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Human rights abuses at the limits of the law: Legal instabilities and vulnerabilities in the 'Global War on Terror'

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Abstract

Law following and law breaking are often conceptualised as polar opposites. However, authorities in liberal democracies increasingly deploy a strategy of what I call *plausible legality* in order to secure immunity and legitimacy for proscribed practices. Rather than ignore or suspend law, they construct legal justifications for human rights abuses and other dubious policies, obscuring the distinction between legal compliance and non-compliance. I argue this is possible because instabilities in legal rules make them vulnerable to manipulation and exploitation. By tracing American rationales for contentious 'enhanced interrogation techniques', indefinite detention, and 'targeted killing' practices in the 'Global War on Terror', I show that law need not always be abandoned or radically reconstituted to achieve troubling ends and that rule structures enable certain patterns of violation while limiting others. The international prohibition on torture is robust and universal, but provides vague definitions open to interpretation. Detention and lethal targeting regulations are jurisdictionally layered and contextually complex, creating loopholes and gaps. The article concludes by reflecting on implications for the protection of human rights. While law is not wholly indeterminate, human rights advocates must constantly advocate shared legal understandings that constrain state violence.

Keywords

Counterterrorism; International Law; Human Rights; Compliance; Interpretation; Torture; Detention; Targeted Killing

During the 2016 US presidential campaign, Donald J. Trump declared he would order waterboarding 'in a heartbeat' and 'a hell of a lot worse than waterboarding' because 'only a stupid person would say it doesn't work'.[1] He moreover pledged to kill the families of terrorists,[2] prosecute American citizens at Guantánamo Bay,[3] and ban Muslims from entering the United States.[4]

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[1] Jenna Johnson, 'Trump says "torture works", backs waterboarding and "much worse"', *The Washington Post* (17 February 2016), available at: {https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.0a8dd10dda12} accessed 15 March 2017.

[2] Nick Gass, 'Trump: We have to take out ISIL members' families', *Politico* (2 December 2015), available at: {http://www.politico.com/story/2015/12/trump-kill-isil-families-216343} accessed 15 March 2017.

[3] Charlie Savage, 'Donald Trump "fine" with prosecuting U.S. citizens at Guantánamo', *The New York Times* (13 August 2016), available at: {https://www.nytimes.com/2016/08/13/us/politics/donald-trump-american-citizens-guantanamo.html} accessed 15 March 2017.

[4] Jenna Johnson, 'Donald Trump is expanding his Muslim ban, not rolling it back', *The Washington Post* (24 July 2016), available at: {https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/?utm_term=.21b55d4773f4} accessed 15 March 2017.

'The problem is we have the Geneva Conventions, all sorts of rules and regulations, so the soldiers are afraid to fight', he said, promising to 'make some changes'.[5] He continued to offer similar statements after his inauguration, reiterating that 'torture works' and that the United States should 'fight fire with fire'.

President Trump's pronouncements are striking, not simply because they endorse human rights abuses in the name of counterterrorism, but because they so flagrantly embrace violations of American and international law. This rhetoric stands in contrast with the euphemistic discourse commonly employed by politicians. It's not that torture or extrajudicial killing are unprecedented, but that public authorities in liberal democracies rarely advocate overt rule breaking. Instead, they attempt to establish what I call the *plausible legality* of controversial policies. Using evasive language, they manoeuvre through and around legal rules in order to justify human rights abuses, claiming that law means what they want it to mean.

In order to assert the legality of what are normally considered illegal practices, policymakers and their lawyers seek out and exploit instabilities in legal rules. As a result, their legal arguments reflect back a deformed, refracted mirror image of existing legal order. Contemporary American security policy constitutes a clear example of this perverse legality, providing an opportunity to explore how legal regimes are structured and where they are vulnerable to exploitation. What characteristics of legal norms make them unstable? How do actors navigate these instabilities? Can legal rules be defended against manipulation?

Both the Bush and Obama administrations were keen to evade, stretch, and reinterpret law to justify interrogation, detention, and 'targeted killing' policies in the 'Global War on Terror'. By backwards tracing their justifications, I identify how states leverage ambiguities and loopholes in the law to minimise substantive constraints on their conduct. For instance, the prohibition on torture is a universal peremptory norm.[6] Therefore, in order to authorise torture, officials manipulated definitional ambiguities in the law to reframe interrogation methods as lawful. Detention and lethal targeting restrictions are jurisdictionally limited by geography and combatant status. Accordingly, authorities reclassified civilians as belligerents, creating novel rationales for imprisonment and transforming extrajudicial assassination into normal wartime killing. While subject to contestation, these legal strategies helped to secure immunity and even legitimacy for human rights abuses. In identifying these developments, my intent is not to endorse the validity of state legal claims, but to understand how authorities get away with what would otherwise be deemed illegal acts.

In mapping how human rights violations may be grafted onto underlying rule structures, scholars and practitioners can move beyond the concept of exception – the idea that authorities suspend law in the name of emergency necessity – to appreciate how extant legal norms can be manipulated to permit what they are supposed to constrain. The problem is not just that powerful states sometimes ignore international law. Nor is law infinitely malleable or fundamentally indeterminate. As I discuss later in the article, the question of who adjudicates legal interpretation is a complex one.

[5] Ben Shreckinger, 'Trump calls Geneva Conventions "the problem"', *Politico* (3 March 2016), available at: {http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/donald-trump-geneva-conventions-221394} accessed 15 March 2017.

[6] According to Article 53 of the Vienna Convention on the Law of Treaties (1969), a peremptory or *jus cogens* norm of general international law, 'is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

Rather, legal rules create opportunities for actors to achieve what many in the international legal community consider non-compliant outcomes through particular patterns of legal rationalisation. By reverse engineering state legal arguments, I pinpoint where strategic justifications meet structural weakness to produce troubling practices. This is important for human rights advocates' capacity to anticipate and push back against the legalisation of human rights abuses.

The article proceeds in four parts. The first examines and critiques dichotomous conceptualisations of law following and breaking in the International Relations (IR) and International Law (IL) literature. The second outlines specific ways in which legal rules have been invoked in the adoption of interrogation, detention, and targeted killing policies in the Global War on Terror. The third considers the implications of these observations for understanding how legal regimes structure rule evasion. The fourth explores the challenge of legal indeterminacy. I conclude by arguing that understanding these dynamics will better position human rights advocates to promote legal interpretations that limit state violence.

Beyond law following and law breaking

Scholars and practitioners usually conceptualise rule following and rule breaking as divergent behaviours. Law manifests itself through adherence, while law breaking represents a violation of legal rules. Accordingly, legally prohibited acts form crimes contrary to the law – 'A crime is an act committed or omitted, in violation of a public law, either forbidding or commanding it; a breach or violation of some public right or duty due to a whole community.'[7] This notion of breach conforms to commonsense understandings of the liberal rule of law. Lawfulness and criminality exist in a state of mutual opposition.

This dichotomous view of legality and illegality is echoed in the IR and IL literature, parsed through a framework of compliance and non-compliance, with contending theoretical traditions offering varying explanations of state behaviour.[8] While all scholars recognise that in the absence of an international sovereign wielding hierarchical authority, international law lacks the enforceability of domestic law, law following and law breaking are often cast as binary outcomes. For some, law is a weak constraint that cannot tame power in the absence of material coercion, resulting in non-compliance. For others, rationalist or normative processes pull states towards compliance. After briefly reviewing these perspectives, I argue that compliance itself is a problematic concept.

Realist scholars suggest international law is primarily epiphenomenal to material power, reflecting the interests of dominant states. From this optic, strong states sometimes comply based on calculations of self-interest, but pervasive insecurity under anarchy often militates against law following, particularly where issues of war and peace are at stake. States frequently ignore legal rules, even ones they helped create, or engage in legal 'cheap talk', which pays lip service to rules while engaging in contrary behaviours. Because international law is largely unenforceable against the strong, impunity

[7] Henry Campbell Black, *A Law Dictionary* (2nd edn, St Paul, MN: West Publishing Co., 1910).

[8] William Bradford, 'International legal compliance: Surveying the field', *Georgetown Journal of International Law*, 36 (2005), pp. 495–563; Emilie M. Hafner-Burton, David G. Victor, and Yonatan Lupu, 'Political science research on international law: the state of the field', *American Journal of International Law*, 106:1 (2012), pp. 47–97; Jana von Stein, 'The engines of compliance', in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (New York: Cambridge University Press, 2013), pp. 477–501.

is common. In contrast, weak states may be punished for legal transgressions, highlighting the status of law as a form of hegemonic discipline.[9]

For rational institutionalists, state compliance is driven by self-interested calculations related to reputation, iterated games, reciprocity, transaction costs, and sanctions. Well-designed legalised arrangements help entrench compliance patterns.[10] Nonetheless, states sometimes ratify legal agreements without intending to comply when there are reputational benefits for doing so.[11] Like realists, rationalists recognise the benefits of hypocrisy. For their part, liberal theorists have devoted attention to the role of domestic ideologies, interest groups, and social movements in incentivising and disincentivising compliance.[12] Legal scholars trace how technical assistance, persuasion, and acculturation can change state behaviour.[13] Research demonstrates that international and domestic reputational concerns can outweigh material incentives.[14]

Offering a sociological perspective, constructivists argue legal compliance is rooted in state internalisation of normative standards of appropriate action and right conduct. International organisations and transnational social movements foster normative diffusion, with institutionalised compliance as an end stage.[15] Non-compliance may indicate legal norms have not been universally or uniformly internalised, often due to competing norms, which may reflect tensions between local and global standards or the influence of domestic, organisational, or epistemic

[9] Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1963); John J. Mearsheimer, 'The false promise of international institutions', *International Security*, 19:3 (1994–5), pp. 5–49; Jack L. Goldsmith and Stephen D. Krasner, 'The limits of idealism', *Daedalus*, 132:1 (2003), pp. 47–63; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

[10] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The concept of legalization', *International Organization*, 54:3 (2000), pp. 401–19; Barbara Koremenos, 'Institutionalism and international law', in Dunoff and Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations*, pp. 59–82.

[11] Oona A. Hathaway, 'Do human rights treaties make a difference?', *The Yale Law Journal*, 111:8 (2002), pp. 1935–2042; Eric Neumayer, 'Do international human rights treaties improve respect for human rights?', *Journal of Conflict Resolution*, 49:6 (2005), pp. 925–53.

[12] Anne-Marie Slaughter, 'International law in a world of liberal states', *European Journal of International Law*, 6:1 (1995), pp. 503–38; Andrew Moravcsik, 'The paradox of U.S. human rights policy', in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005), pp. 147–97; Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009).

[13] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995); Harold Hongju Koh, 'Why do nations obey international law?', *Yale Law Journal*, 106 (1997), pp. 2599–697; Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (New York, NY: Oxford University Press, 2013).

[14] Jennifer Erickson, *Dangerous Trade: Arms Exports, Human Rights, and International Reputation* (New York: Columbia University Press, 2015).

[15] Martha Finnemore and Kathryn Sikkink, 'International norm dynamics and political change', *International Organization*, 52:4 (1998), pp. 887–917; Thomas Risse, Steve C. Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (New York: Cambridge University Press, 1999); Martha Finnemore and Stephen J. Toope, 'Alternatives to "legalization": Richer views of law and politics', *International Organization*, 55:3 (2001), pp. 743–58; Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).

cultures.[16] Perceptions of legal legitimacy further contribute to law's compliance pull or lack thereof.[17]

These varying theoretical perspectives provide extremely useful tools for understanding rule following and rule breaking. However, even when scholars recognise partial, selective, or disingenuous compliance, legal adherence tends to be conceived as an objectively measurable phenomenon. While this is sometimes appropriate, it has also been subject to critique. For instance, Shirley Scott suggests that emphasis on compliance reinforces a misleading understanding of international law as a 'rule book' that is neutral, universal, and apolitical.[18] For Robert Howse and Ruti Teitel, most compliance literature portrays legal rules as clear, stable, and commonly understood when in fact they are subject to frequent reinterpretation.[19] The problem, notes Ian Hurd, is that all states claim legal conformity in justifying their actions.[20] Too often scholars treat norm institutionalisation and legalisation as an end stage or finish line, argues Adriana Sinclair.[21] Traditional understandings of compliance thus miss how states comply with the letter of the law, but violate its purpose, resulting in what Zoltán Búzás calls evasion.[22] As Jennifer Dixon notes, rhetorical adaptation strategies allow states to minimise accusations of norm violation.[23]

Adding to these critiques, I suggest that modes of state engagement with legal rules other than straightforward law following and law breaking demand attention, particularly in the field of human rights. In doing so, I provide new insights into how states construct the plausible legality of human rights abuses in light of, not just in spite of law. International human rights law and liberal domestic law were formulated to limit arbitrary and gratuitous state violence against individuals. Yet, states can elude these rules without embracing outlaw criminality. Instead, they may pursue abusive practices via legal rationales, which neither substantively comply with nor clearly reject the law. This is especially likely in modern bureaucratic polities, where rational-legal authority underwrites

[16] Jeffrey W. Legro, 'Which norms matter? Revisiting the "failure" of internationalism', *International Organization*, 51:1 (1997), pp. 31–63; Andrew P. Cortell and James W. Davis, 'Understanding the domestic impact of international norms: a research agenda', *International Studies Review*, 2:1 (2000), pp. 65–87; Jeffrey T. Checkel, 'Why comply? Social learning and European identity change', *International Organization*, 55:3 (2001), pp. 553–88; Amitav Acharya, 'How ideas spread: Whose norms matter? Norm localization and institutional change in Asian regionalism', *International Organization*, 58:2 (2004), pp. 239–75; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006); Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008).

[17] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995); Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010).

[18] Shirley V. Scott, 'Beyond "compliance" reconceiving the international law-foreign policy dynamic', *Australian Yearbook of International Law*, 19 (1998), pp. 35–48.

[19] Robert Howse and Ruti Teitel, 'Beyond compliance: Rethinking why international law really matters', *Global Policy*, 1:2 (2010), pp. 127–36.

[20] Ian Hurd, 'Is humanitarian intervention legal? The rule of law in an incoherent world', *Ethics and International Affairs*, 25:3 (2011), pp. 293–313.

[21] Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge: New York: Cambridge University Press, 2010), pp. 167–8.

[22] Zoltán I. Búzás, 'Evading international law: How agents comply with the letter of the law but violate its purpose', *European Journal of International Relations* (2016), pp. 1–27.

[23] Jennifer Dixon, 'Rhetorical adaptation and resistance to international norms', *Perspectives on Politics*, 15:1 (2017), pp. 83–99.

political legitimacy,[24] and in liberal democracies, where respect for rule of law and human rights dominate political discourse. The United States' historically legalistic political culture, which encourages Americans to cast political grievances in legal and rights-based language and seek remedies in courts,[25] provides a fertile context for the legal justification of abusive policies. Official authorisations for post-9/11 counterterrorism practices including torture, indefinite detention, and targeted killing emerged in this environment. While it is tempting to understand the Global War on Terror as evidence of the irrelevance of law in the face of realist power politics, recent American legal strategy points to a more nuanced picture in which cynical actors navigate legal rules. Recognising how law both matters and can be manipulated helps account for this contradictory state of affairs.

Although public and international controversy over American counterterrorism policies peaked during the Bush administration, there are several reasons this case demands continued attention. There has been almost no accountability for interrogation methods amounting to torture conducted in the Global War on Terror, which former members of the administration still defend as legal and legitimate. The United States continues to engage in controversial detention policies at Guantánamo Bay. Targeted killing and drone warfare proliferated under the Obama administration. Despite voluminous critiques from human rights quarters, America's post-9/11 legal paradigm has persisted. The election of Donald Trump and the perceived threat of Islamic State terrorism have reinvigorated aggressive, legally dubious counterterrorism efforts.[26] While American hegemony and global influence may be waning, it remains the world's leading liberal democracy with the capacity to influence the behaviour of other states and their interpretations of legal rules.

In contrast to realist rejection of legal constraints on security imperatives, both the Bush and Obama administrations sought to establish what I call *plausible legality* – legal rationalisations for contentious policies that are sufficient to preempt prosecution. After the intelligence scandals of the 1970s, the American national security establishment came under intense scrutiny from human rights NGOs, the press, and government oversight bodies. As a result, post-9/11 security and intelligence officials became increasingly wary of pursuing overtly extra-legal human rights violations that could lead to public shaming and indictments.[27] In order to overcome risk aversion and encourage aggressive policies, they needed legal cover. The Office of Legal Counsel (OLC) at the Department of Justice, which advises the executive branch on legal matters, along with other government lawyers, fulfilled this function. In a series of legal memoranda, the OLC claimed highly questionable practices

[24] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley; Los Angeles, CA: University of California Press, 1978).

[25] Alexis de Tocqueville, *Democracy in America* (New York, NY: Literary Classics of the United States, Inc., 2004); Judith Sklar, *Legalism: Law, Morals, and Public Trials* (Cambridge, MA: Harvard University Press, 1986); Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Ann Arbor: University of Michigan Press, 2004).

[26] For example, days after taking office, President Trump authorised a raid in Yemen that killed numerous civilians. The administration also reportedly loosened Obama-era restrictions on drone strikes. See Ken Dilanian, Hans Nichols, and Courtney Kube, 'Trump admin ups drone strikes, tolerates more civilian deaths: U.S. officials', *NBC News* (14 March 2017), available at: {http://www.nbcnews.com/news/us-news/trump-admin-ups-drone-strikes-tolerates-more-civilian-deaths-n733336} accessed 15 March 2017. The administration is laying plans to repopulate the Guantánamo Bay prison. See Rebecca Kheel, 'Trump officials signal intent to begin refilling Guantanamo', *The Hill* (8 July 2017), available at: {http://thehill.com/policy/defense/341051-trump-officials-signal-intent-to-begin-refilling-guantanamo} accessed 9 July 2017.

[27] Jack L. Goldsmith, *Power and Constraint: The Accountable Presidency After 911* (New York: W. W. Norton & Co., 2012); Michael Hayden, *Playing to the Edge: American Intelligence in the Age of Terror* (New York: Penguin Press, 2016).

such as waterboarding were compatible with existing law.[28] While written in secret to reduce public and professional criticism, unlike Cold War-era 'plausible deniability' for illegal covert action,[29] these justifications were created with the expectation of eventual disclosure. This is not to say authorities welcomed public debate or independent adjudication of their claims. Rather, they understood leaking and recriminations were inevitable.

OLC and other legal opinions structured how the CIA and military pursued the Global War on Terror. Written behind closed doors by a small group of political insiders, memos sidestepped normal inter-agency review and legal consultation. They acted as 'get out of jail free cards', ensuring impunity for public officials who followed their advice and normalising human rights abuses. In this sense, plausible legality is not ethically superior to overt extra-legality or plausible deniability. Rather, it is embedded in patterns of government opacity and mendacity – a form of evasion calibrated to the contemporary socio-legal environment.

The phenomenon of plausible legality points to the need to reconsider the relationship between rule following and rule breaking. Well-established, deeply internalised legal regimes are vulnerable to interpretive revision by political authorities and government lawyers. Legal arguments can be used to achieve substantively non-compliant outcomes. These dynamics raise numerous questions about the efficacy of law as a bulwark against human rights abuses. What characteristics of legal norms make them unstable? How do actors navigate these instabilities? Can legal rules be defended against manipulation?

It is important to clarify that my line of inquiry is not intended to establish a case for the legality of human rights violations. Nor do I posit the total indeterminacy of legal norms. Instead, I emphasise that invocations of law and adherence to what most in the legal community consider genuine legality are not synonymous. The letter of the law rarely stands alone, but almost always requires interpretation and application to specific factual situations. This opens up room for good faith disagreement over the meaning of rules, but does not mean law is infinitely relative or malleable. There are standards and processes available to adjudicate compliance. Yet, ambiguities in existing rule structures make them susceptible to exploitation in predictable ways.

Legal inversions: Manoeuvring through constraining regimes

In states that profess deep adherence to rule of law and human rights standards, legal norms help shape security practice. This is especially true when authorities pursue a strategy of plausible legality that attempts to provide legal rationalisations for controversial policies. In order for such arguments to be sufficiently plausible to immunise officials, or even more ambitiously, legitimise their actions, they must establish that abuses are at least loosely compatible with prevailing rules. The nature of those rules therefore imposes limitations on the scope of legal justification. In this way, this modality of rule violation highlights the structure of the law in ways that are less evident when it is crudely suspended or broken. In the following sections, I explore this dynamic in regards to American interrogation, detention, and

[28] David Cole, *The Torture Memos: Rationalizing the Unthinkable* (New York: New Press, 2009); Rebecca Sanders, '(Im)plausible legality: the rationalisation of human rights abuses in the American "Global War on Terror"', *The International Journal of Human Rights*, 15:4 (2011), pp. 605–26.

[29] For instance, see United States Congress, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee), Final Report, 94th Congress, 2nd Session, S. Report No. 94-755 (1976), Book IV – Supplementary Detailed Staff Report on Foreign and Military Intelligence, Part 5, p. 93, available at: {http://www.aarclibrary.org/publib/church/reports/book4/pdf/ChurchB4_5_Conclusions.pdf} accessed 10 August 2016.

targeted killing policy. In order to identify weak points in international legal rules, I reverse engineer American legal arguments. This methodology of backwards tracing unpacks legal justifications to isolate where law is being strategically interpreted. The resultant government legal claims are not necessarily convincing or valid, but reveal a strategy of rule evasion that has ensured impunity for policymakers and weakened the efficacy of international human rights and humanitarian law.

Torture: Manipulating definitions

Torture is one of the most clearly prohibited human rights violations committed in the Global War on Terror. It is proscribed by international human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), constitutes a grave breach of the Geneva Conventions in armed conflict, is an indictable war crime and crime against humanity under the Rome Statute of the International Criminal Court, and is widely considered to be *jus cogens* – an irreversible peremptory norm. This depth of prohibition extends to American law. In addition to constitutional guarantees to due process and freedom from cruel and unusual punishment, the federal anti-torture statute operationalises the CAT in domestic law while the *War Crimes Act* and the Uniform Code of Military Justice forbid service members from partaking in torture. Yet, this comprehensive regime was unable to prevent post-9/11 US authorities from officially authorising practices widely and reasonably understood to constitute torture.

By invoking a series of highly contested legal manoeuvres, the Bush administration attempted to reconcile the anti-torture regime with what they euphemistically dubbed 'enhanced interrogation techniques' (EITs). Despite suggesting the legitimacy of torture in the Global War on Terror, particularly in imagined 'ticking bomb' scenarios,[30] officials at the time never publically admitted their policies amounted to torture. Certainly, President Bush and Vice President Cheney defended waterboarding and other abusive acts, but did not acknowledge these activities constituted a crime. Rather, they consistently insisted that their preferred methods did not violate legal obligations under American or international law. This claim was underwritten by a small group of lawyers at the Office of Legal Counsel at the Department of Justice, who offered a series of well-known memoranda labelled the 'torture memos' by critics.[31] The first of two 1 August 2002 memos claimed that the president has commander-in-chief powers to authorise wartime interrogation of enemy combatants without regard to the Convention Against Torture and American criminal law. Moreover, a necessity defense might immunise American operatives from torture accusations in US courts.[32] However, these exceptional rationales did not ultimately form the administration's primary exculpatory strategy. Rather, it relied on OLC opinions suggesting a series of approved interrogation techniques did not meet the CAT definition of torture and were thus lawful.

The Convention Against Torture is absolute in its prohibition on torture, which Article 1 defines as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a

[30] David Luban, 'Liberalism, torture, and the ticking bomb', *Virginia Law Review*, 91:6 (2005), pp. 1425–61.
[31] Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005).
[32] Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 USC, §§ 2340–A: US Department of Justice, Office of Legal Counsel (1 August 2002), available at: {https://www.justice.gov/olc/file/886061/download} accessed 10 July 2016.

> confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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.[33]

In the summer of 2002, the OLC evaluated several proposed CIA enhanced interrogation techniques for use on detainee Abu Zubaydah, a suspected Al-Qaeda leader. The methods were developed by two private contractors, psychologists James Mitchell and Bruce Jessen, with the aim of inducing 'learned helplessness' and hence greater compliance from detainees.[34] Mitchell and Jessen had previously worked at the United States Air Force Survival, Evasion, Resistance and Escape (SERE) School, which trained American service members to withstand torture. OLC attorneys John Yoo and Jay Bybee found that waterboarding (partially drowning and reviving a detainee), stress positioning (forcing a detainee into a painful posture for extended periods of time), walling (throwing a detainee against a wall), the confinement box (placing a detainee in an enclosed box with limited capacity to move), sleep deprivation (for several days), and other abusive degradations were legal.[35] EITs became the backbone of the American interrogation program at CIA 'black sites'. Despite objections from some military lawyers, several abusive techniques were authorised for use at Guantánamo Bay.[36] As they diffused throughout the Afghan and Iraqi military theatres, EITs found their way to the Abu Ghraib prison, where stress positioning, humiliation, and sexual degradation were vividly photographed.

How was this abusive interrogation programme possible without an explicit rejection of the anti-torture regime? From the strategic legal perspective developed by American authorities, the CAT does not enumerate a list of torture techniques, creating room for good faith and in this instance, bad faith interpretation. What exactly is severe physical or mental pain or suffering? Is there such a thing as moderate pain or suffering? Where is the line between torture and other cruel, inhuman, or degrading treatment?[37] In exploring such gruesome questions, OLC attorneys not only eschewed common sense, but also declined to reference relevant legal sources and precedents. Instead, they relied on an unrelated healthcare case to conclude torture 'must be equivalent in intensity to the pain accompanying serious

[33] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), United Nations, Treaty Series, vol. 1465, p. 85.

[34] Alfred McCoy, *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006); United States Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, The United States Congress (3 April 2014 – redacted version 3 December 2014), p. 21, available at: {http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-document.html} accessed 5 August 2016.

[35] Jay S. Bybee, Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Interrogation of Al-Qaeda Operative: US Department of Justice, Office of Legal Counsel (1 August 2002), available at: {http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf} accessed 10 July 2016.

[36] Philippe Sands, *The Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York, NY: Palgrave Macmillan, 2008);United States Senate Committee on Armed Services, Inquiry into the Treatment of Detainees in US Custody, Washington, DC, 110th Congress, Second Session (20 November 2008), available at: {https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf} accessed 5 July 2017; United States Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program.

[37] While it seems easy to conclude that waterboarding is torture, what about extended solitary confinement? Denying prisoners healthcare? Allowing detainees to be raped by other detainees? Forcing women to give birth in shackles? These are all routine occurrences in the 'normal' American penal system.

physical injury, such as organ failure, impairment of bodily function, or even death'.[38] It is hard to imagine that highly educated and intelligent people truly believed such claims. OLC's efforts to limit scrutiny suggest they were less than confident in their findings. However, the extent of genuine conviction is immaterial. The memos' legal form, their legal jargon written on official letterhead, not their sincerity, fulfilled their exculpatory purpose. The façade of legality allowed the American political establishment to avoid directly endorsing or rejecting government authorisation of torture.

Given the implausibility of torture memo claims to the majority of legal experts, it is tempting to characterise the Bush administration's interrogation programme as essentially exceptional. Yet there are critical differences between purely extra-legal and legally rationalised approaches to torture. In adopting the latter, US policymakers were somewhat constrained in their freedom of action. They could not defend the abuses at Abu Ghraib, which when caught on camera intuitively looked like torture to most people, prompting rhetorical denunciations along with limited prosecution of several perpetrators, mostly low-level soldiers. While openly advocating everything from humiliation to waterboarding, the Bush administration never publically supported maiming or mutilation, electroshock or rape as means of eliciting information. Such practices had not been given a legal green light. However, in some cases, the CIA concluded OLC-approved interrogation techniques were insufficiently harsh. As a result, it secretly deported detainees through the process of extraordinary rendition to proxy torture in allied regimes. While the United States consistently claimed it received assurances that detainees would be treated humanely, multiple individuals rendered to Pakistan, Afghanistan, Syria, Egypt, Jordan, Morocco, and Libya were brutalised with little concern for legal cover.[39] Plausible legality was primarily necessary when Americans conducted interrogations, not when they outsourced torture abroad.[40]

When the 2002 torture memos were leaked, human rights advocates and legal professionals denounced them as poorly constructed, bad faith efforts to rubber stamp administration policy. Institutions such as the United Nations Committee Against Torture, the International Committee of the Red Cross, and the European Court of Human Rights and non-governmental organisations such as the American Civil Liberties Union, the Center for Constitutional Rights, Amnesty International, and Human Rights Watch called for investigations and accountability. In 2014, the United States Senate Select Committee on Intelligence released a declassified executive summary of its 6,000-page report on the CIA's post-9/11 interrogation programme, which concluded that it 'caused immeasurable damage to the United States' public standing, as well as to the United States' longstanding global leadership on human rights in general and the prevention of torture in particular.'[41] This pushback demonstrates that while legal rules are vulnerable to certain patterns of evasion, they

[38] Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation Under 18 USC, §§ 2340–A (1 August 2002), p. 1.

[39] Open Society Foundation, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (New York: GHP Media, 2013), available at: {https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf} accessed 10 July 2016; Dana Priest, 'Wrongful imprisonment: Anatomy of a CIA mistake', *The Washington Post* (4 December 2005), available at: {http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html} accessed 10 July 2016; Jane Mayer, 'Outsourcing torture', *The New Yorker* (14 February 2005), {http://www.newyorker.com/magazine/2005/02/14/outsourcing-torture} accessed 10 July 2016; Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St Martin's Press, 2006).

[40] Rebecca Sanders, 'Norm proxy war and resistance through outsourcing: the dynamics of transnational human rights contestation', *Human Rights Review*, 17:2 (June 2016), pp. 165–91.

[41] United States Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, p. 16.

are not devoid of content. Rather, they are underwritten by shared understandings promoted by the international legal community.[42] Despite its definitional ambiguities, the torture prohibition's status as a peremptory norm mobilised strong condemnation of American policy and practice. In this way, human rights defenders can limit the efficacy of strategic legal rationalisations by undermining the plausibility and hence long-term sustainability of such claims.

Under fire, the 2002 torture memos were retracted by the Department of Justice in 2004.[43] However, this did not prevent the OLC from continuing to produce memoranda authorising a host of abusive interrogation techniques well into President Bush's second term.[44] While there was significant continuity between the Bush and Obama administrations in most areas of counterterrorism, torture policy was an exception. Upon taking office, President Obama denounced EITs as torture, rescinded all outstanding OLC guidance on interrogation, and ordered compliance with the United States Army Field Manual.[45] Nonetheless, he declined to take further punitive action. The *Detainee Treatment Act* (2005) immunised intelligence operatives implicated in torture who had relied on advice of legal counsel.[46] The United States Department of Justice's Office of Professional Responsibility criticised OLC memos as erroneous, but declined to deem them criminal.[47] High-level investigations foreclosed the possibility of prosecution.[48] Despite the profoundly unconvincing nature of the torture memos, they became the CIA's 'golden shield'.[49] Even the deeply entrenched anti-torture norm did not prove ironclad, leaving it exposed to manipulation.

[42] Brunnée and Toope, *Legitimacy and Legality*.

[43] Daniel Levin, Memorandum for James B. Comey, Deputy Attorney General Re: Legal Standards Applicable Under 18 USC, §§ 2340–A, Washington, DC: US Department of Justice, Office of Legal Counsel (30 December 2004), available at: {https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf} accessed 5 August 2016; Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton & Co., 2007).

[44] Steven Bradbury, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 USC, §§ 2340–A to Certain Techniques That May Be Used in the Interrogation of High Value Al-Qaeda Detainee: US Department of Justice, Office of Legal Counsel (10 May 2005), available at: {http://www.justice.gov/olc/docs/memo-bradbury2005-3.pdf} accessed 5 August 2016; Steven Bradbury, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value Al-Qaeda Detainees: US Department of Justice, Office of Legal Counsel (30 May 2005), available at: {http://www.justice.gov/olc/docs/memo-bradbury2005.pdf} accessed 5 August 2016; Steven Bradbury, Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, Re: Application of Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities: US Department of Justice, Office of Legal Counsel (31 August 2006), available at: {http://www.justice.gov/olc/docs/memo-rizzo2006.pdf} accessed 5 August 2016.

[45] The White House, Executive Order 13491: Ensuring Lawful Interrogations (22 January 2009), available at: {https://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf} accessed 9 July 2017.

[46] Detainee Treatment Act of 2005 (HR 2863, Title X).

[47] United States Department of Justice, Office of Professional Responsibility, Report: Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's use of 'Enhanced Interrogation Techniques' on Suspected Terrorists, Washington, DC (29 July 2009), available at: {https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf} accessed 5 August 2016.

[48] United States Department of Justice, Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (30 August 2012), available at: {http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees} accessed 5 August 2016.

[49] Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), p. 268.

Detention and targeted killing: Exploiting loopholes and gaps

Legal rules governing detention and trial of detainees and the lethal targeting of enemy fighters are more uneven and complex than those prohibiting torture. Accordingly, the purported plausible legality of indefinite detention and targeted killing has hinged not just on definitional acrobatics, but also on exploitation of loopholes and gaps in international humanitarian law (IHL). The following account represents a narrow slice of a convoluted story, but nonetheless captures how United States policymakers have manoeuvred through constraining regimes.

Whereas torture is universally prohibited in all circumstances, various forms of detention are permissible dependent on context. According to the Geneva Conventions (1949),[50] in international armed conflicts (IACs) between two or more High Contracting Parties (that is, states), soldiers are considered privileged combatants who cannot be punished for participation in war. They can be removed from the battlefield once captured, but must be held as Prisoners of War (POWs) and granted particular rights outlined in the Third Geneva Convention. Civilians who represent a direct security threat in such conflicts may be temporarily interned under the conditions laid out in the Fourth Geneva Convention. Combatants and non-combatants may be tried for war crimes or other serious offenses. Article 75 of Additional Protocol 1 of the Geneva Conventions elaborates standards for fair trials in IACs and is considered customary international law by the United States, despite its non-ratification of the Additional Protocols.[51]

In non-international armed conflicts (NIACs), vaguely defined by Common Article 3 of the Geneva Conventions as 'conflict not of an international character occurring in the territory of one of the High Contracting Parties', far fewer rules apply. International humanitarian law is limited to Common Article 3 and Additional Protocol 2 of the Geneva Conventions, supplemented by international human rights law and customary international law. These provisions provide relatively sparse regulations, outlining minimum standards of humane treatment and requiring prosecution by independent, impartial, and regularly constituted courts. The legal categories of POWs and civilian internees are not referenced. In NIACs, such as conflict between states and terrorist or insurgent groups, non-state fighters do not have the right to kill or capture their enemies or qualify as privileged combatants. They may be detained and punished under relevant domestic law. There are no clear rules in IHL governing the preventative internment of potentially dangerous civilians in NIACs. Rather, states must rely on their internal legal frameworks and international human rights law.

As outlined above, there are significant distinctions between rules governing international and non-international armed conflicts. There are even greater differences between rules governing peacetime and wartime. In the absence of a war or national emergency prompting permissible derogations, states are bound by due process provisions laid out in international human rights treaties like the International Covenant on Civil and Political Rights. Domestic law complements international human rights law. In the United States, constitutional law, legal precedents, and legislation provide substantial due process guarantees to those accused in criminal proceedings, although these protections are not generally applied extra-territorially. Because of this layered landscape of

[50] The International Committee of the Red Cross, The Geneva Conventions of 1949, available at: {https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions} accessed 15 August 2016.

[51] While Additional Protocol 1 extended privileges to national liberation movements fighting colonial occupations and racist regimes in the 1970s, this move was flatly rejected by the United States, which refused to ratify the Additional Protocols.

overlapping but distinct regimes, there is ample opportunity for strategic maneuvering, as evidenced by American conduct in the Global War on Terror.

Rules governing lethal targeting are equally complex. In international armed conflicts, soldiers may kill other soldiers without sanction, but the intentional murder of non-combatants is prohibited. Likewise, in non-international armed conflicts, killing civilians and those *hors de combat* (outside the fight) due to injury, surrender, or detention constitute unlawful war crimes. However, in both cases, ambiguities may arise when civilians become belligerent, adopting guerilla or terrorist tactics to conceal their identity. In such cases, they lose their immunity from attack, but only for so long as they directly participate in hostilities. The meaning of direct participation in hostilities remains contested. In 2009, the International Committee of the Red Cross (ICRC) produced controversial interpretive guidance on the matter.[52] Yet states continue to expound their own interpretations of this category. As with detention, rules governing lethal targeting shift radically in the absence of armed conflict. International human rights law and domestic law generally prohibit lethal targeting conducted outside of war, except in narrow cases of self-defence. When such targeting is associated with state authority and political motives, it is often dubbed extrajudicial killing or assassination. In the United States, assassination is prohibited by Executive Order 12333 (1981).[53]

Rather than clearly reject international humanitarian or human rights obligations, the Bush administration initiated a strained engagement with the detention and targeting regimes, which exploited their layered and uneven nature. The United States claimed and continues to claim that the 9/11 attacks triggered an armed conflict with Al-Qaeda and the Taliban. The Congressional Authorization for Use of Military Force (2001) 'against those nations, organizations, or persons' that 'planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons', further bolstered this framing.[54] Insofar as the war in Afghanistan was initially an international armed conflict between the United States and Afghanistan, OLC lawyers asserted that captured Al-Qaeda and Taliban forces did not qualify for POW status. Rather, they were labelled 'unlawful enemy combatants' – actors who could be detained and targeted like soldiers, but who lacked the rights owed to lawful combatants. While not an entirely unreasonable assessment given their non-conformity with Geneva criteria for privileged combatancy, the administration went on to claim that no other rules applied to these detainees, including the minimalist humanitarian criteria of Common Article 3 of the Geneva Conventions. OLC attorneys posited that because the conflict was transnational, occurring on the territory of more than one High Contracting Party, neither rules governing IACs or NIACs applied. Conformity with the Geneva Conventions purportedly required their non-application.[55]

[52] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross (Geneva: May 2009), available at: {https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf} accessed 15 August 2016.

[53] Executive Order 12333 of 4 December 1981, 46 FR 59941, 3 CFR, 1981 Comp., p. 200, available at: {http://www.archives.gov/federal-register/codification/executive-order/12333.html} accessed 15 August 2016.

[54] The Authorization for Use of Military Force (AU), S.J.Res. 23, 107th Congress (14 September 2001), Pub. L. 107-40, 115 Stat. 224, MF, available at: {http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf} accessed 15 August 2016.

[55] Jay S. Bybee, Memorandum for Alberto R Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to Al-Qaeda and Taliban Detainees: US Department of Justice, Office of Legal Counsel (22 January 2002), available at: {http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf} accessed 5 August 2016.

The implications of these manoeuvres for United States detainee policy were significant. Captives deemed 'unlawful enemy combatants' were held outside the rules of Geneva military detention at a variety of global sites, including the Guantánamo Bay prison, an extraterritorial location established for the express purpose of evading the application of United States and international human rights law.[56] While detention as a means of removing combatants from the battlefield is permitted in IACs, the United States applied this logic of captivity to all detainees. Rather than perform individualised screening to determine combatant status as required by the Geneva Conventions, eligibility for this quasi-military detention was applied in a blanket fashion to captives in Afghanistan and other locales in the Global War on Terror. The Bush administration created Military Commissions with poor due process standards to prosecute detainees.

As the years passed, legal and political developments modified these practices. A series of United States Supreme Court rulings clarified that Common Article 3 applies as a minimum baseline in all armed conflicts, that improved screening and trial processes must be used to prosecute detainees, and that Guantánamo detainees have habeas corpus rights in United States courts.[57] In 2009, President Obama pledged to close Guantánamo and move terrorist trials to federal court. Blocked by Congress, which forbade the use of funds to transfer detainees to domestic prisons, these initiatives failed. Nonetheless, a substantial review of remaining Guantánamo detainees was conducted, concluding some should be released, some should be tried, and some should neither be released nor tried for security reasons. Forty-one still languish on the island as of March 2017, including 7 men actively facing formal charges before a Military Commission, and 26 whom the Trump administration is holding indefinitely without charge or trial.[58] Many have been violently force-fed while engaging in hunger strikes in protest of their apparently permanent detention. Within the Afghan theatre, administrative detention also persists. Responsibility for detainees has shifted to Afghan authorities, which have a terrible track record of detainee abuse.[59] The United States continues to resist the human rights community's call to apply protective international human rights standards to NIAC detentions where IHL guidance is underdeveloped.

When it comes to targeted killing, both the Bush and Obama administrations asserted that lethal strikes using drones and other means are normal manifestations of lawful killing in war. While precise targeting standards applied to non-US persons remain classified, numerous public pronouncements by Obama administration officials such as Harold Koh, Eric Holder, Jeh Johnson, and John Brennan clarified that the United States considers actors engaged in activities that support Al-Qaeda or associated forces to be akin to combatants in a war zone, even when they are not engaged in acts of overt violence within a kinetic battle space.[60] Most contentious targeted killings

[56] Amy Kaplan, 'Where is Guantánamo?', *American Quarterly*, 57:3 (2005), pp. 831–58.

[57] *Hamdi v. Rumsfeld*, 542 US 507 (2004) 2004 WL 1431951; *Rasul v. Bush*, 542 US 466 (2004) 124 S.Cl. 2686; *Hamdan v. Rumsfeld*, 548 US 557 (2006) 126 S.Ct 2749; *Boumediene v. Bush*, 553 US 723 (2008) 2008 WL 236628.

[58] Human Rights First, 'Guantánamo by the Numbers' (March 2017), available at: {https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf} accessed 15 March 2017.

[59] Office of the United Nations High Commissioner for Human Rights, *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129* (Kabul: February 2015), available at: {http://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf} accessed 21 August 2016.

[60] Harold Hongju Koh, 'The Obama Administration and International Law', Annual Meeting of the American Society of International Law, Washington, DC (25 March 2010), available at: {https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/50-3_nat_sec_obama_admin.authcheckdam.pdf}

have occurred in Pakistan and Yemen, where the United States is not obviously at war.[61] Legal interpretations governing the targeted killing of US persons such as American citizen Anwar Al-Awlaqi in 2011 have become slightly more transparent with the leaking of interpretive White Papers[62] and subsequent declassification of OLC guidance.[63] As with existing rationales, they rely on categorising targets as combatants in war, but suggest only high level operatives posing an imminent threat are pursued. They highlight the core feature of contemporary American targeted killing doctrine, which rests on an expansive reading of the notion of combatancy in armed conflict, yet purports to respect the principle of civilian distinction.[64] Although subject to criticism,[65] this doctrine remains in place today.

In sum, US engagement with legal rules governing detention and targeted killing has persistently exploited the uneven nature of relevant law in order to maximise American freedom of action. The US has rejected human rights and constitutional protections for detainees in favour of the laws of war. Even within the realm of international humanitarian law, it has at times interpreted the Geneva Conventions to exclude categories of detainees. These positions have been modified over the years to the extent demanded by court rulings, but have remained largely consistent. Arguments have hinged on interpretations of combatancy and armed conflict that subsume a broad category of hostile civilians and construct a geographically unlimited battlefield. While this pattern has been widely critiqued, it suggests a core challenge faced by rules of war. Simply put, this body of law was

accessed 9 July 2017; Eric Holder, 'Remarks as Prepared for Delivery by Attorney General Eric Holder at Northwestern University School of Law', Chicago, IL (5 March 2012), available at: {http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law} accessed 22 August 2016; Jeh Johnson, 'National Security Law, Lawyers and Lawyering in the Obama Administration', Dean's Lecture at Yale Law School, New Haven, CT (22 February 2012), available at: {http://ylpr.yale.edu/national-security-law-lawyers-and-lawyering-obama-administration} accessed 22 August 2016; John O. Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy', Woodrow Wilson International Center for Scholars, Washington, DC (30 April 2012), available at: {http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy} accessed 22 August 2016.

[61] Stanford International Human Rights and Conflict Resolution Clinic and The Global Justice Clinic at New York University School of Law, *Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan* (2012), available at: {https://www.law.stanford.edu/sites/default/files/publication/313671/doc/slspublic/Stanford_NYU_LIVING_UNDER_DRONES.pdf} accessed 10 August 2016; Amrit Singh, *Death by Drone: Civilian Harm Caused by U.S. Targeted Killings in Yemen*, Open Society Justice Initiative (2015), available at: {https://www.opensocietyfoundations.org/sites/default/files/death-drones-report-eng-20150413.pdf} accessed 10 March 2017.

[62] United States Department of Justice, White Paper: Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force (8 November 2011), available at: {https://fas.org/irp/eprint/doj-lethal.pdf} accessed 9 July 2017; United States Department of Justice, White Paper: Legality of a Lethal Operation by the Central Intelligence Agency Against a US Citizen (25 May 2011), available at: {https://www.scribd.com/document/239101821/Redacted-White-Paper#fullscreen&from_embed} accessed 9 July 2017.

[63] David J. Barron, Memorandum for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Operations Against Shaykh Anwar Al-Aulaqi. Washington, DC: US Department of Justice, Office of Legal Counsel (16 July 2010), available at: {http://fas.org/irp/agency/doj/olc/aulaqi.pdf} accessed 10 August 2016.

[64] Rebecca Sanders, 'Legal frontiers: Targeted killing at the borders of war', *Journal of Human Rights*, 13:4 (2014), pp. 512–36.

[65] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings*, UN Doc. A/HRC/14/24/Add.6 (2010), available at: {http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf} accessed 10 July 2016.

primarily designed for IACs fought by conventional armies. There are limited guidelines governing detention and targeting in irregular non-international armed conflicts. As a result, there are loopholes and gaps ripe for exploitation. In this sense, policymakers have sought to legalise contentious practices by utilising instabilities and vulnerabilities in the law.

The above discussion of torture, detention, and targeted killing captures a range of practices adopted in the Global War on Terror that have engaged the law in ways that shed light on underlying legal regimes. However, not all policies have been subject to extensive legal rationalisation. In some cases, authorities have opted for secrecy and deniability over legal justification. For instance, the covert practice of extraordinary rendition to torture severely contravenes the core human rights requirement of *non-refoulement*.[66] Americans have failed to prevent or in some cases colluded with torture and extrajudicial killing committed by local proxies in Iraq, Afghanistan, and elsewhere.[67] The administrative detention and trial regimes in these allied countries have also proved highly inadequate. The Obama administration's aggressive invocation of the state secrets privilege and punishment of leakers compounded secrecy and opacity surrounding counterterrorism policy. Thus, the trend towards legal rationalisation, while notable, has not entirely displaced other means of violating and evading human rights protections.

Structured ambiguity: Constraining and enabling state practice

After 9/11, American policymakers sought expanded counterterrorism powers. Unwilling to fully embrace overt derogations from the law and unable to consistently conceal controversial security and intelligence policies, they pursued a strategy of plausible legality aimed at securing immunity and even legitimacy for abusive practices. This approach to law highlights the need to look beyond dichotomous conceptions of law following and law breaking. Because plausible legality required government attorneys to reinterpret relevant rules in order to claim conformity with existing standards, it further reveals how the contours of legal frameworks inform norm evasion. Legal rationalisation reflects back vulnerabilities and instabilities in legal regimes.

In the case of torture, OLC memos ultimately rested on excluding enhanced interrogation techniques from the definition of torture found in US and international law. This points to both the strength of the universal anti-torture norm and its potential weakness. There is no consensus on the application of the definition of torture to all potential security and intelligence practices – nor could there realistically ever be considering states' unfortunate capacity to innovate myriad forms of abuse. This leaves room for both good faith and bad faith interpretation. In contrast to the anti-torture regime, which applies to all people at all times, international rules governing detention and lethal targeting are much more uneven. While definitional ambiguity also appears in this area of law, its jurisdictionally layered nature is particularly open to exploitation. Because there are objective differences in the degree of rights protections offered in international human rights and international humanitarian law, and varying standards for distinct classes of combatants and civilians covered by the latter, rules can be distorted through re-categorisation.

[66] Under international law, individuals cannot be forced to return to their home countries if they risk persecution.

[67] Amnesty International, *Iraq: A Decade of Abuses* (2013), available at: {http://www.amnestyusa.org/sites/default/files/mde140012013en.pdf} accessed 21 August 2016; Afghanistan Independent Human Rights Commission (AIHRC) and the Open Society Foundations, *Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan* (2012), available at: {https://www.opensocietyfoundations.org/sites/default/files/conflict-related-detainees-afghanistan-20120319.pdf} accessed 15 March 2017.

The legal rationalisation of torture, indefinite detention, and targeted killing both invokes and transforms the meaning of legal rules. In this sense, contemporary American legal strategy is puzzling precisely because it both defers to and undermines the authority of law. This pattern of legal engagement points to a paradoxical tension inherent in all socially embedded legal regimes. Social structures condition the possibilities for action and are in turn altered through social agency. Law is a structuring force, but is always subject to contestation and modification through argument and practice.[68]

While legal structures are subject to strategic legal interpretation, my analysis of plausible legality suggests legal frameworks do shape outcomes as actors seek legal cover. Law creates a conceptual language that is difficult for policymakers in liberal democracies to avoid and which limits the claims they can make. However, this limiting function is not necessarily a constraining one. It can also be enabling. For example, the CAT differentiates between 'torture' and 'cruel, inhuman, or degrading treatment or punishment'. In doing so, it by necessity recognises that there are variations of abuse. The torture memos seized on this logic, suggesting that while EITs might be harsh, they did not constitute the forbidden act of torture. Clearly, the CAT was written to prevent both. Yet, in creating a conceptual differentiation, it opened the door to the idea that some forms of state violence are distinct and possibly worse than others.

In the realm of detention and trial policy, the shadow of international humanitarian law is evident. The category of 'unlawful enemy combatant' comes out of the Geneva Conventions framework. It perversely mirrors the notion of the combatant's privilege, a legal concept designed to immunise soldiers from the consequences of lawful killing in war. Because legitimate combatants must be granted POW and other rights, policymakers inverted this logic to suggest rights could be denied. While 'unlawful enemy combatants' do not actually exist anywhere in international law, American legal claims about this alleged category of protagonists can only be understood within the context of the legal regime they purport to engage. Likewise, targeted killing is wholly dependent on the law of armed conflict for its legitimacy. Killing combatants is allowed in war. Expanding this widely accepted existing concept is at the heart of American policy.

Throughout the Global War on Terror, American authorities made legal claims in light of legal rules. These claims have been conditioned by political preferences, but also suggest that law is imbued with significant content, which influences how it can be navigated. Interpretive struggles are bounded by the frameworks they reference.

The challenge of interpretive indeterminacy

What do these patterns of legal engagement tell us about the international rule of law? It is tempting to understand legal manoeuvring in the Global War on Terror as evidence of the inherent indeterminacy of legal rules. After all, how can compliance be a meaningful concept when government lawyers declare torture legal? The realist tradition points in this direction, emphasising the omnipresent role of power and interest in dictating legal behaviour. From this perspective, legal rules in an anarchical international system are what states make of them. States will interpret international law to suit their purposes, destroying its capacity to act as an independent constraint.

[68] Antje Wiener, 'Contested compliance: Interventions on the normative structure of world politics', *European Journal of International Relations*, 10:2 (2004), pp. 189–234; Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (New York: Oxford University Press, 2009).

In recent years, realism's emphasis on the subordination of law to power in the international sphere has been complemented by scholars' rediscovery of Carl Schmitt's decisionistic theory of law, in which sovereigns suspend and remake legal order in times of national crisis. In states of exception or declared emergency, deemed enemies of the state are dehumanised and stripped of legal rights.[69] In such contexts, liberal legality proves incapable of regulating political struggle; exceptions cannot be contained within existing rules. While authorities may continue to invoke law, it is law based on the unlimited authority of the sovereign dictator.[70] Sovereign power becomes the 'monopoly to decide', pointing to the inherent instability of legal rules.[71] A voluminous literature has characterised the Global War on Terror in these terms, suggesting that the Bush administration created a post-9/11 state of exception.[72] Although in many ways appealing, I argue this reading risks missing the important role law plays in shaping, and thus potentially constraining, contemporary American security practice.

In addition to realism and decisionism, critical legal theorists also note the partial indeterminacy of law. International actors seek to project their particular legal preferences as universal.[73] States have flexibly interpreted the laws of war, which often do more to facilitate than constrain violence.[74] Emergent military technologies legitimise violence by wealthy countries, which claim to employ 'smart' and 'clean' forms of humanitarian combat.[75] States have exploited the ambiguities, contradictions, and lax enforcement of international human rights law to justify political and military interventions that do not serve an emancipatory agenda.[76] The meaning of legal rules is thus continually reproduced and reshaped through states' legal justifications, which reflect competing interests and power struggles.[77] Accordingly, conflicting understandings of law are irresolvable through an objective, neutral process.

In the Global War on Terror, legal interpretation has doubtlessly taken on a conflictive quality, producing shifting understandings of what legal rules require. At the same time, political actors do not have complete freedom of action. The law is not infinitely malleable. Legal scholars, non-governmental critics, and engaged publics may reject absurd legal claims, forcing states to modify their policies. Moreover, as the case studies of torture, detention, and targeted killing policy suggest, the structure of legal rules themselves impose opportunities and obstacles for those seeking the patina of legality. In this sense, the realist, decisionist, and critical lenses can fail to appreciate the important role of law in limiting agents. For actors who crave legal cover, rule structures delimit plausibly legal

[69] Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).
[70] Oren Gross, 'The normless and exceptionless exception: Carl Schmitt's theory of emergency powers and the "norm-excaption" dichotomy', *Cardozo Law Review*, 21:5–6 (2000), pp. 1825–68.
[71] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), p. 13.
[72] See, for example, Derek Gregory, 'The Black Flag: Guantánamo Bay and the space of exception', *Geografiska Annaler: Series B, Human Geography*: 88:4 (2006), pp. 405–27; William E. Scheuerman, 'Carl Schmitt and the Road to Abu Ghraib', *Constellations*, 13:1 (2006), pp. 108–24; Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge: Cambridge University Press, 2013).
[73] Martti Koskenniemi, *The Politics of International Law* (Portland, OR: Hart, 2011).
[74] David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006).
[75] Thomas Smith, 'The new law of war: Legitimizing hi-tech and infrastructural violence', *International Studies Quarterly*, 46:3 (2002), pp. 355–74.
[76] David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004), pp. 25–6.
[77] Ian Hurd, 'Law and the practice of diplomacy', *International Journal*, 66:3 (2011), p. 587.

argument. The resultant patterns of evasion are important for understanding and challenging impunity for human rights abuses.

Implications for promoting human rights

The dynamics I have outlined have implications for strengthening legal limitations on state violence. Compliance-centred IR and IL theories provide important suggestions for improving the human rights performance of states that have yet to internalise international norms. However, the challenge is more complex in cases such as the Global War on Terror, where officials have authorised human rights abuses despite the United States' long-standing commitment to institutionalised legal rules. International human rights and humanitarian norms can be used for oppressive and emancipatory ends.[78] Which purpose law serves is subject to constant struggle. Human rights advocates do not have an uncontested monopoly on the law. Legal rules are vulnerable to exploitation by states and other actors with ulterior agendas. As a result, preventing abusive policies turns less on encouraging adherence to objectively clear prohibitions and more on advancing pro-human rights interpretations of the law.

The legal rationalisation of human rights abuses not only secures legal cover for government officials, but also has the capacity to alter law itself. State practice in conjunction with *opinio juris* (states' understanding of their legal obligations) can reshape customary international law. Legal interpretations influence how states fulfill their treaty obligations. Although fundamental norms such as the prohibition on torture cannot be easily undone, consistent patterns of legal manipulation inevitably impact their efficacy. Legal norms change through contestation over their meaning and application. Norm erosion and even norm death occur in the absence of consistent practice. As Jutta Brunnée and Stephen Toope note in their account of interactional law, 'Stating a norm, even through formal means like treaty or custom, may be a step in creating law: but without the mutual engagement of social actors in a community of practice, the formal norm will not exert social influence.'[79]

Where international human rights and humanitarian norms lack social grounding based in shared understandings, they risk decay. Interpretive manipulation and practical non-compliance can spread alternative principles antithetical to human rights.[80] For instance, the architects and agents of America's post-9/11 torture programme continue to enjoy impunity. When the law consistently fails to deliver justice for victims and accountability for perpetrators, the anti-torture norm is weakened. Guantánamo Bay remains operational, although at reduced capacity, Military Commissions continue, and the practice of targeted killing persists. These developments resonate internationally beyond US policy. If powerful states introduce novel understandings of legal rules, other states are

[78] Ruth Blakeley, 'Human rights, state wrongs, and social change: the theory and practice of emancipation', *Review of International Studies*, 39 (2013), pp. 599–619.

[79] Brunnée and Toope, *Legitimacy and Legality*, p. 351.

[80] Ryder McKeown, 'Norm regress: US revisionism and the slow death of the torture norm', *International Relations*, 23:1 (2009), pp. 5–25; Diana Panke and Ulrich Petersohn, 'Why international norms disappear sometimes', *European Journal of International Relations*, 18:4 (2011), pp. 1–24; Regina Heller, Martin Kahl, and Daniela Pisiou, 'The "dark side" of normative argumentation – the case of counterterrorism policy', *Global Constitutionalism*, 1:2 (2012), pp. 278–312; Chistopher Kutz, 'How norms die: Torture and assassination in American security policy', *Ethics and International Affairs*, 28:4 (2014), pp. 425–49; Búzás, 'Evading international law'; Dixon, 'Rhetorical adaptation'.

likely to follow.[81] Observers have warned that many states around the world have adopted increasingly repressive practices under the guise of counterterrorism.[82]

Tracing how states construct the plausible legality of human rights abuses provides a focal point for efforts to promote pro-human rights understandings of legal rules. In the case of torture, the United States' euphemistic obfuscation of enhanced interrogation techniques means human rights advocates must repeatedly label abuses 'torture' and demand perpetrators be held legally accountable. While it is not feasible to build a comprehensive list of all prohibited interrogation practices into the Convention Against Torture, consistently naming torture when it occurs could reduce public officials' capacity to claim violent practices do not break the law. When it comes to detention and targeted killing, gaps in and between human rights and humanitarian law must be filled through careful international negotiation, not haphazard state practice. In this regard, the International Committee of the Red Cross has led efforts to clarify rules for detention of irregular fighters and belligerent civilians in non-international armed conflicts.[83] Greater rule precision may reduce legal sophistry.[84] As rational institutionalists have shown, well-constructed legal regimes corral state behaviour. However, not all vulnerabilities in international law can be remedied or made impervious to strategic interpretation. All legal frameworks, no matter how precise and deeply entrenched, are exploitable. As a result, international law cannot be definitively fixed on paper.

Institutional and social pressure from international organisations, NGOs, and courts plays an important role in checking the plausible legality of human rights abuses by resisting the normalisation of state legal claims. For instance, the UN Committee Against Torture has repeatedly criticised US interrogation and detention practices. The ICRC has documented unlawful abuse of detainees. The European Court of Human Rights has denounced extraordinary rendition. United Nations Special Rapporteurs have rejected targeted killing. Within the United States, American courts have, in many cases, required modifications to government policy. Human rights NGOs have vociferously campaigned for the closure of Guantánamo. The pages of American and international law reviews are replete with hundreds of articles critiquing post-9/11 policy. This pushback has been impactful, compelling the Obama administration to denounce torture, and forcing the United States into a legally defensive posture.

On the other hand, the success of human rights advocacy should not be over-emphasised. While the plausibility of the torture memos was widely debunked, this rejection has not fully extended to other contentious areas of counterterrorism practice. Both within the United States and the international community, there is far less agreement over targeted killing, which retains support from many operational law of armed conflict experts. Vocal opponents of American interrogation and detention policy during the Bush administration went on to author targeted killing rationales as government

[81] Rosa Brooks, *How Everything Became War and War Became Everything* (New York: Simon & Schuster, 2016), p. 284.

[82] International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism, and Human Rights* (Geneva: International Commission of Jurists, 2009), available at: {http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf} accessed 10 July 2016.

[83] International Committee of the Red Cross, 'Detention in Non-International Armed Conflict: The ICRC's Work on Strengthening Legal Protection' (21 April 2015), available at: {https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm} accessed 10 March 2016.

[84] Thomas M. Franck, 'The power of legitimacy and the legitimacy of power: International law in an age of power disequilibrium', *The American Journal of International Law*, 100:1 (2006), pp. 88–106.

legal advisors under the Obama administration.[85] The legal community continues to disagree over the precise application of international human rights and humanitarian law in irregular conflicts, making shared understandings difficult to consolidate. Consensus among human rights advocates does not mean all national security lawyers agree, nor do the findings of human rights experts automatically trump the claims of American legal advisors when they diverge. As a result, promoting pro-human rights interpretations of the law among the national security establishment remains a significant challenge.

External pressure can limit the plausible legality of human rights abuses, increasing the risk of social sanction, reputational damage, and prosecution for legally dubious conduct. But it cannot in itself undermine the instrumental use of law as a means of legitimising state violence. This requires long-term shifts in national security legal culture towards a deeper appreciation of the rule of law as a political project, not just a collection of rules. American policymakers are not likely to fully embrace what legal scholars have called the 'humanization of international law'[86] or 'humanity law', which displace international law's traditional emphasis on state sovereignty in favour of the core integrity and dignity of all persons.[87] Nonetheless, it is conceivable that politicians and lawyers could make more robust commitments to rejecting the legalisation of state terror in line with liberal democratic values.[88] To achieve this goal, individuals who share this aspiration must be placed in positions of political and legal power in national security institutions. National security advisors must feel free to say 'no' to leaders without fear of retaliation. Lawyers who construct legal cover for human rights abuses should face professional and public opprobrium.

Unfortunately, the Trump administration is not tracking in a pro-human rights direction. On the contrary, it has expressed hostility to human rights norms, rhetorically embracing torture and other abuses. This suggests that it will not only replicate the contentious policies of previous administrations, but may pursue exceptional, overt human rights violations that rely more on the dehumanisation of enemies and less on legal cover. The administration's openness to torture, indefinite detention, and extrajudicial killing along with its racism and Islamophobia may reduce military and intelligence agency aversion to legally risky counterterrorism practices. The strategy of plausible legality has arguably laid the groundwork for such a shift. By attempting to normalise the 'torture lite' of enhanced interrogation techniques, it softens resistance to 'torture heavy'. By sowing confusion over international humanitarian obligations, it blurs collective understandings of what is and is not acceptable. On the bright side, a turn towards obvious extra-legality may help human rights advocates successfully challenge the legitimacy of Trump administration policy in the eyes of liberal domestic and international publics and politicians who eschew gratuitous violence.

For states such as the United States, which have embraced international human rights and humanitarian law principles, but engaged in legal manipulation to minimise substantive constraints on their conduct, there is no simple pathway towards compliance. However, by analysing patterns of state justification, I have highlighted vulnerabilities in legal regimes where such maneuvers are likely to occur. Where ambiguities and loopholes exist or are purported to exist, efforts to forge pro-human rights understandings of the law can curtail, although not eliminate, strategic evasion of legal constraints.

[85] For example, see Koh, 'The Obama Administration'.
[86] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff Publishers, 2006).
[87] Ruti G. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).
[88] Jeremy Waldron, 'Torture and positive law: Jurisprudence for the White House', *Columbia Law Review*, 105:6 (2005), pp. 1726–7.

Conclusion

This article has argued that state engagement with legal rules often goes beyond rule following and rule breaking, compliance and non-compliance. Human rights abuses are not necessarily the result of state rejection of law, or a sign that they have failed to internalise legal norms. As evidenced by the case of post-9/11 American counterterrorism policy, states may adopt a strategy of plausible legality that claims to conform to positive law while substantively violating it. Their legal justifications vary across issue areas, reflecting the particularities of relevant legal regimes. While clearly and unmistakably prohibiting torture, the anti-torture norm suffers from a vague definition of what exactly constitutes torture. OLC lawyers ignored relevant sources for clarifying ambiguity and identified the one weak spot in an otherwise ironclad rule. In the case of detention and lethal targeting, loopholes and gaps within and between the international human rights and humanitarian regimes governing combatants and civilians create room for manoeuver.

Legal rationalisations for human rights abuses are possible because states engage law in cynical, instrumental ways, but also because the instability of legal norms themselves make them vulnerable to exploitation. However, pushback by human rights advocates has potential to limit state capacity to strategically interpret law, forcing actors with a sustained preference for human rights abuses to pursue exceptional or covert derogations. The success of the Trump campaign suggests these alternatives may again emerge in American politics. However, insofar as overt extra-legalism remains unpalatable in contemporary liberal democracies, contesting the legality of abusive practices provides an important check on state violence.

By examining the United States' legal rationalisation of human rights abuses in the Global War on Terror, I have identified instabilities and vulnerabilities in underlying regimes. At the same time, I have suggested that human rights advocates can challenge implausible legal readings and foster alternative rights respecting understandings of legal rules. This is evident in the case of torture, where criticism has undermined efforts to legally legitimise abusive enhanced interrogation techniques, but has been less effective in the cases of detention and targeted killing. There may be instances where clarifying legal rules on paper might help strengthen rights protections. Moreover, external pressure on public officials may reduce human rights violations. Yet, my analysis points to the constant need to build and reinforce shared, pro-human rights understandings of the law among publics, politicians, and lawyers. In the absence of such efforts, plausible legality may continue to prevail, normalising human rights abuses and opening the door to more open forms of state violence.

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