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The Promise and Limits of the International Law of Torture

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is regularly celebrated as one of the most successful international human rights treaties.[1] Its adoption by the United Nations in 1984 culminated an effort to outlaw torture that began in the aftermath of atrocities of World War II. Nations that ratified the Convention consented not to intentionally inflict "severe pain or suffering, whether physical or mental," on any person to obtain information or a confession, to punish that person, or to intimidate or coerce him or a third person.[2] Today, with a membership of over 130 countries, the Convention stands as a symbol of the triumph of international order over disorder, of human rights over sovereign privilege.

Yet while the Convention and its regional counterparts are indisputably remarkable achievements, events of the post–September 11 era have given reason for pause. Torture, we have learned, is not just a practice of the past. As the United States prepared to go to war in Afghanistan, the Bush administration repeatedly drew attention to the Taliban's use of torture to maintain a semblance of control. And no one who followed the news during the following year could not be aware that Saddam Hussein's regime survived for so long in no small part by instilling a paralyzing fear in the population through the widespread use of torture and killing of those it deemed a threat.

Even more troubling, it has become apparent that our enemies in the war on terrorism are not the only ones who have made use of what had previously been seen as unthinkable practices. As noted in Sanford Levinson's introduction, it is an open secret that many of the suspects caught by the

United States in the course of the war on terrorism have been turned over to Saudi, Egyptian, Syrian, and Jordanian officials, who are suspected of using torture in the course of their subsequent questioning. Indeed, even before the scandal over the treatment of prisoners held by the United States at the Abu Ghraib prison in Iraq erupted, it was well known that the United States has itself used "stress and duress" techniques that skirt and perhaps sometimes cross the line dividing legal interrogation from torture.[3]

These revelations pose not only a moral challenge, which the earlier chapters in this book have explored, but also a challenge to those who believe in the power of international law to impose global order. All of the nations mentioned earlier, except Iraq and Syria, have ratified the Convention against Torture and thereby made an international legal commitment not to use torture. Yet they are known to have continued, if not expanded, its use. Recent events thus leave exposed the dark underbelly of the international legal regime against torture: it is not so clear that it really works.

In this chapter, I explore the place of international law in efforts to bring an end to the practice of torture. The debate over whether international law "works" has until now been highly polarized. On the one hand, skeptics of international law claim that international law is mere window dressing. States don't give up the right to engage in torture unless they have no intention of using it anyway. And once they join treaties like the Convention against Torture, states will act no differently from if they had not done so.

On the other side of the debate are those who reject this dismissive view of international law. They argue that states do not simply join treaties that are in their material interests. Rather, states will join a treaty if they are committed to the ideas and goals it embodies, even if doing so may be costly. And once states join, believers in international law argue, they will abide by their international legal commitments "most of the time."[4]

I, by contrast, argue that international law has a real effect, but not one that either friends or foes of international law would expect. In short, neither advocates nor skeptics of international law examine the whole picture. Both fail to consider the role of internal enforcement of international treaties on countries' willingness to join and abide by them. Moreover, both ignore almost completely the indirect effects of treaties on countries' decisions to accept international legal limits on their behavior and then to violate or abide by them. Recognizing these dynamics creates a broader perspective on the role that international law plays in shaping how states

actually behave and hence provides a more accurate picture of both the potential and the limits of international law.

Who Joins the Treaties Prohibiting Torture and What Effect Do They Have?

Let us begin by examining the facts. Which states commit to the Convention against Torture and thereby agree not to take advantage of this possibly useful (if horrific) tool? Do states that do so actually improve their practices as a result?

My examination of the practices of over 160 nations over the course of forty years provides some answers to these questions. The evidence supports several key findings. First, countries that ratify treaties outlawing torture do not always have better torture practices than those that do not. Second, democratic countries are more likely overall to make the legal commitment not to use torture than nondemocratic countries. Third, democratic nations that use torture more frequently are less likely to join the Convention against Torture than those that engage in less. Fourth, nondemocratic nations that use more torture are more likely to join the Convention against Torture than those that use it less. Finally, and perhaps most surprising, not only does it appear that the Convention does not always have the intended effect of reducing torture in countries that ratify, but, in some cases, the opposite might even be true.

I begin by examining which nations make the legal commitment not to engage in torture. Do countries that sign and ratify treaties that outlaw torture have better torture practices than do those that do not?[5] Contrary to the predictions of both critics and advocates of international law, the answer is no. Indeed, countries with worse torture ratings are *slightly more likely* to ratify the Convention against Torture than those with better ratings.[6] Even more striking, states that have ratified the regional conventions prohibiting torture have *worse* practices on average than those that have not, or that did so only after letting several years pass.[7] On the other hand, the opposite is true of articles 21 and 22 of the Convention against Torture (which have stronger enforcement provisions that countries can separately agree to accept). Countries with better torture ratings have committed to articles 21 and 22 at four times the rate of those that have worse torture ratings.[8]

Table 11.1. Who Accepts Limits on Torture?

	Countries that Torture Less	Countries that Torture More
Convention against Torture	41%*	47%*
Articles 21 and 22	22%*	6%*

*Indicates pairs for which the difference is statistically significant at the 99% level.

The story becomes even more interesting when we compare the willingness of democratic and nondemocratic nations to accept international legal limits on their torture practices, as revealed in tables 11.2 and 11.3.[9] First, it is apparent that democratic nations are more likely, on the whole, to join the Convention against Torture. That, perhaps, is not all that surprising, particularly given that democratic nations are less likely to torture than nondemocratic nations.[10] What is surprising, however, is that *non*democratic nations that reportedly use torture frequently are *more* likely to join the Convention than nondemocratic nations that reportedly use torture infrequently.[11] For example, Afghanistan, Cameroon, and

Table 11.2. Comparing Democracies and Nondemocracies

		Better Torture Ratings	Worse Torture Ratings
Nondemocratic	Ratified Convention:	24%*	40%*
		(776)	(383)
	Signed Convention:	35%*	50%*
		(776)	(383)
	Joined articles 21 and 22:	4%	6%
		(776)	(383)
Democratic	Ratified Convention:	57%	62%
		(790)	(201)
	Signed Convention:	76%	74%
		(790)	(201)
	Joined articles 21 and 22:	40%*	6%*
		(790)	(201)

Note: The number of observations appears in parentheses.

*Indicates pairs for which the difference is statistically significant at the 95% level or higher.

Table 11.3. Comparing Democracies and Dictatorships

Torture Rating:		1 (No Verified Allegations of Torture)	2	3	4	5 (Torture Is "Prevalent" or "Widespread")
Dictatorship	Ratified	7%	14%	35%	41%	43%
	Convention:	(73)	(218)	(410)	(218)	(109)
	Signed	7%	22%	40%	47%	53%
	Convention:	(94)	(259)	(487)	(247)	(125)
	Joined	1%	1%	5%	2%	6%
	articles 21 and 22:	(94)	(259)	(487)	(247)	(123)
Democracy	Ratified	69%	76%	53%	50%	60%
	Convention:	(221)	(279)	(223)	(115)	(43)
	Signed	85%	83%	67%	64%	68%
	Convention:	(264)	(300)	(236)	(121)	(47)
	Joined	49%	34%	20%	10%	11%
	articles 21 and 22:	(264)	(600)	(236)	(121)	(47)

Note: The number of observations apperas in parentheses.

Egypt—all of which have well-documented histories of using torture—ratified the treaty almost immediately after it opened for signature, whereas Oman and the United Arab Emirates, with their comparatively good records, have yet to ratify. These patterns are found across the board. As table 11.3 demonstrates, as democracies' torture ratings grow worse, they are increasingly less likely to make legal commitments that prohibit them from engaging in torture. Again, the opposite is true of dictatorships: those with worse reported torture practices are *more* likely to join the Torture Convention than those with better reported practices.

All of these results hold up in a more sophisticated statistical analysis that holds states' economic and political characteristics constant. Looking at the group of states as a whole (grouping together democratic and nondemocratic states), I find that states that reportedly engage in more torture are no less likely to commit to the Convention against Torture or to articles 21 and 22 than states that reportedly engage in less torture. But again, if we look at democratic regimes alone, we find that they differ from the non-

democratic states in two interesting ways. First, they are simply more likely to join the Convention against Torture and articles 21 and 22. Second, even though they are more likely on the whole to join the Convention and articles, the more torture they use, the less likely they are to join—a pattern exactly opposite of that seen among nondemocratic regimes.

We now know something about which states join the Convention against Torture. But whether states will actually abide by international legal commitments once they are made is, of course, another issue altogether. Again, the empirical evidence holds some surprises for traditional accounts. My research indicates that human rights treaties do not always have the effects their proponents intend. A state's ratification of the Convention against Torture provides no guarantee that its actions will improve. Egypt, Cameroon, and Mexico were among the earliest to ratify the Convention against Torture, yet they continued to have some of the worse torture practices well into the 1990s. Indeed, if one compares states that share otherwise similar economic and political characteristics, it turns out that—if anything—those that ratify the Convention against Torture are reported to engage in *more* torture than those that have not ratified.

Accounting for the Evidence

As the foregoing evidence amply demonstrates, traditional accounts of international law that see it as either almost wholly effective or almost wholly ineffective are simply wrong. States do not only agree to the Convention against Torture if it requires them to do what they are already doing, as critics contend. They actually join it even it commits them to do something more. Yet, at the same time, states that ratify the Convention might sometimes have practices that are actually worse than those of states that have not ratified. Advocates of international law are equally at a loss to explain the empirical results. States with poor torture records commit so readily to the Convention against Torture that it would not be unreasonable to conclude that they do so only because they do not take the commitment seriously. More troubling for advocates of international law, however, is the evidence suggesting that countries that ratify the Convention against Tor-

ture and articles 21 and 22 do not engage in less torture as a result. In fact, some countries that ratify might possibly torture their citizens more!

Hence neither side of the existing debate provides a convincing account of the facts. In what follows, I argue that their failure to do so is due to their common oversight of important parts of the broad landscape that defines the role and effect of international law in modern society. More specifically, both fail to consider the role that domestic institutions play in shaping states' willingness to join and to comply with international legal rules. Both also ignore almost completely the role that concern about reputation plays in states' decisions to commit to and abide by international legal rules.[12] These two dynamics have long been overlooked in international law scholarship; yet both, I will show, are central to understanding state choices to commit to and abide by international law.

Domestic Institutions and Self-Enforcement

Often ignored in the celebrations of the Convention against Torture is the fact that while it is quite strong in substance, it is remarkably weak in enforcement. The central enforcement procedure in the treaty is a requirement that states submit reports to the Committee against Torture, an international body created by the treaty to oversee the Convention.[13] But failure to abide by even this minimal commitment is frequently ignored.[14] Stronger enforcement procedures are available but wholly optional: countries can agree to allow states and individuals to file complaints against them with the Committee against Torture, but they are not required to do so in order to join the treaty.[15] Consequently, only about 30 percent of those who have joined the Convention have accepted these additional procedures. According to the skeptical view of international law, these weak enforcement provisions mean that states will never change their behavior to obey the Convention.

Unquestionably, it is true that fear of enforcement is an important reason that states follow international rules. Thus the absence of significant enforcement provisions in the Convention against Torture (and, indeed, in much of international law) certainly means that the Convention is less likely to be closely observed. Yet it does not mean, as some skeptics would argue, that the Convention will have no effect. Indeed, if enforcement were

the only reason people followed the law, the world would be a much messier place. Individuals abide by the law for a complex mix of reasons, including, among others, fear of enforcement by private parties or of retribution by the wronged party, internalization of the legal rule, and concerns about the impact on their reputation if others learn of their wrongdoing. Hence, even if there is no chance that individuals will be punished for a legal transgression, there are still many reasons why they might abide by the law.

As advocates of international law are quick to point out, the same is true of states. There are many reasons other than enforcement that states can be expected to follow international law. Yet when it comes to specifying what those reasons are, the advocates of international law tend to fall short. They often fall back on the relatively imprecise claim that *pacta sunt servanda* is the central proposition of international law.[16] Or they argue that norms of international law are "internalized" by states, without giving much guidance as to when and why certain rules or propositions will be internalized and others will not.[17]

The notion of "self-enforcement"—the use of domestic institutions by domestic actors against the government to uphold international rules—provides more precise guidance. International law is not obeyed only when states fear that an international organization or other state actor will levy sanctions against those who disobey the law, as many skeptics assume. Much of international law is instead obeyed primarily because domestic institutions create mechanisms for ensuring that a state abides by its international legal commitments, whether or not particular governmental actors wish it to do so. In democratic nations, in particular, actors outside government can use litigation, media exposure, and political challenges to compel governments to abide by their international legal commitments. In states lacking these institutions, however, it is more difficult for domestic actors to pressure the government to live up to the commitments it has made. For this reason, the extent to which domestic institutions permit domestic actors to pressure the state to abide by international law can have an important influence on a state's record of compliance.

However, a perverse prediction arises from these claims. The more likely a state is to engage in self-enforcement, the more likely it is to expect to be required to change its practices to abide by an international treaty. And the more likely a state expects to change its practices to abide by a treaty, the more costly and hence less attractive membership will appear. States that

are more likely to engage in self-enforcement of the terms of a treaty are therefore less likely to commit to the treaty in the first place. Put another way, the more likely the treaty is to lead to an improvement in a state's practices, the less likely the state will be to join it.

This is, of course, exactly what the evidence outlined earlier shows. This approach thus helps explain why the democratic nations that are reported to engage in more torture are less likely to ratify the Convention against Torture than those that reportedly engage in less (even though, on the whole, nations that reportedly engage in more torture are no less likely to ratify the Convention than those that reportedly engage in less). It also helps account for why nondemocratic nations actually appear to be substantially more likely to ratify the Convention if they have worse torture records than they are if they have better torture records.

The dynamic of self-enforcement described here enriches both skeptical and sanguine accounts of the role of international law. For skeptics, it has the effect of broadening the notion of enforcement to include internal enforcement efforts. For advocates, it gives a more detailed and precise mechanism to account for the process of internalization. To determine when and why some international rules will be internalized and some will not one can simply look to the treaty terms (is it self-executing?) and the domestic institutions of member states (can actors independent of the government compel it to abide by its international legal commitments?).

The Role of Reputation

Traditional accounts of international law not only tend to ignore the role of domestic institutions in enforcing international law. They have also, for the most part, turned a blind eye to the effects of states' concerns about their reputations. This is a serious oversight, for in many areas—particularly the international law of torture—reputational concerns often play a more significant role than do the much-studied sanctions imposed by a treaty in states' decisions to commit to international legal limits on their torture practices and then abide by or shirk them.

Simply put, states join treaties like the Convention against Torture in no small part to make themselves look good. In doing so, they may hope to attract more foreign investment, aid donations, international trade, and other tangible benefits. The consistent result is that those that do not engage in prohibited practices will be less likely to join treaties because they

have little to gain (their reputation is already good) and something to lose. Conversely, those who are reported to engage in prohibited practices will be *more* likely as a result to join treaties because they stand to gain something and put very little at risk.

Concerns about reputation at home and abroad can also provide states with a powerful motivation to abide by their international legal commitments once they are made. Where violations are likely to be discovered (as is often true, for example, of international trade laws), states will be likely to follow international rules in order to foster a good impression among other members of the international community. But where violations of international commitments are difficult to detect—for example, torture—violations will probably be more common. Moreover, states that already possess good reputations are more likely to abide by their commitment under treaties than are those with poor reputations—again because they have more to lose. This, in turn, further reinforces the counterintuitive dynamic noted earlier: to the extent that those with good reputations expect to expend time and energy ensuring that their treaty commitment will be followed (thus protecting their strong reputations), the prospect of making a treaty commitment will be viewed as more costly, and hence the state will be more reluctant to commit in the first place. Thus, once again, states that are more likely to comply with a treaty's requirements will be less likely to agree to them in the first place as a consequence.

Once again, reference to the actions of states in the real world confirms these claims, some of which are deeply counterintuitive. To begin with, states that have better torture records (and better reputations) are *less,* not more, likely to join the Convention against Torture than states that have worse torture records (and worse reputations). This is particularly true among dictatorships (who do not face the countervailing pressure of self-enforcement discussed earlier). Dictatorships are not only more likely on the whole to join the Convention against Torture if their practices are worse than if they are better but also their likelihood of joining the Convention against Torture grows with each successive increment of worsening torture ratings. Moreover, it appears that the calculated risk that states with poor torture records (and reputations) take in joining the Convention may in fact pay off. The empirical evidence suggests that, if anything, states that join the Convention have *worse* practices than they would be expected to have had they not joined the Convention. This puzzling result may arise because states that ratify receive a boost in their reputations and conse-

quently feel less incentive to make real improvements in their actual torture practices (improvements that would undoubtedly be more difficult and more expensive to achieve than the highly visible but potentially costless act of ratifying a treaty).

Lessons for the Future

What lessons can be drawn from the successes and shortcomings of the Convention against Torture? I will highlight three in particular here. First, while enforcement of international law by international actors is not essential to effective international law, it is far from irrelevant. Where international institutions do not put in place effective enforcement mechanisms, there is of necessity greater reliance on other methods of maintaining compliance, such as domestic enforcement and reputational incentives. But these other methods do not, as I have shown, always have the effects that are intended. In particular, the reliance on domestic enforcement to fill the gap left by weak international enforcement can produce a regime that is shunned by precisely those states who would be the best members. There is, therefore, a tradeoff between widespread participation in the regime and its effectiveness: the more effective the regime would be at changing a state's behavior, the more reluctant the state is to join it in the first place. Any modifications to the international legal torture regime must be made with an awareness of this tradeoff.

Second, the evidence presented here makes clear that strong domestic institutions are essential not only to domestic rule of law but also to international rule of law. Where international bodies are less active in enforcement of treaty commitments, it falls to domestic institutions to fill the gap. In some states, this reliance on domestic institutions is effective. In others, however, it is less so. Because the international torture regime relies so heavily on domestic rule of law institutions, strengthening those institutions could have a profound impact on compliance with the international legal torture regime.

Third, and finally, state reputation plays a central role in state decisions to participate in and comply with the international torture regime. This, again, sometimes produces unintended consequences. At present, membership in the Convention against Torture can confer a boost to a state's reputation, regardless of whether it actually abides by the Convention's re-

quirements. This is possible because the international community does little to police the treaty requirements, leaving member states facing little risk of external exposure if they fail to abide by the Convention's requirements. As a consequence, states that engage in torture and have weak domestic rule of law institutions have every reason to join the Convention. However, simply monitoring the activities of treaty members could substantially improve the situation. If states' violations of the terms of the treaty were likely to be made public, states that do not intend to abide by the treaty would be substantially less likely to join.

The Convention against Torture has not brought an end to states' horrific abuse of their own citizens. Far from it. Each day we learn of new violations, even by states that joined the Convention in its earliest days. Violations of both the letter and spirit of the law are rampant. Yet while the Convention is not a panacea, neither is the problem of torture beyond the reach of international law. Although the Convention has not achieved its lofty goals, it has contributed to the now almost universal view that torture is an unacceptable practice. By facing up to the Convention's successes and its failures, we can begin to learn how to harness the real but limited power of international law to continue to change the world for the better.

Notes

1. This chapter draws on research conducted and data collected for Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?" *Yale Law Journal* 111 (2002): 1935–2042 (hereafter Hathaway [2002]); and "The Cost of Commitment," *Stanford Law Review* 55 (2003): (hereafter Hathaway [2003]). Portions of the chapter are adapted from a forthcoming article, "Between Power and Principle: International Law and State Behavior," *Chicago Law Review* 72 (forthcoming 2005).

2. See John Parry, chapter 8 herein, for a full discussion of the various definitions of torture in international law.

3. See Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," *Washington Post,* December 26, 2002, A1.

4. Louis Henkin, *How Nations Behave,* 2nd ed. (New York: Columbia University Press, 1979), 320–321.

5. The database I use in this article includes crossnational and time series data. Hence a single observation provides information only about a single country during

a single year—a "country-year." When discussing empirical results in this chapter, I refer to such "country-years" with the shorthand "country."

6. This difference is statistically significant at the 99 percent level.

7. For more on the method used to construct the ratings discussed herein, see Hathaway (2002), 1968–1976.

8. This difference is statistically significant at the 99 percent level.

9. The data for table 11.1 are drawn from Hathaway (2003). Table 11.2 is drawn from Hathaway (2003), 1850. Table 11.3 is drawn from James Raymond Vreeland, "CAT Selection: Why Governments Enter into the UN Convention against Torture," unpublished manuscript (2003), which tests arguments made in Hathaway (2002, 2003). It uses data on torture from Hathaway (2002) and data on democracy and dictatorship from a yet unpublished manuscript by Jennifer Gandhi and Adam Przeworski, "Dictatorial Institutions and the Survival of Dictators" (2002), whose definition of democracy and dictatorship differs in several ways from the data on democracy used in Hathaway (2002). This makes the coherence in results all the more striking.

10. Countries that reportedly torture the least (have a torture rating of 1) have an average democracy rating of 7.59; countries that reportedly torture the most (have a torture rating of 5) have an average democracy rating of 2.42. For more on the sources of data on torture and democracy, see Hathaway (2002), 1969–1972, 2029–2030.

11. Hathaway (2003), 1850. These differences are statistically significant at the 99 percent level.

12. My other work situates these dynamics within a broader framework that more fully describes the relationship between international law and state behavior. In that work, I demonstrate that international law gives rise to three contrasting and overlapping sets of incentives for countries to voluntarily accept limits on their actions and then abide by them. I place the incentives created by internal enforcement and state concerns about reputation within these broader categories. I will be elaborating this argument in forthcoming publications.

13. Article 40 of the International Covenant on Civil and Political Rights reads, in part: "The States Parties to the present Covenant undertake to submit reports on measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights." Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, reads, in part: "The States Parties shall submit to the Committee . . . reports on the measures they have taken to give effect to their undertakings under this Convention."

14. As of 2000, 71 percent of all state parties to human rights treaties had overdue reports, and 110 states had five or more overdue reports. Anne F. Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, N.Y.: Transnational, 2001), 8. For descriptions and assessments of the intergovernmental human rights enforcement system, see Henry J. Steiner and Philip Alston, eds., *International*

Human Rights in Context: Law, Politics, Morals, 2nd ed. (New York: Oxford University Press, 2000), 592–704, as well as Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (New York: Oxford University Press, 1992), and Philip Alson, *Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System,* U.N. ESCOR, 53d Sess., Agenda Item 15, U.N. Doc. E/CN.4/1997/74, 1996, 37.

15. Articles 21 and 22 of the Convention provide for these additional enforcement mechanisms.

16. *Pacta sunt servanda* means "[a]greements (and stipulations) of the parties (to a contract) must be observed." *Black's Law Dictionary,* 6th ed., (1990), 1109.

17. For a more complete overview of this scholarship, see Hathaway (2002), 1955–1962, and Oona A. Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics* (New York: Foundation Press, forthcoming 2004). Especially important are Abram and Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995); Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995); and Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1997): 2599–2659; Koh, "The 1998 Frankel Lecture: Bringing International Law Home," *Houston Law Review* 35 (1998): 623–680; and Koh, "Is International Law Really State Law?" *Harvard Law Review* 111 (1998): 1824–1861.