

Torture: Can International Law Prevent it?
A Lecture at Lady Margaret Hall, Oxford Universityⁱ

Stephen J. Toope

8 May 2012

Thank you for the invitation to give this Canada Seminar. My topic is not specifically Canadian, though Canada has been involved in debates around torture, in my view not always to the credit of our government, and not to the improvement of international law. More on that later.

Introduction

Does international law matter? Does it influence the behavior of states and, if so, how? Why do states comply with international law, or why not? These are among the questions that international relations scholars and, more recently, international lawyers have been asking about the role of international law in international society. What has been generally absent from these inquiries is sustained engagement with a prior question: what distinguishes legal norms from other social norms?

In *Legitimacy and Legality in International Law: An Interactional Account* Jutta Brunnée (of the University of Toronto) and I argue that law's distinctiveness rests in the concept and operation in practice of legal obligation. The prevailing accounts of international law pay remarkably little attention to the role of legal obligation, and how it is generated. Many international lawyers view obligation simply as the legal consequence of formal validity or state consent, or take its existence in international practice as given. Some have gone so far as to suggest that the concept of

international legal obligation is theoretically uninteresting and practically irrelevant. I strongly disagree.

In this lecture, I will briefly set out the parameters of what Brunnée and I call an “interactional approach to international law.” Then, I will use that framework to answer the teasing question that I posed in the lecture title: “Torture: Can International Law Prevent It?” The lecture is drawn from the much more detailed analysis contained in our book, recently published by Cambridge University Press.

First, then, a sketching out of the conceptual framework that Brunnée and I propose.

Our framework brings together the legal theory of the mid-twentieth century US scholar, Lon Fuller, and more recent constructivist approaches to International Relations (which I will sometimes refer to as IR) to provide a richer understanding of legal obligation. Constructivism helps us illuminate how shared social norms emerge and shape social interaction. We then rely on a set of criteria of legality identified by Fuller to argue that legal norms exert a distinctive influence. I will enumerate those criteria shortly. But Brunnée and I emphasize that law’s influence does not arise simply when social norms meet these criteria of legality. We show that the obligatory effect of international law must be generated and maintained through practices that sustain legality over time. In short, the three inter-related elements of our framework – shared understandings, criteria of legality and a practice of legality – are crucial to generating distinctive legal legitimacy and

a sense of commitment among those to whom law is addressed. They create legal obligation.

A strong claim concerning legal legitimacy is implicit in our framework: only when law is made through the interactional approach we describe can it be said that the law is ‘legitimate.’ This distinctive legal legitimacy does not merely produce adherence to specific rules, but generates fidelity to the rule of law itself. Our account highlights that influential norms will not emerge in the absence of processes that allow for the active participation of relevant social actors. Social actors in the global domain include states, of course, but the interactional framework acknowledges the importance of robust participation by intergovernmental organizations, civil society organizations, other collective entities, and individuals. The need for broad participation in the creation and upholding of law (through the evolution of shared understandings, and in the building up of communities of practice) has two further consequences worth noting. The interactional framework acknowledges and reinforces the diversity of international society, and shows that legal power is more distributed than commonly thought.

Let me now further explain the three components of the interactional approach to international law.

Shared Understandings

Social norms can only emerge when they are rooted in an underlying set of shared understandings supporting first the need for normativity, and then particular norms that shape behavior. Actors generate and promote certain

understandings, whether through norm entrepreneurship or through the work of epistemic communities, groups of people who learn things together and promote norms based on what they have learned (e.g. climate scientists or international lawyers themselves). Shared understandings may emerge, evolve or fade through processes of social interaction and social learning. Once in existence, shared understandings become background knowledge or norms that shape how actors perceive themselves and the world, how they form interests and set priorities, and how they make or evaluate arguments.

The Criteria of Legality

Legal norms too are rooted in shared social understandings. However, shared understandings alone do not make law. Many social norms exist that never reach the threshold of legal normativity, like saying ‘excuse me’ when you cut in front of someone, or wearing a dinner jacket to a formal dinner in Hall. What distinguishes legal norms from other types of social norms is not form or pedigree, but adherence to specific criteria of legality. Lon Fuller set out eight such criteria, which apply to both individual rules and systems of rule-making. Legal norms must be general, prohibiting, requiring or permitting certain conduct. They must also be promulgated, and therefore accessible to the public, enabling actors to know what the law requires. Law should not be retroactive, but prospective, enabling citizens to take the law into account in their decision-making. Actors must also be able to understand what is permitted, prohibited or required by law – the law must be relatively clear. Law should avoid contradiction, not requiring or permitting and prohibiting at the same time. Law must be realistic and not demand the impossible. Its requirements of citizens must remain relatively constant. Finally, there

should be congruence between legal norms and the actions of officials operating under the law.

Fuller stressed that law is not a unidirectional projection of power. He emphasized the need for reciprocity between officials and citizens in the creation and maintenance of all law. Reciprocity, in Fuller's conception, means that law-givers must be able to expect that citizens will "accept as law and generally observe" the promulgated body of rules. Conversely, citizens must be able to expect that the government will abide by and apply these rules, and that official actions will be congruent with posited law and consonant with the requirements of legality.

Reciprocity is deeper than the exchange flowing from the calculation of material interests. When the eight criteria of legality are met, actors will be able to reason with rules because they will share meaningful standards. When rules guide decision-making in this fashion, law will tend to attract its own adherence – or 'fidelity.' Fidelity to law, or in our terminology 'obligation,' is generated because adherence to the criteria of legality in the creation and application of norms produce law that is legitimate in the eyes of those to whom it is addressed.

The Practice of Legality

In international society, the deeper sense of reciprocity that I just described is even more salient because states are both subjects and lawmakers. The horizontal and reciprocal nature of interactions guided by legality is also

central to law's distinctive legitimacy. In short, interactional obligation must be practiced to maintain its influence.

The idea of communities of practice, therefore, rounds out our approach to the relationship between law and shared understandings. The key point is that interactional law does not arise simply because a community of practice has grown around a given issue or norm. Only when this community is engaged in a practice *of legality* can shared legal understandings, be they procedural or substantive, modest or ambitious, be produced, maintained or altered. We suggest that there exist multiple, overlapping communities of legal practice.

Another important point is underscored by focusing on the role of communities of practice: it is not enough to cast socially shared understandings in legal form; they cannot simply be 'posited.' Positive law can be an element of interactional law, often an important element, but it is not necessarily coextensive with it. The communities of practice concept instructs that positive law is a method of 'fixing' legal understandings – a function that is particularly important in large, diffuse societies. It may also assist in meeting requirements of legality, such as promulgation, clarity, transparency, or predictability. But without sufficiently dense interactions between participants in the legal system, positive law will remain, or become, dead letter.

The interactional account also highlights, then, that the mere declaration of common values in formal law can be deceptive. Without a community of practice, supposed shared values will remain lofty rhetoric. Yet, for a community of practice around international legal norms to emerge, it is not

necessary to imagine the existence of a homogenous ‘international community’ sharing a common goal or vision. It is not necessary to have a morally cohesive ‘community’ before lawmaking is possible. Fuller’s work shows us that a community of legal practice can exist with a thin set of substantive value commitments; indeed, this is the reality of international law today.

Now I will show how this framework helps to make sense of the evolution and current status of the anti-torture norm in international law.

Torture

In the United Nations Convention Against Torture, torture is described as:

...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for [specific] purposes... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity....

The United Nations Committee Against Torture has stated that the prohibition against torture in international law is absolute; that it is a norm of customary international law that must be met at all times.

However powerful the anti-torture norm may have been historically, there can be no doubt that it was severely challenged in the years following the attacks of September 11th, 2001. Certainly within the United States, a wide

consensus seemed to emerge that torture might be justifiable, even necessary, in circumstances where deep threats to national security – like global terrorism – were present. In political discourse and on the radio and television talk shows, “ticking time bomb” scenarios were invoked routinely as examples of when torture might be justified, or at least excused. Popular culture seemed even to glorify acts of patriotic security agents who would torture when necessary to protect their country from harm. The most prominent example of that cultural trend was the hit television thriller “24.”

Although *24* was planned before the assaults of 11 September, it soon became identified with a frightening new era of global terrorist threats against the United States. Jack Bauer, the hero, routinely employed forms of torture himself, and the message was clear: the ends justify the means.

The question that arises, from the standpoint of interactional international law, is whether or not *24* was indicative of changing shared understandings within and outside the United States in the aftermath of 11 September 2001 that might have undermined any previously existing international norms against torture.

To answer that question, it is first necessary briefly to trace the history of the rule prohibiting torture and to assess whether or not the rule was firmly grounded in widely shared understandings before Osama bin Laden’s shocking assault on the United States of America. I will then assess the evolution of the shared understandings underpinning the anti-torture norm from 11 September 2001 to date.

Shared Understandings and the Anti-torture Norm Before 11 September 2001

The imposition of severe physical pain to extract information or to punish or degrade human beings has been practiced throughout human history by sadistic criminals, warriors, religious officials, and the state.

But for our purposes, “torture” is not the application of physical force by anyone; it emerged as a legal process linked closely to judicial procedure. Although the famous English jurist Blackstone famously resisted the description of torture as “legal” – he viewed it as an abhorrent continental tradition outside the law – recent scholarship shows that torture emerged in most of the West as an adjunct to processes of public law.

In his magisterial *Torture and the Law of Proof*, John Langbein traced the legal history of torture in England and continental Europe, and its connection to the laws of proof. In a recent reflection on that history in the light of events after 11 September 2001, Langbein reminds us: “For half a millennium the law courts of continental Europe tortured suspected people to obtain evidence. They acted openly and according to law”. He explains how the criminal procedure became dependent on torture. Langbein suggests that the refusal of English common law to adopt torture was not, pace Blackstone, primarily the result of moral superiority, but because the English laws of proof were so primitive that torture would not have been useful

As early as the Renaissance, however, resistance to the use of torture was building, on grounds of legal logic and moral opprobrium. European states

formally abolished the legal use of torture over the course of two centuries during the Enlightenment. Given the domination of Enlightenment discourse over 19th century legal and social historiography, the story of the formal abolition of torture in the late 18th and early 19th centuries across Europe has often been read together with the end of slavery as a triumph of “progressive” sensibility, as part of a narrative of moral perfectibility. Contemporary scholars debunk this notion, emphasizing that the “end” of torture was never actually accomplished in state policy, or even in law. As soon as treason was suspected, forms of law permitted torture.

With the growth of state power in the later 19th and 20th centuries, in many countries such legal limitations on torture as existed were increasingly ignored. So the ‘abolition’ of torture even in Europe was but a fleeting achievement, overrun by the emergence of totalitarian regimes in the USSR, Spain, Italy, and Germany. In the late 1950s, revelations of the routine use of torture by the French in Algeria demonstrated that even democratic regimes could succumb to the temptations of torture in the name of national security.

In the 20th century, further revelations of torture committed by colonial powers emerged in Africa and Asia. With the growth of independent human rights organizations like Amnesty International, documentation of torture became more systematic, implicating scores of regimes.

Ironically, perhaps, in exact parallel to these chastening practices was the increasingly forceful rhetorical condemnation of the use of torture in all circumstances by the United Nations system and by regional intergovernmental organizations. With the entry into force of the Rome

Statute of the International Criminal Court in 2002, torture was even categorized as an international crime.

Throughout Western societies, national legal systems, often relying on the formal international legal condemnations of torture, have issued ringing statements upholding the absolute prohibition on the use of torture. One of the best examples is the reasons of the Law Lords in the famous 1999 case concerning General Pinochet.

Although it is difficult to assimilate all this contradictory information, we must assess in a dispassionate way whether or not there existed, prior to the events of 11 September 2001, a widely shared understanding that torture is a completely unacceptable practice in all circumstances. I am forced to a troubling conclusion that by the end of the 20th century, the norm against torture was strong as an aspiration but was only weakly supported by a shared understanding around the globe. When Al Qaeda succeeded in its attacks on the United States, the shared understanding supporting the prohibition on torture was fragile at best.

Shared Understandings and the Anti-torture Norm After 11 September 2001

Not surprisingly, in the months immediately following the 2001 terrorist attacks on the United States, in a context of heightened fear and deep frustration, the question of the use of torture came to the forefront. It was in this period that the television programme, *24*, with its routine subjugation of terrorist suspects to torture, burst onto the scene. Opinion leaders in the

United States also embraced the show during the years of the Bush Administration.

In a moment of high drama during an otherwise staid panel discussion involving Canadian and American judges, US Supreme Court Justice Scalia chastised a Canadian Federal Court judge who had offered the comment: “Thankfully, security agencies in all our countries do not subscribe to the mantra ‘What would Jack Bauer do?’” Justice Scalia pushed back: “Jack Bauer saved Los Angeles.... He saved hundreds of thousands of lives... You have the right to a jury trial? Is any jury going to convict Jack Bauer? I don't think so. So the question is really whether we believe in these absolutes. And ought we believe in these absolutes?”

Bauer's fictional methods may even have had a more direct effect upon US interrogation practices in the years after 11 September 2001. In a remarkable admission, the junior Army legal officer who wrote the original opinion justifying the use of 18 “aggressive” interrogation methods at Guantánamo Bay told an interviewer that the hero of *24* “gave people lots of ideas” – she was referring to soldiers who conducted the Guantánamo interrogations. Apparently, many soldiers watched *24* while stationed at Guantánamo: “it was hugely popular,” she suggested.

The increasingly routine infiltration of torture into the popular imagination was not limited to the USA. The television show *24* was shown widely and became popular in scores of countries around the world. The recent James Bond thrillers *Casino Royale* and *Die Another Day*, which attracted large audiences globally, also portray grim scenes of torture that are far more

explicit than anything shown earlier in the franchise, as did the most recent installment of the Batman series, *The Dark Knight*.

Aside from the evolution of popular culture, there are other more formal indications that the shared understanding supporting an absolute prohibition on torture was weakening in the years immediately following 11 September 2001. In his 2005 Report, the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism pointed to “increased questioning or compromising of the absolute prohibition on torture and all forms of cruel, inhuman or degrading treatment” as a global phenomenon. In human rights reports dating from the early to late-2000s, independent sources detailed a worrying list of states from around the globe that committed torture: Albania, Burundi, China, Egypt, Iran, North Korea, Russia, Syria, and Zimbabwe are but some examples. Governments of these states often invoked “terrorism” as the scourge that they were trying to suppress.

At the level of official action in the world’s remaining superpower, conscious and forceful attempts were made by the Bush Administration to re-interpret the very idea of torture so as to render “aggressive interrogations” by US and allied intelligence agencies lawful. In our book, Brunnée and I detail the evolution of US policy and practice from 2001 to 2006. I can only offer a few excerpts here.

As early as 14 September 2001 Vice-President Cheney vowed to use “any means at our disposal” to fight what was already being described as the “War on Terror”. Just two days later, Cheney declared on national television that

the US government would have to work through “the dark side” to fight against potential terrorist attacks.

In February 2002, arguing that the United States needed “new thinking in the law of war,” President Bush issued an Executive Order denying Taliban and Al Qaeda prisoners the protections of the Geneva Conventions. A few months later, Attorney-General Ashcroft determined that “waterboarding” (pouring water over a constrained prisoner’s cloth-covered face to induce fear of suffocation) is legal, permitting its use during interrogations of top Al Qaeda suspect Abu Zubayda. This prisoner was ultimately subjected to waterboarding more than 80 times.

On 1 August 2002, a memo from the Office of Legal Counsel, signed by Bybee, but written primarily by John Yoo, was sent to the White House Counsel, Alberto Gonzales. Yoo sought to limit the concept of torture dramatically, interpreting the US statute so that only pain “associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions” constituted physical torture.

In October 2002, the commander of the Guantánamo detention site requested authorization of new interrogation techniques, supported by a legal memorandum authored by an inexperienced Staff Judge Advocate, Diane Beaver, who had tried futilely to have her legal opinion checked and corrected by superiors. Shortly thereafter, Secretary of Defense Donald Rumsfeld authorized aggressive interrogation techniques for prisoners at Guantánamo Bay, relying on the legal opinion authored by Beaver. In March 2003 U.S. and Pakistani forces captured the main planner of the 11 September attacks,

Kalid Sheikh Mohammed, who was waterboarded 183 times during that month.

In 2003 and 2004, information began to emerge about the treatment of Al Qaeda and Taliban detainees by the US government. The Red Cross issued a rare public statement in October 2003 detailing the deterioration in the psychological health of a large number of detainees at Guantánamo Bay. That same month, photographic evidence was circulated widely over the internet suggesting serious abuse of prisoners at the Abu Ghraib prison in Iraq. The existence of the “torture memos” was revealed in June 2004 by the Washington Post, and the new head of the OLC, Jack Goldsmith, withdrew the August 2002 memo and subsequently resigned.

In February 2005 Alberto Gonzales became the eightieth Attorney General of the United States, and in May the Office of the Legal Counsel sent a new and more comprehensive secret memo to the CIA Counsel, arguing once again that the techniques of coercive interrogation used by the CIA, including waterboarding, were lawful. This OLC opinion remained effective throughout the last years of the Bush Administration.

US polling results show that the Bush Administration had, for a time, considerable success first in shielding “harsh” interrogation techniques from public view, and second in convincing many members of the American public that the ill-defined “harsh” techniques were consonant with existing international and domestic law. As *The Economist* magazine pointed out, “[t]he 11 September attacks have not driven any rich democracy to reverse

itself and make torture legal. But they have encouraged the bending of definitions and the turning of blind eyes.”

In around 2005 the tide began to turn; public opinion shifted quickly after the revelations of secret detention sites and the abuses at Guantanamo and Abu Ghraib. Declining support for the use of torture against suspected terrorists was manifested in responses to popular media as the decade progressed. Whereas *24* had ridden a wave of support for harsh anti-terrorist actions over its first five years on-air, the mood shifted markedly in 2006-2007: Ratings dropped by a third over the course of last year's sixth season. In a remarkable twist, the Dean of the United States Military Academy at West Point participated in a 2006 meeting with the writers of *24*. The Dean argued that the show was promoting “unethical and illegal behavior and had adversely affected the training and performance of real American soldiers.”

Meanwhile, in a number of Western democracies, including the United States, courts were issuing judgments by 2004 that had begun to limit the powers asserted by officials in the prosecution of the War on Terror. The United States Supreme Court extended the right of *habeas corpus* to foreign nationals held at Guantánamo Bay.

Although the US Supreme Court has not yet had the opportunity to consider directly the legality of torture within the context of anti-terrorist policies, the UK House of Lords has done so in robust fashion. In a case concerning the admissibility of evidence obtained through suspected torture outside the UK, Lord Hope’s speech was especially forceful: “[t]he use of such evidence is excluded not on the grounds of its unreliability... but on grounds of its

barbarism, its illegality, and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive.”

It seems that as more time passed after 11 September 2001, Americans became increasingly shaken by the “aggressive” interrogation amounting to torture undertaken in their name. One of the very first acts of President Obama was to issue a series of Executive orders distancing the US government from the practices adopted by the Bush Administration in the War on Terror. He specifically repudiated the Yoo-Bybee torture memos.

My story reveals that for the first few years after 11 September 2001, there appears to have been a further eroding of the already weak shared understanding precluding torture. The US Government became an active “norm entrepreneur” in seeking to alter two distinct aspects of the international prohibition on torture: first, that torture was outlawed in all circumstances; and second, that torture could be defined to allow waterboarding and other techniques that did not produce pain equivalent to the spasms of death or “organ failure”. This norm entrepreneurship ultimately failed to generate shared understandings to support normative change.

Popular opinion worldwide, and especially in the US, moved away from relatively broad support for the necessity of torture in combating global terrorism. Indeed, it seems that the Bush Administration, in arguing for an untrammelled right of the President to do “whatever it takes” to fight

terrorists, including the de facto authorization of torture, had overreached and created strong pushback across the world, and within America itself. Perhaps ironically, instead of further undermining the weak shared understanding supporting the prohibition on torture that existed in 2001, events over the years after 2005 have ultimately reinforced that shared understanding, potentially making the anti-torture rule stronger.

The next step in our interactional framework is to ask whether or not the absolute prohibition on torture meets the eight criteria of legality.

The Prohibition on Torture and the Criteria of Legality

The absolute prohibition on torture as exemplified by the United Nations Convention against Torture clearly meets six of Fuller's internal requirements of legality. In the book, Brunnée make that argument in detail. Today, I will focus only on the two criteria that present considerable difficulty.

One of Fuller's eight criteria of legality requires that law be relatively clear; capable of comprehension. Clarity of the rule against torture is a complicated issue. At first blush, the rule is exquisitely clear because it is said to be a blanket prohibition without exception under any circumstances. If that were true, all relevant actors would be able to understand what is permitted, prohibited or required by the law. The difficulty is that there is no commonly accepted definition of what constitutes "severe pain or suffering, whether physical or mental." The Torture Convention does not further define these terms; it draws a distinction between torture and other "cruel, inhuman or degrading treatment or punishment". Implicit in this distinction is the

assumption that there are forms of abusive treatment that do not amount to torture. The Geneva Conventions ban torture and other forms of mistreatment, but contain no definition of the term.

In attempting to systematically narrow the definition of torture in 2002, a group of US Administration lawyers met with the military leadership at Guantánamo Bay. In minutes of the meeting released to a US Senate hearing, a CIA lawyer is quoted as suggesting that the definition of torture “is basically subject to perception.” He added: “If the detainee dies, you’re doing it wrong.”

In this context of competing and uncertain definitions, the OLC torture memos found at least temporary traction. Yoo later suggested that he never doubted that there was a ban on torture, only that the term needed more precise definition. “But,” he asks, “would limiting a captured terrorist to six hours’ sleep, isolating him, interrogating him for several hours, or requiring him to exercise constitute” suffering amounting to torture? Phrased in this rather anodyne manner, the answer might be “no”. But what if one were closer to the actual practices used on some “high value” detainees at Guantánamo Bay and elsewhere? What if the isolation went on for months, even years; if the deprivation of sleep were repeated for days on end? What if the interrogations included threats of anal rape, slaps, the forced viewing of pornography, and subjection to extremely loud music for hours at a time? What if, interspersed amongst the questions, was repeated waterboarding?

These questions suggest the reason that the international law prohibition is said to be absolute: allowing the use of “aggressive” techniques of

interrogation opens up vistas of abuse that may be hard to resist, as the interrogator becomes frustrated with his own failure to generate actionable information; the temptation to go just that one step further to produce results is enormous. In other words, torture may come to seem both necessary and, by steps, normal.

Assessing the criterion of clarity in the face of this conflicting data is difficult. The precise content of the anti-torture norm is uncertain because of the lack of any widely accepted definition of what constitutes “severe pain or suffering, whether physical or mental”. However, it is apparent that since 11 September 2001, the conscious efforts made to narrow the definition of torture have been rejected. What has emerged is a reaffirmation that it is impossible to create acceptable gradations of aggressive interrogation that can be sustained in practice over time. I conclude that the existing prohibition on torture, although not without grey definitional edges, is clear enough to satisfy the criteria of clarity.

Fuller’s final criterion of legality, that there be congruence between legal norms and the actions of officials operating under the law, also presents significant problems.

So as to avoid repetition, I will blend consideration of congruence, as a criterion of legality, into an investigation of the last step in determining the legal force of the prohibition on torture, deciding whether or not a practice of legality upholds the norm. If there is no such practice, I will also be able to conclude that the final criterion of legality is not met.

Prohibiting Torture and the Practice of Legality

We know that torture has been committed round the world since time immemorial. What concerns us now is the extent to which torture has been committed by state security forces, or with their acquiescence, after 11 September 2001. Sadly, evidence of the practice of torture in states around the globe since 2001 could be expounded for far longer than I have time to undertake here. Suffice it to note that the report of the Arar Commission in Canada, demonstrates that torture is routinely practiced in Syrian detention centres. The Agiza case from Sweden reveals similar patterns of torture in Egypt. Russian security forces have been implicated in torture, especially in the context of suppressing Chechen rebels. Credible reports suggest that the Chinese government has authorized or tolerated the torture of Muslim Uighurs in Xinjiang province.

Pakistan, until very recently a favoured ally in the War on Terror, is reported by major human rights organizations to practice torture in many locations across the country. Iranian authorities use torture to stifle dissent. For Uzbek security forces, torture is a routine means of extracting confessions to be used in criminal trials. In Myanmar, torture was used to further repression of all dissent. Torture also seems to be a routine practice in North Korea, again as an instrument of control. Torture exists as well in sub-Saharan Africa, with reliable reports of torture practiced by security forces or their agents in Zimbabwe, Equatorial Guinea, Cameroon, and The Gambia. Even in Latin America, where enormous political and legal efforts have been made to move away from the abuses of authoritarian regimes in the 1970s and 80s, torture

continues to be employed by some security forces, with credible reports emerging from Mexico, Venezuela and Paraguay.

Equally disturbing is evidence of the complicity of Western security forces in torture committed in secret detention sites in various locations around the globe. In a report to the Human Rights Commission in February 2004, the UN Working Group on Enforced or Involuntary Disappearances, which I then chaired, identified a disturbing trend in the War on Terror. The Working Group had begun to receive credible information revealing the existence of secret detention centres in several countries. These centres were said to exist in the developing world, but it appeared that they were created at the behest of the United States of America.

In November 2005, the Washington Post published a powerful piece of investigative journalism revealing that ghost prisons may have existed in eight countries including some EU member states in Eastern Europe and candidate countries for EU membership. President Bush formally acknowledged the existence of secret detention sites run by the CIA in 2006. In a televised speech, he revealed that in these secret prisons “an alternative set of procedures” was used to obtain information from terrorist suspects.

Secret detention is ripe for abuse; hiding people makes them especially vulnerable. There is now ample evidence in the public domain that abusive interrogation, amounting to torture, has taken place in these ghost prisons. In August 2009, the CIA released a 2004 report by the CIA Inspector General that was highly critical of techniques used in some interrogations.

In considering whether a practice of legality existed after 11 September 2001 to support the absolute prohibition on torture, it would seem that the answer is no: Torture is practiced in all regions of the globe, and it has been sanctioned even by western democracies, including by my own country. Were this conclusion to stand unvarnished, a further implication would be that the last criteria of legality, that official action must mesh with a purported rule of law, would not be met. On two grounds, then, *breaching a criterion of legality* and *failing to find a continuing practice of legality*, the absolute prohibition on torture would not qualify as interactional international law.

However, my final assessment must be more nuanced because the practices of torture since 11 September 2001 are increasingly under scrutiny. Even in the darkest days after the September 11 attacks, rays of light were penetrating the cells of secret detention. A number of former FBI and ex-CIA agents, retired military leaders, and some members of the US government and military legal services, spoke out strongly against secret detention and torture.

As early as 2007, senior members of the US Congress had also begun publicly to question the use of secret detention and the attendant likelihood of abuse.

In one of his very first acts, President Obama announced that he would overturn the Bush-era Executive Order authorizing “harsh” interrogation techniques. The President also ordered the review of secret detention facilities, looking for lawful options for detention. Meanwhile, a Parliamentary inquiry into complicity with torture was launched in the UK but then scrapped in deference to re-launched criminal proceedings. The

Justice Secretary has promised that once the criminal process has been exhausted, a judge-led inquiry would be established. In Canada compensation has been given to a victim of torture in Syria after a public inquiry into the role of Canadian officials in extraordinary rendition from the US to Syria.

The practice of legality on the prohibition of torture has been in a state of movement since 11 September 2001. Torture was taking place around the globe, and was even being used or connived in by liberal democracies, most notably by the indispensable global actor, the United States. Yet the tide has shifted. Disgust over the use of torture seems to be reasserting itself both amongst Western governments and in the public. However, it cannot be said that the undermining of the prohibition has been completely reversed. It is not yet the case that secret detention has been precluded by Executive Order in the US, nor that all forms of “torture lite” are excluded from the arsenal of US interrogators. It must also be admitted that torture is continuing in many states around the globe, and does not seem to be a particular priority for global action.

Conclusion

The case of torture points to both the robustness of the interactional approach to international law and to the hard-headed approach that the analysis demands. Quite frankly, I am not at all comfortable with the conclusion to which my and Brunnée’s analysis draws us in relation to the prohibition on

torture, but I am firmly convinced that the analysis is nonetheless reasonable and accurate.

In evaluating the underlying global shared understandings supporting the absolute prohibition on torture contained in the UN Torture Convention I conclude that the understandings were weak before 11 September 2001. In an intriguing twist, the shared understandings were initially further undermined in the few years immediately following Osama bin Laden's attacks; however, by 2006, the revulsion that attended disclosures of Western, and especially US, government complicity in torture began to reinforce a shared understanding precluding the use of torture in all circumstances.

Attempts made in the OLC memos and subsequent actions of high-ranking US officials to explicitly narrow the definition of torture did not succeed. They did not generate widely shared understandings; indeed they were actively resisted by senior US military and security officials, US allies, the media, NGOs, and the general public.

It remains sadly true that when one considers the eighth criterion of legality, congruence of official action with a posited norm, there is strong evidence that torture is routinely practiced all around the globe in the name of national security, and sometimes simply to extract confessions in criminal proceedings. The complicity, or direct action, of Western security agencies in "harsh" interrogations amounting to torture also undermined this criterion of legality in the period after 11 September 2001. The same data, credibly reported by NGO and official sources, leads to the further conclusion that we lack a robust practice of legality continuing to support the absolute

prohibition on torture. My provisional conclusion is that the absolute prohibition on torture does not meet the standards of interactional international law.

I call this a “provisional” conclusion because the situation is fluid, and there is good evidence to suggest that we are living through a period of normative transition as concerns the anti-torture rule. The reassertion of a robust shared understanding that the prohibition on torture is necessary, and that it should be absolute, is building. What remains uncertain is whether there is a strong normative impulse to confront and challenge the practices of torture that seem endemic in so many states around the globe.

The rule prohibiting torture is a fascinating example of why I argue so strenuously that the work of international law is not done with the positing of a rule in a “binding” convention. Rules are constructed, buttressed or destroyed through the continuing practice of states and other international actors. In the case of human rights norms, like the anti-torture rule, the work of non-state actors, particularly NGOs and the media, is particularly necessary and powerful. So the most important conclusion to draw from an interactional analysis of the prohibition of torture is that the struggle to maintain the norm is never over. If that work is not undertaken successfully, the formal existence of an absolute prohibition on torture could still become a dead letter. Can international law prevent torture? Yes, but only if together we keep working at it.

¹ Based on J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), Chapters 1-3 and 5. All sources and quotations are cited in that text.