on the basis that torture was "an offence of special international concern."[4]

V.C. Keating, *US Human Rights Conduct and International Legitimacy*

Given the rapid transformation of US torture policy in the war on terror, from accepting it as a human rights norm even over and above long-standing issues of sovereignty and political party preferences to actively using techniques that arguably constitute torture for counterterrorism purposes, the question of whether this dramatic change might have repercussions on torture norms within wider international society is even more prescient. However, I argue that there is little evidence that the Bush administration's defection from the torture norm created a norm cascade favoring their preferences.

The analysis, however, is not completely straightforward, as on the one hand, the Bush administration's attempt to legitimate their actions within international society did not challenge the norm against torture itself, but rather challenged what actions it forbade. The Bush administration attempted to push against the boundaries of what might or might not be considered acceptable conduct, arguing for utilizing techniques that were arguably within the penumbra of uncertainty with respect to what constitutes torture. In addition, when confronted with US human rights abuses, other members of international society expressed their horror at their conduct and called for investigations.

On the other hand, with the exception of states with poor human rights records, states publicly avoided calling the US conduct "torture" and some US legitimation strategies were replicated by a small number of states. Expanding on Ann Florini's argument concerning the purpose of international secrecy, this might indicate that the conduct of the United States for the most part was not sufficiently grievous in the eyes of other members of international society that they would risk the costs of a legitimation struggle, preferring to stay quiet unless the abuse rose to a particular threshold, such as when the Abu Ghraib scandal broke.[5] However, by the end of the Bush administration's second term, some states were changing detainee policy to the detriment of the United States, and the Bush administration stopped all attempts to legitimate itself through appeals to international law, relying instead on domestic law. Though the United States might have been successful in reaching a state of norm emergence for a period of time, there is no evidence that by the end of the Bush administration the United States had created a norm cascade that fundamentally shifted the international torture norms. In fact, as time progressed there was an entrenchment of the norm as more and more states openly opposed the Bush administration's policies.

It is possible to read the relative silence from Western nations over whether the United States was torturing detainees, particularly when

contrasted to the vocal opposition from states with poor human rights conduct, as a situation where even if the Western nations did not approve of US conduct, the United States might have been able to leverage its material power to silence them. In fact, off-the-record statements from European diplomats lend some evidence that this took place. However, with respect to the book of Stephen Brooks and William Wohlforth that material advantage can generate long-term norm change, the case is far less clear, particularly as Western states became more vocal about the detainee mistreatment and began to institute detainee procedures that were disadvantageous to the United States. Despite the potential ability of the United States to lower the amount of opposition they faced in the public realm, this ability was limited and did not produce significant norm change in the manner that Brooks and Wohlforth suggested.

The evidence supporting these claims will be examined in three sections. The first section will review the major historical events surrounding the allegations of torture and review the internal discourses of the Bush administration as a way of setting the stage for the legitimation strategies that the United States and other members of international society undertook. The next two sections will review thematically the legitimation strategies of the United States and other members of international society.

Historical Timeline and Internal US Discourses

This section examines the allegations made in the media concerning US treatment of detainees in the war on terror to set the context in which the legitimation strategies of the United States and other actors in the international system operated. It will also provide an overview of some of the off-the-record or private statements made by government officials or employees that give an inside sense of the Bush administration's attitude toward interrogations that demonstrated their intent to defect from the norm.

Domestically, the United States appeared to have undergone a domestic norm cascade with respect to torture.[6] There was a consistent minority, sometimes a plurality, who supported the use of torture. For instance, in early October 2001, when asked whether the government should use torture, not just "rough interrogation techniques," to extract information from detainees, 45 percent of the American public agreed and 53 percent disagreed according to a Gallup/CNN/USA Today poll.[7] The percentage of American citizens who agreed that torture is sometimes or often permissible remained

in the high thirties or low forties for the entire Bush administration, rising as high as 46 percent even after the majority of the torture scandals had occurred.[8] Even at the beginning of the Obama administration, a 2009 poll found that 52 percent of Americans supported the use of torture in some circumstances.[9] Overall, the percentage of the public that thought torture was often or sometimes justified increased over time.[10] This public support provides context for the political decisions made by the Bush administration, as they did not face the level of domestic opposition one might expect given the status of the prohibition of torture as a fundamental norm. This gave the Bush administration more leeway to act, and presents a complication for the maintenance of the torture norm in international society.

Initial Reports of Abuse

The first reports that the United States was contemplating using harsher interrogation methods on detainees occurred only a month after 9/11, when the Federal Bureau of Investigation (FBI) reportedly considered the use of "truth serums" and the CIA began to look into the use of rough interrogation techniques and high-decibel music to extract information.[11] However, the first major scandal involving the suspected mistreatment of detainees began with the internment of prisoners in Guantanamo Bay, Cuba. In January 2002 the British newspaper the *Daily Mail* printed photos of recently transferred detainees and argued that their treatment was not in line with the Geneva Conventions. They claimed that the detainees were "chained, manacled, hooded and even, in a few cases, sedated . . . kept in cramped outdoor cages, open to the elements and to the attentions of possibly malarial mosquitoes."[12] Under this scrutiny, the United States seemed to make attempts to rectify the problems and concerns of other actors in international society. For instance, on January 24, 2002, the United States suspended transfers to Guantanamo Bay citing a lack of space. A representative of the American military was quoted as saying, "Rather than put ourselves in the position of bringing them out here and doubling them up in two per unit, which is not good from a detainee perspective or from a security perspective, we said, 'Let's hold on for a second.' " An unidentified American military source in Washington suggested that this had something to do with the recent international pressure, that "they don't want it to be perceived that we're jamming them in there."[13]

In April 2002, CIA interrogation manuals from 1963, released for the first time in 40 years, heightened the speculation over what

the United States might be doing to detainees,[14] particularly as they detailed the use of pain in interrogation. This speculation was only strengthened as off-the-record comments from FBI agents suggested that they were considering the use of torture.[15] The Associated Press reported that current interrogations involved having the detainee sit or stand for long periods, depriving him of sleep, isolating him, and changing the temperature of the room.[16] *The New York Times* reported that although military officials stated that torture, including physical contact, was not an option for interrogations, anything short of this would be, including preying on a prisoner's fears, desires, sexual stereotypes, and cultural sensitivities.[17] *The Globe and Mail* reported that when the military was questioning the detainees, they used "stress-positions," sleep deprivation, shackling, solitary confinement, and humiliating living conditions.[18]

In addition to the general reports of mistreatment, in early 2002 the media leaked information on the treatment of "high-value" detainees, whom the United States targeted for harsher treatment. *Time Magazine* reported that there was at least some initial discussion within the administration about extracting information from al-Qaeda leader Abu Zubaydah through torture.[19] *The Age* reported that it took three months of "interrogation, sleep deprivation, solitary confinement and mental torture" to break Omar al-Faruq, thought to be one of al-Qaeda's senior operatives in Southeast Asia, who reportedly divulged the information on the Bali bombings.[20] A Western intelligence official later called his treatment "not quite torture, but about as close as you can get." It included food, sleep, and light deprivation, and prolonged isolation and subjecting him to temperatures that spanned from −10°C to 40°C.[21] Both Ayub Ali Khan and Abu Zubaydah allegedly faced similar harsh treatment.[22] This early behavior was later reflected in an October 2002 document released in 2008 in which the CIA counterterrorism lawyer Jonathan Fredman told a meeting of intelligence and military officials gathered to extract better intelligence from detainees that torture "is basically subject to perception," and that "if the detainee dies, you're doing it wrong."[23]

By the end of 2002, the *Washington Post* reported that the United States was using interrogation methods that constituted torture. It revealed that the CIA had an interrogation center in the Bagram air base in Afghanistan where al-Qaeda and Taliban suspects were kept awake for days with what were called "stress and duress" techniques.[24] Two prisoners held at the Bagram air base were killed during their interrogation; the coroner's report stated that they were likely mistreated in a manner that led to their deaths. Both men exhibited

blunt force trauma that led to their deaths by pulmonary embolism and heart attack, respectively.[25] According to Americans with direct knowledge of the general apprehension process, captives at Bagram were "softened up" by either Special Forces or Military Police who beat them before locking them up in tiny rooms. As one official who supervised the capture and transfer of suspected terrorists put it, "Let's just say we are not averse to a little smacky face. After all, if you don't violate someone's human rights some of the time, you probably aren't doing your job."[26]

The treatment of detainees at Guantanamo led several FBI agents to file complaints with the FBI administrators, including beatings and the exploitation of the detainees' sexuality and religious beliefs, hooding, denial of food and water, sleep deprivation, use of loud noises and strobe lights, the use of dogs, and extreme temperatures.[27] After the scandal at Abu Ghraib, the FBI solicited further reports from Guantanamo, where agents reported detainees being held in cells for over 24 hours, denied food and water, and beaten. Many detainees were found in fetal positions after having urinated or defecated on themselves; and there were reports of detainees pulling out their own hair after the temperature in the room was made extremely high.[28]

This type of treatment was also reflected in confidential Bush administration memos written in 2002 that were released in 2004. These memos were allegedly written for the CIA, which had been aggressively interrogating suspects since 9/11 and were concerned about potential prosecution for their actions.[29] The first memo issued approval of a range of interrogation techniques, including changing normal sleep patterns, drastically changing the holding temperature, and subjecting detainees to "sensory assault" with noise and lights. With proper permission, the detainees could be subject to psychological techniques designed to create "feelings of futility" and the use of female interrogators on male detainees. Prisoners could also be made to stand for up to four hours at a time. However, physical contact of any kind, waterboarding, and the use of electricity were prohibited. Despite these limitations, the military acknowledged that two guards at Guantanamo Bay had already been disciplined for the use of excessive force against detainees.[30] A second memo argued that torturing detainees "may be justified" and that international laws on the subject "may be unconstitutional if applied to interrogations." Any government employee who engaged in torture could argue for "necessity and self-defense" to eliminate subsequent criminal liability.[31] The president was not bound by American or international laws on torture, and if national security was at stake, government agents who

tortured prisoners would be immune from prosecution on the president's authority.[32] Famously, an August 2002, a memo written by Alberto Gonzales argued that

> [t]orture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If the pain is psychological . . . these acts must cause long-term mental harm . . . In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.[33]

It was also noted that only those interrogators who had "specific intent" to torture would be covered—those who might have strayed into the realm of torture through overzealous questioning would not be covered under the torture laws, despite the fact that federal law does not make this distinction. This could be established either by a lack of intent to engage in torture through the reasonableness of the interrogator's belief or through a good-faith effort to stay within the law.[34] Another memo noted that because there were no long-term psychological consequences from particular techniques when the military used them against their own personnel in the SERE (survival, evasion, resistance, escape) training, these were also permissible to use on detainees, despite the fact that the SERE program does not expose soldiers to these techniques in the long term. Additionally, because there had been consultation with psychologists and interrogation experts, the memo argued that these methods could be pursued in "the presence of a good faith belief that no prolonged mental harm" would come to the detainees. Some later memos also argued that there could be no international legal consequences because the Convention Against Torture could not impose a different obligation on the United States than found in the torture statute, and ICC prosecution was not possible both because the United States had withdrawn its consent and because war crime prosecutions could occur only when the detainees are covered under the Geneva Conventions.[35] Finally, even if an interrogation method did violate existing statue, it would be unconstitutional if it interfered with the president's constitutional power to conduct a military campaign. With this legal backdrop, the CIA used waterboarding at least 83 times in one month on Abu Zubaydah and 183 times on Khalid Shaikh Mohammed. Additionally, this legal interpretation, though dismissed by the Obama administration, was upheld

in their declarations not to prosecute any agent who had acted in good faith in accordance with the memos.[36]

In addition to the reports coming out of Afghanistan and the CIA, the conditions at Guantanamo Bay also generated some controversy. An anonymous source described the techniques used in Guantanamo Bay since the fall of 2002 as "extremely aggressive" and "appalling," based on a very narrow legal definition of what constitutes torture.[37] The International Committee of the Red Cross (ICRC) was the only international organization that the United States allowed at Guantanamo up to this point, but it was not given a permanent presence on the base nor was it allowed to monitor interrogations.[38] Despite these problems, conditions across the camps were dissimilar. For instance, detainees held in certain facilities such as Camp Iguana had very few complaints about treatment. A 14-year-old released detainee was reported as saying, "Cuba was great! . . . I am lucky I went there, and now I miss it." Others at the same facility said that the US military treated them very well.[39] In addition, conditions sometimes changed over time for the better. For instance, the ICRC noted that complaints of sexual taunting stopped during the course of 2004.[40]

Abu Ghraib and CIA Black Sites

In April 2004 the Abu Ghraib scandal shifted the focus temporarily from Guantanamo Bay, and resulted in an internal army investigation finding 27 people to have committed offences.[41] For the first time in history, four Navy Special Forces personnel were charged with abusing the Iraqi detainee who later died in Abu Ghraib, a practice that military officials noted was very unusual given that the offences were committed on the battlefield.[42] The level of abuse was corroborated by an October 2003 ICRC report that stated that their representatives had witnessed prisoners being kept completely naked in empty concrete cells, having been told by the officer in charge of the interrogation that this practice was "part of the process." When a medical delegate examined them, he found that they were "presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behavior and suicidal tendencies," all of which appeared to have been caused by the methods and duration of detention.[43]

This treatment was not limited to Abu Ghraib. An American army captain stationed at Camp Mercury near the Syrian border in Iraq, Ian Fishback, testified to Human Rights Watch that abuses occurred there both before and after the Abu Ghraib scandal broke, including

pouring chemicals on prisoner's faces, shackling in stress positions, forced exercise leading to unconsciousness, and stacking prisoners in pyramids. He stated that commanders would tell army personnel that someone would be, for instance, the triggerman for an improvised explosive device, after which they would "fuck them up. Fuck them up bad . . . But you gotta understand, this was the norm." Another sergeant who remained anonymous testified that

> [e]veryone in camp knew if you wanted to work out your frustration you show up at the PUC [Persons Under Control] tent. In a way it was sport. One day (another sergeant) shows up and tells a PUC to grab a pole. He told him to bend over and broke the guy's leg with a mini-Louisville slugger, a metal bat. As long as no PUCs came up dead, it happened. We kept it to broken arms and legs.[44]

Furthermore, the sergeant stated that "trends were accepted. Leadership failed to provide clear guidance so we just developed it. They wanted intel [intelligence]." When Fishback consulted with a judge advocate general (JAG) about the abuse, the JAG told him that the Geneva Conventions are a gray area but that the abuse was within them.[45] *The New York Times* similarly reported on a Special Operations forces' prison, off-limits to the ICRC, called the Black Room at Camp Nama in Baghdad. Here detainees, under the guise of extracting information about Abu Musab al-Zarqawi, were subject to beatings with rifle butts, were yelled at, and were used as targets for paintball. Signs at the facility stated, "NO BLOOD, NO FOUL," explained by a Defense Department official as, "If you don't make them bleed, they can't prosecute for it."[46]

There is some evidence that the government was aware of the problems associated with the abuse in Iraq. The CIA station at Baghdad had sent a cable to headquarters on August 3, 2003, stating that it had concerns of the aggressiveness of the techniques Special Operations Forces were using in interrogations. Five days later the CIA issued a classified directive stating that no harsh interrogations were to take place and barred them from working at Camp Nama. A year later an FBI agent sent an email about a detainee captured by Task Force 6–26, who were involved in capturing high-value targets, claiming that he had been tortured and had suspicious burn marks on his body.[47]

At the same time that the Abu Ghraib scandal broke, *The New York Times* reported that the CIA was using a secret set of harsh interrogation techniques, endorsed by both the Justice Department and the CIA, against high-level al-Qaeda operatives. For Khalid Shaikh

Mohammed, they noted that one of the techniques used was "waterboarding." These methods were reportedly so harsh that the FBI told their agents to leave the room lest they permanently compromise themselves for future criminal cases.[48] Faced with the recent leaks and scandals, in 2005 the Pentagon approved a new policy directive that tightened controls over interrogations, ensuring that interrogators were properly trained and enacting measures through which soldiers in the field could report abuses. It specifically prohibited acts of physical or mental torture, the use of military dogs, and the involvement of military police in the interrogations.[49] The 2005 Detainee Treatment Act additionally prohibited cruel, inhuman, or degrading treatment of any individual in the custody or control of the US government.[50] However, *The New York Times* later reported that this update to the Army's Field Manual removed references to Article 3 of the Geneva Conventions in the section dealing with the treatment and questioning of prisoners.[51]

In another attempt to demonstrate reform, the Department of Justice reportedly asked the CIA to disclose the specific interrogation methods used on senior al-Qaeda operatives in an effort to dispel the idea that Department of Justice officials authorized methods that bordered on torture.[52] A military report published the following year on the abuses at Guantanamo Bay stated that though there was no evidence of physical mistreatment, several prisoners were mistreated or humiliated in other ways, perhaps illegally.[53] At the same time that it was taking action against the abuses, the Bush administration also increased pressure on its allies to prevent criticism. A European diplomat was quoted in the same year as saying, "It's very clear they want European governments to stop pushing on this. They were stuck on the defensive for weeks, but suddenly the line has toughened up incredibly."[54]

The next scandal involving allegations of torture by the United States occurred when the *Washington Post* stated that the CIA was hiding and interrogating the most important al-Qaeda captives in Eastern Europe, a system that was reportedly kept secret from public officials and "nearly all members of Congress charged with overseeing the CIA's covert actions." CIA interrogators at these sites were permitted to use "enhanced interrogation techniques" that were otherwise prohibited by law. The article noted that under American law only the president could authorize such a covert action. In total, the United States held about 100 people across the secret bases.[55] *ABC News* later reported that according to current and former officers, the CIA was quick to shut down the secret prisons in Poland and Romania after

they were discovered, moving 11 al-Qaeda suspects to secret jails in North Africa.[56]

A week later, *The New York Times* published a classified 2004 CIA report that included a list of 10 interrogation techniques for high-value detainees, including waterboarding, that were secretly created in early 2002. It also reported a deep unease with some of the techniques that were thought to violate the Convention Against Torture. Though the report did not say that techniques such as waterboarding constituted torture, they did constitute cruel, inhuman, or degrading treatment according to the convention.[57] *The Daily Telegraph* later reported that some CIA agents were taking out legal insurance policies that would cover detainee suits for torture and human rights abuses. Normally agents would be covered under government programs, but the *Telegraph* reported that there was some fear that this assistance could be withdrawn in cases of serious wrongdoing.[58]

The Bush Administration's Response to the Scandals

There were further attempts at the legal clarification of torture, such as in 2005, when the Justice Department published a memo with a revised definition of torture, stating that torture, previously defined as acts that led to "organ failure, impairment of bodily function, or even death," would now include acts that fell short of excruciating pain, including those that caused physical suffering or lasting mental anguish.[59] In 2006, the Supreme Court's Hamdan ruling rejected the structure of the Guantanamo Bay military commissions where evidence extracted through torture might have been admissible, and gave all detainees the protection of the Geneva Conventions, effectively outlawing torture.[60] This led the Bush administration to admit to the existence of then-secret CIA prisons.[61] The subsequent legislative struggle over what constituted torture culminated in a compromise bill between the White House and Senate.[62] Despite claims in August 2006 that the CIA detention centers had been shut down, the administration admitted that the sites reopened seven months later.[63]

The administration spent the rest of its term augmenting and defending the CIA program. This included diplomatic pressure, such as when CIA Director Michael Hayden was reported to have complained privately to European diplomats about their response to the American interrogations of terrorism suspects. He argued that fewer than 100 people had been detained in CIA "black site" facilities since 2002, and, of those, fewer than half had been subjected to "alternative procedures" in their questioning.[64] A former CIA interrogator, John

Kiriakou, argued that these procedures were effective, noting that Abu Zubaydah agreed to cooperate after being subjected to waterboarding, stating that "it was like flipping a switch."[65] Other CIA operatives claimed that Abu Zubaydah was able to withstand waterboarding for much longer than other detainees, but that "a short time afterwards, in the next day or so, he told his interrogator that Allah had vist[ed] him in his cell during the night and told him to cooperate."[66] In February 2007 the ICRC delivered a secret conclusion to the Acting General Counsel of the CIA, stating, "[T]he ill-treatment to which [the detainees] were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel inhuman or degrading treatment."[67] In July 2007 President Bush issued an executive order stating that detainees held by the CIA would be covered by Common Article 3 of the Geneva Conventions, protecting them from torture or "humiliating and degrading" treatment, specifically avoiding "intentionally causing serious bodily injury" and "forcing the individual to perform sexual acts," and for the CIA to adopt a separate and secret set of interrogation methods from those of the military. Privately, officials stated that waterboarding was now out of the question, but did not comment on sleep deprivation, stress positions, or other methods used by the CIA in the past.[68]

The administration also began to discuss the legal ramifications of the CIA program. Attorney General Michael Mukasey stated that he would not allow the Justice Department to investigate whether the CIA interrogators broke torture laws through waterboarding because the Justice Department had issued secret memos stating that the president's wartime powers made it legally permissible. He noted that if they investigated officials who took action on the basis of the memos, then others would stop trusting the legal opinions of the department.[69] The Justice Department subsequently announced that its internal ethics office was investigating its legal approval of waterboarding.[70] The counsel for the Office of Professional Responsibility stated, "Among other issues, we are examining whether the legal advice contained in those memoranda was consistent with the professional standards that apply to Department of Justice attorneys."[71] A letter sent on March 5, 2008, from the Justice Department to Congress stated that despite the executive order that made CIA comply with international treaties against the harsh treatment of detainees, "the fact that an act is undertaken to prevent a threatened terrorist attack, rather than for the purpose of humiliation or abuse, would be

relevant to a reasonable observer in measuring the outrageousness of the act." An anonymous official responded, "I certainly don't want to suggest that if there's a good purpose you can head off and humiliate and degrade someone . . . [but] there are certainly things that can be insulting that would not raise to the level of an outrage on personal dignity."[72]

This summary of the allegations and internal discourse on the treatment of detainees lends credibility that there was an attempt to utilize interrogation techniques that could constitute torture and create a legal backdrop through which this would be possible. It shows that there were some serious problems with detainee abuse, particularly in the military and the CIA, which led to domestic legal reform in an attempt to prevent similar future conduct. However, the executive continuously resisted any restrictions on their ability to use particular interrogation techniques that might constitute torture by arguing that there could be some emergency circumstances under which it would be permissible. In other words, Congress tightened the restrictions over what the CIA and other government agencies could do normally in interrogations, but the Bush administration did not support the non-derogable character of torture, claiming alternatively that they should be able to use special techniques in a state of emergency. There is also some evidence that the United States put pressure on its allies to prevent them from speaking out against the abuses. Finally, it shows that despite its legal norm revisionism, there were still real concerns within the Bush administration that the actions taken could lead to prosecutions, at least domestically.

The United States

Denial and Secrecy

The United States used two primary means to avoid or reduce the discussion of mistreatment allegations. The first strategy, utilized between 2002 and 2004, was to deny reports of mistreatment on the basis that there were factual errors in the statements by the media or other members of international society.[73] For example, Secretary of Defense Donald Rumsfeld commented on allegations of abuse at Guantanamo Bay in early 2002, asserting, "the numerous articles, statements, questions, allegations, and breathless reports on television are undoubtedly by people who are either uninformed, misinformed, or poorly informed."[74] Claims of misinformation were also used between 2004 and 2006 when responding to specific reports by

international organizations concerning the detainee abuse, at times adding that the allegations made by international organizations were not only false but also politically motivated.[75] The second means to avoid or reduce the discussion of mistreatment allegations was to appeal to the need for secrecy. When reasons were given for the secrecy, they revolved around the argument that sharing such information could aid future terrorists in developing ways to combat the interrogation techniques.[76]

In general, discourses that involve only denial or appeals to secrecy occur because a state wants to avoid legitimation contestation from other members of international society for conduct that it suspects might be illegitimate. However, this does not necessarily absolve the state from the costs of illegitimacy. If these types of discourses occur at a time when the alleged conduct is widely viewed to be illegitimate, they will not necessarily help to prevent the state from the costs associated with the illegitimate acts as other actors in international society can still engage in legitimation discourses that place costs on the offending state. At best, they can only allow the state to avoid engaging in a legitimation discourse that might be even less successful in terms of avoiding costs and maintaining its legitimacy. However, if other states accept that US actions are not worth discussing openly, this strategy might be successful in alleviating short-term costs, and would also point to a relative weakness in the particular international human rights norms.[77] This does not necessarily lead to an optimal long-term outcome for the Bush administration; however, as Ian Hurd argued, any type of secrecy is a high-risk strategy to pursue because there are negative consequences associated with the exposure of illegitimate behavior.[78] The other possibility explaining the presence of the discourse is that the state feels that it is in such a strong position, either ideationally or materially, that it can ignore other actors, refuse to engage in practices of legitimation, and absorb the costs of what others view as illegitimate actions.[79]

Moral Legitimation

The moral legitimation strategy of the United States occurred via four major types of discourses. The first set of legitimating discourses focused on entrenching the idea of a state of exception, through appeals either to the special nature of terrorism itself or the detainees in particular. This was complemented with an argument that the state had a duty to protect its citizens under such conditions. The second discourse involved an argument that the United States did not engage

in torture either because torture was abhorrent, the treatment of the detainees was respectful, or claims by detainees that contradicted these statements were dubious. Third, the United States promoted the idea that torture was a contested idea and suggested that particular methods that the government engaged in were not torture. Lastly, it appealed either to the character of the state or to the character of the interrogators, arguing either that it is not within the US character to engage in torture or that the interrogators were professionals with proper procedures in place so acts of torture are unlikely.

State of Exception

The first moral legitimation strategy used by the Bush administration was to argue that there existed exceptional circumstances brought on by the threat of terrorism. As the state has a duty to protect its citizens, this justified the differential treatment of the detainees—treatment that was effective in combating this special threat. This type of argument could be problematic for the Bush administration because torture is defined under international law as a right to which there can be no derogations under any circumstances.[80] To counter this problem, the Bush administration never directly linked the argument of exceptional circumstances to specific changes in the treatment of the detainees. Instead, it referred generally to exceptional circumstances in discussions on detainee treatment, usually in light of the potential for a future terrorist attack. This legitimation strategy allowed the Bush administration to suggest that there were extraordinary circumstances that might permit treatment that would otherwise be unacceptable without making statements that would be in conflict with its treaty obligations.

This legitimation strategy involved the use of contradictions between the prevailing norms against torture and the need to provide physical security for US citizens, in the hopes that the Bush administration could legitimate actions that fell within the penumbra of the accepted definition of torture. In Skinnerian terms, this is an attempt to associate a negatively held evaluative-descriptive term, torture, with a positively held one, security, in order to offset the negative reaction to the former. Notably it is this particular contradiction, as David Luban argued, that allows torture to be legitimated in a liberal democracy. Instead of portraying torture as the application of cruel agency, torture is committed by those who find themselves in circumstances where it is a necessary evil that they otherwise would not commit. As such, the Bush administration argued that there were exceptional circumstances that could be alleviated by state action

through intelligence-gathering methods that were effective. Stressing the exceptional circumstances and particularly the effectiveness of intelligence-gathering methods, one of the most frequent moral discourses employed by the Bush administration, made it more likely that the discourse would be accepted in a liberal democracy under Luban's framework.

However, the clear limitations faced by the United States that prevented it from directly applying the idea of exceptional circumstances to differential detainee conduct also demonstrates the legitimacy of the torture norm being non-derogable. As Schimmelfennig noted, when actors are faced with the external constraints of legitimate norms, they are forced to argue their case through the pre-existing legitimate standards. This lack of direct appeal means that the non-derogable nature of the torture norm under exceptional circumstances is likely one that the United States was aware of, and felt constrained sufficiently by, so that it would prefer to sidestep the issue rather than directly confront the norm.

The administration justified exceptional measures both through an appeal to the risk of future terrorist threats and the differing and exceptional nature of the detainees. In an example of the former, Vice President Dick Cheney alluded to the possibility of non-standard interrogation methods days after 9/11. He argued that, in addition to using military force against al-Qaeda,

> 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. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful.[81]

Cofer Black, the head of the CIA Counterterrorist Center, likewise stated in September 2002 that there was "operational flexibility" in dealing with detainees, noting that "there was before 9/11, and there was an after 9/11 . . . After 9/11 the gloves come off."[82] In 2004, military spokespersons appealed to the condition of war to legitimate alternative interrogation tactics.[83] Speaking to reporters en route to Berlin in 2005, Secretary of State Condoleezza Rice similarly asserted that the war on terrorism "is frankly challenging our norms and our practices."[84] The exceptional circumstances discourse appeared more frequently in 2005 and 2006, primarily through administration officials reminding their audiences of the special dangers inherent in the terrorist threat,[85] but declined near the end of the administration,

occurring only a handful of times in 2007 and 2008.[86] Notably, the White House spokesperson stated in 2008 that the president could authorize further waterboarding on terrorist suspects under certain circumstances, particularly if they were to believe that an attack may be imminent.[87]

In addition to speaking to the general danger of terrorism, the administration also reinforced the exceptionalist discourse by making claims that the detainees were unusual or extraordinary themselves. General Richard B. Myers was quoted as saying that the detainees were so dangerous that if not properly bound during transport "they would gnaw through the hydraulic cables"[88] on their transport plane to make it crash. From time to time this moral aspect of the claim would be more explicit, such as when Deputy Secretary of Defense Eric Ruff stated, "We face an enemy who has no standards, respects no laws, and whose destructive intent has no limits."[89] The discourse that the detainees were "dangerous" or were "bad people" in some way was a very common legitimation tactic for members of the Bush administration, particularly in 2005 and 2006.[90]

The discourse that the state had an overriding duty to protect its citizens only occurred between 2005 and 2006. It is possible that this was added to the Bush administration's legitimation discourses because of the pressure from the torture scandals the Bush administration felt that it needed to make the protective role of the government over its people explicit to legitimate its actions. In effect, it used another contradiction between norms to emphasize the positive role that the state provides for its citizens in contrast to the negative conduct of torture. Again, at no point did an administration official directly tie together the duty of the state to differential interrogation techniques. Instead, these arguments only occurred while discussing these interrogation techniques. This only reinforced the claim that there was a pre-existing norm that prevented the Bush administration from explicitly tying together the protective role of the state with potentially torturous interrogation methods. In one example, the executive stated that proposed legislation to limit interrogation methods would usurp the president's authority and, according to a White House official, interfere with the president's ability "to protect Americans effectively from terrorist attack."[91] The administration would sometimes direct this discourse at other states. Condoleezza Rice used this argument during a visit to Europe in an attempt to reassure the European allies, reminding them that "we are all working together through law enforcement cooperation, intelligence cooperation, to try and produce the very best outcome to protect innocent citizens."[92]

She emphasized the unique nature of the situation in later statements during this trip, reminding others that the state has a duty to protect its citizens in the face of this unique danger.[93] The Bush administration also used this discourse after the press disclosed the existence of the CIA black sites.[94] Moreover, the administration appealed to needing the proper tools with which to conduct the war on terror a few times late in its tenure. In an interview with Matt Lauer, President Bush responded to a question concerning whether the administration had gone too far in interrogating terror suspects, stating, "You can't expect me, and people in this government, to do what we need to do to protect you and your family if we don't have the tools that we think are necessary to do so."[95] A government spokesperson similarly stated of a bill that would limit the interrogation capabilities of the CIA that it, "would take away one of the most valuable tools on the war on terror: the CIA program to detain and question key terrorist leaders and operatives."[96]

Having argued that there existed exceptional circumstances and that the state has the primary duty to protect its citizens, the Bush administration contended throughout its entire term that the successful interrogation of detainees was important to alleviating the security risk, again attempting to associate US interrogation techniques with security. The sheer volume of these statements reflects Luban's book that liberal democracies can engage in torture only as an act to prevent future evils and not as punishment or terror that would be antithetical to the liberal project. Even as early as 2002 Rumsfeld responded to an accusation of the torture of Abu Zubaydah by arguing that "We are very anxious to gather as much intelligence as we can. We've been working hard on it and we intend to continue it."[97] Two days later he did admit during questioning from reporters that "the overriding importance—important issue is intelligence gathering" and that "and we intend to get every single thing out of him to try to prevent terrorist acts in the future."[98] Between 2005 and 2006 many administration members used this discourse, particularly President Bush.[99]

Once the media publicized the methods of interrogation, the Bush administration began to emphasize that the interrogations were working to produce actionable intelligence. They claimed that after almost 100 sessions with both the CIA and the FBI, the interrogation of Abu Zubaydah had resulted in information that allowed the administration to pre-empt a new wave of attacks and arrest an American citizen accused of plotting to detonate a radioactive device in the United States. In addition, they claimed that Abu Zubaydah provided information about the identity of Khalid Shaikh Mohammed, one of

the central planners of the 9/11 attacks.[100] The administration made widespread claims concerning the usefulness of the information gathered from the interrogations of detainees,[101] when defending the CIA secret prisons,[102] opposing legislation that might limit the CIA interrogation program,[103] justifying waterboarding,[104] or defending the interrogation program more generally.[105]

Torture Is Abhorrent and Not Conducted

The second major discourse of the Bush administration was that torture is abhorrent, that it was not conducted by the administration, and, where it did occur, the government brought the perpetrators to justice. The discourse concerning the morally repulsive and unproductive nature of torture attempted to separate the interrogation techniques of the administration from torture. It also suggested that by upholding the moral norm against torture the United States was not as much challenging the torture norm as it was attempting to revise the definition of torture. In other words, there was a difference between special interrogation techniques used, which were both apt for the situation and effective, and torture, which was morally unjustified. However, there were far fewer statements concerning the lack of utility for torture versus its moral repulsiveness, which might indicate, given the large discourse over the positive utility of the interrogation techniques, that there was some belief within the administration that interrogation techniques that pushed the boundaries of what was considered torture were useful. The legitimation strategy that declared the treatment of the detainees to be respectful serves, in parallel with the discourse that torture is abhorrent, as a discourse that legitimated the norm against torture but underpinned the Bush administration's desire to use its alternative interrogation techniques, which were still respectful, though possibly harsher than normal.

The claim that the administration did not torture is one of the more difficult discourses to classify, as it could mean two things. First, it could indicate that the United States did not torture as defined by international standards, in which case it was a denial discourse that operated to avoid the costs associated with potentially illegitimate activity in conjunction with secrecy and claims of misinformation. Second, it could mean that the United States did not torture according to its own standards, standards that were different from those of international society, and it was attempting implicitly to legitimate these domestic standards. If this was the case, then the discourse was a legitimation strategy that attempted to normalize particular behavior that would otherwise be unacceptable. However, as there was

relatively full knowledge of the techniques used in the Bush administration's interrogation program when this discourse was prevalent, it points toward the latter interpretation that the United States was not torturing according to its own standards.

The United States also acknowledged that abuse had occurred, but claimed that these were isolated mistakes that, first, did not represent the status quo and, second, were followed either by changes in policy or by additional monitoring by independent agencies. This helps to reinforce a number of issues. First, it appeals to Luban's claim that torture in a liberal democracy can only be for the purposes of intelligence gathering, so when government operatives step beyond this, it is important to demonstrate that there are corrective mechanisms. Second, it helps to play into the previous discourses stressing that there is professionalism among the interrogators and that the United States is a liberal democracy with a particular character that abhors torture. Third, the argument that the abuse was not systematic, but was only perpetrated by lower-level agents, helps to protect the executive from issues of command responsibility.

The first discourse by the Bush administration was that the treatment of the detainees was respectful without any reference to a particular law or treaty. This discourse was particularly prevalent when information came out that suggested that the United States was abusing prisoners both in 2002 and in the period from 2004 to 2006.[106] Administration officials often nuanced this discourse with the idea that detainee treatment would not necessarily be ideal given their previously legitimated status as dangerous, but would at least meet particular standards.[107] Administration officials also tied the need for respectful treatment with the utilitarian value of this treatment in yielding intelligence. For instance, a military spokesperson stated that respectful treatment was strategic because "the more comfortable that the detainees are, we're hoping that they're going to be more forthcoming with information."[108] The Bush administration reiterated this claim in 2005 and 2006 when an army psychologist described the accoutrements in the interrogation room at Guantanamo Bay, including a faux Persian carpet, a coffee pot, a mini-fridge, and a La-Z-Boy recliner.[109] Another official argued that "the most common method used to interrogate detainees is to sit down with them, watch a movie and eat pizza . . . You build up a relationship with them and eventually they co-operate."[110] In 2006 and 2007, administration officials simply claimed, for the first time, that the United States does not torture.[111] This switch in discourses from the respectfulness of treatment to the outright denial of torture might indicate that sufficient

pressure had been placed on the Bush administration that caused it to directly confront allegations that it tortured instead of making claims about respectful treatment.

The discourse that torture was morally repulsive was prevalent particularly after the Abu Ghraib scandal.[112] In general, from 2003 to 2006 the Bush administration declared that torture was immoral or that it did not tolerate its use.[113] For instance, in a report to the United Nations Committee Against Torture, the US government stated that "the United States is unequivocally opposed to the use and practice of torture . . . [and that] no circumstance whatsoever, including war, the threat of war, [or] internal political stability" can justify its use.[114] However, the Bush administration's claims that torture is ineffective were somewhat sparser.[115] For instance, John Ashcroft stated in front of the Senate Judiciary Committee that despite the 100-page memo, "I condemn torture. I don't think it's productive, let alone justified."[116] John Negroponte similarly stated at his confirmation hearing before the US Senate that the CIA and other agencies would be in "full compliance" with laws that ban torture as torture is not "an effective way of producing useful information."[117]

The Bush administration additionally argued that although particular abuses had occurred, it had brought the perpetrators of those abuses to justice. This occurred even before the Abu Ghraib scandal, when the US military charged six soldiers with indecency and assault over transgressions at the Abu Ghraib prison. Brigadier General Mark Kimmitt stated that "less [sic] than 20" prisoners were abused, and that "Even though it was a very small number, that's the kind of cancer you have to cut out completely."[118] He continued, "[T]he coalition takes all reports of detainee abuse seriously, and all allegations of mistreatment are investigated."[119] This idea that those who committed abuse would be brought to justice was particularly prevalent after the Abu Ghraib scandal.[120] After the trials of these suspected personnel, the discourse transformed to focus on the claim that the Bush administration had brought those responsible to justice.[121] The United States rarely addressed the systemic nature of the abuse. President Bush made statements that portrayed the acts of abuse as the responsibility of one of a few bad apples, arguing how the abuse showed, "how much difference, for good or ill, the choices of individual men and women can make . . . The cruelty of a few has brought discredit to their uniform and embarrassment to our country."[122] At other times, the administration explicitly stated that the abuse was not systemic.[123]

The last discourse was to question the moral character of the detainees. This involved claiming that they always lied in the hopes of

diminishing the legitimacy of any statements that the Bush administration might make with regard to their mistreatment. In a 2001 Senate Judiciary Committee meeting, John Ashcroft displayed what he called a "seized al Qaeda training manual," which he described as a "how-to" instruction manual for terrorists that instructed them to "exploit our judicial process for the success of their operations . . . to concoct stories of torture and mistreatment at the hands of our officials."[124] This legitimation strategy was continued almost two weeks later by Paul Wolfowitz at a press conference. When asked by a reporter about the interrogation plans for 18 prisoners in US custody, he stated that "it's a complicated business . . . [because] these guys are very skilled liars. They lie shamelessly; when you catch them out in a lie, they go on to another lie."[125] This discourse reappeared over the debate concerning detainee suicides in 2003,[126] when countering allegations of ill-treatment while attempting to force-feed detainees on hunger strike in 2006,[127] and to defend the allegations of mistreatment by Omar Kadr in the same year.[128]

Contesting and Defining Torture

In addition to arguing that there was a state of emergency that required special detainee treatment, but arguing that torture was reprehensible and not conducted, the Bush administration also attempted to define what it meant by torture. First it argued that torture was a fundamentally contested concept, by focusing on the fact that there is no commonly accepted definition of torture. This further played on the doubt that there are circumstances in which one might feel morally squeamish about particular action, but where structural constraints might force one's hand. At the same time, administration officials gave examples of acts that they would not regard as torture, sometimes being quite specific. Legally, this was an important distinction because there are interrogation techniques that may be particularly cruel or unusual, but would not rise to the level of torture and therefore have fewer legal ramifications. This legitimation strategy also set up potential contestation between the United States and other actors in international society since it put forward contestable claims regarding what actions constituted torture. It also demonstrates that there was less confidence about the nature of waterboarding, as no administration official directly came out and stated that waterboarding was not torture. Instead, they would imply that waterboarding was not torture or argue that they personally thought it was torture, but that they could not comment on its legal status.

Some administration officials set an exceptionally high bar as to what constituted torture when asked to define it. Paul Rester of the Joint Interrogation Group stated in 2006 that it was "the deliberate and sadistic of [sic] mental or physical pain on another human being. It's as simple as that. For the pure and simple satisfaction of doing it. It serves no redeeming social value in eliciting concrete information."[129] National Intelligence Director Mike McConnell defined torture in 2007 as "mutilation or murder or rape or physical pain, those kinds of things."[130] Administration officials would also appeal to relativism in their definition of torture. In 2005, Director of the CIA Porter Goss defined torture "in terms of inflicting pain or something like that, physical pain or causing a disability, those kinds of things that probably would be a common definition for most Americans, sort of you know it when you see it."[131] Attorney General Alberto Gonzales similarly stated at a meeting that "[i]f we went around this room, people would have different definitions of what constitutes torture, depending on the circumstances."[132] On the subject of waterboarding, however, some administration officials claimed that it was torture to them, but would not make claims of legality beyond their personal feelings on the matter.[133]

The Bush administration also argued that particular interrogation techniques did not constitute torture. Between 2003 and 2005, administration officials claimed that acceptable interrogation techniques consisted of temporary deprivations of sleep, light, food, water, and medical attention, covering detainees in black hoods, having them stand or kneel in uncomfortable positions, subjecting them to extremes of hot or cold, or using detainee's children as leverage;[134] interrogating them for 20 hours a day for two months, telling them that they were gay, forcing them to dance with a man, forcing them to wear a bra, and forcing them to wear a leash and perform dog tricks;[135] and any of the 24 interrogation procedures permitted at Guantanamo, including placing detainees in uncomfortable cells or pretending that they had been flown to a Middle Eastern state for interrogation.[136] They also claimed that the interrogation techniques used were not torture without disclosing what the techniques actually were. Donald Rumsfeld, when asked in 2004 whether the American troops tortured detainees, stated,

> I'm not a lawyer. My impression is that what has been charged thus far is abuse, which I believe technically is different from torture . . . I don't know if the—it is correct to say what you just said, that torture has taken place, or that

there's been a conviction for torture. And therefore I'm not going to address the torture word.[137]

Various spokespersons in the intelligence community made similar statements.[138] Sometimes this argument relied on the legitimacy of domestic legal decisions, such as in an interview with Bill O'Reilly where George Tenet argued that the techniques used by his officers were legal because "[w]e know that the attorney general of the United States told us it was not torture."[139]

Later, the Bush administration implicitly argued that waterboarding was not torture. In 2006 Vice President Cheney was asked on a radio show whether "a dunk water [sic] is a no-brainer if it can save lives?" He responded, "Well, it's a no brainier for me, but I—for a while there I was criticized as being the vice president for torture. We don't torture. That's not what we're involved in."[140] This characterization of waterboarding as an obvious tactic given the circumstances, followed by a claim that the United States does not torture, suggests that waterboarding itself would not be classified as torture. In 2008, when President Bush was asked about waterboarding, he correspondingly replied, "we, within the law, interrogate and get information,"[141] suggesting again that waterboarding might be "within the law" without explicitly saying so. Similarly, when asked about waterboarding two days later, Stephen Bradbury, a senior official in the Office of Legal Council, replied that the permitted interrogation tactics were "quite distressing, uncomfortable, even frightening," so long as they did not cause enough severe and lasting pain to constitute torture.[142] Thus, so long as waterboarding did not meet the threshold of both severity and duration outlined by the Justice Department, it could not be said to constitute torture.

Torture Is Not in Our Character

The last major moral discourse of the Bush administration was to argue that torture could not take place in the United States because of the character of the state or the interrogators themselves. It argued that it is not in the character of the state to use torture attempts to leverage the legitimacy of the United States, perhaps specifically its democratic nature, in order to assuage international criticism. It can be a difficult discourse to implement, because by explicitly focusing on the legitimacy of the state or its institutions, one potentially opens the structures themselves up for criticism. Appealing to the character of the interrogators themselves is an argument related to the professionalism of the interrogators. This echoes Luban's claim

that torture cannot occur in liberal democracies if linked to cruelty. Instead, by appealing to proper procedure, tools to achieve a goal, and given the professionalism of the interrogators, the program was acting with restraint in a manner consistent with liberal values, only applying enough pressure to the detainees as was needed to prevent future terrorist attacks. The Bush administration officials further consolidated this discourse through their claims that interrogators should receive immunity from prosecution, as those interrogating detainees were not sadists, but only state agents attempting to prevent terrorism.

Concerning the legitimation strategy that torture is not part of the American character, President Bush stated as early as 2003, "No, of course not—we don't torture people in America, and people who make that claim just don't know anything about our country."[143] Similarly, after the Abu Ghraib scandal, President Bush responded to the pictures of prisoner abuse in Abu Ghraib by stating, "I share a deep disgust that those prisoners were treated the way they were treated. Their treatment does not reflect the nature of the American people."[144] Other administration officials followed up between 2004 and 2006 by emphasizing either that Americans do not torture others and that there would be no cover-up of torture in a democratic system unlike in other more dictatorial states,[145] that torture was not an American value,[146] that the United States was a leader in human rights,[147] or that the structures of liberal democratic society would bring perpetrators to justice.[148] The United States attempted to demonstrate its character by reminding the audience of the relative openness of the state and the media. Other actors in international society, particularly the ICRC, were monitoring the United States' conduct. This legitimation discourse was prevalent after various scandals over the torture of detainees.[149] The US Department of State also invited three UN experts to visit Guantanamo Bay to ensure that the detainees were treated properly,[150] the officer in charge of media relations at Guantanamo Bay later mentioning that "we keep inviting people down, even the people from organizations that say we torture."[151]

An example of the discourse stressing proper procedures occurred when a Pentagon spokesperson explained in 2004 that "the high-level approval is done with forethought by people in responsibility, and layers removed from the people actually doing these things, so you can have an objective approach."[152] Similarly, after the Abu Ghraib scandal broke, a spokesperson for the American military denied the claims that mistreatment at Guantanamo Bay was equal to that at Abu Ghraib,

stating, "From the beginning we have taken extra steps to treat prisoners not only humanely but extra cautiously."[153] Several administration officials used this legitimation strategy between 2004 and 2008.[154] Even waterboarding was defended with this discourse, the administration arguing that it was subject to "strict time limits, safeguards, [and] restrictions" and that water had not entered the lungs of the three prisoners subjected to the practice. [155]

The last discourse in this category was to appeal to the professionalism of the interrogators. For instance, National Security Advisor Stephen Hadley defended the program in an interview with George Stephanopoulos, stating, "this is not a program out of control. This is a program that is conducted pursuant to law by professionals who receive a lot of training."[156] Similarly, between 2005 and 2008, other members of the administration appealed to the professionalism of the interrogators.[157]

Legal Legitimation

Norm Entrepreneurship

In order to understand the legal norm entrepreneurship that the Bush administration engaged in, it is necessary to place it within the context of the previous moral argumentation. The moral legitimation strategies that stressed the state of exception due to the dangers of terrorism, the duty of the state to protect its citizens, and the importance of intelligence gathering provide the backdrop to the Bush administration's legal challenges during its tenure, in terms of both international human rights and humanitarian law. The United States attempted to act as a norm entrepreneur through both international humanitarian law, where they claimed that the detainees should receive differential treatment, and international human rights law, where it challenged the geographical scope of applicability of the Convention Against Torture and passed legislation that gave the powers of defining torture to the executive. However, there are very few statements of either type, and no legal legitimation occurred past 2006, suggesting that the United States believed it had been unsuccessful in its attempts to innovate and had given up. This idea is reinforced by a subsequent revival of legitimation via domestic legal sources from 2006 to the end of the Bush administration's term.

Within international humanitarian law, the administration attempted to justify differential treatment for the detainees of the war on terror through an appeal to the notion that they were not prisoners of war,

but instead "enemy combatants" who had fewer rights. This legal legitimation strategy correlates with the moral legitimation strategy that the detainees were morally suspect and were to be treated respectfully in light of their position as particularly heinous individuals who could commit future crimes. In response to the initial Guantanamo pictures, Donald Rumsfeld insinuated that the detainees were not classified as prisoners of war, stating that they were only "for the most part" being treated "in a manner that is reasonably consistent with the Geneva Convention."[158] This was built upon by Secretary of State Colin Powell, who added,

> A certain set of criteria were applied to the terrorists at Guantanamo, that they were illegal noncombatants, and a different set of criteria were applied to the people that came into our custody in Iraq. That was clearly during [a] normal conventional war and they would be treated fully within the Geneva Convention.[159]

However, this appeal to norm change in international humanitarian law was limited in scope, and after 2006 there were no further attempts to legitimate a reclassification of the detainees in the administration's discourse concerning their proper treatment.[160]

A longer-lasting but equally sparse legal discourse that attempted to innovate through the medium of international human rights law dealt with the interpretation of the Convention Against Torture. Here the administration attempted to argue that there were geographical limits to the applicability of the convention that rendered it inapplicable to those held in Guantanamo Bay. In a March 2003 memo entitled "Working Group Report on Detainee Interrogations in the Global War on Terrorism," lawyers assessed the rules for interrogations at Guantanamo Bay, stating that while the United States ratified the Convention Against Torture, it did so with "a variety of reservations and understandings" and that "the United States has maintained consistently that the covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict."[161] Similarly, in his confirmation as attorney general, Alberto Gonzales stated that nonmilitary personnel such as CIA agents fell outside the 2002 directive on the humane treatment of prisoners issued by President Bush, and that the Congressional ban on cruel, unusual, and inhuman treatment of prisoners did not extend to all cases of aliens overseas.[162]

Treatment in Accordance with the Law

At the same time that the United States was attempting to innovate within international law, it also used legitimation strategies where it claimed that it was acting within the law, both international and domestic. However, like previous legitimation strategies where it denied that torture was taking place, this was potentially norm entrepreneurial depending on whether the United States intended to make the statements to deny the actions that it was taking or to indicate that it considered that the publicly known interrogation methods were in accordance with international law. This legitimation strategy took two general forms. The first was to use the idea of lawfulness without engaging in legal argumentation itself. The second was to engage actively in direct appeals to international or domestic law.

The general discourse of lawfulness without engaging in legal reasoning occurred throughout the administration.[163] The use of this discourse might have indicated an unwillingness to engage directly in legal debates over the treatment of the detainees, as there was no specificity to what law it was engaging with, while still attempting to give the impression that the techniques were legal. For instance, as part of his confirmation as attorney general, Alberto Gonzales stated, "there was a desire to explore certain methods of questioning these terrorists," though "there was concern that nothing be done that would violate the law."[164] At times, "international law" was referenced without any clue as to what particular aspect was being discussed,[165] such as when General Richard Meyers noted that "torture is not one of the methods that we're allowed to use and that we use. I mean, it's just not permitted by international law. And we don't use it."[166] This type of claim was more specific than appealing to the law in general, since it demonstrated an assertion that the methods used to interrogate the detainees fell specifically within international norms. Again though, because of the lack of specificity, it is difficult to know whether this was the intention, or whether they were used in the same manner as the discourses appealing to generalized "law." This problem also exists with rather frequent statements that covered a gambit of laws, mentioning both international and domestic sources.[167] This discourse was less abstract than the previous legitimation strategy of appealing to "the law" in general, and can be interpreted more as a direct claim to legality. However, in its generality it could also be understood as a means to make a discursive appeal to the law without engaging in the legality of the treatment of the detainees. In a typical example, John Ashcroft stated in front of the Senate Judiciary Committee that the administration "has operated with respect to all of the laws enacted

by the Congress, all of the treaties embraced by the president and the Congress together, and the Constitution of the United States, and no direction or order has been given to violate any of those laws."[168]

The second set of legal discourses directly appealed to specific international or domestic laws. These were almost certainly claims that the treatment of the detainees was legal, but were relatively rare compared to the legal discourses that did not appeal to specific laws. Some discourses explicitly cited international humanitarian law. Donald Rumsfeld responded to an accusation of the torture of Abu Zubaydah by reiterating that the United States was not torturing them: "We're treating these people under the Geneva Convention and in a humane way."[169] This appeal to international humanitarian law was particularly prevalent among military spokespersons in 2003 and 2004,[170] but other administration officials occasionally used the discourse up to 2006.[171] Other references were explicit in mentioning international human rights law. For instance, the State Department issued a statement on the International Day in Support of the Victims of Torture in 2002, "freedom from torture is an inalienable human right, and the prohibition of torture is a basic principle of international human rights law. This prohibition is absolute and allows no exception . . . The United States is committed to the world-wide elimination of torture."[172] Some administration statements in 2005 and 2006 specifically mentioned treaties such as the Convention Against Torture, but again these were relatively rare.[173]

Finally, the Bush administration would appeal solely to its own domestic law in responding to claims of torture or mistreatment. This had a bimodal distribution, appearing just after 9/11 and just before the end of the Bush administration's second term. This distribution, particularly in light of how appealing to international sources of law disappeared at the end of Bush's second term, seems to demonstrate that the administration had given up on appealing to international law and was placing increasing emphasis on domestic sources of legal legitimacy. For instance, when the United States allowed some reporters to visit the Guantanamo facility in early February 2002 to refute the claims of torture, Brigadier General Mike Lehnert stated, "the questioning that goes on is within the bounds of normal legal procedures that are in effect within the United States."[174] Despite a discourse in 2003 that did not mention domestic law directly, but instead referred to American standards or civil rights,[175] direct appeal to solely domestic law did not reappear until 2005, when the Assistant Secretary of State for Democracy, Human Rights, and Labor asserted that "torture and other forms of abuse are absolutely verboten under U.S. law

and policy for all agencies, including the intelligence agencies."[176] The idea that the administration adhered to the domestic law of the United States, which prohibits torture, was used by several officials up to 2007.[177] Notably, Attorney General Michael Mukasey testified before Congress that the Justice Department would not investigate whether US interrogators broke the law when they waterboarded suspected terrorists because "whatever was done as part of a CIA program, at the time that it was done, was the subject of a Department of Justice opinion through Office of Legal Counsel—and was found to be permissible under the law as it existed then."[178]

International Society

Challenging Claims

This section will review all of the arguments that the other members of international society used that did not involve the legitimation of torture. They can be broken up into two categories. The first category consisted of challenges to claims that the United States did not abuse the detainees. This discourse countered US attempts to avoid engagement in practices of legitimation with other members of international society. The second was to call for investigations or ask for additional information on the nature of the abuses. Again, this brought focus on US conduct and forced the United States into a position where it needed to legitimate its behavior. Few members of international society chose to engage in these discourses, instead focusing on moral and legal legitimation strategies over the abuse that was already publicized. Of those that did, almost all were representatives of international organizations.

International organizations publicly aired their concern about the abuses allegedly conducted by the United States between 2002 and 2005, though the discourse was rather sparse in frequency.[179] For example, UN Special Rapporteur on Torture Theo van Boven noted that

> detainees in Bagram Air Base, Afghanistan, had been subjected to "stress and duress" techniques during interrogation by the Central Intelligence Agency [and in particular] had allegedly been subjected to prolonged standing or kneeling, hooding, blindfolding with spray-painted goggles, sleep deprivation and 24-hour lighting, and were kept in painful or awkward positions.[180]

However, not all international organizations reinforced the discourse that the United States was treating detainees poorly. For instance, the

head of European Union (EU) anti-terrorism, Gijs de Vries, stated in 2006 that there was no evidence to prove that the CIA had secret prisons in Europe, arguing that neither the European Parliament nor the Council of Europe investigations uncovered human rights abuses.[181] From 2004 to 2006 international organizations tended to call for investigations of the allegations, request further information from the United States, or question whether current investigations were sufficient.[182] A letter from the Special Rapporteur on Torture to the US government dated October 22, 2003, asked the administration for information regarding the alleged conditions at the military base at Guantanamo Bay.[183] European officials similarly vowed to investigate reports of mistreatment, stating that they "have to find out exactly what is happening."[184] This concern was extended with the revelation of CIA secret prisons. Manfed Nowak argued several times that the existence of these facilities could indicate serious violations of human rights, especially since torture is more frequent in incommunicado detentions.[185] Louise Arbour also expressed her concern several times, writing that she held that the "disappearance" of those in the secret detention

> in and of itself has been found to amount to torture or ill-treatment of the disappeared person or of the families and communities deprived of any information about the missing person. Furthermore, prolonged incommunicado detention or detention in secret places facilitates the perpetration of torture and other cruel, inhuman or degrading treatment.[186]

The ICRC asked the United States that, if these facilities did exist, a representative be allowed to visit.[187]

Moral Legitimation Strategies

Other members of international society pursued several moral legitimation strategies in response to the allegations of US treatment of detainees and US legitimation strategies. Some of the discourse supported the Bush administration by parroting back its messages. Some implicitly supported the treatment of the detainees through appealing to the danger of those held or the exceptional circumstances brought on by the security problems surrounding the terrorist threat. Others corroborated the Bush administration's position by arguing that particular interrogation techniques did not constitute torture and that the character of the American state would not allow torture to occur, or by reminding their publics that despite the problematic conduct,

the United States was a friend and ally. These discourses point to some weaknesses in the norm as, all things being equal, a strong norm under threat will yield rather uniform responses criticizing the conduct or discourse of the offending member of international society. The majority of the moral legitimation strategies, however, involved criticizing the United States for its conduct or legitimation strategies. This included stating that they were morally appalled by the abuse, using the US conduct as a means to minimize their own human rights problems, issuing reminders that there should not be trade-offs between human rights and counterterrorism strategies, defining specific abuses as torture, and reminding the United States that it had a special role to play in the human rights system.

No Evidence of Abuse

States in international society would, at times, declare that there were no problems with the human rights conduct of the United States, through declaring that there was no evidence that the detainees were being mistreated. This was a relatively rare phenomenon, indicating that very few states believed that the United States was treating the detainees in an acceptable manner, at least enough to publicly support the United States. For example, the British government defended the American treatment of the detainees in 2002, stating that among the three British detainees at Guantanamo Bay there were no complaints of ill-treatment and they seemed to be in good physical health.[188] This claim, however, was not as significant given that we know that the relative level of mistreatment was low at this time. More noteworthy were similar claims regarding there being no evidence of the mistreatment of prisoners made by Australia between 2003 and 2005,[189] and Denmark in 2005.[190] There was also one example of Western states attempting to avoid debate on the topic. In 2004, Cuba presented a resolution to the UN Human Rights Commission calling on the Americans to open Guantanamo Bay for inspection by the United Nations Special Rapporteur on Torture and the Special Rapporteur on Arbitrary Detention. Cuba also called for all European countries with citizens in Guantanamo, namely France, Sweden, and Great Britain, to support the resolution. *Le Monde* reported that the Europeans were having difficulties harmonizing their position on the resolution, with Sweden, Germany, and Austria leaning toward abstention to send a clear signal to the Americans, while the United Kingdom and France wanted to put forward a procedural motion in order to avoid a difficult debate. A Western diplomat admitted, "We are in a very difficult situation . . . Guantanamo is the elephant in the room, everyone knows that it is there and everyone pretends to ignore it."[191]

Responses to US Legitimation Strategies

Few states within international society chose to endorse key Bush administration moral legitimation strategies, suggesting a general failure in the United States to properly legitimate its preferences within international society as a whole. Despite the paucity of support, the presence of these arguments also demonstrates that a norm that should be relatively entrenched, given its legal status, has not yet reached a fully taken-for-granted status within international society. For instance, a handful of states echoed the Bush administration's argument that either the detainees themselves or terrorism in general posed an extraordinary threat, potentially requiring new intelligence-gathering methods.[192] There was little support for the Bush administration's claims concerning a less permissive interpretation of torture. Only Australian Attorney General Philip Ruddock stated that he believed the use of sleep deprivation could not constitute torture in interrogations, arguing that "some decisions will have to be taken as to what constitutes torture for the military commission process and those who are adjudicating the matter will determine that."[193] Other governments echoed the US discourse that the abuse was only due to the mistakes of a few people and did not represent a systemic problem.[194] With respect to the abuse at Abu Ghraib, Britain was quick to acknowledge that "you shouldn't judge the actions of the coalition as a whole on the basis of the actions of a few."[195] The British and Australians additionally argued that the United States was handling allegations of torture through proper procedures.[196] These discourses might have been affected by the fact that many of these states were part of the "coalition of the willing" responsible for the occupation of Iraq, but given that this was not the case for Germany, it suggests that participation in the occupation was not the only causal factor that accounts for this discourse.

Other states within international society used legitimation strategies that referred to the nature of the state, how the United States had given them reassurances, or how they had a close relationship. These discourses attempted to legitimate particular beliefs by focusing on the intrinsic legitimacy of the United States, either in its liberal democratic nature or in their relationship to it. For instance, in 2002 German Foreign Minister Joschka Fischer warned about comparing a constitutional democracy like the United States to other torture regimes.[197] The Prime Minister of Spain Jose Zapatero stated that those responsible for the crimes in Abu Ghraib should be held accountable, not for the United States in general, arguing that "As I have confidence in US democracy . . . I am sure that the perpetrators will be held responsible for their deeds."[198] President Bush noted in

a press conference with Hungarian Prime Minister Peter Medgyessy that Medgyessy had brought up the problems of Abu Ghraib in their meeting, but noted that Medgyessy believed that this incident did not characterize the US or the American people.[199] Informed by this implicit nature, many states, particularly members of the EU, discussed how the United States gave them assurances that there was no torture taking place in 2005 and 2006.[200] For example, the British Foreign Secretary stated, "US policy is to comply with the UN Convention Against Torture."[201] International organizations also mentioned how the United States gave them reassurances that it was not torturing detainees. UN High Commissioner for Human Rights Sergio Vieira de Mello noted that "the President assured me he had given instructions for torture not to be used and I take that as a very sincere, important statement."[202] A few also reminded the public of the good relationship they had with the United States. Germany stated that despite the abuse, the United States and Germany still worked as "close partners and friends,"[203] and the Czech Foreign Minister Cyril Svoboda noted that trust among allies is important for an effective anti-terrorism struggle.[204]

The United States Commits Prisoner Abuse or Torture

States with good human rights records were very cautious in their use of the word "torture" when referring to the conduct of the United States, whereas those with poor records used the term frequently. States with good human rights records additionally did not call for investigations into the alleged mistreatment unless it was obvious, as in the case of Abu Ghraib. Thus, although there was only a smattering of open support for US legitimation strategies, as we saw in the last section, there was also little opposition except from states with poor human rights records. If the strength of a norm is measured by the response to it when it is under threat, as Hurd suggests, then this response was lukewarm at best. This is particularly the case if the United States was attempting to expand the definition of torture to include treatment that might have formerly been excluded. According to Hurd's method of determining legitimacy, if the norm had been firmly entrenched, other members of international society would be expected to actively challenge this claim by stating that these actions are torture and forbidden. Despite the lack of such a discourse from states with good human rights, it is important to note that the discourses of states with poor human rights records are strategically utilized to impose costs on the United States, which would be impossible if the norm itself was relatively weak. As such, this strategic

discourse lends some evidence to the fact that the norm is strong enough to be used in such a fashion.

Some states with poor human rights records argued that the United States had failed to protect human rights,[205] while others explicitly argued that the United States had committed torture.[206] For instance, a member of the Iranian Guardian Council, Ayatollah Ahmad Jannati, stated that the United States will "now arrest, jail and torture whoever they want and force confession from them as well as confiscating their belongings."[207] Similarly, the Zimbabwean Minister of Information and Publicity, in responding to American criticism over problems in a by-election in Zimbabwe, stated that the United States had lost the moral rights to judge others because of their "racial profiling, illegal detention and torture of inmates under the guise of fighting terrorism."[208]

States with good human rights records declared that torture was taking place through their legal maneuvering, such as when Spain dropped an extradition request for two British residents formerly at Guantanamo Bay after stating that the torture they had suffered there made them too weak to stand trial.[209] In general, Spain disallowed extraditions to the United States on the grounds that legal guarantees of the state could be violated. Additionally, Dutch soldiers were ordered not to hand over Afghan captives to US forces for fear of abuse, deportation to Guantanamo, or rendition.[210] A British official told a parliamentary committee that the British government did not believe early reports of torture by the Americans, but after Abu Ghraib they became "fully aware of the risk of mistreatment associated with any operations that may result in U.S. custody of detainees." Regarding the intelligence relationship after this point, he noted that "we still trust them, but we have a better recognition that their standards, their approaches, are different, and therefore we still have to work with them, but we work with them in a rather different fashion" without specifying what "a different fashion" entailed.[211] Similarly, the House of Commons Foreign Affairs Committee released a report that similarly argued that "the UK can no longer rely on US assurances that it does not use torture, and we recommend that the government does not rely on such assurances in the future."[212] At other rare times their discourse was explicit, for instance, when the Italian Foreign Minister Franco Frattini claimed that the abuse at Abu Ghraib was torture.[213] Similarly, British Foreign Secretary David Miliband argued in 2008: "We would never use waterboarding . . . There's absolutely no question about the UK government's commitments in respect of torture, which is illegal, and our definition of what torture is."[214]

International organizations also issued statements explicitly warning the United States to avoid the torture of detainees.[215] States with good human rights records would alternatively call for public explanations or investigations into the allegations of abuse or torture, but this occurred almost entirely in response to Abu Ghraib.[216] In a rare counterexample, when the first photos from Guantanamo Bay leaked, then British Foreign Secretary Jack Straw had British representatives at Guantanamo Bay ask the Americans for an explanation.[217]

Negative Moral Reactions

Many states used discourses that described their moral outrage at the abuses perpetrated by the United States. These discourses reinforced the moral prohibition against torture independently of the legitimation strategies employed by the United States. Members of international society also reminded the United States not to operate as if there were direct trade-offs between successful intelligence techniques and committing torture. However, these discourses generally occurred after large scandals like Abu Ghraib, suggesting that it is only when torture reaches a particular public frequency that other members of international society, particularly states, will react to reinforce the norm. Many states with problematic human rights records used the exposure to contrast US conduct with their own, while others directly suggested that the United States had lost legitimacy in speaking out against other human rights abuses. In addition, and contrary to Brooks and Wohlforth, some states changed their policy regarding detainees in reaction to the detainee abuse despite the material advantage of the United States. This added to US costs and suggested that though the material advantage might have helped to mitigate adverse reactions in the short term, it did not help to legitimate the Bush administration's position.

Many states claimed that they were shocked by the abuse, suggesting a moral prohibition against it, particularly after Abu Ghraib.[218] For instance, the British government said it was "appalled by the photographs."[219] The Spanish Foreign Minister Miguel Angel Moratinos equally expressed his "total horror" over the prison photos.[220] International organizations also expressed their disapproval over the treatment of the prisoners[221] and the UN Special Rapporteur on torture, Theo van Boven, stated that he was "seriously concerned about recent reports of torture and other cruel, inhuman or degrading treatment of Iraqi detainees by United States of America and United Kingdom military forces serving under the Coalition Provisional Authority."[222] The UN special representative in Afghanistan

similarly argued about two prisoners who were reportedly tortured to death in 2002 that "such abuses are utterly unacceptable and are an affront to everything the international community stands for in Afghanistan."[223] The UN High Commissioner for Human Rights, Louise Arbour, stated in 2005, "It is appalling that even now we are entering an era where we are even revisiting this [legal and moral] terrain . . . There are no circumstances where recourse to torture can ever be justified. End of debate."[224]

Many states also commented that the United States should be careful about the trade-offs between human rights and successful counterterrorism. This was entirely a European discourse in 2004 and 2005, and was exemplified by German Chancellor Angela Merkel, who stated, "we have to face the challenges of the 21st century . . . but we have to strike a careful balance. We have to stay in line with the laws we believe in."[225] This discourse was also found among international organizations.[226] The High Commissioner on Human Rights, Mary Robinson, stated in an interview with *Le Temps*,

> I am also very concerned about the treatment of prisoners Taliban or Al Qaeda detainees in Afghanistan, they are under U.S. jurisdiction or Afghanistan. According to my information, their conditions of detention are alarming: they did not have enough to eat, they do not care, prisons are overcrowded, they are confined in the darkness . . . Certainly, they can be questioned, but the questioning should not lead to abuse or torture.[227]

Very few spokespersons, however, argued that torture was ineffective. In a rare example, Louise Arbour wrote, "Whatever the value of the information obtained in secret facilities—and there is reason to doubt the reliability of intelligence gained through prolonged incommunicado or secret detention—some standards on the treatment of prisoners cannot be set aside."[228]

States with poor human rights records sometimes compared the conduct of the United States to their own conduct, suggesting that the United States did not have the moral standing to reprimand them.[229] For instance, in a question from *Der Spiegel* in 2007 Vladmir Putin defended his regime by criticizing the United States, arguing, "I am an absolutely true democrat. The tragedy is that I am alone. The Americans torture at Guantanamo, and in Europe the police use gas against protesters."[230] China suggested in 2004 and 2005 that the United States should focus on its own problems instead of criticizing other states.[231] Some states, notably Indonesia, made statements claiming that the reaction of international society to the scandal

shows how international society discriminates between developed and developing states in terms of human rights promotion.[232] Many states argued that the United States had lost its moral high ground or was acting hypocritically, though most were human rights–abusing states themselves. For instance, the Chinese government released a 2002 report criticizing the American human rights record, stating that the US had double standards whereby it actively engaged in "censuring other countries for their human rights situations . . . [while turning] a blind eye to serious violations of human rights on its own soil." Specifically citing the prisoners in Guantanamo Bay, the report noted, "it was unclear . . . what kind of treatment they would receive . . . Former Al-Qaeda members were also subject to torture or other forms of maltreatment."[233] Some were quite explicit, such as an Indonesian foreign affairs spokesperson who said in 2004 that "the US Government has no moral authority whatsoever to make any evaluations or to stand as a jury on other countries including Indonesia in regard to Human Rights Issues, let alone after the cases of torture and harassment in Abu-Ghraib prison in Iraq."[234] This discourse was popular in states with human rights problems,[235] but was also voiced by the Czech Republic.[236] Some international organizations also argued that the conduct was undermining the status of the United States in the world. Another was to discuss how the strength of American democracy was being eroded. In responding to a question from *Le Temps* about Guantanamo, Louise Arbour stated:

> What was most disturbing after the events of September 11 in the United States was to see how the administration . . . abandoned what has always been its strength, namely the commitment and quality of all its institutions including the power of the judiciary. The strength of American democracy is the exceptional attributes of the three branches of governance . . . Whatever the ultimate answer for the interpretation of the convention against torture and *habeas corpus*, what is important is that the these matters are referred to courts.[237]

Manfred Nowak was even more explicit in his discussion of Vice President Cheney's attempt to have the CIA excluded from a ban on torture, claiming, "One of the cornerstones of human rights is being put in question. This is undermining the reputation of the US as a democratic country based on the rule of law."[238]

Some members of international society suggested that US conduct could have larger effects on the international human rights system. Both Germany and Austria reminded the United States that it has a special role in the human rights system that torture would make problematic.[239] Manfred Nowak claimed that

the framework of international human rights which the UN has built up since 1945 is threatened when a democratic country undermines the total prohibition on torture . . . . This should not be undermined by democratic states. The world is more dangerous: on the one hand due to terrorists, and on the other due to actions taken in the fight against terrorism.[240]

Louise Arbour similarly expressed frustration in 2007 at the US conduct, stating, "If I try to call to account any government, privately or publicly, for their human rights records, the first response is: first go and talk to the Americans about their human rights violations."[241]

Legal

Appeal to International Law

Very few states appealed to international law in their discourse over the allegations of torture by the United States. This reflects the moral legitimation discourses where very few states with good human rights records would state that the United States engaged in torture. Some appealed to international norms,[242] such as the government of South Africa, which stated that "the reports of abuse undermine the stated goals of the coalition forces to bring about a human rights-based culture and democracy in Iraq, under the rule of law, in line with international norms and standards."[243] A much rarer discourse, limited to states with poor human rights records, was to challenge the United States on its legal interpretation of international humanitarian law.[244] Equally as rare was bringing up humanitarian law at all, such as when the publication of the first Guantanamo photos led British Prime Minister Tony Blair to argue that the prisoners needed to be treated in accordance with the Geneva Conventions.[245] Again, this particular claim was made before the serious allegations of abuse took place, which leads to a question of why these more serious allegations did not trigger similar statements.

International organizations, on the other hand, were more active in legitimating their preferences through legal argumentation, often arguing that detainees should be treated in accordance with international law generally. Sometimes this was put in terms of International Human Rights Law; for example on November 22, 2001, the Committee Against Torture reminded state parties to the Convention Against Torture of "the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention," including the prohibition of torture under any circumstances and the prohibition of cruel, inhuman, or degrading treatment or punishment.[246] UN Special Rapporteur on Torture Manfred Nowak stated similarly in 2008

that the United States should give up on its defense of "unjustifiable" interrogation methods, arguing that "this is absolutely unacceptable under international human rights law."[247] In 2007, the Committee Against Torture argued that because torture was difficult to differentiate from cruel, inhuman, or degrading treatment or punishment, and since experience shows that the conditions that facilitate ill-treatment often facilitate torture, the prohibition against ill-treatment is also non-derogable under the convention.[248] This shows that not only did international organizations reject Bush administration claims, but also clarified and strengthened existing international human rights law. At other times the legal legitimation strategies were based on international humanitarian law, such as when the ICRC reminded the media that "[i]nternational humanitarian law bans all forms of torture absolutely, regardless of the circumstances."[249] At other times, international organizations referenced "international law" without specifying which type.[250]

In addition to appealing to international law in general, international organizations used legal legitimation strategies to call on the United States to bring perpetrators of detainee abuse to justice.[251] However, the United States was also commended in the same way, such as when the Norwegian member of the Committee Against Torture, Nora Sveaass, stated that the US representatives had given "very reassuring answers" with regard to bringing those responsible to justice.[252] International organizations used legal legitimation strategies to remind the United States about command responsibility, which could make those at the top of the chain of command responsible for allegations of torture.[253] They also classified certain interrogation techniques conducted by the United States to be legally torture or tantamount to torture.[254] Finally, some international organizations argued that the United States did not have the legal competence to define torture by itself.[255]

Conclusion

This chapter has examined the legitimation discourses of the Bush administration and other members of international society with respect to the United States' treatment of detainees during the war on terror. Specifically, it asked whether the Bush administration was successful in the legitimation of its preferences and whether its materiality seemed to play a role in the practices of legitimacy.

The legitimation discourses of the Bush administration can be broken down into three overlapping periods. The first set of discourses

occurred before the Abu Ghraib scandal, from 2001 to 2004. These involved several avoidance discourses, including outright denial that mistreatment was taking place, arguing that claims to the contrary were incorrect, and, early on, claiming that discussion of the exact interrogation techniques was impossible due to national security. The Bush administration stressed both the unique threat posed by terrorism and the idea that the detainees were taught to lie to the media about alleged acts of torture. At the same time, the Bush administration was also active in claiming that the detainees' treatment reflected the standards of both international humanitarian and human rights law and, over time, became more explicit in describing the interrogation techniques involved.

Once the Abu Ghaib and CIA secret prison scandals broke, in the period between 2004 and 2006, the number of legitimation strategies increased considerably. The Bush administration ended its denial discourses but continued the idea that some claims, particularly from international organizations, might be due to misinformation or were politically motivated. It expanded its legitimacy strategy to emphasize not only the general threat caused by terrorism but also the danger posed by the detainees themselves and the need for the state to gather actionable intelligence so the state could protect its citizens. At the same time, it argued that the treatment of the detainees was respectful, that torture was immoral, and that all perpetrators of torture either were going to be brought to justice or, later on, had been brought to justice. The Bush administration initiated legitimation strategies involving claims that the United States does not torture because it is not in its nature, that there were proper procedures in place, and that questioning was conducted by professional interrogators. Legally, it continued to appeal both specifically to international humanitarian or human rights law, but more often to the general international legality of the acts in general.

We can see the utility of Luban's theory of torture within liberal democracy playing out in the legitimation strategies of the United States during this period in particular, with the Bush administration's stress on future-looking, structurally constrained action to avoid potential catastrophe. This was particularly clear in its claims of the existence of the exception danger of terrorism, the danger posed by the detainees themselves, its stress on the need to gather intelligence, their argument about the professionalism of the interrogators, and its argument that when scandals did occur they were the result of a few "bad apples" who were appropriately punished. These discourses, in sum, attempted to give the impression that the treatment that took

place, whether considered torture or not, was not due to revenge, punishment, or sadistic pleasure, but only to ensure that the greater catastrophe of a future terrorist attack could be avoided. The treatment of the detainees, where questionable, was done reluctantly by professionals who had no other choice given the circumstances.

In the last period between 2006 and 2008, almost all previous legitimation strategies fell by the wayside. The few exceptions were a continuation of the state of exception argument, though this also declined in 2007 and 2008. However, the appeal to proper procedures and the professionalism of the interrogators continued. The Bush administration for the first time claimed outright that it did not torture, but at the same time made more statements that either challenged the idea of a firm definition of torture or presented exceptionally vague definitions of what would constitute torture. From a legal perspective, all appeals to international law ended, replaced by appeals to the domestic legality of the interrogations.

Within international society, there were very few legitimation discourses in the first period, with the exception of some international organizations claiming that there were problems with the way that the United States treated its detainees, some calls for investigations, and a few states with poor human rights records using the discourse of US torture strategically to point out US hypocrisy in the matter. It was only with the revelation of the Abu Ghraib scandal and the CIA secret detention centers that other members of international society became involved. When this occurred, many claimed to be shocked by the abuse, called for investigations, reminded the US of balancing the trade-offs between counterterrorism and human rights, and were concerned that this conduct was undermining US legitimacy to defend human rights, particularly given its special role in the system. The frequency of response between states and international organizations, however, varied. For the former, the span of these legitimation discourses was much more acute than the latter, with almost all discourses occurring in 2004, whereas international organizations extended these discourses from as early as 2003 to as late as 2006. Additionally, states within international society supported some of the US legitimation strategies during this period, either by reflecting on the extraordinary threat posed by terrorism, claiming that there was no systematic abuse by the US or that proper procedures were in place, or claiming that the United States had given them reassurances that torture was not taking place. On the other hand, states with poor human rights records used the opportunity to either publicize the US abuses, claimed that the United States was acting hypocritically and undermining its authority

to speak on human rights, or attempted to downplay their own human rights problems by comparing them to those of the United States.

During the final period between 2006 and 2008 most of these discourses disappeared, with the exception of claims that the abuse had undermined US authority, though this time mostly from states with good human rights records and international organizations. International organizations continued to press the United States to give up any justification for the interrogation techniques that it championed. Perhaps more problematically for the United States, other states within international society started changing state policy to reflect the risk of the United States torturing detainees in its custody.

Reflecting this summary of the data on the central research questions, it seems that, given the absolute legal prohibition on torture, the Bush administration was relatively successful in avoiding costs of its potentially illegitimate activities, particularly at the beginning of the administration's term. Whether the Bush administration was willing to act as an overt norm entrepreneur is somewhat unclear as there are only a few statements explicitly justifying its conduct in terms of the law, but this is not particularly surprising given that the norms that it would be contesting were seemingly quite entrenched within international law. This corresponds with Schimmelfennig's idea that actors are faced with external constraints from pre-existing norms, where they are forced to argue their case through these standards if the actor believes them to be sufficiently legitimate in international society. This lack of direct appeal might indicate that the Bush administration was both aware of and felt constrained by the non-derogable nature of the torture norm.

Thus, instead of attempting to pursue overt norm innovation, during the period between 2004 and 2006 when the United States faced the most criticism from other members of international society, the Bush administration attempted a policy of justification, or where the state attempts to legitimate its preference through claiming that it is in compliance with the norms as "properly" interpreted.[256] As such, the Bush administration was not attempting to challenge the torture norm in its entirety, but rather redefining the meaning of torture to permit actions that would not be previously permissible.[257] This explains the conduct of claiming legality, that it was in compliance with international law, coupled with moral legitimation tactics stressing that the treatment was respectful, that torture was immoral, that it had taken steps where interrogators have crossed the line, and that it had explicitly outlined some of the interrogation techniques used, while at the same time reminding international society of the dangers of terrorism

that required good intelligence so that the state could defend its citizens. In other words, the Bush administration attempted to use the contradictions between the particular and unique situation that threatened citizens that it had a duty to protect, and pushing the boundaries of what might be acceptable interrogation techniques, all at the same time reinforcing that it does not "torture," which it declared to be immoral.

This strategy seemed to have some success within international society, as very few states commented negatively on US behavior, even when reports of mistreatment surfaced. This is possibly because the conduct of the United States was not sufficiently grievous to challenge it openly given the potential costs to any state of doing so. However, given some statements reflecting on the importance of the United States in the human rights system, the silence might also have been a way of avoiding structural damage to the system through making the United States a hypocritical, and therefore more illegitimate, actor.[258] Even at the height of the scandals in 2004 and 2005, states with good human rights records made seemingly conflicting statements, first by claiming that they were shocked by the abuse and calling for investigations, and second by echoing some American legitimation discourses that there was an extraordinary threat posed by terrorism, that there was no systemic abuse, or that the United States had given them reassurances. This is particularly striking given that these supportive legitimation discourses were complementary with several introduced or augmented by the United States during this middle period, namely that the detainees were particularly dangerous, that there were proper procedures and professional interrogators in place, and that the perpetrators had been brought to justice.

Despite this relative success given the purported stringency of the norm, as the term progressed, there is evidence that the US ability to translate this mixed attitude into norm change was not successful. First, international organizations exhibited a fervent opposition to the possibility of torture throughout, demonstrating their utility in promoting human rights norms in the face of state behavior that was less supportive. They rarely engaged with the moral legitimation discourses of the United States, instead preferring to argue that torture was wrong, to call for investigations and occasionally to remind the United States of its special place in the international human rights system. Legally, the international organizations were more apt to challenge specific claims that the United States made, while reaffirming existing international law and calling for investigations into alleged misbehavior. Second, there is some evidence that the United States

attempted to coerce its allies into compliance based on comments made by European diplomats, suggesting that legitimacy alone was not effective in producing compliance. Third, some allies began to change their detainee policies at the end of the Bush administration, increasing the costs of interaction between themselves and the United States. Lastly, the United States also faced constant criticism from states with poor human rights records. While this latter observation is not the strongest evidence of the strength of the norm, it is important to note that even these actions demonstrate both that the norm was seen to be strong enough to be useful to these states and that their discursive actions reproduced it.[259] As a whole, the Bush administration did not seem to be successful in completely legitimating its preferences, at best reaching a position of norm emergence, but with little evidence of a norm cascade.

This increased pressure that came as a result of the Bush administration's inability to legitimate its preferences is also confirmed by its retreat from international legitimation between 2006 and 2008, where it shifted to legal arguments based almost entirely on domestic law, moved away from explicit statements about the type of interrogation techniques used to statements that focused on the ambiguity of the term "torture" instead, and reaffirmed repeatedly that the United States does not torture; instead claiming that the detainees were treated respectfully. This abandonment of arguments based on international law, the lack of confidence in a clear definition of torture, and a direct confrontation of torture claims indicates that the United States had given up on any major attempt to reinvent the torture norm in the way that the earlier internal memos suggested, taking instead a very defensive posture. This was also reflected in an evolution of domestic legislation that strengthened the torture norm, first outlawing it in the military in 2005, and second outlawing it for CIA intelligence agents in 2007. This trend should not be overstated, because at the same time the Bush administration consistently argued that special interrogation techniques should be allowed in exceptional circumstances. Additionally, this shift to legitimating domestic legal sources might have also helped to avoid issues of command responsibility, since their very restrictive definition of torture meant that there was little to no conduct that would have been out of line with the legal recommendations of the Justice Department. This is particularly the case given the public and private statements made by administration officials that suggested that the purpose of the alleged torture, that is, whether it was done to successful thwart a terrorist attack, would be taken into consideration when determining the legality of the action.

At the same time, the legal restrictions imposed by Congress certainly demonstrated a change in posture from the relatively unrestrictive definition of proper conduct put forward by the Bush administration at the beginning of the war on terror. This suggests that the Bush administration's failure to legitimate its behavior in the long run created costs that it then attempted to avoid by trying to create a tolerable consensus balancing between its preferences and those of the rest of international society.

This case study also seems to indicate that material preponderance did not help to change the norm, contra Brooks and Wohlforth. However, this does not mean that US material power was of no use. On the contrary, there is some evidence that it was effective in mitigating public criticism from the allies, which might explain the dual nature of other states' reactions in 2004, whereby states condemned the activity but were far less prone to condemn the United States itself. This is supported by a European diplomat who in 2005 claimed that the United States went on the offensive against European states in their allegations of torture. However, there were clear limitations to this strategy, as toward the end of the term even coercion or bribery was either not effective or judged to be too costly by the United States to implement at necessary levels to ensure compliance, leading to some allies making adjustments to their policies dealing with the relationship between detainees and the United States that negatively affected cooperation. Thus, other than mitigating some of the negative responses, the material position of the United States did not seem to have much effect on its ability to legitimate its position and therein significantly change the norms of torture.

Chapter 4

Habeas corpus

Introduction

The case study of *habeas corpus* differs fundamentally from the torture case study in that the international norms surrounding the deprivation of *habeas corpus* are less strict than those of torture, providing a comparative contrast over how states react to the Bush administration breaching human rights norms where there is the possibility of derogation under certain circumstances. This is not to say that *habeas corpus* is an unimportant right, as it provides the most basic protection against arbitrary political power and, unlike torture and rendition, is more difficult to hide from other members of international society.[1] The exploration of the historical conduct and discourse in this chapter centers on the primary research question: was the United States successful in legitimating its human rights conduct? To answer this question, this chapter will examine the legitimation strategies through which the United States and other members of international society attempted to legitimate their preferences with regard to the relationship between *habeas corpus* rights and the challenges posed by the terrorist threat brought on by the 9/11 terrorist attacks.

I argue that the United States was unsuccessful in legitimating its actions regarding the norm of *habeas corpus*, specifically the reintroduction of the "unlawful combatant" category to categorize the al Qaeda and Taliban fighters who did not meet the requirements of "lawful combatants" under the Geneva Conventions.[2] This failure to legitimate its preferences can be demonstrated both through the negative reaction to its attempted norm-entrepreneurship by a large number of states and all relevant international organizations and a shift

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in the legitimation strategies and conduct of the Bush administration in reaction to this opposition. I argue that this failure to legitimate its preferences indicates that despite its material power, the United States was unable to change the existing norms with respect to *habeas corpus* in any substantial way. Furthermore, in its failure to do so, there is some evidence that the Bush administration incurred costs by continuing a policy that it had failed to successfully legitimate. In other words, the attempt to incur short-term costs in exchange for a lock-in of preferred norms was unsuccessful.[3] Instead of the Bush administration destabilizing the norm of *habeas corpus* within international society, international society responded with resistance, imposing costs on the Bush administration for their defection.

The evidence supporting these claims will be examined in three sections. The first will review the major historical events surrounding the detention of the detainees and review the internal discourses of the Bush administration as a way of setting the stage for the legitimation strategies that the United States and other members of international society undertook. The next two sections will review thematically the legitimation strategies of the United States and other members of international society.

Historical Timeline and Internal US Discourses

Habeas corpus is one of the oldest rights, tracing its origin back to the Magna Carta in 1215. From the beginning, its purpose was limit the arbitrary power of rulers by ensuring that there is a legal and factual basis for the detention of a criminal suspect through judicial review.[4] This function continues to the present, where it "restricts [the] government's ability to imprison its citizens for any reason it wants—or for no reason at all."[5] Domestically, the Suspension Clause of the US Constitution restrains Congress from suspending *habeas corpus* except in circumstances prescribed by the article, although the Constitution does not offer affirm of the existence of *habeas corpus* as a right. Instead, judicial judgments clarified that Congress must provide a statutory basis for *habeas corpus*, a basis that Congress has consistently acted to provide, sometimes as a positive right, but more recently as a negative right.[6] For instance, the 1867 Habeas Corpus act that granted the writ in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States," while the 2006 *habeas corpus* statute declared that the writ "shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." [7]

Habeas corpus has only been temporarily suspended in the United States three times: during the Civil War, during an armed rebellion in the Philippines in the early 1900s and in the immediate aftermath of Pearl Harbor in 1941. On each occasion, Congress made the determination that suspending *habeas corpus* was required by public safety and specifically limited the duration of the emergency situation. Jonathan Hafetz argued that if we compare these historical suspensions of *habeas corpus* with that of the Bush administration, there are three key differences. First, the executive had never before claimed that it could, on its own, permanently deny detainees the right. Second, it has never been used before to single out a particular class of people, in this case, those who were designated "unlawful combatants" by the executive.[8] Third, the executive has never claimed this power without finding that public safety required it.[9] The case study of *habeas corpus* is thus unique historically, both in domestic practice as outlined by Hafetz, and also in the international sphere where the United States had never previously denied the right in a non-war situation. The Bush administration's defection is thus a potentially radical proposition to be either accepted or rejected by the rest of international society.

Domestically, unlike the persistent support for torture, support for the deprival of *habeas corpus* followed a downward trend throughout the Bush administration. In the immediate aftermath of the 9/11 attacks there was a significant amount of support for the erosion of traditional civil liberties to fight terrorism within the United States. An ABC-Washington Post poll reported that 66 percent of American citizens would give up some of their civil liberties in the fight against terrorism; a *New York Times*/CBS News poll put the same number at 74 percent.[10] However, in 2006 a poll stated that 71 percent of American citizens wanted the inmates in Guantanamo to be either given Prisoner of War status or charged with a crime, with only 25 percent of them supporting labeling the detainees enemy combatants and holding them indefinitely.[11] Another poll in the same year found that 57 percent of American citizens believed it was acceptable to hold the detainees indefinitely without trial.[12] Finally, a poll taken at the beginning of the Obama administration showed that 42 percent of American citizens believed that the terrorism suspects should remain at Guantanamo Bay.[13] Although support for denying *habeas corpus* to detainees in the war on terror declined over the course of the Bush administration, it never did so to the extent that there was large domestic opposition to indefinite detention from the US public. This initial public support likely contributed to the scope of the State of Emergency declared by President

Bush, which activated around 500 dormant powers, including the right of the President to suspend *habeas corpus*.[14] This state of emergency was subsequently renewed every year during his presidency, showing a determination on the part of the Bush administration to maintain the right to suspend *habeas corpus* for counterterrorism purposes.

The first appearance of the term "unlawful combatant" to designate suspected terrorist detainees occurred in a September 24, 2001 op-ed in *The Washington Times* by David Rivkin and Lee Casey. They argued for a formal declaration of war by Congress in response to the 9/11 terrorist attacks, as this,

> . . . would permit the United States to treat bin Laden and his terrorists as "unlawful combatants," who would be entitled to much less due process than ordinary criminal defendants.[15]

In line with the suggestions made by Rivkin and Casey, in November 2001 President Bush signed an executive order entitled *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* that empowered him to order military trials for any terrorists or collaborators both in the United States and abroad. It did not allow for judicial review, stating explicitly that "any individual subject to this order shall not be privileged to seek any remedy . . . in any court of the United States, or any state thereof."[16] The promotion of administrative detention was not just discursive. In November, *The Globe and Mail* reported that more than 1000 people, mostly Arab men, had been arrested and jailed for weeks without charges.[17]

These actions were far from ad hoc. Legal memos within the Bush administration suggested an active and well-thought out attempt to restrict *habeas corpus* from all detainees during the war on terror. A December 2001 memo to the General Counsel of the Department of Defense argued that "a federal district court could not properly exercise habeas jurisdiction over an alien detained at the GBC [Guantanamo Bay camp]," but noted that there was still some litigation risk.[18] Four separate memos published in early 2002 all contended that international treaties, including the Geneva Conventions, did not protect members of al Qaeda or the Taliban.[19] Assistant Attorney General Jay Bybee additionally argued that the President had the constitutional power to determine whether the Taliban are unlawful combatants. Furthermore, there was no need to establish tribunals to make this determination, as would be prescribed under international humanitarian law.[20] There was some disagreement in the Bush administration

over this assessment. For instance, a memo from Secretary of State Colin Powell during the same period argued for the implementation of the Geneva Conventions.[21] Powell's argument, however, did not prevail and in February 2002 President Bush issued a memo accepting that the Geneva Conventions applied to the conflict with the Taliban, but did not apply to the conflict with al Qaeda. These detainees would be covered under the Geneva Conventions, but would be classified as unlawful combatants.[22]

As various NGOs challenged the deprivation of *habeas corpus* in US courts through 2002 and early 2003,[23] domestic judges supported the administration's interpretation of the legal rights of the detainees on the basis that Guantanamo Bay was not part of the United States and therefore those interned there had no ability to take *habeas corpus* claims to US courts.[24] At the end of 2003, almost 2 years after the detention system started, opponents of the denial of *habeas corpus* rights made some legal gains. The Ninth Circuit Court of Appeals stated that the government's legal justification for the indefinite detention at Guantanamo Bay was "a grave and startling proposition," ruling that a Libyan held there could challenge his case in US courts. The Second United States Court of Appeals similarly told the Justice Department that they had 30 days to charge a detainee in a federal court or they would have to release him.[25]

In June 2004 the Supreme Court ruled on the Bush administration's policy of executive detention in two cases. First, it decided to examine a case that would determine whether any prisoner at Guantanamo Bay was entitled to challenge their detention in civilian courts.[26] Second, it decided to examine the case of Yaser Hamdi, a US citizen who was held by the United States as an enemy combatant, after lower courts upheld the executive's right to detain him indefinitely.[27] In the resulting cases, *Hamdi v. Rumsfeld* and *Rasul v. Bush*, the Supreme Court ruled that although the government had the right to hold enemy combatants, US citizens held as an enemy combatants should have "a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker"[28] on the basis that the Authorization for the Use of Military Force passed by Congress did not allow the president to detain people indefinitely, which was a distinct possibility in the War on Terror, and on the basis that the allegations against Hamdi could not affect his right to due process. Additionally, basing their decision on existing statute, the Supreme Court argued there was nothing preventing domestic courts from exercising jurisdiction in the cases of the detainees who were not US citizens.[29]

The Bush administration, in a nod to the Supreme Court ruling that required giving the detainees some means to challenge their detention, subsequently announced that new Combatant Status Review Tribunals would review the detention of prisoners at Guantanamo Bay as a means of providing a *habeas corpus* substitute.[30] The prisoners would receive the help of a non-lawyer military officer "personal representative," and if not found to be an enemy combatant, they would be handed over to the State Department for transfer to their home country.[31] This process appeared to have widespread legitimacy within the prison camp at first, with the Pentagon reporting that 90–95 percent of detainees accepted participating in the review process.[32]

However, in November 2004 a federal court judge struck down the proposed military tribunal for Salim Hamdan, ruling that President Bush had overstepped his constitutional powers and that the tribunals did not meet the requirements of the Geneva Conventions.[33] The Supreme Court refused to take up the case prior to the federal appeals court deciding on it, effectively halting the military tribunals.[34] In July 2005, the U.S. Court of Appeals overturned this decision, leading the Supreme Court to accept the case in November.[35] At the same time, Congress passed the Detainee Treatment Act, which made it explicit that there was no right to *habeas corpus* for Guantanamo detainees, making the 2004 judgment of the Supreme Court, which was based on their interpretation of existing statue, irrelevant.[36]

In June 2006 the U.S. Supreme Court ruled in the case of *Hamdan v. Rumsfeld* that the planned military trials for suspects at Guantanamo were illegal. Specifically, it stated that all US prisoners in the war on terror were covered under Common Article 3 of the Geneva Convention, which was incorporated into US law by the Uniform Code of Military Justice, and that the President exceeded his powers in the creation of the new legal system for the detainees.[37] In order to get around this ruling, President Bush subsequently signed the Military Commission Act in October of 2006 that created new rules for the prosecution of terrorism suspects and also stipulated that "no court, justice, or judge" could consider petitions from anyone designated to be an unlawful combatant. Furthermore, the Geneva Conventions could not be relied upon for *habeas* rights or any other civil proceeding against US personnel.[38] In a rare move, in April 2007 the Supreme Court declined to take up the case of whether the Guantanamo detainees should have access to federal courts to appeal their detention,[39] but then changed its opinion in June and agreed to hear the case.[40] The Supreme Court eventually ruled in this case,

Boumediene v. Bush, that all the detainees at Guantanamo Bay had *habeas corpus* rights given to them by the Constitution of the United States and that any law removing these rights was therein unconstitutional because such acts violated the suspension clause.[41] The same day it ruled in *Munaf v. Geren* that persons detained in Iraq also have the right to *habeas corpus* in Iraqi courts.[42]

There are three distinct patterns of behavior in this history of internal discourses and events concerning *habeas corpus*. First, it is clear that the Bush administration attempted to deny *habeas corpus* to the detainees through systematic and well-thought out changes to domestic law. Second, the Bush administration was hindered by a series of Supreme Court rulings in 2004, 2006 and 2008 that gradually restricted its ability to deny *habeas corpus* rights through executive degree, ruling in 2004 that all US citizens had the right to challenge their detention in US courts and that all detainees had the right to challenge their detention through some judicial process, in 2006 that the process devised by the Bush administration for the latter was unconstitutional, and in 2008 that all detainees had the constitutional right to challenge their detention before US courts. Lastly, it continuously attempted to modify legislation that both worked around these judicial rulings and, in some cases, sought to deny domestic courts the right to decide on whether laws denying *habeas corpus* were legal.

It is clear that the legal opposition to the Bush administration's *habeas corpus* policies did not prevent them from continuing to hold many detainees indefinitely in Guantanamo Bay. The Bush administration attempted, almost at every turn, to limit the influence these judicial decisions had on their ability to conduct themselves as they pleased. The Supreme Court, for its part, also deferred to the executive on these matters, avoiding making a Constitutional judgment on non-citizen detainees for seven years, instead showing how the policies were in conflict with existing statute that could be modified by the Bush administration.[43]

United States

Moral Legitimation Strategies

The United States attempted to legitimate its preferences through a number of moral legitimation strategies. First, it argued that the detention was not for interrogation, but to prevent the detainees from committing future terrorist attacks. Second, it argued that the state had a duty to protect citizens from external threats. Third, it

argued that the detainees themselves were morally deficient, and that this deficiency allowed differential treatment. Finally, it argued that it would like to release the detainees, but found itself unable to do so for structural reasons.

Detentions for Intelligence and Safety

The Bush administration legitimated the purpose of the indefinite detention, and therein the removal of *habeas corpus* rights, in two ways. First, it argued that the detainees were interned for interrogation purposes, though this was a relatively rare discourse. In 2002, Rumsfeld argued that "To stop future terrorist attacks, we have detained these people and we have and will be questioning them together for additional intelligence information."[44] Similarly, Condoleezza Rice noted in 2005 regarding the detentions policy that, "We've had to get intelligence about whether there was a coming attack."[45] A second discourse, occurring infrequently between 2001 and 2006, was that the detention was designed to remove the detainees from public life so that they could not commit future terrorist attacks.[46] By associating legitimate behavior with behavior that is not currently legitimate but argued to be similar to the legitimate behavior, the United States was hoping that disapproval from other members of international society would be withheld. For instance, in 2001 Attorney General John Ashcroft defended the detention policy by arguing that, "It is difficult for a person in jail or under detention to murder innocent people or to aid or abet in terrorism."[47] Even after the first Supreme Court rulings in 2004, Vice-President Dick Cheney argued that the detentions were warranted by the special circumstances and dangers faced in the War on Terror, where he argued, "as a by-product, if you will, of that activity, we have from time to time captured individuals . . . who are doing their level best to launch attacks against Americans either on the battlefield or in the United States."[48] He noted that of the 200 people who had been released from Guantanamo Bay, at least 10 had been recaptured after getting "back into the battle on the other side."[49] This reinforced the need to deny the detainees *habeas corpus* rights by discursively linking the detention policy to international humanitarian law.

State has a Duty to Protect Citizens

The United States argued that its detention policy was necessary because the state, sometimes specifically the executive, had a duty to protect its citizens. This discourse was also used to legitimate the administration's preference that the executive should have powers

to detain suspects independent of judicial oversight, echoing the confidential internal memos. This legitimation discourse played on the contradictions between the right of *habeas corpus* and the duty that a state has to protecting its citizens. Again, following Quentin Skinner, this is an attempt to link a controversial idea with an ethically admirable one in an attempt to legitimate the former. Attorney General John Ashcroft, when asked why there are no *habeas corpus* protections for the detainees, stated in 2001 "the president ought to and does have a right to protect US lives by assigning them to a military court."[50] Both Paul Wolfowitz and Donald Rumsfeld reiterated the President's ultimate authority to decide which detainees got a hearing, as opposed to the judiciary.[51] The Bush administration drafted legal opinions using this argument, submitting a 62-page brief to the Supreme Court for *Rasul v. Bush* arguing that granting the detainees the writ of *habeas corpus* "would directly interfere with the executive's conduct of the military campaign against al Qaeda."[52] This occurred again in 2006 when the Bush administration petitioned the Supreme Court not to issue an opinion on the legality of military trials for detainees, arguing that the legislation passed in the previous month prevented the court's ability to consider the issue.[53] This argument was prevalent, but became watered-down late in the Bush administration, particularly after the 2008 Supreme Court ruling *Boumediene v. Bush*, with the emphasis placed on the obligation to protect without emphasizing the contestation with the judiciary.[54] This seems to suggest there were domestic drivers at work that affected the nature of the discourse. However, the argument that stressed the President's need to protect the US people remained strong throughout the administration.

Detainees are Morally Deficient

The United States also legitimated its detention of the detainees by arguing that they were morally inferior, sometimes explicitly linking this inferiority to their placement in a different class with fewer rights. Attorney General John Ashcroft, when asked why there were no *habeas corpus* protections for the detainees in early 2001, stated:

> Alien, foreign terrorists who have assaulted the United States, killed thousands of Americans have been a participant in this heinous act. They don't deserve the kind of justice that the US judicial system offers with appeals that extend on practically ad nauseam. These are war criminals. And the president ought to and does have a right to protect US lives by assigning them to a military court.[55]

Similarly, the Government of the United States argued before the Working Group on Arbitrary Detention that approximately 625 detainees were terrorists who "violated the law of armed conflict and basic principles of international humanitarian law."[56] However, from 2005 on the discourse surrounding the danger of the detainees lacked this explicit tie to the idea that they were treated differently because they were exceptionally dangerous.[57] For instance, in 2007 the US ambassador to Australia maintained that inmates like David Hicks were, "ideologically ruthless fanatics who would kill Australians and USs without blinking an eye."[58]

This discourse surrounding the moral deficiencies of the detainees is interesting because it began by explicitly linking these deficiencies to differential treatment, even in official responses to international organizations, but was later invoked without this link. This is similar to the transition in the previous section where the argument that the state or executive has a duty to protect its citizens also lost its explicit link to the exclusion of the judiciary. However, the maintenance of both moral legitimation strategies minus the legal argumentation might indicate that despite the fact the administration believed it had failed to make the legal case domestically, there was still some utility in making these claims—to either lower costs domestically or internationally from actions that it had failed to fully legitimate. This was particularly the case given the synergies between arguing that there was an exceptional danger and that the President had a responsibility to handle it.

Structural Barriers to Release

Late in its term the Bush administration frequently referred to the fact that it would like to release the detainees, but there were either structural conditions that prevented this from occurring and there were no existing ideas that would solve this problem.[59] This discourse seems to indicate that the United States was unable to legitimate its preferences to detain the detainees indefinitely, and therefore was led to argue that there were structural constraints inhibiting its agency that would otherwise be used to release them. For instance, President Bush stated in 2006, "We'd like it [Guantanamo Bay] to be empty . . . But there are some that, if put out on the streets, would create grave harm to US citizens and other citizens of the world."[60] Equally, some administration officials noted that there were no better ideas out there on what to do with the detainees, such as when Donald Rumsfeld opined,

> Every once in a while someone pops up and gets some press for saying, "Oh, let's close Guantanamo Bay." Well, if someone has a better idea, I'd like to

hear it . . . The idea that you could just open the gates and say, "Gee, fellows, you're all just wonderful" is not realistic.[61]

Similarly, a legal advisor to the State Department, John Bellinger III, noted that there was little that the administration could do to close Guantanamo Bay, as, "our critics abroad and at home . . . have not offered any credible alternatives for dealing with the dangerous individuals that are detained there . . . Our experience has shown that transferring or releasing a detainee from Guantanamo is quite difficult."[62]

Moral Arguments to Assuage Criticism

The United States took several steps that could be seen to assuage or pre-empt criticism through its discourse and actions which can be interpreted to be efforts to avoid some of the costs of illegitimacy. Even as early as 2001, it attempted to argue that the detention measures were either temporary or not as stringent as they seemed. In an interview with Larry King in 2001, Colin Powell reflected the cautious tone in his confidential memos, stressing that this was a state of emergency and not a permanent condition, arguing, "I'm also sure that as we find ourselves more secure again—once again secure in our own society, that some of the things that are inconveniences now will go away and go back to our normal way of doing business."[63] White House Counsel Alberto Gonzales, who was much more supportive of indefinite detention in his confidential memos, similarly gave some reassurances before the *Daily Mail* story, claiming that, "despite the broad language in the military order, which talks about cutting off other avenues of court proceedings for commission defendants, we fully contemplate that habeas review will be available."[64] Though this was not the case, it suggests that the administration was at least aware of the potential criticisms it could face as a result of instituting this practice, leading some to be conservative about the proposed scope of their plans. Subsequently, the United States discursively supported the repatriation of the detainees, following through on this on several occasions between 2003 and 2006.[65] Donald Rumsfeld stated that once the United States had finished questioning the detainees it would, ". . . let as many countries as possible have any of their nationals they would like, and they can handle the law enforcement prosecution." However, he added they would "prefer to only give detainees back to countries that have an interest in prosecuting people that ought to be prosecuted," so long as the United States had the right to ask for them back for interrogation.[66]

The United States also attempted to limit the number of people covered under the unlawful combatant category. Donald Rumsfeld announced in April 2003 that none of the senior Iraqi officials would be sent to Guantanamo Bay,[67] stating that,

> We intend to not take people, regardless of what they are characterized as, from Iraq or from any other country to Guantanamo Bay at the moment. Could it change? Possibly. But my preference is not to, and I would guess I'd have a voice in it, and I would discourage doing that.[68]

One month before the Supreme Court ruled on their first two cases concerning *habeas corpus*, the US government quietly abandoned an earlier plan to designate some of the prisoners captured by US forces in Iraq as unlawful combatants. No prisoners from the Iraq conflict were given this classification, meaning that even foreign fighters and suspected Al Qaeda members captured in Iraq were classified as prisoners of war and given the protections of the Geneva Conventions. *The New York Times* stated that in making this decision, the administration decided the detention and interrogation procedures in the Geneva Conventions were adequate for its purposes. This was in stark contrast to a year prior when the staff judge advocate for occupation land forces in Iraq stated that the military intended to segregate unlawful combatants from prisoners of war, especially foreign fighters.[69] This conduct was important because it suggests that the United States was attempting to limit its exposure to an illegitimate activity, which would indicate that any attempts to legitimate its position were not successful. It is particularly notable because the majority of the discourse took place before the domestic judicial climate began to definitely turn against the Bush administration's interpretation of executive power and detention practices.

Legal Legitimation Strategies

Detention as Action in a State of Exception

Between 2002 and 2005 the United States legally asserted that the detainees were being detained due to the special circumstances of the war on terror.[70] This appeal drew on both the nature of international humanitarian law as *lex specialis* and on particular aspects of emergency law domestically. In an example of the latter, in 2001 President Bush justified the new detention measures by arguing:

> Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism

against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.[71]

The Bush administration later used the special circumstances faced by the United States against accusations that it was not respecting the Geneva Conventions. In effect, the administration was arguing that the war on terror represented an exception to the Geneva Conventions. In a 2002 press conference the White House Press Secretary stated that,

> The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949 . . . The president has maintained the United States' commitment to the principles of the Geneva Convention while recognizing that the convention simply does not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today.[72]

Pierre-Richard Prosper, the US ambassador for war crimes, similarly stated in the same year that the Geneva Conventions were outdated and needed to be rewritten to deal with international terrorism because, "The war on terror is a new type of war not envisaged when the Geneva Conventions were negotiated and signed. We now have organizations that . . . do not conduct their operations in accordance with the laws and customs of war."[73] With this type of justification, as late as 2007 a State Department legal advisor stated that the United States had the right to hold a detainee indefinitely, even if they were acquitted of charges through the military commission, noting that holding prisoners until the end of a war so that they cannot return to combat was routine.[74]

Designation as Unlawful Combatants

The primary norm entrepreneurial act of the United States was to reintroduce a term into international humanitarian law, the unlawful or enemy combatant.[75] For instance, President Bush argued in 2001 that, ". . . we must not let foreign enemies use the forums of liberty to destroy liberty itself . . . Non-U.S. citizens who plan and/or commit mass murder are more than criminal suspects . . . They are unlawful combatants who seek to destroy our country and our way of life."[76] In addition, the United States reportedly attempted to demand that other governments treat detainees in a similar manner should they receive them from the United States. But according to a Pentagon

official this was never successful as, "The rest of the world failed to see this as a real war, rather than a law-enforcement situation."[77] This designation of unlawful combatant attempted to legitimate the US preference to detain the terrorist suspects for as long as it would like without access to judicial oversight. However, with the exception of domestic court briefings, no senior administration official used the term after the 2004 Hamdi decision.[78] This abandonment of the use of this term suggests a realization of its unsuccessful norm entrepreneurship.

International Society

Moral Legitimation Strategies

Other members of international society legitimated their preferences concerning US legitimation claims in two ways. First, some agreed with the US position that the process was fair or stated that they were given assurances by the United States that the detainees were being handled appropriately. Second, they expressed their concern and put diplomatic pressure on the United States to release any of their citizens who were being held.

Guantanamo Process is Fair

Some governments declared that the detention process found at Guantanamo Bay was fair without engaging in legal argumentation for why this was so, though this was quite rare. Australia expressed support for the process on several occasions, such as when Prime Minister John Howard stated in 2002,

> Our view is that it is not unreasonable, in the circumstances, that [David Hicks] stay where he is. I'm not going to make any statement about his legal position. He has not, in our view, been taken by the Americans unlawfully. Whether or not, in those circumstances, we have an obligation above every other consideration to bring him to Australia is arguable.[79]

The Canadian Defence Minister argued somewhat differently that the United States had given Canada assurances concerning the treatment of the detainees, stating, "Mr. Bush has made it clear that they are abiding by the Geneva Convention, and that's all we wanted."[80] Both of these discourses argued that the treatment of the detainees was fair, the former giving explicit sanction to the process and the latter arguing that if the United States stated it was treating the prisoners according to the Geneva Conventions, this must be the case.

Expressing Concern

Other states in the international system both expressed their concern and applied diplomatic pressure over the detention policies of the United States. This took two major forms, one highly communitarian and focusing on the treatment of their own citizens, and a second which was cosmopolitan and focusing on the treatment of all detainees.

The cosmopolitan response to the detention was relatively small. In 2002, the initial reaction from European diplomats was to express concern over the definition of the Guantanamo detainees' status.[81] Swedish Prime Minister Goeran Persson stated the criteria that the United States used to hold the Guantanamo detainees was "very dangerous."[82] In 2003, Denmark, France, Germany, Britain and Spain all expressed their concern about the US detention policy but did not pressure the US administration further.[83]

The communitarian discourse, focusing on the repatriation of citizens, was much more prevalent.[84] Though domestic pressures likely had some effect, the popularity of this discourse might also suggest that other states in the international system believed there was more legitimacy in the role that a state had in protecting its own citizens than in the promotion of universality in human rights protection. In 2003, of the 42 different states with detainees represented at Guantanamo Bay, eight US allies already complained that they wanted their citizens released into their custody.[85] As the detention lengthened, this discourse was elevated. In 2004, the British government criticized the United States for the long detention of five of its citizens. It was reported that the administration had come under sustained pressure from the Prime Minister to intervene in the cases of the British detainees.[86] Two detainees at Guantanamo from Kuwait were sent home in 2006 after a personal intersession by the Emir of Kuwait to President Bush. He had asked for all six remaining nationals to be released and negotiations were still ongoing to release the final four.[87] Additionally, when German Chancellor Angela Merkel took a hard-line approach to Bush in August of the same year, stating that any detainees against whom there is no case should be repatriated, the United States released Murat Kurnaz.[88]

Engagement with Legitimacy Strategies of the United States

Other states in international society engaged with several of the legitimation strategies of the United States. Several states agreed with the United States that the detainees were dangerous and required differential detention treatment. The Canadian foreign affairs minister

argued in 2006 that, "Canada is sensitive to the need to ensure that persons who are a danger to international peace and security not be provided with the opportunity to resume a direct part in hostilities or re-engage in terrorist activity."[89] However, acknowledging this danger did not always translate into support for exceptional measures. For instance, in 2002 the British Foreign Secretary Jack Straw challenged the state of exception argument, contending that, "These people . . . are accused of having been members of the most dangerous terrorist organization which the world has ever seen. That does not mean for a second that they do not have rights."[90] In 2006 the skepticism increased to the point where the utility of the entire process was being questioned. A spokesperson for the British government argued that, "the continuing detention without fair trial of prisoners . . . is ineffective in terms of counter-terrorism."[91] This reaction was not confined to the United Kingdom. German Chancellor Angela Merkel condemned Guantanamo Bay in an interview with *Der Spiegel*, stating that, "An institution like Guantanamo can and should not exist in the longer term . . . Different ways and means must be found for dealing with these prisoners."[92] However, this was tempered by a need to address the difficulties of the situation. During a visit to Washington, she noted in a joint press conference that "we have openly discussed the fact that there were sometimes differences of opinion, and in this regard, I mentioned Guantanamo . . . Germany and Europe must come up with convincing proposals on how to deal with these detainees."[93]

Legal Legitimation Strategies

General Legal Discourse

In addition to appealing to international humanitarian and human rights law specifically, other members of international society appealed to the law in general. The use of this generalized legal discourse might indicate an unwillingness to engage directly in legal debates over the treatment of the detainees while retaining the idea that the actions of the United States were unacceptable. However, it could also signal a general prohibition of the actions independently of what type of law was invoked. International organizations, for instance, complained that some of the detainees were placed in a lawless state. An ICRC spokesperson summed up the problem in 2003, arguing,

> The main concern for us is that the US authorities have effectively placed them beyond the law . . . After more than 18 months of captivity, the internees have

no idea about their fate, no means of recourse through any legal mechanism. They have been placed in a legal vacuum, a legal black hole. This, for the ICRC, is unacceptable.[94]

Béatrice Mégevand-Roggo, the ICRC Delegate for Europe and the Americas, continued the organization's public criticism of the US policy in 2004, stating that, "These people [Guantanamo inmates] have been living for months and years in a completely rights-free space—and this we cannot accept."[95] States also spoke in general legal terms.[96] A spokesperson for the French foreign ministry argued in 2002, for example, "that all the prisoners at Guantanamo should benefit from all the guarantees provided by international law."[97] *The Scotsman* reported in 2004 that the British government had kept a lid on any misgivings it had with the US procedures until Jack Straw criticized the military tribunal system being drawn up, stating that it would "not provide the type of process we would afford British nationals" and that those remaining at Guantanamo must be put on trial "in accordance with international standards."[98]

International Humanitarian Law

The discourses of international organizations with respect to international humanitarian law took several forms. First, they debated the introduction of the term "unlawful combatant." Second, they argued that the detainees either should receive prisoner of war status, or at least be ensured it was a judicial decision that determined whether this was the case, and not executive action.

In 2002, there was a flurry of activity when international organizations appealed to the United States to give the detainees prisoner of war status,[99] stating additionally that domestic courts needed to determine this status[100] as the executive did not have the authority to make this decision.[101] Several states also argued that the Geneva Conventions ought to be applied to the detainees or welcomed changes to US policy that granted detainees these rights.[102] The Spanish government went even further, announcing that it would not respond to extradition requests from the United States if the person requested would be judged by a special tribunal.[103] However, the appeal to an orthodox reading of international humanitarian law was limited to this short period immediately after 9/11.

Some international organizations challenged the reintroduced category of unlawful combatant. For instance, in 2002 an ICRC spokesperson noted that the status of an unlawful combatant did

not exist under international law.[104] However, by 2005 the ICRC supported the reintroduced category, arguing that terrorists were unlawful combatants who should not be classified as prisoners of war because members of lawful armed forces must distinguish themselves from the civilian population. As such, the ICRC decided that suspected terrorists could be interred without charge if there was a serious security threat, and that they could be prosecuted for war crimes and sentenced to terms longer than the period of the conflict.[105] However, not all international organizations agreed with this assessment. The Working Group on Arbitrary Detention, for example, argued in 2008 that the term "enemy combatant" was not a recognized category under international law.[106]

International organizations also defended the existing rules. In an article written by Jelena Pejic but later adopted by as official position of the ICRC, in 2005, she argued for 15 principles and safeguards with respect to detainees with reference to the Fourth Geneva Convention, including "a person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention."[107] It also argued that the procedures of the Fourth Convention served as an excellent basis for administrative detention for all types of armed conflict. The Danish Ambassador to the United Nations was similarly quoted as saying that "the challenge [to international humanitarian law] was not the elaboration of new rules, but to make the existing legal framework fully applicable in practice."[108]

The United States is at War

Related to their commentary on international humanitarian law, international organizations also took it upon themselves to comment on whether the United States was at war. Though there was some support at the beginning of the period to this claim, this faded. The Inter-American Commission on Human Rights stated in a 2002 opinion that it agreed the government of the United States believed itself to be at war with an international network of terrorists against which it undertook military operations and took prisoners resulting in most of detainees at Guantanamo Bay.[109] The ICRC clarified its position in the publication of a 2003 report entitled *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts.* The ICRC argued that the "fight against terrorism" is a war when it pertains to armed conflict, such as the case in Afghanistan, but it is doubtful that the entirety of the "war on terror" could be said to constitute an armed conflict.[110] It argued that armed conflict requires a certain

intensity and the presence of two organized opponents each capable of implementing international humanitarian law. As such, acts of terrorism and their responses must be considered on a case-by-case basis to determine whether they should be covered by international humanitarian law.[111] In 2005, the ICRC released a report arguing that the war on terror could not be classified as a "war." Specifically, it stated that when the "global war on terror" manifested itself as an armed conflict, international humanitarian law applied, but not all events covered by this idea did.[112] The Working Group on Arbitrary Detention concurred with this judgment in Opinion 43/2006 where it argued that the struggle against terrorism could not be deemed an armed conflict in the way that international humanitarian law understands the concept.[113]

International Human Rights Law

Adding to the criticism of the war on terror as not constituting a war, members of international society frequently engaged the Bush administration's legitimation strategies with legitimation strategies based on international human rights law. This discourse occurred from the beginning of the Bush administration and continued throughout the period, replacing all legitimation through international humanitarian law. International organizations would frequently refer to the detention of the detainees as arbitrary. Sometimes this would happen through appeal to international human rights law terminology, such as when the United Nations Special Rapporteur on the Human Rights of Migrants, Gabriela Rodriguez Pizzaro, mentioned hundreds of Arabs and Asians in the United States had been "arbitrarily detained" following 9/11.[114] International organizations also used the term "disappeared" when dealing with some of the cases of the detainees. The Working Group on Enforced or Involuntary Disappearances noted in its annual report that it had, for the first time in the history of the organization, issued a case for a disappearance to the government of the United States.[115] It wrote subsequently in 2008 reminding the US, "that intentionality is irrelevant in the sense that any act of enforced disappearance has the consequence of placing the persons subjected thereto outside the protection of the law, regardless of the pursued purpose."[116] However, the more common usage was a direct appeal to international human rights law, found in legal findings between 2002 and 2008 by the Working Group on Arbitrary Detention,[117] reports by the United Nations Commission on Human Rights,[118] and findings by the Inter-US Commission on Human Rights.[119]

Complementarity of IHL and IHRL

In addition to their commentary on international humanitarian and human rights law as independent subjects, international organizations also argued against the stark trade-off between international humanitarian law and international human rights law that the United States put forward. The Inter-American Court of Human Rights added that,

> . . . in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, . . . it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis.*[120]

The ICRC also stated that international humanitarian law should not lead to the exclusion of other bodies of law, including international human rights law.[121] Similar claims were made after the disclosure of the CIA secret detention sites, where a report of the Working Group on Arbitrary Detention stressed that detaining terrorist suspects, "without charging them and without the prospect of a trial in which their guilt or innocence will eventually be established, is in itself a serious denial of their basic human rights and is incompatible with both international humanitarian law and human rights law."[122]

Conclusion

This chapter examined the attempts of the United States to legitimate its suspension of the writ of *habeas corpus* with respect to the unlawful combatants held primarily in Guantanamo Bay. To do so, it analyzed the legitimation strategies of the Bush administration and the responses from other members of international society.

The Bush administration attempted to legitimate its preferences regarding the suspension of *habeas corpus* in a very overt, norm entrepreneurial way. With the moral backdrop of the duty that the state has to protect its own citizens and the necessity of indefinite detention for both intelligence gathering and safety purposes, particularly given the danger of the detainees, the Bush administration put forward a legal argument contending that current international humanitarian law was not sufficient to accommodate its needs of this new war on terror. Drawing on domestic case law from World War II, its proposal was to make explicit a previous implicit term in international humanitarian law, the unlawful combatant. Previous to this,

international humanitarian law defined a category of lawful combatants, and the Bush adminsitration argued that those who did not meet these criteria should be placed in this reintroduced category. Once a detainee was given unlawful combatant status, they could be detained for the duration of hostilities without access to judicial oversight. In addition, unlike lawful combatants, they could be charged for murdering US soldiers. However, these legitimation strategies were either watered-down or replaced after 2004, with arguments about the danger of the detainees losing their explicit link to their differential treatment, the role that the executive has to protect the citizens of the state losing its explicit challenge to judicial power, or the introduction of an argument that stressed the willingness of the United States to release the prisoners if it were not for particular structural constraints. More importantly, the scope of denying *habeas corpus* was reduced even before the first Supreme Court ruling in 2004, where the Pentagon announced that none of the senior Iraqi officers, nor any foreign fighters, would be classified as unlawful combatants.

As its detention policy continued, it became increasingly difficult for the Bush administration to legitimate it with other states in international society. In many situations, other states pressured the United States to release their citizens. Many states were also vocal in their opposition to the introduction of a reintroduced unlawful combatant norm, with some arguing that the prisoners should be held under the auspices of the Geneva Convention like any other prisoner of war, independently of whether they qualified for the status. Other states, like Kuwait, helped to pay for the legal defense of their nationals detained by the United States. The notable exception to this behavior came from Australia, which throughout the entire period legitimized the US government's right to detain Australian Daniel Hicks. To a lesser extent Canada was also more silent than other states with the case of Omar Khadr, for whom little was done publicly. There were some cosmopolitan arguments made by states contesting the lack of *habeas corpus* at the Guantanamo base, but this was not as widespread as a legitimation strategy based on a communitarian idea of repatriating their own citizens. This shows a decidedly communitarian focus among states, though these more cosmopolitan critiques, such as demanding closure of the facility independently of the nationality of those detained there, gained in prominence as time went on. This initial appeal to communitarian values points to a weakness in international human rights norms in this case, as instead of being valued on the basis of being human, people are differently valued depending on the political community from which they come. Whether one is

protected by international human rights norms becomes a lottery of birth.

As a whole, international organizations eventually arrived at a consensus of legitimating via international human rights law instead of international humanitarian law as the term of detentions became increasingly long. The Bush administration was successful in its promotion of the explicit use of the term unlawful combatant as a category of combatants who did not meet the criteria of lawful combatants as described in the Third Geneva Convention with the ICRC. Given this, it was a successful norm entrepreneur because it successfully lobbied for the inclusion of a previously implicit term within the scope of international humanitarian law. However, the ICRC did not legitimate the US government's claim that the war on terror constituted a war in which international humanitarian law would necessarily apply and argued that unlawful combatants should still have an opportunity to challenge their detention, rendering this success moot in practical terms.

With respect to the first research question, I argue that the legitimation efforts of the Bush administration were not successful. This can be seen in the opposition of many states to the detention of their citizens and the increasing opposition over the term of the Bush administration by international organizations to both the policy itself and the US claim that the war on terror constituted a war, which served as the legal basis of the policy. There is also evidence for this claim in the shifting legitimation strategy of the Bush administration from a legal basis concerning its introduction of the term unlawful combatants, captives deprived of their rights due to their conduct, to a strategy based solely on the moral duty of the executive to keep dangerous detainees off the battlefield. With the adoption of the unlawful combatant by the ICRC as a category of international humanitarian law and various attempts by the Bush administration to limit the scope of its actions through not designating unlawful combatants during the Iraq operation, even though several of the foreign fighters would have qualified for the title, we can see an attempt by several parties in the international system to reach what Clark called a tolerable consensus through ongoing acts of legitimation.[123] This could be seen as an attempt to gain legitimacy for itself through the mechanism of strategic restraint,[124] that is, although the US had the power to detain foreign fighters in the Iraq war through the same logic as it did those captured in Afghanistan, it chose not to in order to assuage those participants in the international system who were wary of its actions. In this way, the prospective increase in legitimacy would reduce the

costs of being out of compliance with norms that it had failed to delegitimize. As these changes occurred before the first US Supreme Court case that challenged the Bush administration's ability to indefinitely detain terrorist suspects, this opens up the possibility that the changes might have been a result of pressure from other members of international society.

Accordingly, the conduct and legitimation discourses of the United States did not seem to open up the possibility of major change within the existing norms as most states and international organizations opposed its attempts to legitimate a revision to current norms, and the United States eventually gave up this pursuit to legitimate its position in terms of norm revisionism. In Finnemore and Sikkink's terms, there was no norm cascade. It is this relatively uniform response to defending an institution under threat that can lead us, following Hurd's method,[125] to state that the United States was unsuccessful in its aims to introduce new norms.

Finally, the case study does not suggest that materiality helped the United States in its attempt to legitimate its preferred norms. Although Hurd argued that hegemons cannot violate the "rules of the game" and are bound to the rules to the extent they value legitimacy,[126] Wendt argued that the effect of material factors means the materially preponderant state has opportunities to bear the cost of failing to legitimate its actions.[127] The latter is evident in the ability of the United States to continually detain hundreds of prisoners for up to six years without access to trial. Despite this, even the great powers, as Hurd stressed, need to legitimate their actions and, in its failure to do so, the United States faced resistance from other international actors. As such, the scenario envisioned by Brooks and Wohlforth where the materially preponderant state attempts to face short-term costs through attempts to change the norm but accrues long-term benefit in its favor if successful did not occur in this case.[128] The strategy of routinely violating pre-established norms to make them more difficult to be (re)accepted failed despite the material capacity that was backing the new norm.[129] This suggests, as Clark argued, that power itself did not directly translate into legitimacy.[130]

Chapter 5

Rendition

Introduction

Rendition is defined as the transfer of a person, usually a suspected criminal or terrorist, from one state to another. There are several subcategories of rendition, of which *extradition*, or the process whereby one state surrenders a suspect to another via a predetermined formal legal process, is the most widely accepted form. *Irregular* or *extraordinary renditions*, on the other hand, are transfers where the suspect has no access to a judicial system through which they could challenge the transfer.[1] As only this type of rendition is of interest in this chapter, all future references to "rendition" will refer to only irregular or extraordinary renditions. The practice of rendition is problematic not only because of its extrajudicial nature but also because rendition to some states can facilitate the torture of the rendered person. It is this latter concern that drove most of the negative reaction to the rendition program instituted by the Bush administration during the War on Terror. Prisoners had little opportunity to contest their transfer based on the principle of nonrefoulement, the doctrine that non-citizens should not be sent to other states where their basic rights may be undermined.[2]

Rendition is clearly a useful practice if a state believes that intelligence can be gained through torture or other forms of ill-treatment. Instead of running the risk of torturing a detainee, the state can leave this up to another state for which the risk of exposure may not be as severe. In addition, if one selectively chooses the states that detainees are rendered to, ensuring that those who are nationals of Western states are rendered to states of which they have dual citizenship, one can avoid problems that might otherwise arise over consular

V.C. Keating, *US Human Rights Conduct and International Legitimacy*

protection. Rendition is a legally contested subject because, like torture, its illegality under international human rights law depends on the differentiation between torture and cruel, inhuman, or degrading treatment. In addition, the legal requirements prohibiting transfers to other states are unclear. This affords the Bush administration two avenues of legitimation discourse. First, it can claim that the detainees were not tortured in other states because it believed that their treatment did not rise to the level of torture. Second, it can claim its belief that it was "more likely than not" that the detainee would not be tortured upon his transfer to another state. This chapter will evaluate the legitimation strategies of the Bush administration and other actors in international society with regard to the practice of rendition to a third-party state where torture is likely to occur.[3]

I argue that there is little evidence to demonstrate that the Bush administration engaged in an overtly norm entrepreneurial program that was successful. However, open norm entrepreneurship was less necessary either because there were covert strategies that were successful or because the norm was not particularly established among international elites. This conclusion is supported by several pieces of evidence. First, the Bush administration avoided criticism from other members of international society for years after the first reports of rendition came to light. Second, many states in the West, all of which had good human rights records, actively colluded with the United States in the rendition program and reportedly benefited from the intelligence gained. This collusion not only helped the Bush administration implement and sustain the program, but also paralyzed any potential criticism from these states, who instead had to spend a good deal of time distancing themselves from the program. In addition to the lack of criticism, several states also replicated many of the denial or mitigatory discourses the Bush administration used, perhaps in order to discursively lower their exposure to conduct that was seen as illegitimate to their publics. Third, the Bush administration made little attempt to follow a Skinnerian approach of offsetting the negative ideational component of the concept "rendition" by associating it with positive or at least neutral ideas. Instead, the Bush administration focused on downplaying the extent of its program or simply claiming that rendition did not lead to torture. Additionally, it only attempted to legally justify its position in the first few years after it became a public issue, later dropping this legitimation tactic altogether. Lastly, whereas states with poor human rights records heavily criticized the United States over its alleged torture of detainees, almost no such states used rendition in the same way, suggesting that the status of

rendition as a norm was so unclear that, unlike in the torture case study, these states did not feel it worthwhile to use it strategically against the United States.

It is important to note, however, that though these factors suggest that although this norm was relatively weak, particularly at the elite level, it was not completely absent. The very fact that the United States relied on secrecy and subsequently downplayed its actions signals that it was aware that this conduct might not be accepted. This is supported by the way that other states also attempted to distance themselves from their role in the program. I argue that this pattern of behavior can be explained through the lack of norm internalization among international Western elites compared to the societies they govern. The norm against rendition, using the typology of Finnemore and Sikkink, is not internalized—it has not reached a "taken for granted" status—remaining more easily challenged as compliance with the norm is governed by its utility in trade-offs with other norms. Thus, so long as the conduct was kept secret or relatively low profile, Western governments did not criticize but colluded with the United States, as this secrecy dampened any pressure from their respective populations. However, once the extent of the collusion was revealed, these elites then had to spend most of their time defending their own conduct instead of criticizing the conduct of the United States.[4] There is also some evidence that the United States benefited from its materially preponderant position, both in reports that it put pressure on European states to either stop taking legal action or tone down the rhetoric concerning the human rights situation in states to which the detainees were rendered and potentially in the general acquiescence of states to the program itself.

In sum, I argue though the norm appeared to be internalized among Western societies, which led to both the use of secrecy and subsequent defense of state action, the lack of internalization of the norm among elites when faced with the security threat of terrorism led them to abandon the norm when it could be kept secret. Given this overarching condition, this case study also illustrates the importance of international organizations in upholding particular human rights norms where other states have compromised themselves through collusion. With few exceptions, international organizations were the only members of international society that actively defended the prohibition of rendition for the purposes of torture. They also functioned to refute some of the discourses that either denied or attempted to downplay the involvement in the rendition program by the United States and other states in international society.

This chapter will proceed to illustrate these points through the following structure. First, it will investigate the existing information on the rendition program during the War on Terror to provide a backdrop for the discursive component of the analysis. Second, it will review the legitimating discourses of the Bush administration and other members of international society with respect to rendition to states suspected of torturing their detainees.

Historical Timeline and Internal US Discourses

Until recently, the United States did not have an active rendition policy. In fact, both American case law and political norms made the practice of rendition highly problematic for political elites.[5] This prohibition against renditions was the status quo until 1986, when the Reagan administration began to kidnap terrorist suspects in other states in order to transport them to the United States for trial. This practice was accelerated under President Clinton, who oversaw the creation of the CIA's first rendition program in 1995. This involved an agreement with the Egyptian government to transport certain terrorist suspects to Cairo for trial. Since Egypt considered these people to be a threat to their regime, many were executed or not heard from again, having been tried in absentia for their crimes.[6] The primary change in the rendition program between the Clinton and Bush administrations is that while the Clinton administration would render suspects to states where there was an outstanding legal charge against them, however dubious, the Bush administration's rendition program rendered suspects to other states for the explicit purpose of interrogation whether or not the person rendered was wanted in a criminal case in the state to which they were rendered.[7]

The post-9/11 US rendition program was first publicly revealed in a December 2002 *Washington Post* article. Dana Priest and Barton Gellman reported that the CIA was handing over lower-level detainees to foreign intelligence services, particularly those of Jordan, Egypt, and Morocco, with a list of questions for interrogation.[8] The total number of persons rendered to such states is unknown, but several estimates have been put forward. In 2005 *The Economist* reported that fewer than 100 captives had been subject to such transfers as of the beginning of 2003.[9] *Le Monde* slightly differed, reporting that between 100 and 150 people had been rendered to Egypt, Syria, Saudi Arabia, Jordan, and Pakistan.[10] CIA officials also told journalists that there were between 100 and 150 transfers.[11] The higher figure might be more likely as Egyptian Prime Minister Ahmed Nazif declared in

the same year that between 60 and 70 terrorism suspects had been rendered to Egypt alone, though this assumes that the distribution of recipient states was not highly skewed.[12] Later reports emerged that the destinations chosen for renditions had changed. The Ethiopian government confirmed in 2007 that it had detained 41 suspects who allegedly fought against Ethiopian troops in Somalia. The *Daily Telegraph* also reported that the CIA had rendered hundreds of al-Qaida suspects to Ethiopia where they faced torture and abuse.[13] This program continued throughout the Bush administration with very little domestic judicial oversight. The US Supreme Court refused to review the only case to make it to this level in 2007.[14]

Although no government officials stated publicly that the purpose of rendition was to facilitate torture, there is some evidence from the statements of anonymous US officials that this was the case. For instance, one official infamously declared in 2002, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."[15] Furthermore, in response to a question attempting to parallel how the Clinton administration ensured that states to whom detainees were rendered respected lawful boundaries with the Bush administration conduct, another Bush administration official stated, "You can be sure that we are not spending a lot of time on that now."[16] This emphasis on physical coercion was balanced by several anonymous Bush administration officials who commented on the utility of the rendition interrogations. A US official stated that Jordan was a preferred state to send rendered detainees to because they had "highly professional" interrogators. The official contended that the states were not selected because of their coercive questioning techniques or because they tortured the detainees, but because they shared a cultural affinity with the rendered suspects that could create a culture of intimacy unavailable in US interrogation sessions. Interrogators who spoke the dialect of Arabic used by the detainees could also use shame and the prospects of reputation loss for the family of the captive as a technique to gain information.[17] There are also indications that the Bush administration seemed to be pleased with the intelligence gathered by the program. When speaking to the case of Maher Arar a year later, a senior US intelligence official stated, "We are doing a number of them [renditions], and they have been very productive." Another official was somewhat more explicit about the problems of renditions, noting that "[t]he temptation is to have these folks in other hands because they have different standards," and a third agreed, saying, "Someone might be able to get information we can't from detainees."[18]

In addition to the general volume of rendered persons involved in the program, journalists also uncovered several cases of mistaken rendition. The *Washington Post* reported in 2003 that Syria released Maher Arar, a Canadian citizen, from prison after 10 months of detention on behalf of the United States.[19] Macedonian police reportedly picked up a German citizen, Khaled el-Masri, and held him for weeks before flying him to a jail in Afghanistan. After five months of captivity, they released him in Albania.[20] An Australian citizen, Mamdouh Habib, was reportedly rendered to Egypt before being sent to Guantanamo Bay.[21] All three of these cases were made famous by the fact that none of the suspects were found to have any ties with terrorist organizations, but all were rendered to states where they faced mistreatment and allegedly torture.

There was also an outcry from civil society within particular states whose governments facilitated the rendition process. The most famous of these concerns the case of Sweden, which admitted to aiding the United States in the rendition of two terrorist suspects to Egypt.[22] There is a great deal of evidence of collaboration between the United States and other Western states in the rendition program, the latter usually involved either by lending resources such as airfields to the US government or by directly participating in the rendition operations, such as providing support to the rendition process or questioning detainees themselves. Amnesty International believed as of 2006 that the US intelligence agencies made over 1000 covert flights through European air space.[23] A former CIA operative stated, "With the Europeans, and the Germans in particular, it was always a case of don't ask, don't tell. They wouldn't know the specifics, but they knew the sort of things we were up to."[24]

The involvement of the United Kingdom is particularly well documented. In 2006, the British government admitted that CIA aircraft that could have rendered detainees to states where they risked being tortured had landed at British airports 73 times since 2001.[25] A leaked memo by former British ambassador Craig Murray stated that the CIA station chief in Tashkent had acknowledged torture was used in order to gather intelligence.[26] He later published documents showing that the government routinely received intelligence from suspects tortured by the Uzbek government.[27] The *Sunday Herald* reported in 2005 that MI6 would pass questions on to the interrogators in states such as Morocco for use with prisoners of interest to the British government.[28] British involvement was further confirmed in 2008 when a British high court found that MI5 colluded in the illegal interrogation of a British resident, Binyam Mohamed, who was rendered and tortured in Morocco.[29] More damning for the British government

was the release of a classified British government document written by Irfan Siddiq of the Foreign Secretary's Office to Grace Cassy in the Pprime Mminister's Ooffice in 2006 that seemed to argue that the debate on rendition should be stifled. It stated that "We should try to avoid getting drawn on [sic] detail, and to try to move the debate on, in as front foot a way we can, underlining all the time the strong anti-terrorist rationale for close co-operation with the US, within our legal obligations." In discussing the outcome of detainees transferred to the United States, it continued, "Cabinet Office is researching this with MoD [Ministry of Defence]. But we understand the basic answer is that we have no mechanism for establishing this, though we would not ourselves question such detainees while they were in such facilities."[30] The memo pointed out that the UN convention bans torture but not "cruel, degrading or inhuman" treatment,[31] although it argued that the practice of rendition was "almost certainly illegal."[32] However, the extent to which this illegality applied did not seem to encompass the use of information from renditions. Craig Murray stated that the FCO, on the authority of Jack Straw and "C,"[33] revealed that their legal position was that the use of intelligence gathered by torture in a court of law would be illegal, but it was not illegal under the convention to simply receive such intelligence.[34]

Similar to the UK, the German external intelligence service publicly admitted in 2006 that it knew about the 2004 American seizure and detention of Khaled el-Masri, 16 months before the government was officially informed of his mistaken arrest. However, it was unclear whether the information had been passed on to senior officials.[35] Italy was also allegedly aware of rendition operations in its state, as CIA agents stated that the CIA station chief in Rome briefed their senior Italian counterparts prior to the operation.[36] In general, former secretary of state Colin Powell argued that the European leaders always knew about the transport, detention, and torture of suspects, stating,

> Most of our European friends cannot be shocked that this kind of thing takes place. The fact is that we have, over the years, had procedures in place that would deal with people who are responsible for terrorist activities, or suspected terrorist activities, and so the thing that is called rendition is not something that is new or unknown to my European friends.[37]

A leaked document to the *Mail on Sunday* corroborated this, stating that there was implicit agreement between European governments and the United States with regard to rendition. The document noted that "Both sides agreed on . . . increased use of European transit facilities to support the return of criminal/inadmissible aliens . . . and

improving co-operation in removals."[38] Equally, in 2007 the CIA Director Michael Hayden reportedly complained privately to European diplomats about their criticism of US intelligence programs. He stated that he was worried that misinformation could lead some states to stop cooperating with these programs, and that it was hypocritical for governments who benefited from the programs then to criticize them publicly.[39]

This collaboration was not limited to European states. The *Toronto Star* reported that the Canadian government approved all rendition flights taking place in the state. This was limited to the Canadian Security and Intelligence Service and the prime minister's office, who would approve the flights without telling other government agencies.[40] A Canadian commission found that the rendition of Maher Arar was the result of false warnings passed from Canadian intelligence officials to the United States.[41] The prime minister of Canada later apologized to Arar and awarded him 10.5 million Canadian dollars in damages for his rendition.[42] Likewise, in late 2007 an Australian Security Intelligence Organization (ASIO) agent admitted that he was present in a meeting with Mamdouh Habib in Pakistan days before he was kidnapped by the United States and sent to Egypt to be tortured.[43] The Australian Federal Police Commissioner subsequently admitted that an officer in his service discussed the deportation of Mamdouh Habib to Egypt with US officials.[44] It was later reported that the US government told the head of ASIO that it wanted to render Mamdouh Habib to Egypt for questioning.[45]

We can see from this overview of historical events and internal discourses that the number of people in the program was likely in the hundreds and that when caught, there is evidence that the United States simply moved the program from states in the Middle East and North Africa to sub-Saharan Africa. More importantly, it also provides a good deal of evidence that there was a concerted collusion between many Western states and the United States in the rendition program, which included both supporting the material aspects of the program and benefiting from the intelligence that it gathered.

United States

Denial, Mitigation, and Secrecy

This section will review all of the arguments that the Bush administration used to defend its human rights conduct in the War on Terror that did not involve the legitimation of its position. These demonstrate

that the state is attempting to avoid the costs of illegitimacy rather than attempting to challenge the legitimated norms, and are relevant in that they signal the presence of a legitimated norm with which the state is attempting to avoid conflict.

Secrecy played a large role in the American strategy during the beginning of the Bush administration, most likely so it could avoid the need to engage in a legitimation debate over conduct that might be judged negatively by other members of international society. Secrecy was also important for both domestic and legal reasons. An article in *The New Yorker* argued that the extraordinary rendition program was likely kept secret because a 1998 US law declared that no one was to be sent to another state if there were substantial grounds to believe that they would be tortured, independent of whether the person was in the United States at the time of their rendition. Even though the program was revealed to the public in a December 2002 *Washington Post* article, there were very few attempts by the US government to address the issue until 2005. Even then, the Justice Department tried to maintain some level of secrecy through invoking a "state secrets privilege" when faced with Maher Arar's legal challenge, arguing that such a court case would jeopardize the "intelligence, foreign policy and national security interests of the United States."[46]

Despite the Bush administration's best attempts, the rendition program slowly came to light through the media. The Bush administration consequently attempted to combat this by arguing that there was no evidence supporting the rendition claims. This legitimation strategy was used primarily in its defense of the alleged rendition flights that landed in Europe. For instance, the US consul in Scotland stated in 2005 that if the UK authorities had evidence that a crime had been committed, the British police would have sought a search warrant to board suspected aircraft. However, she also argued that routine searches by British authorities on such flights would be out of the question, reinforcing the need for a legal process based on sufficient evidence in this matter.[47] John Bellinger, a lawyer for the US government, likewise called on EU officials in 2006 to challenge assertions made about the rendition program, arguing that "[i]t's not possible for the United States to prove a negative, but responsible European governments or responsible European officials simply need to say this has gotten out of hand."[48]

Other strategies used by the Bush administration when responding to accusations involved a minimization of the program's scope, claiming that the number of people rendered was lower than it was. In 2006 John Bellinger did not deny that rendition took place, but

emphasized that there were "very few" cases.[49] CIA Director General Michael Hayden similarly stated a year later that only several dozen detainees had been transferred to foreign governments through the rendition program.[50] Though the total number of rendered persons is unknown, these figures are significantly lower than most estimates.[51]

In addition to arguing that there were fewer renditions than was reported, the Bush administration also denied that cases of rendition that came to light were not actually rendition. Attorney General Alberto Gonzales argued in 2006 that "Mr. [Maher] Arar was deported under our immigration laws. He was initially detained because his name appeared on terrorist lists . . . Some people have characterized his removal as a rendition. That is not what happened here. It was a deportation."[52] He later followed up, claiming that "[w]e were not responsible for [Mr. Arar's] removal to Syria. I'm not aware that he was tortured, and I haven't read the commission report . . . He was initially detained because his name appeared on terrorist lists, and he was deported according to our [immigration] laws."[53] Again, there is no admission of rendition, only that he was "removed" or "deported." Even two years later, John Bellinger, the legal adviser to the Secretary of State, stated that the rendition of Maher Arar was "a myth," characterizing the decision to send him to Syria as an immigration matter where all the proper rules were followed.[54]

The Bush administration also argued that they had made mistakes in particular cases. The use of apology was a useful strategy because it allowed the Bush administration to claim that the few public cases of rendition that led to torture were the result of error. Almost all of these claims were made with respect to the high-profile cases of rendition that the media publicized. For instance, in 2005 Secretary of State Condoleezza Rice noted of a German citizen who was rendered: "Any policy will sometimes result in error, and when it happens we do everything we can to correct it."[55] The CIA inspector general subsequently announced that the independent watchdog was investigating ten cases of potentially erroneous rendition, mostly due to cases of mistaken identity.[56] Condoleezza Rice similarly admitted a year later that mistakes were made in the rendition of Maher Arar to Syria, claiming,

> Our communication with the Canadian government about this was by no means perfect. In fact, it was quite imperfect . . . We have told the Canadian government that we did not think that this was handled particularly well in terms of our own relationship, and that we will try to do better in the future.[57]

Note that the apology here is not about the person rendered, but about the failure of intergovernmental communication over the issue. However, there were instances where the apology was directly tied to the rendition activity itself. In 2008, when it was announced that the CIA had used British airports to transfer two prisoners in 2002, the CIA director stated that neither of the two men were ever part of the high-value terrorist interrogation program, and that the fact that the CIA "found this mistake ourselves, and that we brought it to the attention of the British Government, in no way changes or excuses the reality that we were in the wrong."[58]

The Bush administration used many discursive strategies that focused on minimizing the potential costs of not complying with legitimated norms. Some, such as secrecy, were effective for years, allowing the Bush administration to opt out of any need to legitimate its conduct in international society. However, once it became clear that secrecy would not suffice, these discursive strategies were implemented in order to argue either that the program was not as large as it was claimed; through appealing to a lack of evidence, claiming a lower rendition frequency, or denying that particular cases constituted rendition; or by claiming that those detainees who were innocently rendered were mistakes. In its attempt to avoid a legitimation strategy that would defend its actions, the Bush administration is at least implicitly acknowledging the potential illegitimacy of its conduct, giving some credence to the idea that there is a legitimated norm against the practice of rendition.

Moral Legitimation Strategies

Government officials rarely appealed publicly to the utility of rendition. The first publicly attributable statement from the Bush administration came when Condoleezza Rice argued in 2005 that the United States did not knowingly allow terrorism suspects to be tortured, but argued that the information gathered had prevented attacks in both Europe and the United States, summing up that "Renditions take terrorists out of action and save lives."[59] Similar statements were later made by State Department spokespersons while discussing intelligence cooperation and the importance of a common fight against terrorism.[60] However, the most common moral legitimation tactic was to deny that rendered prisoners were being sent to states for the purposes of torture. Though this is not an explicit type of norm revisionism, to the extent that it is known that the torture occurs in rendition, it acts to undermine and delegitimize the norm through

relegating it to a status where open lying is promoted as acceptable. Rendition in this respect could also be used as a neutral proxy term for torture, which otherwise carries negative connotations. Finally, rendition could be used in this sense to achieve an implicit redefinition of terms—in this case, the definition of torture.[61] This was accomplished legislatively, such as in 2004 when the White House endorsed the "9/11 Recommendations Implementation Act." This made it illegal for US intelligence officials to deport terrorist suspects to states that were known to practice torture.[62] It provided some legal cover for the administration and upheld the idea that torture would not be used during rendition. Though this sounds relatively restrictive, it did not mean that cruel, inhuman, and degrading treatment could not be used in the interrogations of those detainees rendered to other states. In addition, it also rested on whether the domestic definition of torture would be congruent to those definitions found within international society.

The denial that rendition led to torture was also reflected in administration discourse after the rendition legislation was passed. For example, when Condoleezza Rice took a trip to Europe in 2005, where she was faced with public criticism from the European allies over the legitimacy of the rendition program, she declared in a written statement:

> The United States does not use the airspace or airport of any country for the purpose of transporting a detainee when we believe he or she will be tortured. The US does not transport, and has not transported detainees from one country to another for the purpose of interrogation using torture. With respect to detainees, the US government complies with its laws, its constitution and its treaty obligations.[63]

This legitimation strategy was used again after a Canadian commission reported that rendered terrorism suspect Maher Arar was subject to torture during his rendition in Syria despite having no ties to terrorist organizations.[64] Attorney General Alberto Gonzales reacted to this report, stating that the US government would never send a suspect to another state where they were likely to be tortured.[65] This message was conveyed repeatedly by others in the Bush administration during its term, proving to be one of the most utilized legitimation tactics by the United States from 2005 to 2008.[66]

Another way that the Bush administration would attempt to morally legitimate its action was through arguing that once it rendered a person to another state, that state's conduct was essentially

out of US hands. For instance, in 2005 Alberto Gonzales stated that the United States would never send detainees to states where they would be tortured. However, he acknowledged that the United States has little control over detainee treatment once they were out of US custody, stating, "We can't fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us. If you're asking me, 'Does a country always comply?' I don't have an answer to that."[67] Over a half year later, Press Secretary Scott McClellan still would not say whether the United States took steps to ensure that prisoners sent to other states were not tortured after they had left US custody.[68] Alberto Gonzales also stated the following year that his government asked for assurance that Mr. Arar would not be tortured, stating, "I'm not aware that he was tortured";[69] he denied any knowledge of the claims put forward by the Canadian commission.

The Bush administration also attempted to escape costs regarding its conduct through putting pressure on other states that might criticize the program. This suggests that material power was used to enforce discipline among the allies. It also might demonstrate the relatively low priority that the other states placed on opposing the rendition program. This included deflecting the argument by pointing out the complicity and hypocrisy of the states accusing the United States of rendering detainees for the purposes of torture. A State Department spokesperson argued with respect to the investigations of 26 CIA agents indicted in Italian court for their rendition activities that these investigations could cause other problems, asserting that "[t]hese continuing investigations and continual threat of criminal charges not only harm co-operation on our end but also cast a pall over co-operation on the Europeans side as well."[70] There were also other incidents where threats were made against European states that spoke out against the United States. *The Guardian* reported that the CIA attempted to have Germany silence protests from the EU over rendition flights. This was done in return for access to a German citizen and suspected al-Qaida member who was being held in a Moroccan prison. This practice was allegedly widespread among European states. It was reported that after the deal was made, EU states almost universally downplayed the human rights problems of the states where terrorist suspects were being held.[71] Overall there seemed to be little outward tendency for the Bush administration to reach a tolerable consensus that led it to revise its original conduct or discourse significantly. The only possible instance of this occurred in talks with Canada over Maher Arar, when the US Secretary of State Colin Powell agreed

to hand over the names of any Canadians who may have aided in his arrest and deportation in 2002.[72] Canada and the United States subsequently signed a protocol stating that the two states would advise each other before deporting nationals to third states, and "consult expeditiously" if either state required it. The US representative accepted this understanding, but noted that it was "not intended to create binding obligations under international law for either government."[73]

Legal Legitimation Strategies

The Bush administration attempted to legally legitimate rendition through direct appeals to both international humanitarian law and international human rights law. With respect to the former, a government legal opinion document dated March 2004 stated that some of the non-Iraqi prisoners captured during the Iraq War would not be entitled to the Geneva Convention protection. Specifically, it argued that this allowed the US government to legally transport up to a dozen detainees outside of Iraq for interrogations. The government initially reacted to the release of the document by stating that it had not been incorporated into new legal opinion and that all the prisoners in Iraq for whom this would apply had already been moved between April 2003 and March 2004.[74] However, Alberto Gonzales later confirmed the attitude found within the legal opinion at his nomination hearings in 2005, claiming that non-Iraqis would not have the protection of the Geneva Conventions, as these would prohibit the transfer of prisoners outside the state in which they were held.[75]

In addition to this claim to international humanitarian law, the Bush administration made appeals to a more generalized "international law." This was an explicit legal justification of its position, arguing that prior human rights abuse does not lead to an automatic transfer prohibition, which worked in conjunction with the moral claim that the purpose of rendition was not to torture the detainees. Condoleezza Rice explicitly argued in 2005 that "renditions are permissible under international law."[76] John Bellinger, an adviser to Rice, further commented on the issue at length:

> I want to be clear on what the international law standard is. Yes, we as a State Department, as a country, have got problems with the human rights records with certain countries. The law in the torture convention, however, says one may not transfer an individual to a country if we believe that there is a substantial likelihood that the person will be tortured. The human rights record is certainly going to be relevant and should raise a flag. But it does not mean that you may not transfer a person to that country.[77]

This reasoning was echoed half a year later by another State Department official.[78] Despite its insistence on the absence of torture during renditions, the Bush administration used the legal language of the CAT very seldom. Only in 2008 did John Bellinger claim that a detainee would never be sent to a state where "it is more likely than not that the individual will face torture."[79]

International Society

Denial, Mitigation, and Secrecy

One of the major problems facing other states in international society was how to deal with their widespread collusion with the rendition program, either in terms of aiding the rendition process, giving intelligence to the United States that led to rendition, or utilizing the intelligence gained from the rendition interrogations. Given this backdrop, many of the discourses of other states in international society echoed those of the Bush administration. One of the few that were not similar was to call for an investigation into US rendition activities under the justification of gathering more evidence. Though some of these investigations could have been suggested out of goodwill to uncover illicit activities, they also had the effect of delaying legitimation interactions until they were complete. Such calls can also cast doubt on rendition claims, and their appeal to legitimate process makes them difficult to refute. These worries are particularly salient since most of the calls for investigations were confined between 2003 and 2005 when the United States faced very little opposition to the program.

In response to the detention and suspected torture of Arar, the Canadian government stated in 2003 that it would investigate what information the Royal Canadian Mounted Police gave the US authorities.[80] Italian police likewise investigated allegations that intelligence agents from the United States kidnapped a suspected Islamic militant in Milan and rendered him to Egypt where he was tortured.[81] There were also many calls for investigations from European governments over the use of their airspace or airfields for rendition flights. For instance, the government of Ireland announced that it was going to investigate allegations that Shannon airport was used to facilitate extraordinary renditions.[82] The Canadian government acted similarly when its ties to the rendition program were unearthed in 2005.[83] The Swedish government was unique in that it called for an international investigation over the matter. It admitted to deporting two terrorism suspects to Egypt, claiming that though the government had obtained

a promise from the Egyptian government that the suspects would be treated well, this promise was not honored. The Swedish government called for an international investigation, possibly under the United Nations, into how the two men were treated, and launched an internal probe to determine the role played by US intelligence agents in the case. The deputy foreign minister stated, "We have taken the allegations seriously, very seriously . . . We have asked for an independent, international investigation . . . . It would be in the best interests of the government of Egypt to do this."[84]

Few states declared that they wished to question the states reportedly involved in the torture. In a rare example, the Canadian government stated that it would question the Syrian ambassador about the allegations of torture of Maher Arar.[85] The Australian government similarly claimed that it had asked Egypt about the torture of Mamdouh Habib. However, Egypt did not admit that he was held prisoner, despite the fact that the interior minister of pakistan stated that his government had transferred him to Egypt under the instructions of the United States.[86] The Swedish government wrote in a letter to the Committee Against Torture in 2002 that the ambassador had seen Ahmen Agiza and brought back no complaint about his treatment.[87]

Another discourse similar to those of the Bush administration was an outright denial of any wrongdoing. This was the case both for the states where the suspects were rendered and for those who colluded in the renditions. For instance, in a radio interview the Syrian chargé d'affaires in Washington claimed that Arar had not been tortured in his state.[88] The Swedish government equally stated in 2003 that Agiza's public complaints of mistreatment were not credible,[89] and the Canadian prime minister claimed in the same year that "The people who are responsible for the deportation of this gentleman to Syria are in the government of the United States, not the government of Canada."[90] The Italian minister for parliamentary relations similarly told the Italian Parliament in 2005 that the abduction of Abu Omar "was never brought to the attention of the executive or of the national institutions . . . consequently, it is not conceivable that any operation of this type was authorised or that Italian bodies were involved."[91] A spokesperson for the UK government stated in the same year,

> The British government, including the security and intelligence services, never uses torture for any purpose. Nor would HMG [Her Majesty's Government] instigate or condone the use of torture by third parties. Specific instructions are issued to all personnel of the UK security and intelligence services who

are deployed to interview detainees, which include guidance on what to do if they considered that treatment in any way inappropriate.[92]

International organizations, on the other hand, raised doubts over the claims that other states had no part in the rendition process. This was an important function as it allowed subsequent legitimation discourse over the conduct that was discovered. This was almost an exclusive characteristic of European Union institutions between 2006 and 2007. For instance, in 2006 a report by the Council of Europe stated that there was "a great deal of coherent, convergent evidence pointing to the existence of a system of 'relocation' or 'outsourcing of torture."' The lead investigator stated concerning the program,

> Individuals have been abducted, deprived of their liberty and transported to different destinations in Europe, to be handed over to countries in which they have suffered degrading treatment and torture. Hundreds of CIA-chartered flights have passed through numerous European countries. It is highly unlikely that European governments, or at least their intelligence services, were unaware.[93]

Likewise, a 2006 report from the European Parliament claimed that the CIA operated more than 1000 secret flights over EU territory. The report's author, Claudio Fava, questioned whether they could be for a purpose other than rendition, claiming that "The routes for some of these flights seem to be quite suspect . . . . They are rather strange routes for flights to take. It is hard to imagine . . . those stopovers were simply for providing fuel."[94] A subsequent Council of Europe report in 2007 on the rendition program claimed that the UK not only offered logistical support to the program, but also provided information that was used for torture in Morocco.[95] In total, 14 states were accused of collaborating with the United States in its rendition program. The report concluded that "It is only through the intentional or grossly negligent collusion of the European partners that this 'web' was able to spread also over Europe."[96] In a non-European example, the United Nations Committee Against Torture ruled in 2006 that Sweden had "committed a breach of its obligations," by not "disclosing relevant information" with regard to the rendition of Ahmed Agiza.[97]

In addition to denying their wrongdoing outright, governments also claimed that there was little to no evidence to suggest that they had conspired in the rendition process or that their state assets were used. For instance, in 2003 *El Pais* reported that the Spanish intelligence service knew CIA planes were stopping in Spain and urged

the American agency to stop the flights. The Spanish defense minister replied, "We have no evidence, we have no proof, so I am not prepared to put a friendly, allied government on the spot on the basis of supposition and rumour."[98] This was similar to a Canadian response to the issue, where a spokesperson claimed that "We have no reason to raise this issue with the U.S. because there is no credible information that U.S. activities are taking place in Canada that are contrary to Canadian and international law."[99] This discourse was used frequently by many European governments between 2005 and 2007.[100]

Once there was sufficient evidence that some of the suspects rendered had nothing to do with terrorist organizations, states added that renditions were due to mistakes in the system. German Chancellor Angela Merkel stated in 2005 that she had received an apology from the United States regarding the five-month detention of Khaled Masri, who was wrongly identified as a terrorist.[101] Chancellor Merkel replied, "I'm pleased that we spoke about this individual case which is accepted by the US as a mistake. And I'm so very pleased that (Dr Rice) has restated that if mistakes are made, they must be immediately rectified."[102] Others implicitly used the "mistakes" discourse over their knowledge of the rendition program. In the UK, a House of Commons committee, speaking about two terrorists suspects apprehended by MI5 and given over to the CIA, noted that MI5 were "were slow to appreciate (the) change in US rendition policy"[103] and that they "should always have sought assurances on detainee treatment" when dealing with US agencies.[104] In 2008 the British foreign secretary revealed that the US government did use UK airbases for rendition flights to Guantanamo Bay, similarly stating,

> Contrary to earlier explicit assurances that Diego Garcia had not been used for rendition flights, recent US investigations have now revealed two occasions, both in 2002, when this had in fact occurred. An error in the earlier US records search meant that these cases did not come to light . . . . [Condoleezza Rice] shares my deep regret that this information has only just come to light.[105]

The prime minister later followed up that "It is unfortunate that this was not known . . . but it's important (to ensure) this will not happen again."[106]

Many Western states attempted to mitigate the effect of their alleged role in the rendition program by claiming that they had received assurances from the United States that their assets were not used for the purposes of rendition. Not only does this strategy attempt to shift the blame away from the colluding state, but it also uses the

standing of the United States as a mechanism to increase the veracity of the claim. For instance, the Irish minister for foreign affairs stated after the meeting with Condoleezza Rice in 2005 that "She was very categorical that Shannon has not been used for anything untoward. We fully accept the categorical assurance of a friendly nation."[107] Many similar statements were made by the Irish government over the course of the Bush administration.[108] Other states used these assurances not to claim that rendition did not occur, but that it did not lead to the torture of those rendered. This is a more problematic claim in that it implicitly concedes that rendition might be legitimate, but the torture that occurs during rendition is not. For example, the foreign minister of Denmark noted that "We must simply make sure that they are not flown somewhere where they are tortured. And now Rice has said very clearly that this does not happen."[109] This was similar to a claim several years later when the Danish foreign minister denied that he had lied about Greenland being a stopping place for CIA rendition flights, claiming that "after consulting the United States I had been informed that nothing illegal had occurred. I was given the impression that the Americans were respecting the conventions. So you cannot say that I was lying."[110] British Prime Minister Tony Blair likewise made a statement before the House of Commons where he argued that "It is not the case that the Americans say they are deliberately returning people for torture in countries. On the contrary, they say they do not return them unless they get assurances about the treatment of these individuals."[111] This type of statement was echoed by other members of the UK executive and their spokespersons up to the end of the Bush administration.[112]

Moral Legitimation Strategies

Despite the problems that states faced with their own involvement in the rendition program, there were also some attempts to respond to the legitimation strategies of the Bush administration. Overall, the message was mixed, with some states challenging the assertions of the Bush administration, but others upholding and strengthening some of their assertions.

States stressed the utilitarian nature of the rendition act in their acts of legitimation. For states that were allegedly conducting the interrogations, there were some statements indicating that they saw it as a way of building bridges or continuing their relationships with Western states. A high-ranking Syrian diplomat stated that his government agreed to the imprisonment of Maher Arar as a gesture of goodwill to the United States, arguing, "They told us he was an Al Qaeda

activist, so we took him and put him in custody . . . The U.S. was pressing us not to send him to Canada." The diplomat reported that Syrians eventually freed Arar because the Bush administration had cut communications with them and they wanted to repair their relationship with the Canadians, noting that the whole process was a "political decision" and that they believed "there [was] no case against him."[113] For many Western states, the rendition program had legitimacy because of the intelligence that it produced. States used this discourse in particular when they were pressed on whether they would use the intelligence data gathered by the program.[114] The Canadian government stated that the Canadian Security Intelligence Service would not reject evidence based on torture if it could be corroborated with other sources, allegedly pressing for information from Syria on the torture of particular suspects.[115] A spokesperson for the British Foreign Office stated that Britain condemned torture but at the same time could not ignore sources of intelligence, as

> [w]ithout the sharing of intelligence, there would have been many more bloody terrorist attacks that would have gone ahead, like the plan to bomb a Christmas market in Strasbourg. If you have an agreement to work together against terrorism with another country then it's obvious common sense that one has to have a certain amount of trust in that country and in the way it chooses to use that intelligence.[116]

At other times the stress was not on the utility of the intelligence itself, only on the utility of the maintenance of the intelligence relationship with the United States.[117]

International organizations, on the other hand, were uniformly against the practice of rendition. The report from the UN Committee Against Torture said of rendition, or in its language, "enforced disappearances," that it "considers the [US] view that such acts do not constitute a form of torture to be regrettable."[118] Since the use of reassurances as a legitimation tactic was popular among the United States and other states, this was commented upon by the UN High Commissioner for Human Rights, Louise Arbour, who claimed that the practice of seeking diplomatic assurances about torture was "dubious."[119]

Legal Legitimation Strategies

Several states upheld the idea that rendition itself might be legally problematic. This is the strongest form of legal argument in the case study, since it challenges the idea that moving prisoners to a state

where they might face abuse, independently of whether it happens, is problematic. The Canadian Solicitor General stated in 2003 that the government needed "a clear understanding of our desire that with information sharing, Canadian individual rights are protected as they would be in Canada."[120] The Spanish interior minister similarly noted in 2005 that if his government colluded in the rendition process, "we would be looking at extremely serious, absolutely intolerable acts that violate rules for treating prisoners in a democratic society."[121] The Irish deputy prime minister stated that if there were reasonable evidence that a crime had been committed onboard CIA flights landing in his state, the police could search the plane, as "It would be a crime to detain, against their will, any person on a flight, other than on foot [sic] of an extradition treaty which is not relevant to this case."[122]

Legal legitimation tactics that focused on the illegality of rendition were much more prevalent among international organizations. For instance, in 2002 Madeleine Rees, the head of the Bosnia office of the UN High Commission for Human Rights, stated outright that the actions of the Bosnian government where six men were handed over to the Americans ignored their civil liberties and "violat[ed] the rule of law."[123] The UN Commission on Human Rights Special Rapporteur, Martin Scheinin, likewise argued in 2005 regarding renditions in general that "When several states can, through cooperating, breach their obligations under international law simultaneously, if they are all involved in torture, they all bear their own responsibility."[124] Manfred Nowak, high commissioner for torture, reiterated that "there is no doubt that extraordinary rendition is illegal. This is abducting a person. I think there is evidence that this practice was used and I would like the European Union to take a stronger position."[125] He noted in another article the same year that it was illegal in a number of respects. First, they were detained illegally. Second, they were sent to states where they might be tortured, contravening treaties against refoulement. Third, they were transported without an extradition hearing. Finally, their treatment during the rendition itself might have been torture, such as being shackled in a painful position or being deprived of sleep.[126] Later in the year, he attacked the practice of obtaining assurances, arguing "that the plan of the United Kingdom to request diplomatic assurances for the purpose of expelling persons in spite of a risk of torture reflects a tendency in Europe to circumvent" international obligations.[127]

Other international organizations appealed specifically to European law. The Council of Europe's Commissioner on Human Rights argued that renditions were "so far beyond anything that the rule of law

permits that they are completely unacceptable."[128] The justice commissioner of the European Union similarly stated, "It's absolutely clear that such facts would represent, if they really happened, a serious infringement of the principles of the European Union as well as of the laws of EU member states which punishes such facts."[129] The EU subsequently issued a formal complaint to the United States about its practice of rendition.[130]

Other states were more ambiguous over whether rendition itself constituted a human rights violation. Some governments, such as of the UK and Denmark, argued that rendition was legal, but the torture that rendition might lead to was not. The foreign minister of Denmark noted directly that "There is nothing wrong with transferring prisoners unto itself."[131] British Prime Minister Tony Blair told the House of Commons that extraordinary rendition had been a policy in place for many years on the part of the Americans, but torture could not be justified "in any set of circumstances at all."[132] At other times it was unclear what the status of rendition was for the United Kingdom. When Blair was asked in 2005 whether he approved of the practice of rendition, he stated, "It all depends what you mean by rendition. If it is something that's illegal, I totally disapprove of it. If it is lawful, I don't disapprove of it."[133] It was clear that any acceptance of rendition might be perceived as a change of policy, as the British Foreign Secretary Jack Straw admitted that the UK had once refused to allow the transport of terrorist suspects through British airspace in 1998 because they received legal advice that the renditions would not be lawful.[134] Though most made statements concerning the legality of rendition itself, the Canadian government commented on the use of rendition intelligence, claiming:

> The sharing of information always involves a weighing of the variety of considerations that are here, and there aren't, in my submission, specific circumstances that trump . . . . the [Convention Against Torture] does not create a standard, certainly not one that governed in 2001 to 2004, by which to judge sufficiency or deficiency of Canadian actions because it did not impose such a standard.[135]

However, this was the only attempt on record to legally defend the use of intelligence from the rendition program.

Conclusion

This case study is significantly different in some respects from the previous case studies, particularly in the way the Bush administration's

practices of rendition benefited from secrecy. Despite the fact that the practice of rendition was first reported in December 2002, with few exceptions neither the United States nor any member of international society actively engaged in any legitimation discourses for two years. When the practices of rendition finally became public, practices that extended the scope of rendition from sending a detainee to trial to sending a detainee for interrogation purposes, the Bush administration primarily focused on denying its actions, mitigating their scope, putting pressure on allies to prevent criticism, and even threatening the intelligence co-operation between the United States and the European states in the war on terror. The Bush administration also attempted to defend its actions through moral legitimation strategies, the most common of which, spanning from 2005 to the end of the Bush administration, was to deny that renditions led to torture. This might echo the differential definition of torture as distinct from cruel and unusual punishment put forward in the chapter on US torture practices, but more importantly it lacks a similar supporting framework of positive context that Skinner argues is necessary for successful norm innovation.[136] To a much lesser extent, the Bush administration also claimed that it had no responsibility for what happens to detainees outside its custody, which speaks to a highly communitarian view of human rights. From a legal perspective, in 2004 and 2005 the Bush administration argued that those enemy combatants who were not subject to the Geneva Conventions could be legally transported elsewhere for interrogations. At the same time, through International Human Rights Law, it argued that just because a state has a history of torture does not mean that rendition to these states should be automatically prohibited, echoing its moral strategy that rendition does not lead to torture. Importantly, after 2006 almost no legal legitimation strategies were employed by the Bush administration. The legitimation strategies used by the Bush administration overall were relatively few and far between, as the administration rather focussed on either denying or mitigating its conduct.

The initial period of secrecy was crucial to the relative success of the rendition program, as it allowed time for Western states to collude in the process without facing the consequences of participating in a potentially illegitimate process. This is important not just because the Bush administration was able to conduct a potentially illegitimate activity without repercussions for several years, but also because the colluding states were consequently put in a position where they faced two difficulties. First, if they wished to critique the United States for its conduct once the program became public, their arguments could more easily be seen as self-serving or hypocritical. Second, they had to

spend a great deal of time defending their own collusion to domestic audiences, lessening the time that they could spend criticizing the United States. At the extreme, it could be argued that their participation in the program changed their payoffs so that partial or full legitimation of rendition would be in their interest.

This is reflected in the response to US legitimation claims by other members of international society, where there were highly differential strategies depending on whether the legitimation arguments came from states or international organizations. States were relatively muted in their criticism of the program. Some even argued that rendition itself was legal, and others legitimated their role through appealing to the utility of intelligence sharing with the United States. This mimicking of US legitimation strategies suggests an attempt by other states to legitimate rendition after it was discovered, perhaps to avoid the costs that they had started to face. This is an important feature as, according to Hurd, one of the requirements to determine the legitimacy of a particular rule or norm is the rate of compliance. This collusion, in addition to the mimicking of US legitimation strategies, suggests that there might be some problems with the purported illegitimacy of rendition in international society.[137] It was thus left to international organizations to defend the right, and they did so primarily through legal legitimation strategies instead of moral legitimation strategies, arguing that the rendition practices violated international human rights or European law.

Given this data, the answer to the first research question, whether the Bush administration was successful in legitimating its preferences within international society, is unclear. Certainly there was no overt norm entrepreneurial strategy on the part of the Bush administration to legitimate its preferences. Thus, whether state collusion was the result of a secret norm entrepreneurial discourse that was successful, or whether it indicates a relatively weak norm that had yet to reach "taken-for-granted" status among elites, is unknown with the data available. Despite this problem, there is still little evidence of a norm cascade with respect to rendition because the widespread use of denial discourses by both the United States and other members of international society once the veil of secrecy was lifted suggests that the norm was relatively entrenched in the domestic sphere. In addition, the fact that secrecy was necessary in order for collusion to take place further suggests that the actions taken by other states in international society were possible only because the secrecy allowed these states to avoid the costs of violating a domestic norm that they could otherwise not legitimate.[138]

This relative success of secrecy has theoretical implications. If under the guise of secrecy, states within international society can collude against particular norms, or at least be pressured by the materially preponderant state to aid them in the process with fewer ramifications, this lends doubt to Ian Hurd's claim that such secrecy is a higher-risk strategy than legitimation because the negative consequences of exposure outweigh the gains that might be made through its limited success.[139] Contrary to Hurd's assessment, instead of facing additional costs, the collusion brought on by the secrecy lowered the costs of US actions by paralyzing the potential negative discourse by other states within international society, and in some cases led them to defend the legality of rendition, leaving solely international organizations to uphold the norm discursively.[140]

Finally, concerning the effects of materiality on the case study, we can see again that the Bush administration was successful in ensuring collusion with the rendition program, which could have been caused in part by material influences. The only public statement that corresponds to this is the veiled threat to Italy over intelligence cooperation when Italian courts charged CIA agents allegedly involved in the rendition program. Another report without attributable public statements argued that the Bush administration put pressure on other European states as well. According to this report, this pressure was successful and resulted in European states downplaying the human rights problems of the states to which the detainees were being rendered. If these reports are true, then this shows that material influence might affect the contestation of a norm, at least with one that is weakly entrenched among elites. This is not the ability to induce a norm cascade that Brooks and Wohlforth suggested, but it does suggest that materiality can play a greater role in subverting norms that lack a "taken for granted" status.

In sum, this case study demonstrates the fragility of international human rights in an environment where the particular human right might not be adequately internalized by political elites who then secretly collude against it. However, the resistance experienced both from international organizations and from the domestic publics lends some evidence that though the norm prohibiting rendition is relatively weak among state elites, there are still some costs associated with ignoring it should states decide to do so in the future without the benefit of secrecy.

Chapter 6

Conclusion

The purpose of this book is to examine the effect of US human rights conduct in the war on terror through an analysis of the legitimation claims of the Bush administration and other members of international society with respect to three norms: torture, rendition for the purposes of torture, and *habeas corpus*. The central research question asks whether the United States was successful in legitimating its preferences regarding these three human rights norms within international society. This is an important question because it is generally acknowledged that the United States played a pivotal role in the creation and sustenance of the post-1945 international human rights system. Additionally, the United States is the materially preponderant state within international society, and, as such, it is able to withstand the costs of illegitimate conduct to a greater degree than states with fewer resources to draw upon. Additionally, this material preponderance might help it to initiate a norm cascade to match its preferences. Some realist theorists of international politics have argued that the success of the international human rights system is only due to the presence of a superpower that believed the system was in its own interest. Absent this interest, the system will be in crisis. This is particularly the case given that the international human rights system, unlike economic agreements for instance, has very few costs associated with defection outside of the negative reactions of other states. Given that the primary objective of other states is to protect their own citizens above others, there is very little for other states to gain from retaliating against human rights–abusing states. In sum, the defection of the state that did the most to create and support the system, the state that is also clearly materially preponderant, can be seen as a cause for alarm to

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both scholars and practitioners who are interested in sustaining strong international human rights norms.

This project sought to explore this question through a large-*N* analysis of legitimation discourses in international society. By providing a sample size that took in almost the entirety of the discourses of the United States and other members of international society on the subject, this thesis sought to analyze the ways in which the legitimation strategies of each were both enacted and transformed as the actors engaged in practices of legitimacy. Empirically, one could potentially draw two broad conclusions depending on the evidence in the three case studies. If the United States had been relatively successful in legitimating its preferences through the widespread concurrence, or even acquiescence, of other members of international society to its legitimation claims, then this would provide some evidence that the norms surrounding human rights within international society might have changed because of their conduct or norm entrepreneurial activity. If the United States had been unsuccessful in legitimating its preferences based on reactions of hostility by other members of international society, then not only would we have evidence that the norms of international human rights were still intact, but also we might look for evidence that the United States was paying costs for its failure to legitimate its preferences.

Conclusions from the Case Studies

The three human rights chosen for the case studies have different pre-existing strengths as norms and therein protections under international law. *Habeas corpus*, in particular, is the only human right of the three that is derogable in states of emergency or during wartime. However, within international human rights law, this status was in flux as the Human Rights Council argued in 2001, before the 9/11 terrorist attacks, that *habeas corpus* should be non-derogable. This also matched a longer-standing verdict by the Inter-American Court of Human Rights, which declared in 1987 that *habeas corpus* was non-derogable in a state of emergency. International humanitarian law, on the other hand, still allowed for the suspension of *habeas corpus* until the cessation of hostilities. Torture is non-derogable under both international human rights and humanitarian law, and has a more explicit international legal status with a separate convention forbidding its use. Torture is differentiated from cruel, inhuman, or degrading punishment under all international law, and this differentiation can lead to contestation over what types of conduct fall into each category.

With rendition in particular there is even larger scope for diversity in the legitimation of these practices because the legal requirements under which a prohibition of transfer from one state to another would exist are unclear. Additionally, the status and rules of rendition are uncertain in international humanitarian law, allowing for even greater differences in interpretation. With these differences in mind, the next section will review the legitimation strategies of the United States and other members of international society in each of the three case studies.

Habeas corpus

The United States attempted to legitimate its denial of *habeas corpus* in a number of ways. From the perspective of moral legitimation, it supported the idea of indefinite detention by arguing that the president has a duty to protect American citizens from the special danger posed by terrorism. These arguments attempted to play on the contradictions between the right to *habeas corpus* and the idea that a state has a duty to protect its citizens from external harm. This takes a concept with negative connotations, that of the deprivation of judicial oversight, and links it with the positive concept of a state defending its citizens. From this, the United States proceeded to a legal argument that contended that the rules of war as enshrined in the Geneva Conventions were not sufficient to cope with this new threat, and therefore the United States needed to reintroduce a category of combatant, the unlawful combatant, to prosecute the war on terror successfully. Not only were these arguments used publicly, they were also leaked in confidential memos from the Bush administration. This parallel between the internal and external discourse suggests that the Bush administration was serious about their attempts to engage in norm-entrepreneurship in international humanitarian law.

However, the outcome of US legitimation efforts was mixed. In many cases, other states seem to have pressured the United States into releasing their citizens through public criticism concerning the potential indefinite nature of their detention. In addition to contesting the detention of their citizens, states sometimes made cosmopolitan statements contesting the lack of *habeas corpus* at the Guantanamo base in general, though this did not occur as frequently. Many states were vocal in their opposition to the introduction of the reintroduced unlawful combatant norm, with some arguing that the prisoners should be held under the rules of the Geneva Conventions, independently of whether they qualified for the status. As time went on, other

states in international society additionally demanded closure of the facility independently of whoever was detained there.

The United States was successful in its reintroduction of the explicit use of the term "unlawful combatant" as a category of combatants who do not meet the criteria of lawful combatants as described in the Third Geneva Convention with the Red Cross. Given this, it was a successful norm entrepreneur in that it successfully led to the clarification of a norm that was previously implicit within international humanitarian law. However, the Red Cross did not legitimate the American government's claim that the war on terror constituted a "war" in which international humanitarian law would necessarily apply and made claims about the standards of treatment that would be necessary for persons in this category that did not match the Bush administration preferences. Thus, the United States was unsuccessful in its revisionist desire to remove the right of *habeas corpus* from the detainees through international legal means. This followed a general pattern where as the term of extrajudicial detentions became increasingly long, all international organizations eventually arrived at a consensus of legitimating their preferences via international human rights law over international humanitarian law, challenging the idea of the war on terror as a war in which humanitarian law could apply.

Finally, there is also evidence that the United States was aware of its overall lack of success in legitimating its preferences, leading to a shift in its legitimation strategies. Though it started with a legal argument concerning the definition of enemy combatants, deprived of their rights due to their illegitimate conduct on the battlefield, the United States ended up with a strategy based solely on the moral duty of the executive to keep dangerous detainees off the battlefield, abandoning its explicit norm entrepreneurship. The United States also arguably attempted to reach a tolerable consensus over the matter by assuaging other international actors in the hopes of reducing the costs of illegitimacy. It stated that the Geneva Conventions would apply even though the detainees would not receive prisoner of war status, it repatriated citizens of particular states after coming under pressure from these governments, and subsequently it limited the application of the unlawful combatant designation by refusing to apply it to any soldier or foreign fighter in Iraq. Given the preference for the use of indefinite detention found in the internal administration memos and the fact that the majority of these decisions took place before the 2004 Supreme Court ruling that placed domestic limitations on the administration's detention policy, this only increases the likelihood that these actions were taken in response to international pressure caused by their defection from the norm.

Torture

The United States attempted to legitimate its preferences regarding torture in a way that can be modeled by Luban's theory of torture within liberal democracies. His argument was that the legitimizing discourse for torture must be forward looking and must avoid any indication that the suspected torturous practices were committed for sadistic or cruel purposes. We can see this reflected in the legitimation discourses of the United States, who never admitted that it tortured, but at the same time attempted to challenge the definition of what constitutes torture by including some practices that fall within the penumbra of uncertainty between torture and cruel, inhuman, or degrading treatment. First it attempted to avoid any practices of legitimation by claiming that torture was not taking place. However, once the Abu Ghraib scandal was exposed, it legitimated its actions by playing on the contradictions within international norms, attempting to link positive norms such as the need for states to protect their citizens with the new, questionable interrogation methods. Following on the need to ensure that their conduct was not seen as sadistic or cruel, it appealed to the professionalism of the interrogators and claimed that there were adequate procedures in place. Finally, it argued that where there were genuine abuses, the perpetrators had been brought to justice. Throughout the United States supported the idea that torture was immoral and, on fewer occasions, ineffective, indicating that it was not so much looking to overthrow the torture norm as to push at its edges. In the period between 2006 and 2008 the United States shifted its legitimation strategy again, claiming it did not torture and appealing to the professionalism of the interrogators and the protections for the detainees inherent in the program.

The legal legitimation arguments of the United States also followed this pattern, where it claimed that the procedures used for interrogating the detainees were lawful on all levels, which adds to the hypothesis that the United States was more interested in revising than overthrowing the torture norm. However, attempts to legitimate the differential treatment of suspected terrorists in both humanitarian and international human rights law were initially attempted but ultimately abandoned after 2006, suggesting that it had given up on direct norm entrepreneurship. Interestingly, appeals to the legitimacy of domestic law increased in importance toward the end of the administration's term. This also coincided with their appeal that interrogators should not be prosecuted as they had broken no domestic laws, particularly as such prosecution could make the validity of future legal options from the Justice Department less certain. This might further indicate

an abandonment of norm entrepreneurship at the international level, although at the same time it could represent a genuine fear of domestic prosecution under a new administration.

The response by other states in the international system to these discourses was mixed. States with good human rights records were much more tepid in their opposition and in some cases even parroted back the moral legitimation strategies of the United States. Even expressing their displeasure or horror at the Abu Ghraib scandal was limited to an acute period in 2004. It is unclear how much coercion occurred between the United States and the other Western states, as there were only two instances where this was suggested by officials or diplomats. However, US conduct led some states to change their policies because of the suspected ill-treatment. This means that despite potential coercion and bribery, the illegitimacy of the detainee policy was beginning to present visible costs to the United States. Overall, some states with good human rights records took action through domestic policy to limit the potential exposure of detainees to US interrogation, but did not tend to speak out against US conduct. Notably, most of the direct criticism came from states that themselves had poor human rights records.

International organizations tended to voice their opposition to the conduct of the United States more than human rights–respecting states in the international system. However, they did not actively engage in the legitimation discourses of the United States, instead relying on appeals to the moral abhorrence of torture and calling for investigations. They did put forward a thorough legal defense of existing legal norms, though this was perhaps not as effective as it could have been since it relied on their own ability to legitimately define what is and is not torture. Since the United States was operating within the penumbra of uncertainty using a state of emergency argument, this arguably gave such direct legal appeal less influence.

The United States responded to the criticism from international society by publicly limiting the application of torture, attempting at the same time to reach a tolerable consensus where the use of alternative interrogation techniques could still reside within the domain of the CIA. The result of these discourses seems to be that, given the absolute prohibition on torture, the United States was relatively successful in avoiding costs of its potentially illegitimate activity, particularly at the beginning of the administration's term. However, as this term progressed, this became increasingly difficult, as evidenced by the hard lines taken by the international organizations, public statements where the United States had to coerce their allies into

compliance, and the changes in allied policy that increased the costs of interaction that were attributable to their detainee policies. As such, despite facing less overt opposition to their policies than in the case of *habeas corpus*, they seem to have been relatively unsuccessful in their attempts to redefine the meaning of torture to exclude acts that they were interested in pursuing for interrogation purposes, and paid costs for their illegitimate activity.

Rendition

With rendition the United States initially attempted both to deny the existence of the program and, when revealed, to discursively minimize its size, while arguing that the practice of rendition should be regarded as legitimate conduct. It argued that rendition was not about torture and reaffirmed that torture was illegal, but also defended the utility of the rendition program without explicitly stating what provided this utility. When it attempted to legitimate the rendition program through international law, it did so primarily with international human rights law, although international humanitarian law was also used occasionally. Specifically, the United States focused on the fact that rendition does not automatically equate to torture, which it believed was illegitimate, and just because a state has a history of using torture, it does not automatically mean that torture will be used. When the United States was not mitigating the effects of their conduct or attempting to legitimate rendition as normal conduct in international society, it was also using its material power to threaten intelligence cooperation with other states. According to some sources, this use of coercive force was so successful that it minimized the amount of delegitimizing discourse that other states engaged in. Importantly, unlike the case of *habeas corpus* and torture, there seemed to be little outward tendency for the United States to reach a tolerable consensus through revising its original conduct or discourse significantly.

Secrecy played a large role in the way that the rendition case study unfolded. Unlike the other two case studies, one where it was obvious that the detainees were being held without access to courts and the second in which there were rumors and reports of torture even before the Abu Ghraib scandal, it was not until 2005 that there was sustained reporting of the US practices of rendition. This secrecy was likely very useful to the United States, as it allowed the United States to coordinate the rendition program with other states without either party facing the negative consequences of being found to be engaging in a potentially illegitimate activity. In addition, once this collusion was

initiated, other states had a difficult time delegitimating rendition as they ran the risk of being charged with hypocrisy. Interestingly, despite the fact that the other states in international society participated in the program, which would hypothetically change their payoffs so that a partial or full legitimation of rendition would be in their interest, there was only a small amount of discursive support for the program, mostly based around the utility of the intelligence gained. At the same time, there was also almost no opposition of the practice. States with good human rights records instead devoted much of their time to defending their actions, likely to domestic audiences, claiming that they had little or nothing to do with the program, which in most cases was found to be inaccurate by subsequent inquiries. Even more telling concerning the weakness of the norm, states with poor human rights records rarely used the rendition program to embarrass the United States, unlike the case of the United States committing torture itself.

Because any delegitimation discourse from states was problematic due to their involvement in the program, international organizations played the largest role in challenging the claims of the United States and other states and delegitimating rendition as a practice. This points to the importance of international organizations in promoting existing international legal standards when even the most powerful states decide that it might be prudent to abandon them. The international organizations were responsible for conducting investigations that uncovered and publicized the rendition program, while providing some commentary reproducing the standards set in international law.

Despite the activities of the international organizations, the case study of rendition appears to be the most likely case of legitimation success for the United States relative to torture and the denial of *habeas corpus*, at least among the elite level of state actors. As such, it should be viewed as serving a warning that despite the widespread prohibitions against torture, states might have learned that, given the lack of consistent opposition to the practice, there is something to gain from ensuring that less-reputable states conduct torture on their behalf.

Theoretical Implications

Legitimacy in International Society

I argue that the data from the three case studies demonstrates that the practice of international legitimacy both occurred and mattered in all three cases. Though John Bolton and Condoleezza Rice claimed that US actions do not need external validity to be legitimate, the extensive

discourses attempting to legitimate or delegitimize the actions of the United States from both the United States itself and numerous members of international society seem to demonstrate that this is empirically incorrect.[1] In the cases of *habeas corpus* and torture specifically, there is a good deal of evidence suggesting that the United States both engaged in practices of legitimacy and attempted to come to some sort of tolerable consensus between its preferences and those of international society.[2] These legitimation strategies also followed patterns from which one could suggest the success or failure of particular legitimation strategies by exploring the way in which other members of international society responded to US claims, with *habeas corpus* showing the greatest failure to legitimate US preferences, and rendition showing the greatest success.[3] These legitimation strategies also followed patterns that were anticipated in the existing legitimation theory. For instance, there were Skinnarian attempts to associate potentially negative ideas with either neutral or positive ideas.[4] For instance, the explicit decoupling of the term "rendition" from the torture that it entailed could be seen as a way in which the United States attempted to use a potentially negative word in a neutral way. Similarly, by tying together the idea of keeping citizens safe from a grave threat with the denial of *habeas corpus*, the United States attempted to show how a number of favorable terms can be applied to an otherwise unfavorable idea. In sum, the empirical material from the case studies shows not only that states engage in practices of legitimation but also that there are consequences for their success or failure to legitimate their preferences.

Human Rights and Norm Change

A great deal has been written about the effect that the United States has had on the international human rights system given its defection from key norms during the war on terror. Some scholars argued that this could have very negative effect. Dunne, for instance, argued that the fundamental problem with the US conduct is that certain human wrongs, such as torture, can "cascade" as a norm just as their prohibition did through the promotion of their "torture culture." In addition, the normative contestation of human rights can weaken the regime so that future governments can breach rules by similarly invoking the necessity of counterterrorism.[5] This type of argument is far from novel. Dunér argued that the attacks of 9/11 tipped traditional balance between security and human rights away from human rights.[6] This is echoed in Skogly's argument that states have since diminished

their commitments to both domestic and international human rights.[7] On the other hand, there are some scholars who argued that the war on terror had little effect on the human rights regime, since there were other states, particularly those of Europe, who could continue to support it despite the defection of the United States.[8]

The analysis of the legitimation processes in the case studies shows alternatively that neither the excessively optimistic nor pessimistic views hold. Contra the pessimistic view, the case studies show that there was a dramatic negative response to the *habeas corpus* policy of the United States by members of international society, and at least unease and criticism to the US practices of torture. Though there is no question that the security environmental allowed the United States to temporarily relax its standards, particularly as it has the ability to take some costs of illegitimacy, there is little evidence that any of these norms became less entrenched in international society because of US actions. Contra the optimistic view, the rendition case study showed that Europe, far from being "sufficient to uphold the regime absent the hegemon,"[9] actually colluded with the United States in their rendition program, ostensibly to gain the intelligence benefits they believed it to have. This might suggest that a norm prohibiting rendition is not as established among international elites as the norm against performing torture and, particularly, the norm enforcing *habeas corpus.* Additionally, the opposition to torture by Western states was weak at first, with human rights–abusing states providing most of the discursive opposition to US conduct, again suggesting that the norm is not quite as strong as some might wish it were.

When reflecting on the how the different patterns of legitimation strategies might have affected the outcomes of these legitimation contestations, the largest difference between the case studies is in whether the United States actively engaged in norm entrepreneurial activity. Where it attempted to directly change norms, or what Morris et al. called norm innovation, it faced the greatest criticism.[10] An example here is the *habeas corpus* case study where the United States openly suggested that it could detain suspects indefinitely through appeal to the reintroduced unlawful combatant category and the special circumstances of the war on terror. When the United States attempted norm justification, or where it claimed that it is in compliance with the "proper" interpretation of the norm, it was slightly more successful. An example of this can be found in the torture case study, where it did not overtly attempt to change the norm, instead relying on legitimation discourses that suggested that the expansion in possible interrogation techniques was still within the remit of its international

obligations. Finally, it was the most successful when it did not legitimate its preferences at all, rather relying on secrecy, as exemplified in the rendition.

The success of secrecy in the rendition case study opens up some theoretical questions. This is particularly the case because Hurd was explicit in arguing that secrecy can be a high-risk strategy as the consequences are more negative in the potential exposure of the illegitimate act.[11] However, there is little evidence that this is the case. In fact, it seems to be the opposite—where the United States decided to make its conduct secret, they did not face as much international criticism as they did when they openly acted either through norm innovation, such as in the *habeas corpus* case, or through justification, such as in the torture case. Instead of secrecy working against the United States when the program was unveiled due to the illegitimacy of both the program and the act of secrecy, the secrecy of the rendition process allowed the collusion with other Western states that then immobilized them from criticizing the program, both because they needed to devote time to legitimating their conduct with their own publics and because any anti-rendition statements could be seen as hypocritical. This conclusion cannot be taken too far, as the cases of *habeas corpus*, torture, and rendition are different in the character of the human rights abuse; however, one might conclude that secrecy can play a positive role in ensuring collusion where the norm itself has not reached a taken-for-granted stage of socialization among state elites, such as in the case of rendition.

In addition to the theoretical contributions these case studies may add to the function of secrecy within international society, it is also important for English School theorists because it demonstrates that, even given the material power of the United States, some of the key human rights norms in international society are relatively robust. With the failure of the United States to legitimate its actions, particularly with respect to *habeas corpus* and to a lesser extent torture, there is increased confidence that these human rights are strong norms within international society and not, as realists would have it, the epiphenomenal effect of a hegemonic liberal democratic state attempting to impose its value system on the rest of the world.

Role of Materiality

A great number of academics, particularly those from the realist school of international relations, believe that the largest influence on the human rights system lies in the material preponderance of a state or a

number of states.[12] This material preponderance has potential effects on ideational structures. If a materially preponderant state wishes to violate a norm, it is in a good position to do so because it can better absorb the costs of its illegitimate actions. If other members of the community then join the new status quo, the materially preponderant state will then enjoy long-term benefits of having its preferences legitimated within international society for some short-term costs.[13] This might particularly be the case if the materially preponderant state decides to use "positive inducements" where material inducements are initially used on smaller states to change their policies to those of the materially preponderant state, which then becomes socialized via a norm cascade within these smaller states.[14] Empirically, some argued that the United States actively used its material preponderance to undermine the international human rights regime,[15] while others argued that its material preponderance would not undermine the regime, but could possibly change "how it will be made, interpreted, and used in the future."[16]

Though it can be argued that the material preponderance of the United States allowed them to absorb the costs of illegitimate action when they failed to legitimate their preferences, the case studies do not show that material preponderance helped the United States legitimate their preferences. In other words, there is little evidence in any of the case studies that the material preponderance of the United States allowed it to change international human rights norms. There is also evidence that points to costs associated in their failure to legitimate their preferences. When an outright norm entrepreneurial strategy was attempted, such as the case of *habeas corpus*, it was a clear failure and ultimately abandoned. With torture case study, material preponderance did seem to have the effect of silencing some potential state critics of torture, which affected the reproduction of the norm, but it did not lead to support of American preferences among their allies, nor did it prevent states with poor human rights records from openly criticizing their conduct. Although material preponderance seems to have some effects in silencing criticism, which will affect the way in which an ideational norm will be reproduced, it did not do so sufficiently to undermine any of the norms examined in the three case studies.

It seems, as Hurd argued, that hegemons cannot violate the "rules of the game" too often and are bound to the rules to the extent they value legitimacy.[17] They need to legitimate their actions, and in their failure to do so, the United States faced resistance from other

international actors and therein incurred costs that would not have accrued had they been successful. Some of these costs can be observed directly, such as the changes in detainee policy transfers from some states or a prohibition on extraditions,[18] or the open distrust of American assurances.[19] Other costs can be associated with the necessity to strong-arm allies into remaining quiet about illegitimate activity.[20] Even further costs came from the time needed for diplomatic defense of illegitimate activity, such as after the Abu Ghraib scandal or during Condoleezza Rice's 2005 trip to Europe.[21] Thus, other than mitigating some of the negative response, the material position of the United States did not seem to have much effect on their ability to legitimate their position. The strategy of routinely violating pre-established norms to make them more difficult to be (re)accepted failed despite the material capacity that was backing the new norms.[22] This suggests, as Clark argued, that material preponderance does not directly translate into legitimacy.[23]

Possibilities for Further Research

Though the conclusions of this thesis helps expand our knowledge of the effects the United States had on international human rights norms during the war on terror, the limitations of the research should guide potential future research in the topic. First, the analysis is limited by the selection of case studies themselves. To further verify that *habeas corpus*, for instance, is a more entrenched human rights norm than rendition, it would be helpful to analyze similarly the legitimation arguments of other states that have conducted both types of behavior simultaneously. Not all combinations of the case studies would have historical parallels, but where they did, one could generate a better understanding of the phenomenon in general.

Second, the data, being the legitimation strategies of various members of international society, limits our understanding of the interactions between the United States and other members of international society because as strategic language it represents the intersection of the internal preferences of the actors and the effects the existing ideational structures have on the enunciation of these preferences. It thus cannot say much directly about the degree of socialization of the actors into the system. In order to better understand whether norms have been internalized by actors, something that might strengthen the argument concerning the lack of internalized norms among elites in the rendition case study, we would need more data from interviews,

memoirs, and other personal sources. Archival sources including currently classified documents would also help in the analysis. This would also be very helpful in augmenting the analysis of the role of materiality, as there would be additional clues as to whether or not the United States used material incentives and disincentives in order to prevent particular states from speaking out against their human rights abuses or even making statements in support of them.

Third, again due to the nature of the data available, the model used to understand the interactions was Schimmelfennig's rhetorical action model. However, this presupposes that there is no socialization processes occurring outside of elites attempting to promote their policy preferences within particular ideational structures, including the effects that previous statements might have in limiting their future options. It is possible that complex social learning could have taken place in the case studies, but additional evidence would be needed in order to analyze this. Particularly important to these are the availability of documented non-politicized spaces where political elites can speak freely with each other. Absent this data, such analysis is difficult, if not impossible, to conduct. However, with the future release of personal documents and archival sources, this hurdle could be overcome.

Finally, the relatively uniform reaction by other states in international society to the publicity of the rendition program suggests that there may be some research possibilities in examining the role of world society in this particular case study. This is particularly striking given that the extent of the collusion might otherwise suggest that the rendition norm is relatively weak. However, the defensive reactions by almost all states to their role in the program suggest that there is another force at work that upholds the ideational structure that rendition is illegitimate. As international organizations are unlikely sufficient agents unto themselves, I suggest that world society might be a reasonable suspect.

Conclusion

The three case studies analyzed in this thesis demonstrate that despite the defection of the United States from these norms, there was relatively little negative effect on the international human rights system given the dire predictions of some scholars. It additionally shows that while material preponderance is useful for taking the costs of illegitimacy, it seems to play little role in the ability to change norms. This lends credence to the idea that the human rights revolution that

started with the end of the Cold War has not come to a halt, but instead continues to have effects on even the most materially powerful states within international society. At the same time, it issues a warning that not all human rights are as equally entrenched, as the future can bring additional possibilities for states to collude in order to subvert these rights if they believe it to be in the national interest.

Notes

Chapter 1

1. Ken Booth and Tim Dunne, eds., *Worlds in Collision: Terror and the Future of Global Order* (Houndmills: Palgrave Macmillan, 2002); *Terror in Our Time* (Milton Park, Abingdon: Routledge, 2012); Tim Dunne, "Society and Hierarchy in International Relations," *International Relations* 17, no. 3 (2003); Caroline Kennedy-Pipe and Nicholas Rengger, "Apocalypse Now? Continuities or Disjunctions in World Politics after 9/11," *International Affairs* 82, no. 3 (2006); Michael Byers, "Terrorism, the Use of Force and International Law after 11 September," *International Relations* 16, no. 2 (2002); Steve Smith, "The End of the Unipolar Moment? September 11 and the Future of World Order," ibid.; Andrew Hurrell, " 'There Are No Rules' (George W. Bush): International Order after September 11," ibid.; Chris Brown, "The 'Fall of the Towers' and International Order," ibid.
2. Bertil Dunér, "Disregard for Security: The Human Rights Movement and 9/11," *Terrorism and Political Violence* 17, no. 1–2 (2005): 94.
3. Tim Dunne, " 'The Rules of the Game Are Changing': Fundamental Human Rights in Crisis after 9/11," *International Politics* 44, no. 2–3 (2007): 270.
4. United Nations General Assembly, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," (Office of the High Commissioner for Human Rights, 1984).
5. Todd Landman, "Holding the Line: Human Rights Defenders in the Age of Terror," *British Journal of Politics and International Relations* 8, no. 2 (2006): 124.
6. Mlada Bukovansky, "Liberal States, International Order, and Legitimacy: An Appeal for Persuasion over Prescription," *International Politics* 44, no. 2/3 (2007): 176.
7. Dunne, " The Rules of the Game Are Changing,". This concern was not limited to scholars of international politics. Legal scholars expressed similar concerns about "the [growing] notion that the international human rights law framework necessarily complicates the fight against terrorism"; Paul Hoffman, "Human Rights and Terrorism," *Human Rights Quarterly* 26, no. 4 (2004): 951. In some cases they particularly single out the problematic rise of torture as a means of dealing with terrorists; see John H Langbein, "The Legal History of Torture," in

Torture: A Collection, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 93.

8. Tony Evans, *US Hegemony and the Project of Universal Human Rights* (Houndmills, Basingstoke: Palgrave MacMillan, 1996), 8.
9. Dunne, "The Rules of the Game," 284.
10. Joan Fitzpatrick, "Speaking Law to Power: The War against Terrorism and Human Rights," *European Journal of International Law* 14, no. 2 (2003): 242.
11. Sigrun I Skogly, "Global Responsibility for Human Rights," *Oxford Journal of Legal Studies* 29, no. 4 (2009): 830.
12. Julie Harrelson-Stephens and Rhonda L. Callaway, " 'The Empire Strikes Back': The US Assault on the International Human Rights Regime," *Human Rights Review* 10, no. 3 (2009): 432.
13. Ibid., 450.
14. Richard Falk, "Theoretical Foundations of Human Rights," in *The Politics of Human Rights*, ed. Paula R Newburg (New York: New York University Press, 1980). Cited in Evans, *US Hegemony*, 39.
15. For those who see materiality as structuring all norms, see Kenneth N Waltz, "The Continuity of International Politics," in *Worlds in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Timothy Dunne (Basingstoke, New York: Palgrave, 2002). For those who believe that they are related, see Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005); Christian Reus-Smit, "International Crises of Legitimacy," *International Politics* 44, no. 2/3 (2007); Mlada Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Oxford: Princeton University Press, 2002); Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).
16. Waltz, "The Continuity of International Politics," 350. This comparison to Rome is far from unique; see Michael Byers, "Terror and the Future of International Law," in *Worlds in Collision: Terror and the Future of Global Order*, ed. Ken Booth and Timothy Dunne (Basingstoke, New York: Palgrave, 2002), 118; Colin Gray, "World Politics as Usual after September 11: Realism Vindicated," ibid. (Basingstoke, NY), 227.
17. "World Politics as Usual," 233.
18. World society was originally defined by Bull as "a sense of common interest and common values, on the basis of which common rules and institutions may be built." See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (New York: Columbia University Press, 1995), 269. Buzan later clarified that "[w]hile international society is focused on states, world society implies something that reaches well beyond the state towards more cosmopolitan images of how humankind is, or should be, organised." See Barry Buzan, *From International to World Society? English School Theory and the Social*

Structure of Globalisation (Cambridge: Cambridge University Press, 2004), 1.

19. Rosemary Foot, *Rights Beyond Borders: The Global Community and the Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000), 1–2.
20. Matthew Krain, "*J'accuse*! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?," *International Studies Quarterly* 56, no. 3 (2012): 575–76.
21. Foot, *Rights Beyond Borders*, 1.
22. Ibid., 9.
23. Terrence L. Chapman, "Audience Beliefs and International Organization Legitimacy," *International Organization* 63, no. 4 (2009): 760. See also Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," in *The Power of Human Rights: International Norms and Domestic Change*, ed. Thomas Risse, Steve C. Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999).

CHAPTER 2

1. For an example of the natural law approach see Thomas Aquinas, *Summa Theologiæ*, vol. 28 (London: Blackfriars, 1966), 23. For a discussion of its central tenants and limitations, see Myres Smith McDougal, Harold Dwight Laswell, and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven, Conn: Yale University Press, 1980), 68–69.
2. See Alexander Wendt, *Social Theory of International Politics.* (Cambridge: Cambridge University Press, 1999), 185.
3. See Ted Hopf, "The Promise of Constructivism in International Relations Theory," *International Security* 23, no. 1 (1998): 173.
4. Wendt, *Social Theory*, 188; Trine Flockhart, "Critical Junctures and Social Identity Theory: Explaining the Gap between Danish Mass and Elite Attitudes to Europeanization," *Journal of Common Market Studies* 43, no. 2: 258; Martin Marcussen et al., "Constructing Europe? The Evolution of French, British and German Nation State Identities," *Journal of European Public Policy* 6, no. 4 (1999): 616.
5. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4: 888.
6. As suggested by Ryder McKeown, "Norm Regress: US Revisionism and the Slow Death of the Torture Norm," *International Relations* 23, no. 5 (2009): 20.
7. Max Weber, *On Charisma and Institution Building: Selected Papers*, ed. S. N. Eisenstadt (London: University of Chicago Press, 1968), 11; *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther

Roth and Claus Wittich (London: University of California Press, 1978), 213, 15.

8. Wendt, *Social Theory*, 272–73.
9. Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990), 26, 205–06.
10. For recent examples in business environments, see Eero Vaara and Janne Tienari, "A Discursive Perspective on Legitimation Strategies in Multinational Corporations," *Academy of Management Review* 33, no. 4 (2008); W. E. Douglas Creed, Maureen A. Scully, and John R. Austin, "Clothes Make the Person? The Tailoring of Legitimating Accounts and the Social Construction of Identity," *Organization Science* 13, no. 5 (2002); Hannele Mäkelä and Salme Näsi, "Social Responsibilities of Mncs in Downsizing Operations: A Finnish Forest Sector Case Analysed from the Stakeholder, Social Contract and Legitimacy Theory Point of View," *Accounting, Auditing & Accountability Journal* 23, no. 2 (2010). For examples in domestic politics, see Grant Samkin and Annika Schneider, "Accountability, Narrative Reporting and Legitimation: The Case of a New Zealand Public Benefit Entity," ibid; John Kane and Haig Patapan, "Recovering Justice: Political Legitimacy Reconsidered," *Politics and Policy* 38, no. 3 (2010).
11. Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), 12. For a similar argument, see also, Franck, *The Power of Legitimacy*, 21.
12. Mlada Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Oxford: Princeton University Press, 2002), 37; Clark, *Legitimacy*, 5.
13. Ian Hurd, "Legitimacy and Authority in International Politics," *International Organization* 53, no. 2 (1999): 379; Clark, *Legitimacy*, 5.
14. Franck, *The Power of Legitimacy*, 38.
15. Ian Clark, "Setting the Revisionist Agenda for International Legitimacy," *International Politics* 44, no. 2/3 (2007): 325.
16. Christian Reus-Smit, "International Crises of Legitimacy," ibid.: 163, 70.
17. Franck, *The Power of Legitimacy*, 191.
18. Clark, *Legitimacy*, 4, 20.
19. Ian Hurd, "The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003," *International Organization* 59, no. 3 (2005): 501.
20. "Breaking and Making Norms: American Revisionism and Crises of Legitimacy," *International Politics* 44, no. 2–3 (2007): 206.
21. Bruce Cronin and Ian Hurd, "Introduction," in *The UN Security Council and the Politics of International Authority*, ed. Bruce Cronin and Ian Hurd (London: Routledge, 2008), 6.
22. Clark, *Legitimacy*, 30; Reus-Smit, "International Crises," 159, 65; Bukovansky, *Legitimacy*, 3; G. John Ikenberry and Charles A. Kupchan,

"The Legitimation of Hegemonic Power," in *World Leadership and Hegemony*, ed. David P. Rapkin (London: Lynne Rienner Publishers, 1990), 49; David P. Rapkin, "Empire and Its Discontents," *New Political Economy* 10, no. 3 (2005): 400; Ian Hurd, "Breaking and Making Norms: American Revisionism and Crises of Legitimacy" *International Politics* 44, no. 2–3 (2007): 195.

23. Jack Donnelly, "International Human Rights: A Regime Analysis," *International Organization* 40, no. 3 (1986): 638.
24. Stephen G. Brooks and William C. Wohlforth, "International Relations Theory and the Case against Unilateralism," *Perspectives on Politics* 3, no. 3 (2005): 517.
25. "International Relations Theory", 518.
26. Ibid.
27. Ikenberry and Kupchan, "The Legitimation of Hegemonic Power," 57.
28. Clark, *Legitimacy*, 3.
29. Justin Morris et al., *The Rise and Fall of Norms in International Politics* (Unpublished Manuscript), 5–6. I thank Justin Morris for coming up with this typology.
30. David N. Gibbs, "Secrecy and International Relations," *Journal of Peace Research* 32, no. 2 (1995): 214–17.
31. Dennis F. Thompson, "Democratic Secrecy," *Political Science Quarterly* 114, no. 2 (1999): 182. For other discussions of the paradoxical role of secrecy in liberal democracies, see Donald C. Rowat, "How Much Administrative Secrecy?," *The Canadian Journal of Economics and Political Science/Revue canadienne d'Economique et de Science politique* 31, no. 4 (1965); Francis E. Rourke, "Secrecy in American Bureaucracy," *Political Science Quarterly* 72, no. 4 (1957); Bayless Manning et al., "The Role of Secrecy in the Conduct of Foreign Policy," *The American Journal of International Law* 66, no. 4 (1972).
32. Ann Florini, "The End of Secrecy," *Foreign Policy*, no. 111 (1998): 60.
33. Hurd, "Breaking and Making Norms," 210.
34. Jens Steffek, "Discursive Legitimation in Environmental Governance," *Forest Policy and Economics* 11, no. 5/6 (2009): 315. Note that the use of the term "modern rational legitimation" here is in contrast to two other types of legitimation put forward by Weber, "traditional" legitimation, which is based on the authority of religion or mythos, and "charismatic" legitimation, which is based on the pull of the charisma of a particular agent.
35. Marcussen et al., "Constructing Europe?," 615.
36. Frank Schimmelfennig, "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union," *International Organization* 55, no. 1 (2001): 48.
37. "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union," *International Organization* 55, no. 1 (2001): 62.

38. "The Community Trap," 63.
39. Ibid., 64.
40. Ibid.
41. Ibid., 65.
42. Ibid. See also the discussion in Foot, *Rights Beyond Borders*, 10.
43. Quentin Skinner, "Some Problems in the Analysis of Political Thought and Action," in *Meaning and Context: Quentin Skinner and His Critics*, ed. James Tully (Cambridge: Polity Press, 1988), 112.
44. Ibid.
45. Ibid., 113–14.
46. Ibid., 115–16.
47. Hurd, "Legitimacy and Authority," 390.
48. Ibid., 391.
49. Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (London: Cornell University Press, 2003), 165–66; Clair Apodaca, *Understanding U.S. Human Rights Policy: A Paradoxical Legacy* (London: Routledge, 2006), 17–18; David P. Forsythe, *Human Rights in International Relations*, 2nd ed., Themes in International Relations (Cambridge, UK; New York: Cambridge University Press, 2006), 155.
50. *Human Rights in International Relations*, 156.
51. Schimmelfennig, "The Community Trap," 66.
52. Ibid.
53. Clark, *Legitimacy*, 18, 209; Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Oxford: Princeton University Press, 2001), 21.
54. *Revolutions in Sovereignty*, 21–22; Clark, *Legitimacy*, 20.
55. *Legitimacy*, 20.
56. Alan James, "Law and Order in International Society," in *The Bases of International Order: Essays in Honour of C. A. W. Manning*, ed. Alan James (London: Oxford University Press, 1973), 67.
57. "Law and Order in International Society,", 68.
58. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 567.
59. *From Apology to Utopia*, 570. Similarly on international law as a "continuing process of authoritative decisions" made "within the framework of established practices and norms" see Rosalyn Higgins, "Policy Considerations and the International Judicial Process," *The International and Comparative Law Quarterly* 17, no. 1 (1968): 58–59.
60. Stephen Toope, "Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law," in *United States Hegemony and the Foundations of International Law*, ed. Michael Byers and Georg Nolte (Cambridge: Cambridge University Press, 2003), 301. [emphasis mine]
61. Wendt, *Social Theory*, 222.

62. Again, according to Finnemore and Sikkink, a norm cascade requires "a critical mass of relevant state actors to adopt the norm." Finnemore and Sikkink, "International Norm Dynamics," 895.
63. Donnelly, *Universal Human Rights*, 10; Jean L. Cohen, "Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization," *Political Theory* 36, no. 4 (2008): 581.
64. Jack Donnelly, "The Social Construction of International Human Rights," in *Human Rights in Global Politics*, ed. Timothy Dunne and Nicholas J. Wheeler (Cambridge: Cambridge University Press, 1999), 80.
65. Donnelly, *Universal Human Rights*, 7.
66. Ibid., 9, 12.
67. R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), 17.
68. Donnelly, *Universal Human Rights*, 8; Vincent, *Human Rights*, 8.
69. Aquinas, *Summa Theologiæ*, 28, 23.
70. *Summa Theologiæ*, 28, 91.
71. McDougal, Laswell, and Chen, *Human Rights*, 68–69.
72. Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002), 19; Vincent, *Human Rights*, 25.
73. Freeman, *Human Rights*, 20.
74. Ibid., 27.
75. Ibid.
76. Edmund Burke, "Reflections on the Revolution in France," in *The Works of the Right Honourable Edmund Burke: In Twelve Volumes* (London: John C. Nimmo, 1899), 310–11; Vincent, *Human Rights*, 28.
77. Jeremy Bentham, "Anarchical Fallacies," in *The Works of Jeremy Bentham* (New York: Russell & Russell, 1962), 501.
78. "Anarchical Fallacies," , 498; Freeman, *Human Rights*, 28; Vincent, *Human Rights*, 30.
79. Freeman, *Human Rights*, 28; Vincent, *Human Rights*, 30.
80. Laura Donohue, "Security and Freedom on the Fulcrum," *Terrorism and Political Violence* 17, no. 1 (2005): 70.
81. Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998), 204–06.
82. David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91, no. 6 (2005): 1428–29. See also Shklar's discussion of the "liberalism of fear" in Judith N. Shklar, *Ordinary Vices* (Cambridge, MA: The Belknap Press of Harvard University Press, 1984), 5. This is clearly not the only causal factor in the decline of the state practice of torture. For example, John Langbein added that a move away from Roman law that required the confession of the suspect or two eyewitnesses for a conviction to the admittance of more circumstantial

evidence was also a factor. See John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (London: University of Chicago Press, 1977).

83. Luban, "Liberalism," 1430.
84. Ibid., 1433.
85. Ibid. See also Günter Frankenberg, "Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty," *The American Journal of Comparative Law* 56 (2008): 412.
86. Natan Sznaider, "Pain and Cruelty in Socio-Historical Perspective," *International Journal of Politics, Culture and Society* 10, no. 2 (1996): 334–35. See also D. Hawkins, "Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms," *International Studies Quarterly* 48, no. 4 (2004): 785; Keck and Sikkink, *Activists Beyond Borders*, 27–28.
87. Leonard Wantchekon and Andrew Healey, "The 'Game' of Torture," *The Journal of Conflict Resolution* 43, no. 5 (1999): 597.
88. Ibid.
89. Luban, "Liberalism," 1436.
90. Javaid Rehman, *International Human Rights Law: A Practical Approach* (Harlow: Longman, 2002), 13–22.
91. Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 2.
92. Forsythe, *Human Rights in International Relations*, 12.
93. Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006), 1, 3; Noëlle N. R. Quénivet, "Introduction: The History of the Relationship between International Humanitarian Law and Human Rights Law," in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, ed. Roberta Arnold and Noëlle N. R. Quénivet (Leiden: Martinus Nijhoff Publishers, 2008), 2.
94. Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'," *Terrorism and Political Violence* 17, no. 1&2 (2005): 159; Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (Oxford: Oxford University Press, 2008), 395.
95. Christian Tomuschat, "Human Rights and International Humanitarian Law," *The European Journal of International Law* 21, no. 1 (2010): 16.
96. Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Philadelphia: University of Philadelphia Press, 1994), 52; Rona, "Interesting Times," 3.
97. Steiner, Alston, and Goodman, *International Human Rights*, 395.
98. A French expression that literally means "outside the fight"
99. Theodoor C. van Boven, "Survey of International Law and Human Rights," in *The International Dimensions of Human Rights*, ed. Karel Vasak and Philip Alston (Paris: UNESCO, 1982), 103.

100. Johan Steyn, "Guantanamo Bay: The Legal Black Hole," *International and Comparative Law Quarterly* 53, no. 1 (2004): 5; Steiner, Alston, and Goodman, *International Human Rights*, 396, 98.
101. However, he believed that the deliberate attacks on civilians demonstrated a disregard of humanitarian law that arguably diminished incentives for the American side to participate. Meron, *The Humanization of International Law*, 86.
102. Rona, "Interesting Times," 159.
103. International Committee of the Red Cross, "Convention (Iii) Relative to the Treatment of Prisoners of War," (1949).
104. Ibid.
105. Meron, *The Humanization of International Law*, 4–5. See also ICTY Case No IT-96-23-T
106. Joan Fitzpatrick, "Rendition and Transfer in the War against Terrorism: Guantánamo and Beyond," *Loyola of Los Angeles International and Comparative Law Review* 25, no. 3 (2003): 459.
107. Ibid., 485.
108. Ibid., 486.
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CHAPTER 3

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CHAPTER 4

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