The Responses of Liberal Democracies to the Torture of Citizens: A Comparative Study

Cynthia Marina Banham

October 2014

A thesis submitted for the degree of Doctor of Philosophy of The Australian National University
Declaration

I hereby state that the following thesis is entirely my own original work and has not been submitted for any other degree at any other university or education institution. All sources of information used in the thesis have been indicated and due acknowledgment has been given to the work of others.

Signed:

[Signature]

Cynthia Marina Banham

Date: 1 October 2014
Acknowledgements

I am very grateful to all the people who guided and supported me throughout this PhD. To my supervisor, Hilary Charlesworth – you have challenged and inspired me. You helped me to believe in my capabilities and in the value of my thesis and I have learnt so much from you. You made the entire experience so enjoyable, rewarding and meaningful. It was a true privilege to study under you. Thankyou. Chris Reus-Smit, you opened a door to me in 2007 when it seemed like all others had closed; I thank you and Heather Rae for reaching out to me and showing me there was still so much for me to achieve intellectually and professionally. It was a former teacher, Peter Van Ness, who first encouraged me to probe deeper into the issue of torture in the war on terror, so credit for the initial impetus to pursue this topic goes to him. I also thank my panel member, Jacinta O’Hagan for her dedication to my project and for providing me with invaluable feedback throughout. I have met many generous and supportive people at the Australian National University: thanks to those who read my drafts (especially Bob Goodin) and those whose friendship sustained me along the way (especially Emily Tannock and Natasha Tusikov). I would like to pay tribute to the Regulatory Institutions Network for offering me an intellectually rich and stimulating environment in which to work. Support for the thesis has come in many forms, and I would like to thank Lanette Gavran for ensuring I had the physical strength to see me through the gruelling years of study.

To my family – my parents Lori and John, thankyou for your complete love and support, for always being there for me in every way possible. And to my siblings Juliette, Anthony and Sebastian. I am incredibly fortunate to have such a wonderful family.

Finally, to the loves of my life, Michael and Leo. Michael, I would not be here without your love, loyalty and sacrifice. You believed in us when it mattered. We played a song in the hospital that is hard to listen to now. It has the line, “To you, I would give the world”. And you did, Michael. You gave me a reason to live – and then you gave me Leo and made this PhD possible. I am forever grateful for your unconditional, selfless love, for your patience, for never complaining, never questioning, for your absolute devotion. Every day I am reminded how lucky I am that I found you, that you are my one. And my darling boy Leo, my heart. You have made everything – everything – worthwhile. I dedicate this thesis to you. It has, I am afraid, dominated the first three years of your young life. I hope you take from it the knowledge that no matter what the universe throws at you, good things are possible if you have belief in yourself and the love of others around you.
Abstract

Liberal international law analyses typically focus attention on the role of domestic politics in shaping state responses to international human rights violations. The analysis, exemplified in Beth Simmons's book, *Mobilizing for Human Rights*, assumes that stable liberal democracies will respond to international human rights issues in a similar fashion, based on the fact that political rights in these open, democratic systems are largely protected, leading to complacency among citizenries. This thesis tests this approach by examining the reactions of three liberal democracies – Australia, the United Kingdom and Canada – to the torture of their citizens detained overseas in the war on terror. It investigates why, despite sharing a common legal and political culture that values the protection of individual rights, they reacted quite differently to this phenomenon.

I argue that the role of civil society as agents of accountability of government on matters of international human rights is a distinguishing factor in understanding the different responses of the three states. Where civil society mobilised, states tended to respond to concerns about the use of torture against their citizens in the war on terror and, where civil society did not, states were not so responsive. The thesis identifies the enabling and constraining factors that influenced civil society to mobilise, including domestic rights cultures, institutional frameworks and political opportunity structures. I suggest that civil society is more likely to mobilise when it exists within a strong human rights culture and has the right institutional tools and political opportunities at its disposal.
# Table of Contents

PREFACE ....................................................................................................................... 8

CHAPTER ONE – INTRODUCTION ............................................................................ 11
   I TORTURE AND LIBERAL DEMOCRACIES ................................................................. 11
   II THEORISING THE REALISATION BY STATES OF INTERNATIONAL
      HUMAN RIGHTS PRINCIPLES .............................................................................. 18
   III MY ARGUMENT ................................................................................................. 20
   IV THE CASES .......................................................................................................... 25
   V METHODOLOGY ................................................................................................. 28

CHAPTER TWO – HOLDING STATES ACCOUNTABLE FOR THE
PROTECTION OF INDIVIDUAL INTERNATIONAL HUMAN RIGHTS .......... 30
   I THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ................................ 30
   II CIVIL SOCIETY AND LIBERAL DEMOCRATIC VARIATION .............................. 37
      A Conceptualising Civil Society ........................................................................... 37
      B Civil Society and Human Rights ...................................................................... 43
     C Civil Society and Political Accountability ......................................................... 45
   III NATIONAL STRUCTURES AND THEIR INFLUENCE ON CIVIL SOCIETY
      MOBILISATION ................................................................................................... 47
      A Political Culture ............................................................................................... 47
      B Legal and Political Institutions ...................................................................... 50
      C Political Opportunities ..................................................................................... 53
   IV CONCLUSION ..................................................................................................... 55

CHAPTER THREE – AMERICA’S RESPONSES TO TORTURE AFTER 11
SEPTEMBER 2001....................................................................................................... 57
   I EXECUTIVE DOMINANCE .................................................................................. 58
      A US Policy Before 11 September 2001 ........................................................... 58
      B US Policy After 11 September 2001 ............................................................. 60
      C Abu Ghraib ..................................................................................................... 68
   II CONGRESSIONAL ACQUIESCENCE .................................................................... 72
   III AMERICAN COURTS ......................................................................................... 75
      A Rasul v Bush ..................................................................................................... 76
      B Hamdan v Rumsfeld ......................................................................................... 77
      C Boumediene v Bush ......................................................................................... 78
   IV CIVIL SOCIETY CHALLENGES THE EXECUTIVE ....................................... 79
   V CONCLUSION ..................................................................................................... 84

CHAPTER FOUR – AUSTRALIA ............................................................................... 86
   I AUSTRALIA’S ROLE IN THE WAR ON TERROR .................................................. 86
   II AUSTRALIA’S TORTURE LAW ........................................................................... 88
   III AUSTRALIAN CITIZENS DETAINED IN THE WAR ON TERROR ............... 90
      A David Hicks .................................................................................................... 90
      B Mamdouh Habib ............................................................................................ 91
   IV THE EXECUTIVE’S RESPONSE ....................................................................... 93
      A The Howard Government ............................................................................... 93
      B The Rudd Government ............................................................................... 100
      C The Gillard Government ........................................................................... 101
   V THE AUSTRALIAN PARLIAMENT .................................................................... 103
      A A Cowed Opposition ................................................................................... 103
      B A Robust Senate .......................................................................................... 104
   VI THE JUDICIARY ............................................................................................... 106
   VII CIVIL SOCIETY’S LACK OF PRESSURE ...................................................... 107
In January 2005, I was cooking dinner for friends in Canberra when my mobile phone rang. The agitated caller was the chief-of-staff of *The Sydney Morning Herald*, the newspaper for which I worked as a reporter. The federal government had just issued an explosive press release. After two years, Mamdouh Habib, one of two Australian citizens detained at Guantánamo Bay by the United States, Australia’s close ally, was coming home (Downer and Ruddock 11 Jan. 2005). This was, quite literally, “stop the presses” news. Given the Howard government’s steadfast indifference towards the Australian captives thus far, the announcement came as a shock. It was late in the evening and most reporters had left for the night. Could I come back into work and help write the story, I was asked (the story was Marriner, Jamal and Banham 12 Jan. 2005).

Two and a half weeks later, Habib arrived home and was immediately released without charge. Soon after his return, Habib appeared on the television program *60 Minutes*, where he described his alleged torture while detained in Pakistan and Egypt, before being taken to Guantánamo Bay (Channel Nine 13 Feb. 2005b). The day after the *60 Minutes* interview, the Australian Foreign Affairs Minister, Alexander Downer, was asked on talkback radio whether he believed Habib’s claims. Downer replied:

> You can weigh up, in relation to the allegations of torture, whether you believe a man who has allegedly been involved in al Qaeda, or whether you believe the Americans. It depends where your prejudice lies I suppose (2UE 14 Feb. 2005).

Downer’s comments implied that alleged torture victims accused of terrorism, as Habib was by American and Australian officials, were lying about their treatment by their captors and should not be believed. Anyone who did believe them – or thought their torture allegations should be taken seriously – must be sympathetic to al Qaeda and anti-American.¹

The Foreign Affairs Minister’s comments illustrated the permissive attitude towards torture that had taken hold in Australian national politics following the terrorist attacks

---

¹ Downer’s comments illustrate what Stanley Cohen calls “literal” classic official denials of torture. “Victims are lying and cannot be believed, because they have a political interest in discrediting the government. … Journalists and human rights observers are selective, biased, working from a hidden political agenda, or else naïve, gullible and easily manipulated” (Cohen 2001: 105).
of 11 September 2001. In 2004, revelations that prisoners at Abu Ghraib prison in Iraq had been tortured by their US captors reverberated around the world (CBS 28 Apr. 2004; Hersh 10 May 2004). International concerns were being raised, including by the International Committee of the Red Cross (ICRC), that detainees at Guantánamo Bay were also being mistreated and even tortured (Lewis 30 Nov. 2004). Yet as Downer’s remarks indicate, such allegations no longer appeared to shock or offend Australian political elites, whose public rhetoric implied that torture, in the so-called “war on terror” context, was not necessarily a bad thing.²

As a journalist reporting on Australia’s response to 11 September and its aftermath, I found this perplexing. Abhorrence of torture was a marker of a modern liberal democracy. Torture was banned under international law. Its prohibition constituted a norm of *jus cogens* – there could be no justification for its use. The prohibition against torture was accepted by the international community, with 154 states having ratified the 1984 *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, including Australia. Australia was a stable liberal democracy with a record of defending human rights in international forums. How was it that such a nation was suddenly defending, or refraining from questioning or criticising, the use of torture in the Bush Administration’s war on terror, even when used against Australia’s own citizens?

The puzzle did not end there. Canada and the United Kingdom were countries with whom Australia had much in common, including their status as long-standing liberal democracies sharing similar political cultures and values, and close alliances with the US. Yet they responded differently to the issue of the torture of their own citizens detained in the war on terror. Canada, for instance, established a public judicial inquiry in 2004 into allegations that one of its citizens, Maher Arar, was tortured in Syria, having been sent there by US officials for interrogation (The Arar Commission 2006). The inquiry resulted in the first officially documented description of the US practice of extraordinary rendition – the same ordeal to which Habib was subjected (Whitaker 2008: 9). The UK was different again to Australia and Canada in its response to the detention of its citizens at Guantánamo Bay. Amid the international concerns that

² I use the phrase “war on terror”, not “war on terrorism”, in this thesis. Bush Administration officials used both versions at different times. President George Bush in a defining address of 20 September 2001 referred to the “war on terror” (Bush 20 Sep. 2001).
detainees were being tortured there, the UK began repatriating its nine citizens in early 2004, with all returning home by January 2005. In time, the UK also sought to repatriate all remaining British residents detained at Guantánamo Bay. In addition, the UK refused to allow its citizens to be tried by the US military commission process, which permitted the use of evidence obtained by coercion (Steyn 2004). The reason given by the UK was that the commissions failed to offer “sufficient guarantees of a fair trial in accordance with international standards” (Goldsmith 25 Jun. 2004). Both Australia and Canada, by contrast, allowed their citizens to be tried under the Guantá namo Bay military commissions.

Accounting for these varying responses by similar liberal democracies to the torture of their own citizens – an issue that invokes a core international human rights principle which all three states purport to uphold – is the central concern of this thesis. The specific question at the heart of this thesis is:

How can we account for the different responses of liberal democracies to the torture of their citizens and residents after 11 September 2001?
CHAPTER ONE – INTRODUCTION

The use of torture is inconsistent with liberal values, in the sense that it shows no regard for the principle of the fundamental nature of individual dignity, autonomy and freedom. Despite this, liberal democracies have regularly used torture as a tool of statecraft (Rejali 2007). This thesis examines how this has occurred and the factors that promote recourse to torture as well as those that restrain it. It uses case studies of three liberal democracies during the “war on terror” initiated by the attacks on the United States of 11 September 2001 and questions why they reacted differently to the torture of their citizens overseas. In this chapter I consider basic assumptions underpinning the thesis about the incompatibility of torture with liberal democracy. I then introduce the theoretical body of literature with which the thesis engages – that dealing with the realisation of international human rights principles. I outline the three cases – Australia, the United Kingdom and Canada – as well as the methodology and plan of the thesis.

I TORTURE AND LIBERAL DEMOCRACIES

Torture, which is the intentional infliction of pain to punish or obtain information, is antithetical to liberal values. Liberalism is a political tradition distinguished by the supreme value it places on the liberty or freedom of the individual (Arblaster 1984: 56). Liberal thought has a long history and contains many strands, and different scholars emphasise a range of attributes in describing liberalism. Some highlight ideas about tolerance and privacy, along with commitments to constitutionalism and the rule of law (Arblaster 1984: 55). Others focus on values of individualism and the moral primacy of the individual; egalitarianism, the idea that all people have the same moral status; and universalism, a belief in the moral unity of the human species (Gray 1986: x). As a political system, liberalism can be understood as an attempt to limit the power of the state for the sake of guaranteeing or protecting individual freedom (Holmes 1995: 18). Thus the liberal state is one in which the government is limited by stringent rules – it must contain constitutional constraints on the arbitrary exercise of governmental authority (Gray 1986: 73-74). The US, Australia, the UK and Canada are examples of liberal democracy, a form of government in which the liberal tradition coexists and is balanced by a commitment to democracy. Although historically liberalism has always been associated with democracy, they are distinct political traditions. Liberal tradition is
constituted by the rule of law and respect for individual rights and liberty, while the older democratic tradition is associated with the equality of citizens and popular sovereignty (Mouffe 2000: 2-3). Liberal government need not of itself be democratic, assuming individual liberties are protected, while democratic government without liberal limits arguably represents a form of totalitarianism, given there is no requirement that individuals are guaranteed a “domain of independence or liberty as being immune to invasion by governmental authority” (Gray 1986: 74). There is, therefore, an inbuilt tension in liberal democratic government that, theoretically, operates as a safety net against inequality and abuse of power. This tension exists because democratic principles ensure that the government is responsive to the will of the people, yet sometimes the majority wants to see individual liberties, such as those of minorities – the protection of which is a sacred liberal commitment – curtailed.

Torture aims to isolate, humiliate and terrorise the individual – to strip away every vestige of human dignity, the precise qualities that liberalism prizes, the values the liberal state exists to uphold. The reason torture is considered more illiberal than, say, killing lies in the relationship between torturer and victim (Luban 2005: 1430). Torture is the deliberate imposition of intense pain on an utterly vulnerable individual designed to shatter that person’s will (Waldron 2010: 5). It begins only after the fight for the victim is over – it is thus carried out against the defenceless and powerless (Shue 2004: 51). The ability of the torturer to escalate the pain at will, in the face of the victim’s resistance, is an important component of its capacity to destroy the individual’s autonomy and world (Parry 2004: 153; Scarry 1985: 29). In a political sense, torture “is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most” (Luban 2005: 1430). Conducted by the state, the practice of torture is unbounded government power.

Torture is now prohibited by international law and is – rhetorically at least – unacceptable to most, especially liberal, states. No other practice, except slavery, is as universally and unanimously condemned in law and human convention (Shue 1978: 124). The prohibition on torture constitutes a basic human rights norm, where a norm is defined as “collective expectations for the proper behaviour of actors with a given identity” (Katzenstein 1996: 5). Its prohibition helps express what it means to be modern and progressive – it is emblematic of the larger commitment by liberal states to
non-brutality in the legal system (Parry 2010: 81; Waldron 2005: 1681). Yet torture was, historically, rejected for quite pragmatic reasons. Torture was outlawed by Western states in the middle of the 18th century. Its abolition is frequently linked to Enlightenment thinkers such as Voltaire and Cesare Beccaria, whose powerful writing on the subject shocked the conscience of Europe (Langbein 1976, 2006: 10; see also Hunt 2007: 81-82). John Langbein, however, has described the explanation that abolition occurred as a result of persuasive arguments pointing out fatal deficiencies in the jurisprudence of torture as a “fairy tale” (Langbein 1976, 2006: 10). His rigorous historical account establishes that the banning of torture came about not because of politics or the work of publicists, but for juristic reasons – due to a revolution in the law of proof and the introduction of fact-free judicial evaluation of evidence (Langbein 1976, 2006: 4, 11). Torture, states realised, did not work, and far more reliable methods of determining criminal guilt emerged.

Torture today is prohibited by international law under the *International Covenant on Civil and Political Rights* (ICCPR) (Article 7) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). What exactly constitutes torture, however, is difficult to define, in part because drawing a line between it and other forms of abuse involves a normative judgment (Waldron 1994: 526; see also Roth et al. 2005: xxi; Peters 1985, 1999: 152). CAT is the most extensive international law document addressing the issue of state torture and abuse. It defines torture in Article 1(1) 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 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.

Torture, then, according to CAT, involves the intentional infliction of physical or mental pain by or at the behest of the state, in order to extract information, punish, intimidate or coerce. CAT goes on in Article 2 to stipulate that no exceptional circumstances whatsoever can be invoked to justify torture. Yet prohibiting exceptions to the ban on torture, some legal scholars argue, makes the definition of torture, rather than possible exceptions to its non-use, the central legal issue (Parry 2005: 520). CAT shifts the zone
of contention, in other words, for states wanting to use torture from the idea of exceptional circumstances to interpretations of legal definitions; governments wanting to maintain a formal adherence to CAT can interpret the definition of torture in a way that allows their proposed coercive conduct. This is facilitated by the fact that CAT arguably leaves room for states to engage in coercive treatment that falls short of torture (Parry 2005: 526). Evidence supporting the contention that denying exceptions to the prohibition on torture can have the unanticipated outcome of making the definition of torture a central controversy emerged after 11 September. Bush Administration lawyers in the US based their legal justifications for approving coercive techniques in part on a contorted definition of torture, where “torture” applied only to the most extreme conduct. The lawyers claimed that torture had to be “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death”, to contravene the US’s international law obligations (Memorandum from Bybee 1 Aug. 2002a).

The modern, near-universal, legal and moral condemnation of torture is, clearly, not the whole story. Torture thrives in the contemporary world, a fact attributed to, among other factors, the growth of the security state in the 20th century, the emergence of anticolonial insurgencies and the rise of terrorism (Waldron 2005: 1684; see also Rejali 2007: 36; Peters 1985, 1999: 119). For example, torture was carried out extensively and systematically by the French army operating in colonial Algeria in the late 1950s and early 1960s (Vidal-Naquet 1963). Amnesty International in the late 1990s described torture as being prevalent (Rejali 2007: 22). While pre-Enlightenment torture was frequently carried out as a public spectacle, the distinguishing feature of modern torture is that it is hidden. Torture today is a secret practice that survives under conditions of deniability, a political practice that must be known but not seen (Kahn 2008: 3). Many modern torture techniques are “clean” as opposed to “scarring” – that is, while they are physical in nature, they leave few marks (Rejali 2007: 4). Darius Rejali demonstrates that most of these clean methods were pioneered by liberal democracies, including the British, French and American governments, many in the last hundred years (Rejali 2007: 4). While “classical torturers” (those in pre-18th century Western states, as well as more recent dictatorships) marked their victims’ bodies as religion or custom dictated, modern torturers favour pain that intimidates the prisoner alone (Rejali 2007: 35). The purpose of modern torture is not just about inflicting severe pain to extract information
or to punish, but to dominate and ascribe responsibility to the victim for the pain incurred (Parry 2004: 154). How does this style of torture fit with liberalism?

Liberalism is a contested concept. Many of the internal philosophical contestations that plague liberal thinking relate to fundamental disagreement over how freedom, or liberty, should be defined. Is it freedom from something, or freedom to do something? The former notion envisages a more minimalist conception of the state’s function in guaranteeing individual freedom. It suggests freedom from coercion or interference, and is often labelled “negative” liberty (Berlin 1958, 2002: 169). The latter conception implies a much more active role for the state, in setting up the conditions for individuals to be able to achieve their potential. This is often described as “positive” liberty (Berlin 1958, 2002: 177-178). Whether liberty is defined in negative or positive terms thus has major implications for how we think about the state’s role in ensuring personal freedom and, more specifically, where the limits on state power should lie. Political philosophers quarrel about the validity of conceptualising liberty in positive/negative terms, with some arguing the difference is illusory. My interest lies in a different dispute concerning the dangers of viewing liberty in a positive sense.

The central argument put against conceiving individual liberty in a positive way is that such an understanding implies there exists a single political ideal, and the state has a legitimate role in promoting and projecting the values associated with such a model life. Isaiah Berlin makes this argument most powerfully: he views positive liberty as deriving from the wish on the part of the individual to be his own master, and argues that this carries a danger of authoritarianism when applied not only to one’s inner life, but to one’s relations with other members of society (Berlin 1958, 2002: 178, 191). This is because self-mastery implies if I am rational, what is right for me must be right for others who are rational like me – in other words there “must exist one and only one true solution to any problem” (Berlin 1958, 2002: 191). Recalcitrant human beings must be moulded “to my pattern” (Berlin 1958, 2002: 192). Taken to the level of government, for Berlin such a way of thinking – that the ends of all rational beings must fit into a single, universal, harmonious pattern – suggested authoritarian structures (Berlin 1958, 2002: 200, 216). Negative liberty on the other hand recognises that “human goals are

---

3 Henry Shue makes this argument, on the basis that the positive/negative conception is founded on a moral distinction between action and omission of action that is morally bankrupt, because the prioritising of negative liberties over positive favours the privileged (Shue 1980, 1996: 36, 51, 69).
It is not only liberal scholars who caution against interpretations of liberal beliefs that would ultimately lead to authoritarianism. Political theorist Carl Schmitt, a critic of liberal constitutionalism, also saw peril in liberalism’s universalist ideals. Liberal ideology embodies the possibility of justifying one’s actions on the basis of a claim to universal moral principles and, as such, Schmitt thought there was no natural limit to what one might do to make the world safe for liberalism (Strong 1996: xxii-xxiii). Liberalism, he wrote, perceives the adversary – those who do not ascribe to liberal beliefs – not just as an enemy but “an outlaw of humanity” (Schmitt 1996: 79). It is the case that liberalism has a lengthy imperialist history of treating “others” differently. Many prominent 19th century liberal thinkers, for example, supported a non-egalitarian political system that excluded individuals regarded as lacking the capacity to exercise rights and freedoms enjoyed, essentially, by white males (Pitts 2005; Singh 1999).

These warnings about the potential dangers of viewing liberty in a positive sense are compelling in the context of torture. Torture relies upon a distinction being made between “us” and “them”, between what we may do or countenance doing to each other, as fellow members of a liberal political community, and what we may do or countenance doing to outsiders (Waldron 2010: 5). Such a differentiation between two types of human beings – our civilised selves and the barbaric terrorists – is a common rhetorical device used by liberal democracies in the war on terror (Liese 2009: 42; Hesford 2011: 61).

Modern liberals employ another important device to justify torture, in addition to the “us” and “them” distinction. This device centres on the idea of “the exception”, defined by Schmitt as a situation that cannot be codified in the existing legal order, best characterised as “a case of extreme peril, a danger to the existence of the state” (Schmitt 

---

4 See, for example, President Bush’s declaration that “either you are with us or you are with the terrorists” (Bush 20 Sep. 2001).
Whether such an extreme emergency exists, and what must be done to eliminate it, is determined by the sovereign, who "stands outside the normally valid legal system", though he belongs to it, "for it is he who must decide whether the constitution needs to be suspended in its entirety" (Schmitt 1922, 2005: 7). Contemporary scholars have linked Schmitt's writings and liberal justifications of torture after 11 September, arguing that modern liberal legal orders are defined by ideas of the exception and commitments to violence (Parry 2010: 82). What David Luban calls the "liberal ideology of torture" insists that the sole purpose of torture must be intelligence gathering to prevent catastrophe – it is necessary, those who inflict it are motivated not by cruelty but by looming disaster, it is the exception not the rule and therefore has nothing to do with state tyranny (Luban 2005: 1439). Used in such circumstances the practice, so this ideology asserts, is self-defence, and does not even merit the epithet torture (Luban 2005: 1440).

A paradox emerges here, then, between international law, which is resolute in its prohibition on torture, and state practice, which allows for exceptions on the basis of existential threats to national security. Another way of thinking about this juxtaposition is in terms of a conflict between law and sovereignty (Kahn 2008: 12). Terrorism, as the embodiment of the extreme peril Schmitt wrote about, moves a polity beyond law – beyond the absolute prohibition constructed by global law makers – to sovereignty, where states assert a space exists outside the structures of the law. It is in this space that we find liberal democracies resorting to, or supporting, the use of torture.

The liberal construct for rationalising torture is embodied in the "ticking time bomb" hypothetical, a scenario frequently drawn upon after 11 September by those wishing to justify the use of torture in the war on terror (Luban 2005: 1440; Cole 2007: 4). According to this scenario, torture is warranted in order to extract information from an individual which would enable authorities to locate and defuse a bomb, and thus prevent the deaths of many innocents. Liberal legal scholar Alan Dershowitz went as far as to argue for the use of torture warrants – or judicially regulated state torture in such a situation (Dershowitz 2004: 267). He argued this position on the grounds that, since torture would probably be used anyway in cases of preventing imminent terrorism events, it would be better to assure "accountability and neutrality" on such occasions through the use of warrants.
The global norm against torture remains in place after 11 September 2001 as does the international law entrenching that norm. Yet both have been undermined by the war on terror. More specifically, the conduct of the US with regard to detainees captured in that conflict had the effect of creating the space for torture to become a key intelligence gathering tool. The US detainee policies were founded on a series of premises, including that the adversary – al Qaeda and its supporters – was to be regarded as a new kind of enemy, requiring a new kind of response (Bush 11 Oct. 2001). One aspect of these detainee policies was legal in nature. It involved rejecting international human rights and humanitarian law regarding the detention and interrogation of detainees on the basis that it did not apply to this novel situation. This is illustrated by the US redefinition of torture, noted above. The Bush Administration also decided not to apply the *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)* protections concerning humane treatment to al Qaeda or Taliban suspects (Greenberg and Dratel 2005: xxv). The other part of the US’s detainee policies was normative. It engaged many liberal justifications for using illiberal practices against non-deserving individuals, including the “us” and “them” distinction and referencing the idea of the exception. The US response to the al Qaeda threat represented a challenge to a fundamental principle of international human rights law – the prohibition against torture. It was a challenge that drew in the US’s close liberal allies. This thesis examines how those allies – Australia, the UK and Canada – responded to this challenge by the US, when the torture of their own citizens and residents was at issue.

II THEORISING THE REALISATION BY STATES OF INTERNATIONAL HUMAN RIGHTS PRINCIPLES

At its most general level, this thesis is concerned with the effectiveness of international law: how does it influence state behaviour on human rights issues? I frame the theoretical concerns driving this study in terms of international legal commitments based on the premise that human rights treaties serve as public standards of critique to which domestic actors – citizens, residents and activists – can refer in order to hold their governments to account (Cohen 2012: 216).
I focus on the literature concerned with theorising and demonstrating that international human rights treaties do influence states. This literature is especially helpful in directing attention to the role domestic actors play in shaping responses to international human rights matters (Putnam 1988; Keck and Sikkink 1998a; Simmons 2009; Risse and Sikkink 2013). The work of Beth Simmons is of particular relevance to my study (Simmons 2009). Simmons proposes a model for explaining the conditions under which states are most likely to adhere to international human rights law. Human rights treaties affect state behaviour by altering domestic politics, she argues (Simmons 2009: 12). They alter domestic politics through the channel of social mobilisation. Citizens are more likely to mobilise around issues of human rights where they possess both the motive and the means to do so – criteria most often met, Simmons contends, in moderately democratic and transitional regimes (Simmons 2009: 16).

The explanatory power of the literature regarding the impact international treaties have on state behaviour on human rights is, however, limited. This is because it tends to assume citizenries in similar types of states will act in analogous ways. For example, Simmons’s model postulates that citizens in stable liberal democracies will generally lack the necessary motive to mobilise on international human rights issues (Simmons 2009: 136). This literature does not, then, shed light on how three liberal democracies, sharing common values and systems of government, could respond differently to the same international human rights concern. Hence while the writings of Simmons and other liberal international law scholars are insightful in accounting for the role of civil society in pressuring states to adhere to international human rights principles, they make overly broad assumptions about liberal democracies. Specifically, these generalisations relate to the common tendency of liberal democracies to uphold treaty obligations and the repercussions this has for creating civil society apathy when these principles are transgressed.

Other scholars have argued that liberal international law scholarship predating 11 September 2001 erred in assuming a democratic regime type was sufficient to ensure human rights compliance (Jetschke and Liese 2013: 27). They point out that the US’s response to terrorism, in undermining widely accepted global human rights norms without – at least initially – provoking substantial domestic and international resistance, exposed the flaw in this generalisation (Jetschke and Liese 2013: 35). I would
extrapolate this argument further and suggest that this liberal scholarship oversimplifies the situation regarding the mobilisation of citizenries in liberal democracies on contentious human rights issues. It does this by ignoring the fact that civil societies in different liberal democracies are influenced by their particular political environments and will behave differently as a result. Civil societies are affected by the extant enabling and constraining factors that characterise their polity – factors which influence their abilities to mobilise in a practical sense and shape their interests in an ideational sense. In other words, the existing literature on the power of international human rights law to shape state behaviour does not pay close enough attention to civil society. If domestic non-state actors hold the key to understanding state compliance on contentious international human rights principles, we must equally understand the complex political environments that shape the way civil societies behave.

III MY ARGUMENT

This thesis argues that the role of civil society is a distinguishing factor in understanding the different responses of Australia, the UK and Canada to the torture of their citizens and residents. Where civil society mobilised, states tended to respond to concerns about the use of torture against their citizens and residents in the war on terror and, where civil society did not, states were not so responsive. Understanding why civil societies mobilised in some countries, and over certain individual cases involving torture but not others, requires a fuller analysis of the concept of civil society than that offered by the existing literature on human rights treaty compliance.

I understand civil society to mean the social arena in which citizens freely assemble, interact, and express opinions about matters of general interest and concern, without being subject to coercion. This definition is informed by Jürgen Habermas’s exposition of the “public sphere” – by which he means the social domain of discourse where public opinion is formed – but there are additional features of the civil society concept I would add (Seidman 1989, 2005: 231). Civil society operates domestically and transnationally, and encompasses a diverse set of non-government institutions, from voluntary associations and other non-governmental organisations (NGOs) and actors, to the media and, in some cases, the family sphere (Cohen and Arato 1992: ix). The most critical feature of civil society is its function in checking the state: civil society has an important
role to play in guarding against abuse of power and overreach by the state. Ernest Gellner conceptualises this role in terms of counterbalancing the central agency of order: while not preventing the state from fulfilling its role of keeper of the peace, civil society can nevertheless stop it from dominating the rest of society (Gellner 1994: 2, 5). This checking role is integral to my argument about the connection between civil society and state behaviour on international human rights.

Civil society operates within the restrictions or freedoms afforded by its political environment. These constraining and enabling factors influence how civil society responds to a contentious human rights transgression by the state. I highlight three factors. The first, borrowing from the anthropological literature on political culture, is that of a nation’s idiosyncratic rights culture (Merry 2006). By this I mean the way historical legacies precondition how members of a modern polity think about themselves as rights-bearing individuals and influence their willingness to act on new cases of rights infractions. The second enabling or constraining factor is a state’s political and legal institutions, such as a bill of rights. For this I draw on the literature concerning the impact a country’s institutional settings have on policy outcomes in influencing, guiding, redirecting, magnifying and inhibiting policy battles (Ikenberry 1988). In addition, drawing on social movement literature, I focus on the role political opportunity structures play in creating incentives for domestic civil society actors to organise around contentious issues (Tarrow 1998). An example of an open political opportunity structure would be a divided government where disunity means there are possibilities for civil society lobbying of political elites.

I contend that civil society is more likely to mobilise when it exists within a strong human rights culture, and has the right institutional tools and political opportunities at its disposal. This dependence on the distinctive features of the domestic political context means the effectiveness of civil society, faced with a politically contentious human rights issue, can differ in holding the state to account across liberal democracies. The mere fact that a state is a liberal democracy with associated values and principles does not mean its civil society will respond in a particular way. The scope for civil society to conduct itself differently according to the vagaries of its political context has major implications for how states behave with respect to breaches of international human rights principles involving a domestic political dimension. A highly organised and
effective civil society can potentially bring massive pressure to bear on executive government – pressure that would be largely absent where civil society was disorganised and ineffectual.

I use accountability theory in assessing the relationship between civil society and the executive government on the torture issue, in particular how civil society influenced government policies. I draw on the work of John Braithwaite, Hilary Charlesworth and Adérito Soares on pluralised separated powers and Mark Moore’s writing on social accountability (Braithwaite et al. 2012; Moore 2014). These scholars employ broader ways of thinking about the institutions and actors that hold executive government accountable in a democracy, and the means by which they do this, compared to the more traditional conception of the separation of powers developed in the late 18th century which was based on the three branches of government – the legislature, executive and judiciary – each checking the other (Braithwaite 1997: 306). Civil society can be conceptualised as one branch of a pluralised notion of separated powers, operating alongside the traditional tripartite model of the executive, legislature and judiciary (Braithwaite et al. 2012: xii). Civil society actors operate as “accountability agents” in that they are self-appointed and self-authorised, and make public claims based sometimes on law, but often on morality, against powerful governmental institutions (Moore 2014: 633). Civil society, I argue, is central to political accountability in a liberal democracy. The case studies in this thesis offer a spectrum of possible outcomes with respect to how liberal democracies responded to the torture of their own citizens, in part according to whether and how effectively civil society fulfilled this accountability role.

The ideas of Braithwaite et al. are based on a republican conception of freedom as non-domination – or freedom from arbitrary power (Braithwaite et al. 2012: xii). The understanding of “arbitrary” that informs this thesis is shaped by international treaty law and jurisprudence. The UN Human Rights Committee has found that “arbitrariness” has a broader meaning than simply “against the law”, and includes elements of inappropriateness, injustice, lack of predictability and due process of law (Human Rights Committee 21 Jul. 1994: [9.8]). Thus, in the context of Article 9 of the ICCPR, for detention pursuant to lawful arrest not to be arbitrary in contravention of the right to liberty and security of person, it must not only be lawful, but must also be “reasonable
in all the circumstances” (Human Rights Committee 21 Jul. 1994: [9.8]). By arbitrary power, then, I mean the subjection of individuals to unconstrained and unreasonable exercises of power at the discretion of the state.

I develop the argument as follows. In Chapter Two I outline in greater detail a three-part framework for analysing the political environment in which civil society operates in a liberal democracy, in order to understand the polity’s constraints and freedoms on mobilisation. Chapter Three examines what occurred in America after 11 September 2001 that led to torture becoming a central tool in the war on terror. In Chapters Four, Five and Six I provide detailed narratives of how the three states – Australia, the UK and Canada – responded to the issue of the torture of their own citizens. I focus on the individual responses of each country’s executive, legislature and judiciary, before turning my attention to what civil society was doing at the time. In analysing the role of civil society, I use the three-part framework to examine the rights cultures of Australia, the UK and Canada, their institutional structures and the various political opportunities that presented themselves. In Chapter Seven I then compare the three states’ civil societies, the features of their domestic political contexts that inhibited or facilitated them in mobilising on contentious human rights matters and their respective behaviours in relation to the torture issue. I do this through the lens of accountability theory, in order to theorise more deeply the role civil society played in shaping state responses to the torture of their citizens and residents. I draw conclusions about the significance of an effective civil society to ensuring accountability of states on controversial international human rights matters; how civil society’s effectiveness is determined in important ways by its domestic political context; and the explanatory power of this framework for understanding variation between liberal democracies on common global human rights principles these states might otherwise be expected to uphold.

There have been many legal and other scholarly works dealing with America’s use of torture after 11 September 2001 (for example Luban 2005; Cole 2012a; McCoy 2006; Margulies 2006; Greenberg (ed) 2006; Waldron 2010; Hafetz 2011; Sands 2008; Jackson 2007; Mayerfeld 2007; Nowak 2006). While there is some scholarship examining the responses of America’s allies to the use of torture in the war on terror, this is less detailed and does not engage in comparative analysis of states’ behaviours. Comparative work has, however, been done that focuses on other aspects of different
state responses to terrorism following the attacks on the US. John Owens and Riccardo Pelizzo edited a comparative volume looking at the growth in executive power in different liberal democracies as a result of the war on terror (Owens and Pelizzo 2010). Kent Roach examined the issue of post-11 September responses of liberal democracies in comparative perspective, focusing on legislative counter-terrorism responses of states (Roach 2011). Fergal Davis, Nicola McGarrity and George Williams compiled a volume comparing surveillance powers granted to law enforcement and intelligence agencies after 11 September in different countries (Davis et al. 2014). My thesis, by contrast, focuses on a particular manifestation of torture – that used against the citizens and residents of liberal democracies overseas by, or at the behest of, a close ally. It brings a comparative perspective to the responses of three US allies to this issue after 11 September. In addition, my frame of analysis differs from the other writings mentioned in that my interest lies with the role civil society plays in shaping state responses to this torture issue. While the other authors also consider questions of accountability in their studies, none of them undertakes a close examination of the way the domestic political environment influences the capability and willingness of civil society to check the state and the connection this has with determining government policy outcomes.

This thesis comprises the first documentary and comparative account of the responses of America’s three liberal allies to the use of torture after 11 September 2001, where their own citizens were directly concerned. It also extends the theoretical explanations for when, why and how international human rights law influences state behaviour. For example, Simmons’s model attributes a central role to domestic non-state actors. While agreeing with her locus for analysis, I argue that Simmons’s model glosses over some interesting differences between liberal democracies. I use the framework of the enabling and constraining factors that are particular to the domestic political contexts of different liberal democracies as a vehicle to question Simmons’s model. This enabling and constraining framework, I posit, can explain the mobilising behaviour of civil society – behaviour that helps shape the responses of liberal democratic states to contentious international human rights issues.
IV THE CASES

I have selected Australia, the UK and Canada as case studies because they are similar countries, which nonetheless had different responses to the torture issue in the war on terror. The three polities share a common British heritage, have legal systems based on the common law and possess strong records of ratifying international human rights treaties. However they have different domestic human rights frameworks, with only Australia not having a national bill of rights or equivalent, while only the UK is networked into an effective regional human rights system through its membership of the Council of Europe. They are all US allies, though their individual relationships with the superpower are influenced by different geostrategic factors. Australia, for instance, is the most geographically isolated and historically has carried a deep sense of insecurity, which has shaped its heavy reliance on America’s friendship (Burke 2001). This contrasts with Canada, which shares a border with the US – a proximate geographical reality posing its own cultural, economic and foreign policy challenges, as Chapter Six discusses. The UK’s geostrategic imperatives are different again. Retaining a close US alliance is seen as a way for the former imperial power to exercise influence over global affairs beyond its current position (Dunne 2004: 898). All three countries were involved in the war on terror but only Canada refused to participate in the 2003 invasion of Iraq. All three states had citizens detained in the war on terror who made allegations of torture against their captors, and all countries, to a degree, were implicated in at least some aspect of that detention. Their levels of involvement however varied, ranging from connivance (turning a blind eye), to complicity (for example, knowingly supplying information that in some instances led to their own citizens’ capture or assisted in their interrogations).5

I study the decade after 11 September 2001 up until December 2013, when the UK government released the report of its aborted Detainee Inquiry into torture complicity (which began in 2010). This time frame enables a study of changes of government in all three countries. This period also encompasses the change in US administrations from President George W Bush, whose administration instigated the post-11 September torture policies, to President Barack Obama, who banned torture when he arrived in

5 Chiara Lepora and Robert Goodin define these terms as follows: complicity is “contributory action that is ‘wrapped up’ in another’s principal wrongdoing”, while connivers take no part in making the plan, “they merely stand aside to allow others to act on it” (Lepora and Goodin 2013: 41, 44).
office in 2009 (Exec. Order 22 Jan. 2009). This is significant because after Obama’s election, it presumably became easier for allies – if they chose – to be critical of the US’s torture policies and practices.

My decision to focus on the torture of citizens, rather than foreigners, is based on claims made by liberal states about the particular obligations they owe nationals as members of a defined political community. I employ liberal claims that states owe citizens particular obligations as a test of liberal credentials: in the case of torture of their own members, did liberal states look after their own? The liberal distinction between citizens and non-citizens is founded in ideas about citizenship as membership of a particular political community; membership as determinative of legal rights; and the state as being constituted through exclusion (Thwaites 2014: 302; see also Finnis 2007). Citizenship defines bounded populations with a specific set of rights and duties, excluding “others” on the grounds of nationality (Soysal 1994: 2). These ideas resonate with the “us” and “them” distinctions implicit in certain conceptions of liberty that theorists such as Berlin and Schmitt warned about, as discussed above.

While there is general acceptance of a state’s right to treat nationals and aliens differently in some respects – for example, requiring foreigners to obtain permission before entering a country and denying foreigners the right to vote in elections – this is a heavily contested area of law and morality among liberals (Cole 2007: 39). For example, many liberals would argue that states do not have the right to discriminate against non-nationals on issues involving fundamental rights such as the right not to be arbitrarily deprived of liberty, or tortured or disappeared. The basis for this position can be found within liberal ideology itself, with universalism – meaning all people, no matter their nationality, are entitled to basic human rights – regarded as a central tenet (Gray 1986: x). Ideas about the universality of human rights can also be found in the emergence after World War Two of the international human rights regime, where human rights are specifically not dependent on nationality – though they are on jurisdiction (Duffy 2005: 289). Indeed, it is argued that older notions of nation-based citizenship are being destabilised and a new and more universal, cosmopolitan concept of citizenship is developing (Soysal 1994: 1, 119; Sassen 2006, 2008: 307; Nash 2009: 18). Although this literature refers to modern developments by which non-nationals within a state’s jurisdiction are being afforded rights more in line with nationals, my
contention is that this blurring of the line between citizens and non-citizens is also relevant to the way states – notably the UK – came to treat residents detained by a foreign power in the war on terror.

Within each of the three case studies I focus on two people or groups of people, based primarily on how representative they were of each state’s (sometimes internally inconsistent) approaches to the torture issue. In Australia, I focus on David Hicks and Mamdouh Habib, Australia’s only citizens held at Guantánamo Bay. Hicks was an Australian-born Caucasian, who had converted to Islam before the time of his incarceration, while Habib was a dual Australian-Egyptian national. Australian governments demonstrated, for a long time, a similar level of indifference to both. However Australian civil society treated the men quite differently to each other, with Hicks – or at least his personal advocates – perceived far more sympathetically than Habib.

In the UK case study I have chosen for comparison two groups of people rather than two particular individuals – namely UK citizens and residents detained at Guantánamo. The UK had many more instances of individuals alleging they were tortured in the war on terror than Australia and Canada. The UK’s Guantánamo detainees included nine UK citizens, for whom it took responsibility well before Australia and Canada. It also included six UK residents, for whom the UK reluctantly intervened years after it did so for its citizens. The two focal points demonstrate a discrepancy in the response of the UK to the torture issue, between citizens and residents. What is interesting in the UK case is that while, initially, the UK government distinguished between its citizens and residents at Guantánamo who claimed they were tortured, UK civil society did not.

In Canada I select for examination Maher Arar, a dual Canadian-Syrian citizen who, like Habib, was subjected to extraordinary rendition to Syria (though Arar was never detained at Guantánamo Bay), and Omar Khadr, who was captured at age 15 in Afghanistan and sent to Guantánamo. Extraordinary rendition was the US practice, used increasingly after 11 September, of transferring an individual, who had no access to a legal proceeding in which to challenge that transfer, to a country where he or she was at risk of torture (Satterthwaite 2007: 1336). Arar is an interesting focal point because the

---

6 This included a group of UK nationals detained and tortured in Pakistan between 2004 and 2007 (Human Rights Watch 24 Nov. 2009).
treatment of him, both by Canadian governments and civil society, was far more sympathetic than that of Khadr, whose family were associates of al Qaeda leader Osama bin Laden (Shephard 2008: 137). The Arar and Khadr cases thus demonstrate an internal inconsistency in Canada’s approach to the torture issue that encompasses both the behaviour of the government and civil society.

Since my interest is in the different ways liberal democracies responded to the torture of their citizens overseas, I treat arguments that could technically be regarded as about detention (though still implicating torture) as being issues about torture. For example, torture was at the heart of the practice of extraordinary rendition (since it was about interrogating detainees in countries that used torture). Torture was also central to concerns about the treatment of detainees at Guantánamo Bay, including those held by the International Committee of the Red Cross (ICRC) (Lewis 30 Nov. 2004).

V METHODOLOGY

This thesis adopts a comparative case study approach, based on a “most similar” research design. That is, cases have been selected because, despite their similarities as liberal democracies, on the specific issue of responding to the torture of their own citizens overseas they demonstrated diverse outcomes (George and Bennett 2005: 165). The thesis uses qualitative forms of analysis, derived from media reports and other relevant publicly available texts, as well as a small number of semi-structured interviews, to draw out the similarities and differences between the cases. Finally, the study is inductive, seeking to identify patterns from the evidence.

For each case study state, I have selected two mainstream newspapers, nominally representing opposite sides of the political spectrum (progressive and conservative), and reflecting different ownerships. Newspapers displaying different political views were chosen in order to ensure as wide a spectrum as possible of dominant views on the torture issue in a particular polity were captured. From each publication, I identified all individual newspaper articles that directly dealt with torture in the war on terror,

7 I selected broadsheets on the basis that they generally gave more serious treatment to human rights issues in the war on terror than tabloids. This typology is less appropriate today since many broadsheets have adopted a “compact” format; however while the physical distinction between broadsheet and tabloid may no longer hold, the distinction in reporting styles between compacts and tabloids still does.
Guantanamo Bay and the torture of the particular country’s individual citizens (and, in the UK case, residents) who were detained by the US, or were subjected to extraordinary rendition.

From an initial analysis of these newspaper articles, I constructed a narrative of what occurred in each state with respect to the unfolding of its responses to the torture issue, both in terms of the executive, judicial and legislative arms of government, as well as civil society. From this narrative, I identified important public texts (primary and secondary sources) for closer study. These included government press releases, reports and transcripts of media interviews; records of judicial proceedings; records of parliamentary proceedings, including speeches and committee reports; NGO press releases and reports; and additional media articles, including transcripts of television programs and opinion articles. I also identified the main actors in the torture debate within each case, including political elites, and members of civil society. Among civil society members, I considered five categories of actors to have been most involved in the torture issue: the legal profession, domestic and international human rights NGOs, Muslim community organisations, the media and family members. I assessed a group or individual to be influential or important if they were frequently mentioned in newspaper reports as playing an important role or speaking out on the torture issue, or if they made a significant interjection into the debate. I then identified a small number of actors from the political and civil society spheres to interview on the basis that they might help clarify or confirm an issue or a hunch that arose from the narrative. Transcripts of these interviews were then coded into conceptual categories, in order to identify dominant themes that emerged in connection with the torture issue in the three states (see Neuman 2006: 460).

8 Some interviewees were happy to be named; others wished to remain anonymous.
CHAPTER TWO – HOLDING STATES ACCOUNTABLE FOR THE PROTECTION OF INDIVIDUAL INTERNATIONAL HUMAN RIGHTS

This chapter sets out the theoretical framework informing the central inquiry of this thesis – why three liberal democracies responded differently to the torture of their citizens and residents abroad. It uses the lens of implementation of international human rights principles as public standards that citizenries can reference in holding their governments answerable for breaches. This conceptualisation is based on a pragmatic understanding of human rights as political tools available to citizens to resist state encroachment on personal freedoms.

In developing this framework, I outline a major school of thought regarding the power of international human rights law, broadly described as the liberal tradition. The liberal tradition pays attention to the role that state-society relations play in influencing state behaviour on international human rights issues (Moravcsik 1997: 513). I then use the concept of civil society as a way to interrogate the existing literature regarding human rights treaty implementation, in order to account for the variation between liberal democracies on the issue of the torture of citizens and residents. I discuss particular aspects of civil society that are pertinent to my study, namely its relationship with human rights and its political accountability role. I conclude by identifying three types of domestic structures that affect civil society mobilisation on international human rights. They are political culture, especially the role that national historical experiences play in shaping present day rights consciousness; the legal and political institutions available to civil society; and the political opportunity structures that present openings for political action at different times.

I THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW

Debates in the international relations literature about the power of international law to influence state behaviour fall into two broad camps: those who argue legal commitments are largely irrelevant to the way states behave and those who argue such commitments can affect governments’ actions. The former position is in the realist tradition, which focuses on the idea that the global society of states exists in a state of
anarchy and lacks any central enforcement mechanism similar to that which exists in domestic polities (Milner 1991). Because of this, realists argue, considerations of power – more precisely the relative distribution of power among states – determine issues of compliance with and enforcement of international law (Morgenthau 1948, 2006).

The second camp is associated with the liberal schools of international relations and international law. They provide more nuanced and complex explanations of influences on state behaviour than the realist school. In contrast to realism’s “top-down” view of the world, which sees states as unitary actors with fixed preferences, the liberal international literature takes a “bottom-up” perspective (Slaughter 2000: 241). Liberalism in this context refers to the theory that state preferences derived from domestic and transnational social pressures, rather than state capabilities, influence state behaviour (Moravcsik 2008: 236). Liberal theory sees individuals and private groups as the fundamental actors in international politics and it assumes that the domestic and international spheres are inextricably linked (Moravcsik 1997: 516; Slaughter 2000: 241). A formative work in directing the study of international politics inwards to national politics was that of Robert Putnam, who drew attention to the reciprocal influence between domestic and international affairs in shaping the foreign policy of states (Putnam 1988). Putnam’s focus on this two-way influence was based on a recognition that decision-makers in government strive to reconcile domestic and international imperatives simultaneously (Putnam 1988: 460). Liberal international law scholarship, more particularly, argues that global rules and principles can have a profound impact on the behaviour of states based on the important role that internal state-society relations play in determining external state behaviour (Moravcsik 2000; Keck and Sikkink 1998a; Dai 2006).

The liberal international literature shares a number of premises with the classical liberal political tradition discussed in Chapter One. These include the prioritisation of individual rights and a distrust of government, the power of which must be limited by rules to prevent it arbitrarily violating personal freedoms. Understood with respect to the liberal view of international law, the “aim of liberalism is ... to place external restraints on government, thus protecting citizens and guaranteeing respect for rights” (Turner 2008: 138). The area of human rights law is, from the perspective of liberal theory, the core of international law because “human rights law is precisely about
structuring state-society relations to ensure at least minimal individual flourishing” (Slaughter 2000: 246). International law comes into this picture by imposing external standards on domestic governments from outside the state. However, it is up to the domestic sphere to give these principles effect. At the same time, human rights law poses challenges for compliance (Hathaway 2002: 1938). This is because the major incentives for compliance that arguably exist in relation to other areas of international law, including financial or economic pressures, are not applicable to international human rights law. In international commerce or trade, for example, competitive market forces or costs of retaliatory non-compliance act as inhibitors of legal breaches. When it comes to international human rights law, a nation’s actions against its own citizens do not directly threaten or harm other states, suggesting that countries have little incentive to police other countries’ non-compliance with treaties or norms (Hathaway 2002: 1938).

While the liberal tradition of international relations and international law focuses broadly on internal state-society relations, different scholars emphasise different factors in explaining how treaties shape the way nations act on human rights. Neoliberal institutionalists, for example, emphasise the capacities of international institutions to assume a life of their own, by altering beliefs, interests and behaviour (Keohane 1997: 501). Another body of work emphasises the importance of legitimacy in ensuring state compliance with international law. Compliance with international rules, this literature argues, is a function of the legitimacy of international rules or of their source; rules are internalised by actors and help to define how they see their interests (Hurd 1999: 380-381). Other scholars have examined the critical role civil society groups, especially transnational organisations operating across national borders, play in shaping international human rights principles and monitoring compliance (Keck and Sikkink 1998a).

I am primarily interested in the strand of liberal international law literature that addresses how domestic politics can affect state compliance with international human rights treaties and principles, because of its focus on the role played by domestic non-state actors. The argument here is that the primary effect of international human rights law lies in its ability to empower domestic stakeholders to make claims against their states. Thomas Risse and Kathryn Sikkink capture this idea, arguing:
Ultimately human rights change begins at home with a build up of domestic pressures. In the final analysis, persistent and sustained human rights change depends on mobilized groups in domestic civil society pressuring for greater democracy and using the space provided by democratic institutions to vigilantly defend and protect these rights (Risse and Sikkink 2013: 295).

Beth Simmons’s work offers a good example of liberal international law scholarship that emphasises the role of domestic stakeholders in explaining state compliance with human rights treaties (Simmons 2009). Simmons has demonstrated empirically that international law can affect domestic politics in ways that exert positive influences on how governments behave towards their citizens (Simmons 2009: 4). Previous large-scale empirical studies of treaty compliance reached more pessimistic conclusions. Linda Camp-Keith, for example, suggested it was “overly optimistic” to expect that being a party to a particular human rights treaty – the *International Covenant on Civil and Political Rights* – would produce an observable direct impact on state behaviour (Camp-Keith 1999: 95). Oona Hathaway’s findings were even more gloomy, providing evidence that human rights treaties may sometimes lead to poorer human rights practices within countries that ratify them (Hathaway 2002: 1940).

Simmons’s insights are most pertinent to my study because of the close attention she pays to the various ways the actions of domestic non-state actors shape the behaviour of their national governments on international human rights issues. Simmons contends that treaties have a constraining effect on states in relation to international human rights by altering domestic politics, which they do by focusing the expectations of citizens about their government’s behaviour (Simmons 2009: 13-14). She draws attention squarely to the relationship between domestic civil society and the government in making sense of state behaviour on international human rights matters, arguing that international human rights agreements have the potential to influence domestic politics “because they suggest new ways for individuals to view their relationship with their government and with each other” (Simmons 2009: 141). Simmons focuses on domestic actors because they are the most likely actors to organise to demand their rights as they have the most at stake (Simmons 2012: 733). Specifically, Simmons posits that treaties can trigger three domestic mechanisms: affecting elite-initiated agendas; supporting litigation; and sparking political mobilisation (Simmons 2009: 14). Central to Simmons’s argument,
however, is that treaties will not have the same effects everywhere. Rather, their power to affect state behaviour is contingent upon the presence of unstable political institutions (Simmons 2009: 16). Treaties are irrelevant, Simmons contends, in stable autocracies where citizens lack the resources to demand change and they are redundant in stable democracies where political rights are already largely protected (Simmons 2009: 16). She writes:

Treaties alter politics through the channel of social mobilisation, where domestic actors have the motive and the means to form and to demand their effective implementation. In stable autocracies, citizens have the motive to mobilise but not the means. In stable democracies, they have the means but generally lack a motive. Where institutions are most fluid, however, the expected value of importing external political rights agreements is quite high (Simmons 2009: 16).

The liberal tradition of treaty compliance literature has resonance and insight for understanding the issue of international torture. However, it is limited in its capacity to distinguish between the responses of similar liberal democracies to international human rights concerns. Simmons’s model in particular makes broad assumptions about similar political regime types, implying that citizens in stable liberal democracies will usually enjoy the effective means to mobilise but lack the requisite motive. This approach fails to account for the differences that exist among the legal and political systems of such states, which are relevant when considering the means by which civil society can effectively engage in mobilisation. Simmons’s model also does not contemplate the differences that may exist between citizenries of liberal democracies in terms of their collective motive to mobilise on international human rights matters. A civil society’s motivation or willingness to mobilise could, for example, reflect its particular national history with respect to human rights, including previous experiences of government overreactions to terrorism. Simmons is correct that citizenries in democratic political systems will find it easier to mobilise than those living under autocratic rule. She may well also be correct to observe that citizens in transitional democracies will have more reason to demand their rights than those in stable liberal democracies, most of whom have never known what it means to experience wholesale denial of human rights. However, for the purposes of understanding variation between similar liberal democratic polities, a more nuanced approach than Simmons’s – one taking account of the particular domestic political context – is required.
The tendency of liberal theorists to generalise about the similarities between liberal democracies has been critiqued. One criticism often made of liberal international relations theory is that it assumes democratic identities are constant and acontextual, rather than historically contingent (Risse-Kappen 1996: 370). Another critique notes that, before 11 September 2001, much of the liberal international relations and international law literature took for granted that human rights violations were primarily a problem of authoritarian countries and that a democratic regime type, the existence of transnational advocacy actors and public debate were sufficient conditions for human rights compliance (Jetschke and Liese 2013: 27). The influential five-phase “spiral model” of human rights compliance developed by Thomas Risse, Stephen Ropp and Kathryn Sikkink, for example, by which states, through a process of socialisation, were said to internalise norms in their domestic practices, was uni-directional towards greater compliance (Risse et al. 1999; Risse and Sikkink 2013: 285). The model overlooked the possibility that a country that had already ratified and implemented international treaties on a core human rights norm could experience a reversal of these commitments (Sikkink 2013: 145; Dunne 2007: 44; Nash 2009: 47). Such generalised thinking tended to treat norms, once established, as stable in terms of content, ignoring their ongoing internal dynamism and the fact that their content may be revised in the course of attempts to extend or challenge their meanings (Krook and True 2010: 108-109, 117). The spiral model also disregarded the prospect of domestic support for certain human rights violations in established democracies where there were competing norms such as global security and order (Jetschke and Liese 2013: 41-42). Both commitment reversal and domestic support for violations were evident in liberal democracies in the war on terror, predominantly – but not only – in the US.

My particular interest lies, however, not in the power of norms by themselves to influence state behaviour, but rather in the way international human rights principles can be used by domestic non-state actors as public standards that can be referenced in holding governments answerable for breaches. Jean Cohen’s work on international human rights is helpful in developing this argument (Cohen 2012: 216). She advocates a “participant perspective” in assessing the role and importance of international human rights because what is at stake is the local contextualisation of human rights on the part of those affected as persons and citizens (Cohen 2012: 216). She writes:

9 The five phases comprised repression, denial, tactical concessions, prescriptive status and rule-consistent behaviour (Risse and Sikkink 1999: 20).
While international human rights have been articulated as global public standards and aspirations, their main function is not to serve as norms to which the international community of states holds each country’s government accountable through reciprocity mechanisms. Rather they function as public standards of critique to which citizens and residents, domestic rights activists, and social movement actors can refer in order to hold their own governments accountable, especially (but not only) if these governments have signed on to the relevant human rights treaties (Cohen 2012: 216).

Cohen’s ideas embody a functional and political understanding of the role treaties play in facilitating domestic civil society mobilisation on human rights issues. Treaties and the principles they incorporate are functional in that they can provide ammunition for local non-governmental organisations (NGOs) and activists to organise and pressure their governments, or a textual and interpretive template for domestic courts and legislatures to use (Luban 2013). Judgments and parliamentary reports are examples of such templates that can then be used by civil society actors as focal points in their activism. International human rights principles are also political in the way they can be harnessed by domestic non-state actors in ongoing contests with the state over incursions of individual freedoms. These ideas are developed further in the next section.

Hence, the liberal literature on treaty compliance is useful in directing the search for an explanation of state behaviour inwards to the role of domestic factors and to the impact of international human rights principles in empowering local citizenries to make claims against their governments. However, these theories assume homogeneity among liberal democracies in terms of how domestic civil societies in such polities are likely to respond to occurrences of international human rights transgressions. The literature thus cannot explain variations in responses by liberal democracies to the torture of their own citizens and residents by an allied foreign power in the war on terror, nor why some of these polities might be more open to – and others more resistant to – contestation of the prohibition against torture. It is necessary to identify an approach that, while still focused on the interaction between domestic non-state actors and treaties in shaping state behaviour on international human rights, allows for differentiation between liberal democracies in terms of variations in domestic political context, in order to explain the actions and effectiveness of civil society.
II CIVIL SOCIETY AND LIBERAL DEMOCRATIC VARIATION

A Conceptualising Civil Society

Jürgen Habermas’s exposition of the public sphere forms the foundation for much recent writing on civil society. Habermas emphasises a number of features of the public sphere: its inclusiveness, its separation from the state and the importance of free assembly and expression. He writes:

By “public sphere” we mean first of all a domain of our social life in which such a thing as public opinion can be formed. Access to the public sphere is open in principle to all citizens. A portion of the public sphere is constituted in every conversation in which private persons come together to form a public. They are then acting neither as business or professional people conducting their private affairs, nor as legal consociates subject to the legal regulation of a state bureaucracy and obligated to obedience. Citizens act as a public when they deal with matters of general interest without being subject to coercion; thus with the guarantee that they may assemble and unite freely, and express and publicise their opinions freely (Habermas in Seidman (ed) 1989, 2005: 232).

Drawing on Habermas, Cohen and Andrew Arato theorise the concept of civil society to mean a domain of social interaction that exists apart from the formal economy and the state, key elements of which are the public sphere and voluntary associations, and which is stabilised by a series of fundamental rights (Cohen and Arato 1992: ix, 412, 440).10 These rights include those concerning cultural reproduction (freedom of thought, press, speech and communication); those ensuring social integration (freedom of association and assembly); and those securing socialisation (protection of privacy, intimacy, and the inviolability of person) (Cohen and Arato 1992: 441). Civil society actors, according to Cohen’s and Arato’s conception, include the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements and forms of public communication (Cohen and Arato 1992: ix). The inclusion of the intimate sphere is significant. It is a realm often overlooked because women’s issues (such as women’s rights and domestic violence) have traditionally been considered private (Kaldor 2003: 48-49).

10 Cohen and Arato acknowledge arguments as to whether the economy should be included in the civil society concept; they contend it should not be, because “the spontaneous forces of the capitalist market economy can represent as great a danger to social solidarity, social justice, and even autonomy as the administrative power of the modern state” (Cohen and Arato 1992: 74-75, viii).
A critical feature of civil society for the purposes of this study is its relationship with the state and the impact this has on the strength of liberal democracy. The relationship between the two spheres, whether cooperative or fractious, may vary across liberal democracies. The nature of the relationship may depend, for example, upon the ideological settings of the government in power at the time, and whether they envisage a legitimate role for civil society in the democratic process, particularly in critiquing official policies. What matters is that the relationship is a well-balanced one, where an effective, moderate state is offset by a robust civil society. Putnam's work has demonstrated that the health of a democracy, in terms of the performance of representative government, is inextricably linked to the vitality, strength and engagement of its civil society sphere (Putnam 1993; see also Walzer 1995, 2002 and Slaughter 1995). Some characterise the relationship as one of co-dependence: civil society and representative democracy cannot exist without the other (Cohen and Arato 1992: 412-413). This co-dependence is partly what Putnam was referring to, in terms of realising fundamental democratic principles through the engagement of citizens in social and political life. However, co-dependence also refers to ensuring the protection of individual freedoms, such as those identified by Cohen and Arato above, which allow civil society to flourish. One useful conceptualisation of civil society is to think about it as counterbalancing the "central agency of order", that is, the state (Gellner 1994: 2). Ernest Gellner writes that civil society comprises:

that set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society (Gellner 1994: 5).

Implicit in this idea is that civil society is not so strong as to be able to overwhelm the state. This counterbalancing role can also be thought of in regulatory terms (Hutter 2006: 8). Civil society actors, especially NGOs, engage at a practical level in behaviour modification by mobilising public opinion, using various forms of civil action to do this such as protests, press conferences, demonstrations, petitions and publicity stunts.

Building on these different ideas about civil society, I understand the concept to mean the social arena in which citizens freely assemble, interact and express opinions about matters of general interest and concern, without being subject to coercion. Civil society operates domestically and transnationally, and encompasses a diverse set of non-
government institutions, from voluntary associations and other non-governmental organisations and actors, to the media and, in some cases, the family sphere. The most critical feature of civil society is its function in checking the state: civil society can guard against abuse of power and overreach by the state.

As indicated in my definition, globalisation has given rise to civil society actors operating transnationally in international politics. Transnational advocacy networks are networks of activists distinguishable by their commitment to a particular principle or issue (Keck and Sikkink 1998a: 1). These networks operate across borders and become involved in domestic political and social struggles, making international resources available to local non-state actors, and blurring the boundaries between a state’s relations with its own nationals and the recourse citizens have to the international system (Keck and Sikkink 1998a: 1-2). Because of this, some scholars argue, it no longer makes sense to draw strict distinctions between national and global civil societies (Kaldor 2003: 79). Others, however, maintain there is an important distinction between domestic and global civil society, based on arguments about the representativeness of non-governmental organisations operating in the different spheres (Anderson and Rieff 2008; see also Charnovitz 2006: 364-365). Kenneth Anderson and David Rieff, for example, argue that because domestic civil society organisations operate in settled democratic societies, they can play the role of single-minded advocates for their particular cause or position, and have no need to make claims of democratic representation (Anderson and Rieff 2008: 1.5-1.6). However, global civil society actors, because they advocate in a system that is not democratic, are driven to stake their claims to legitimacy on the basis of fulfilling the role of intermediary and representative of the world’s people, a constituency so vague as to place these organisations “beyond the bounds of serious accountability” (Anderson and Rieff 2008: 1.11). According to this critique, global civil society actually buttresses the “democracy deficit” of the international system (Anderson and Rieff 2008: 1.2).

Other scholars have also questioned the representativeness of global civil society – the issue of who speaks for whom, and with what right – particularly with respect to human rights NGOs (Sen 2007; Mutua 2001; Sklair 2009 92; see also Oberleitner 2007: 173-
Jai Sen argues that, contrary to the celebrated image of civil society as a neutral space between the individual and the state, it is actually the site of power and exclusion, ruled by norms of “civility”, where those considered not to conform are subjugated and either ignored or destroyed (Sen 2007: 54). Those who “constitute ‘civil societies’ are in general middle or upper class, middle or upper caste, white ... and male, actively or passively practicing the dominant religion in the region and speaking its dominant language”, while the “incivil” are the lower classes and castes, the black, and those with languages, faiths and preferences “other than those of the successfully domesticated and ‘civilised’” (Sen 2007: 58). Sen calls the process of the expansion of transnational civil society organisations “globalisation from the middle” because of the sphere of society from which actors tend to be drawn (and not “globalisation from below”, as it is traditionally described) (Sen 2007: 62). Rather than being a process of democratisation of world politics, the growth of global civil society is actually about the consolidation, strengthening and imposition of historically unequal social and political relations and entrenched interests (Sen 2007: 64). Sen’s views echo those of Makau Mutua, who argues international human rights NGOs should be seen as engaged in a political project to replicate a vision of society based on the industrial democracies of the north (Mutua 2001:159). These groups “focus on abusive practices and traditions in what they see as relatively repressive, ‘backward’ foreign countries and cultures”, and seek to reform governmental laws, policies and processes to bring about compliance with American and European conceptions of liberal democracy (Mutua 2001: 151, 153).

Questions about representativeness are interconnected with another major critique of global civil society – that of the accountability of international NGOs. Concerns about to whom civil society organisations should be accountable and through what mechanisms and enforcement have become more pressing with the increasing global influence of international NGOs (Spiro 2002: 161). NGO accountability – the process by which such an entity holds itself openly responsible for what it believes, does and does not do – is closely connected to issues of legitimacy (Slim 2002). Human rights NGOs are essentially self-mandating; they seek legitimacy at a legal level, by being

11 A human rights NGO can be defined as an entity that is private in character, where its work is guided by the same ideas about human rights as set out in international law (Rice and Calnan 2007: 15).
12 Richard Falk authored this phrase, a reference to the grassroots nature of global civil society (Falk 1997).
law-abiding according to national and international law, and at a moral level, based on
the mission of challenging and ending human rights violations (Slim 2002). But
international NGOs “epitomise internal and external deficits in the form of disconnects
between donors, members and beneficiaries” (Anheier and Hawkes 2008: 125). Ac-
countability is thus of two kinds – internal, in terms of memberships, and external,
by way of their responsiveness to the larger systems of which they form part (Spiro
2002: 163). The accountability of NGOs is complicated because they are expected to be
answerable to a variety of stakeholders (public and private funders, individual donors,
the community at large, boards of directors, program users and sometimes third party
accrediting bodies); because many provide services that are difficult to evaluate; and
because some smaller organisations lack the resources and expertise to implement
governance programs (Smith 2014: 339). The challenge of making NGOs externally
accountable to the global system is said to be serious because NGOs “can use the
system to advance their agendas, but are not answerable to the system. They can bring
others to task, but themselves remain immune” (Spiro 2002: 166). However, responses
to this critique point out that ideological undercurrents often underpin claims of lack of
NGO accountability which are motivated by resentment towards the influence civil
society organisations have on governments and international organisations (Mertus
2008: 205; Rice and Calnan 2007: 19).

I have outlined a concept of civil society where its central role lies in counterbalancing
the state, but there are challenges for non-state actors – particularly NGOs – in carrying
out that role. Civil society’s power to perform a checking role against the state is
contingent on its freedom to organise collectively and to take issue publicly with
contentious aspects of government policy. A state may well resist its power being
checked by civil society actors, especially when this activity involves the public
criticism of government policy. In such a case the state can constrain civil society’s
ability to fulfil its role, particularly where NGOs rely on government support, including
funding to operate or contracts to provide community services (Kaldor 2003: 92). For
example, the trend towards privatisation of government services which are increasingly
being carried out by civil society organisations poses a threat to the expressive liberty of
these voluntary organisations and their members (Cordelli 2013: 72, 81; see also
Morison 2000; Mertus 2008: 206; Oberleitner 2007: 166). The link between NGOs and government is described as simultaneously the most powerful and the least dependable aspect of the work of these non-state actors, because the effectiveness of the these organisations often depends on engaging support from and having access to governments, while that support and access can be withdrawn (Sikkink 1993: 423). A civil society that is heavily reliant on the state entails risks and threats for NGOs: existential, should their funding be cut, but also to their freedom and independence to speak out against government policies and actions.

The imperative for NGOs to remain viable can manifest itself in opportunistic behaviour that leads organisations to engage in issue selection – that is, choosing concerns or cases that are more likely to garner sympathy. NGOs, particularly those in transnational networks, are subject to powerful institutional imperatives such as organisational insecurity, competitive pressures and fiscal uncertainty (Cooley and Ron 2002: 6). Even in the human rights NGO sphere, celebrated for its altruism, hard-nosed calculations of costs and benefits compete with sympathy and emotion. At their root, most NGOs are affected by the same anxieties about maintenance, survival and growth that beset every organisation (Bob 2005: 14, 195). This opportunistic behaviour can take the form of NGOs only selecting saleable issues where they are more likely to attract support from the public, donors and the media (see generally Carpenter 2007a; 2007b; Cooley and Ron 2002; Bob 2005; Keck and Sikkink 1998a). Some issues are by their nature more readily adopted by NGOs, including those involving bodily harm to vulnerable individuals, because they resonate with basic ideas of human dignity common to most cultures, and also because they lend themselves to dramatic portrayal (Keck and Sikkink 1998a: 204-205). However, the war on terror demonstrated that even in cases involving physical bodily harm, such as torture, some NGOs will select only appealing victims. The war on terror did not, in general, produce popular human rights victims. The men alleging mistreatment by their captors were detained on the basis of alleged terrorism, making them enemies in the eyes of many officials and publics in the West. Some individuals, however, were more unpopular than others and were avoided by NGOs.

13 A study by John Dryzek and others found that states that were inclusive of civil society in relation to environmental policy actually led to an undermining of democracy, while states that were more exclusive of civil society unexpectedly promoted a healthy civil society and thus democracy (Dryzek et al. 2003).
B Civil Society and Human Rights

The likelihood of rancour arising in the relationship between civil society and the state is nowhere greater than in the area of human rights, where human rights are claimed against a state. The notion of human rights providing an armoury against the potential exercise of excessive or arbitrary power has long been present in the scholarship on rights. John Locke, the 17th century political philosopher, described the natural right to freedom as a “fence against tyranny” (Locke 1689, 1988: 279). More recently, Henry Shue posited that the chief purpose of rights is “to provide some minimal protection against utter helplessness to those too weak to protect themselves” (Shue 1980, 1996: 18). Thinking about human rights in this way emphasises their political quality, a point which speaks to current debates in the philosophy of rights literature between those espousing a moral (or natural) view of rights, and more recent functionalist views (Dembour 2010). The orthodox, moral view of human rights sees rights being held by all individuals by virtue of their humanity (Vincent 1986: 9; Tasioulas 2012). A functionalist view takes a more pragmatic approach to human rights. This view understands the “enterprise” of human rights to be a global discursive and political practice, comprised of a set of norms that may be used to regulate the behaviour of states, the underlying purpose being to protect individuals against the consequences of certain actions and omissions of their governments (Beitz 2009: 8, 14).

The distinction between these two divergent views as to the philosophical underpinnings of human rights is pertinent to this thesis. While not in any way denying the moral basis for rights – nor the importance of individuals and groups being able to call on their moral quality – I conceive of international human rights principles in terms of their being used by civil society in disputes with the state in a way that is fundamentally political in nature. So while behind specific human rights lies an implied notion of the moral individual, I am interested in how they are used as “power mediators, normative principles that materially weak actors can invoke to alter the power relationship between themselves and materially preponderant political agents or institutions, usually sovereign states” (Reus-Smit 2011: 1210-1211). Individual rights, in other words, empower civil society actors, who can invoke them in order to influence government policies and actions.
What, then, is the specific relationship between civil society and human rights? Is it the case, as some theorists argue, that the role of civil society in standing up for human rights is a kind of constitutional function, in that democratic discourse – an intrinsic feature of civil society – plays a role in generating and maintaining rights (Cohen and Arato 1992: 395)? Or, is it more accurate to view civil society as making rights meaningful by bridging the gap between politics and constitutional law, through “building, supporting, and reinforcing a culture of resilience with respect to constitutional and human rights” (Cole 2012b: 1256)? It is possible to think of civil society as doing both things, producing and preserving rights through their contests with government and making them meaningful by holding the state to account when existing principles are transgressed. Either way, civil society understood in these terms plays an important role in resisting state incursion of personal liberties. Civil society is a realm of power in which basic legal freedoms can be achieved. Simultaneously, individual rights depend on civil society being willing and able to play this mobilising role of moderating state power.

In practical terms, civil society carries out this role in generating and giving content to human rights by engaging in contentious politics. Contentious politics is especially relevant where there is a particular human rights issue at stake, as there was in the case of torture being used by the state in the war on terror. The various features of this kind of politics are identifiable in the cases studied in this thesis. Contentious politics refers to collective political struggle; it involves episodic, public interaction among makers of claims and others; it is recognised by those others as bearing on their interests; and it brings in government as mediator, target, or claimant (McAdam et al. 2001: 5). Contentious politics is “transgressive” when at least some parties are newly self-identified political actors, and/or at least some parties employ innovative collective action and, from it, substantial short-term political and social change often emerges (McAdam et al. 2001: 8). In the case of disputation over human rights, when domestic actors target their own states and mobilise for rights, they act politically “as citizens and persons concerned with their own emancipation” (Cohen 2012: 218). Cohen writes:

At issue for [domestic actors] is the internal legitimacy of the political and social structure of the society in which they live. They re-link the politics of human rights to domestic democratic politics by creating publics and public spaces in which to make and debate new claims and thereby participate in deciding what rights they have (Cohen 2012: 218).
Domestic civil society, then, can assist in holding the state accountable for international human rights principles through political contestation.

C Civil Society and Political Accountability

Accountability can be thought of in terms of an obligation to account for particular types of activities to another body or person, or, in an inverted way, as the possession of an entitlement to determine how another person or body ought to behave (Lodge 2004: 127; Brennan et al. 2013: 36). By political accountability, I mean that the obligation to be accountable rests with the government, usually the executive, while the entitlement to demand accountability resides with the citizenry, though it is sometimes realised through other bodies (other arms of government, corporations, or NGOs for example).

A growing body of accountability literature provides useful ways to conceptualise the role of civil society in holding states to account for breaches of international human rights (Braithwaite et al. 2012; Moore 2014; Peruzzotti 2012).

In Chapter One, I noted that a central preoccupation of liberal democracy as a political system is with defining and limiting the exercise of political power in order to minimise the possibility that the coercive power of the state will threaten individual liberties. One way of doing this is through the traditional doctrine of the tripartite separation of powers, where the power to govern is distributed between the Parliament, the executive and the judiciary. Each group, in working within a defined area of responsibility, maintains a check on the actions of the other arms of government. However, a broader way of conceiving political accountability is necessary in order to understand civil society’s role in constraining power. This broader conceptualisation is offered by the ideas promoted by republican theories of freedom and accountability. Republican theory conceives of liberty more broadly than the traditional separation of powers, as the desire not to be dominated (Barnett 2006: 94; Bukovansky 2007: 180). Critical to understanding how to achieve freedom from domination is the notion of pluralised “separations of powers” (Braithwaite et al. 2012: 296). This idea advocates republics radically pluralising their vision of how to separate powers within the state, so that the state has many branches of separated powers rather than just the traditional legislature, judiciary and executive (Braithwaite et al. 2012: xi). In such a world, no one centre of
power is so dominant as to be able to crush any other separated power, without the other separated powers mobilising to defeat that domination (Braithwaite et al. 2012: 128).

One way to think about civil society actors in such a pluralised model of accountability is as “accountability agents” (Moore 2014: 633). Accountability agents emerge in the context of recent social and political movements demanding, in the absence of government mediation, compliance by powerful organisations (mainly corporations) with standards of social accountability not necessarily enshrined in law (Moore 2014: 632). Social accountability can be defined as accountability that relies on civic engagement, often driven from the bottom-up, in which ordinary citizens or civil society organisations participate directly or indirectly in exacting accountability (Malena et al. 2004: 3). Accountability agents may seek to impose external accountability separately or collectively; they are often self-appointed and self-authorised; and they may or may not have a legal basis to press their demands, which are based generally on a belief in some compelling moral claim (Moore 2014: 633). In performing this function, civil society can be regarded as engaging in “social accountability politics” (Peruzzotti 2012: 250). Where horizontal mechanisms comprise the tripartite separation of powers and agencies such as ombudsmen and human rights commissioners, vertical mechanisms involve accountability initiatives undertaken by citizens, both formal, through free elections, and informal, through civil society and an autonomous public sphere (Peruzzotti 2012: 246-247). Viewed in this way, vertical forms of accountability rely on actors external to the formal political system, namely the citizenry, who can contest governmental decisions and denounce the unlawful actions of public officials (Peruzzotti 2012: 249). The citizenry can comprise NGOs and citizen associations, as well as protest movements born out of the mobilisation of groups directly affected by breaches of law by public officials, including families and friends of the victims of rights violations (Peruzzotti 2012: 251-252).14 These actors can monitor the state and expose governmental wrongdoing. They can also activate the operation of horizontal agencies such as the judiciary or legislative investigation commissions, which would otherwise not act (Peruzzotti 2012: 251).

This accountability literature envisages the emergence of a new brand of citizen politics, whose goal is to ensure the subordination of elected officials to legal and constitutional

---

14 The paradigm case of this phenomenon is the role of the “Mothers of the Disappeared” in Argentina during the military dictatorship from 1976 to 1983 (Sikkink 2008).
norms. The willingness of these modern accountability agents to perform this role and organise against the executive government over human rights concerns, and their effectiveness when they do so, is not guaranteed. An antagonistic or harmonious relationship with government, or a survival imperative potentially leading to particular issue selection, may be influencing factors, but they are not the only ones. Domestic political structures can also enable or constrain civil society.

III NATIONAL STRUCTURES AND THEIR INFLUENCE ON CIVIL SOCIETY MOBILISATION

Three kinds of domestic political structures can affect the ability and willingness of civil society to mobilise on controversial international human rights issues. They are political culture, specifically domestic human rights culture; legal and political institutions; and political opportunity structure.

A Political Culture

The importance of examining a country’s political rights culture in order to understand civil society mobilisation on human rights issues has been touched on in a number of studies (Crawford 2002: 11; Mertus 2005; Nash 2009). The point of examining culture is based on the understanding that the actions of domestic civil society actors in making human rights claims against the state involve contentious politics — and politics is shaped by the rights culture of each society. Politics, it is argued, is impossible without culture, which differs according to time and place, because political power rests largely upon expectations, communications and shared sentiments and values (Pye 1997: 247). Similarly, in the sphere of global politics, the process of foreign policy-making and international relations is characterised by political arguments that are based on beliefs that gain their content and are intelligible through and within cultures (Crawford 2002: 13-14). The foreign policy belief systems of states are embedded in larger belief systems (religious, ethical and scientific traditions) and common historical experience —

15 A separate set of literatures emphasises the influence of the global cultural environment in pressuring states to conform to international human rights laws and principles, in particular the work of Ryan Goodman and Derek Jinks with their work on “acculturation” (Goodman and Jinks 2013). Christian Reus-Smit also theorises the relationship between international human rights law and culture, but his interest is in the way international law mediates cultural engagement and negotiation in the face of growing cultural diversity across the globe (Reus-Smit 2014).
in other words, they are grounded in the historically situated culture or cultures of the community in question (Crawford 2002: 72).

The same considerations apply to the domestic politics of international human rights. Political culture comprises shared understandings. In relation to international human rights, these are understandings about rights: what they are, who has them, whether they a good thing, whether they are necessary, whose job it is to uphold them, what should happen when they are breached. A nation’s rights culture operates at a very practical level, in terms of holding the key to the actual realisation of human rights. Rights culture matters at the level of the citizen. Bringing about positive human rights change lies in a broad cultural shift in favour of human rights among the public, members of which must be prepared to demand policy options consistent with human rights principles from their governments (Mertus 2005: 324). Change, in other words, does not rest in merely persuading decision-makers. International human rights must become part of the consciousness of ordinary people to have an impact (Merry 2006: 3). Sally Engle Merry conceives of this process in terms of the “vernacularisation” of rights (Merry 2006). Ideas about human rights are embedded in cultural assumptions about the nature of the person, the community and the state. They must, if they are to be effective, be translated into local terms and situated within local contexts of power and meaning – they must be “remade in the vernacular” (Merry 2006: 1).

Yet political rights culture is an elusive concept. I use the term “rights culture” as a subset of political culture. A strong rights culture is one in which human rights are embedded in the everyday thinking of policy-makers, legislators, the judiciary and the wider community (Kinley and Ernst 2012: 61; Banakar 2004: 165). In other words, such a culture requires a consciousness about rights at different levels of the polity. Where does political culture come from and how does it influence civil society behaviour on human rights issues? Political culture is a product of the collective history of a political system (Pye 1965: 8). It is deeply subjective, historically contingent and not necessarily consistent. Rather, political rights culture is a dynamic and fluid concept, consisting of ideas and practices that are continually changing because of contradictions among them or because new ideas and institutions are adopted by members (Merry 2006: 11). Political rights culture comprises the set of beliefs, symbols and practices that social groups are convinced of, or in great measure take for granted (Crawford 2002: 59).
Clifford Geertz’s classic definition of political culture is “an historically transmitted pattern of meanings”, according to which members of a polity interpret their experiences and decide upon their actions (Geertz 1973: 89; see also Webber 2004: 31; Wilson 1994: 64). This definition emphasises what political culture actually does. Political culture defines the range of acceptable possible alternatives from which groups or individuals may choose a cause of action (Elkins and Simeon 1979: 131). This system of beliefs refers not to what is necessarily happening in the world of politics, but what people believe about those happenings (Verba 1965: 516). Culture provides the background meanings – the metaphors and historical events – by which specific beliefs and arguments are consciously judged and which actors intentionally use to frame problems (Crawford 2002: 59).

In answer, then, to the questions of how does political rights culture reflect a nation’s history, and how does it influence civil society’s ability and preparedness to mobilise on international human rights, I suggest that a country’s national historical experiences confer upon its people a shared (though not uncontested) consciousness through which current human rights issues are interpreted. I acknowledge the concept of rights culture is quite general. There will often exist competing narratives about a country’s national historical experiences, including a dominant national narrative that is contested by other groups who have alternative narratives (often minorities, such as, in Australia’s case, indigenous Australians or migrant groups). Louis Hartz’s liberal fragment theory is useful here (Hartz 1964). Australia and Canada formed as colonial offshoots or “fragments” of Britain and, in Canada’s situation, also of France. Hartz directs us to reflect on these early origins in order to appreciate the nuances in the political cultures of the former settler societies – including the different conceptions of liberalism and rights embedded therein (Hartz 1964: 3). His argument is that residues of the particular circumstances under which Australia and Canada broke away from Europe, and of the political ideas that prevailed at the time, can be found in these polities’ modern-day political cultures. In Australia’s case for example, the modern polity has a well-documented utilitarian view of rights, comprising a preoccupation with ensuring the rights of the majority rather than with identifying minority interests (Charlesworth 2002; Pauly and Reus-Smit 2012). This utilitarian outlook reflects popular and dominant ideas in early 19th century Britain and the non-violent way the Australian colony gained its independence (Rosecrance 1964: 275). However, such unitary
accounts of culture among Western democracies risk oversimplification (Katzenstein 2012: 6, 11). They can overlook the contested histories, identities and values that also feature prominently in the ideas embodied in the contemporary political cultures of these Anglo-American polities, which reflect the struggles of indigenous populations and issues of race and multiculturalism.

While Hartz’s work draws attention to the formative ideologies that continue to dominate a polity’s shared perspective or world view about human rights, close attention must simultaneously be paid to the ongoing internal conflicts over the ideas, values and identities that challenge this dominant paradigm. A polity’s rights culture is forged out of its continuing historical experiences, founded on early ideas about liberalism and democracy. The culture is also shaped by legacies of racist policies and ongoing internal struggles, as well as by past encounters with political violence. Accounts of national history affect the way members of a polity think about themselves as rights-bearing individuals and what that signifies. They also influence the public’s willingness to act with respect to new experiences of rights infractions; they shape collective ideas about what constitutes good and evil, what is acceptable and what is not; and they help determine what issues a polity cares about.

Political rights culture does not only influence the way a state justifies its actions, and how civil society responds. It also influences, and is influenced by, the institutional framework of a state – with implications for civil society mobilisation on human rights. For example, the Australian polity, by virtue of its history and the way it achieved independence, is more inclined to trust the state, including with the protection of individual rights (Rosecrance 1964: 310). The fact that Australia does not have a bill of rights, and instead views the Parliament as the rightful protector of human rights, reflects the power of the utilitarian ideology in Australian public life (Charlesworth 2002: 38).

**B Legal and Political Institutions**

Institutionalist theory seeks to explain variations in the behaviour of similar states subject to the same international conditions and constraints through the particular domestic structures and coalition-building processes of the country involved (Risse-
Kappen 1991: 479-480). Institutions order democratic political life, defining the setting within which governance and policy-making must take place (March and Olsen 2008: 691). James March and Johan Olsen describe the effects of institutions on human action in terms of the “logic of appropriateness”. That is, policy-making is driven by rules of appropriate or exemplary behaviour which are organised into institutions (March and Olsen 2008: 689). They define an institution as “a relatively stable collection of rules and practices, embedded in structures of resources that make action possible” (March and Olsen 2008: 691). Institutions wield considerable power:

They create actors and meeting places and organise the relations and interactions among actors. They guide behaviour and stabilise expectations. Specific institutional settings also provide vocabularies that frame thought and understandings and define what are legitimate arguments and standards of justification and criticism in different situations... Institutions, furthermore, allocate resources and empower and constrain actors differently and make them more or less capable of acting according to prescribed rules (March and Olsen 2008: 691).

The institutionalist argument contends that these organisational structures of the state – shaped and reshaped by a confluence of historical forces – exert an influence over policy choice (Ikenberry 1988: 220, 223). The state is “not simply a collection of officials, but it is also a piece of strategically important terrain, which shapes the entire course of political battles and sometimes provides the resources and advantages necessary to win them” (Ikenberry 1988: 220-221). A state’s domestic institutions play two fundamental roles. They affect the degree of power that any one set of actors has over policy outcomes and they influence an actor’s definition of his or her own interests. In this way, organisational factors affect both the degree of pressure an actor can bring to bear on policy and the likely direction of that policy (Hall 1986: 19). This analysis applies to the sphere of transnational actors trying to access a state’s domestic political system, as well as local ones (Risse-Kappen 1994: 187).

Institutions exist at separate levels. They include the overarching level of basic organisational structures such as constitutional provisions for regular elections. Another level encompasses features intrinsic to the organisation of the state and society such as the nature of the political system (like the party system) and the structure of the state (including the administrative division of responsibilities and the state’s receptivity to
external advice). Yet another level comprises the procedures, regulations and routines of public agencies and organisations (Hall 1992: 96-97).

One example of an influential domestic structure is the Parliament, or legislature, an institution that features prominently in the political systems of all three cases, Australia, the UK and Canada. The Parliament can be thought of as straddling the executive and citizenry (Norton 2005: 11). Its various functions include holding parliamentary committee hearings and inquiries and parliamentary debates. As well as participating in these forums, members of Parliament can directly ask questions of and lobby ministers. Theoretically, the legislature gives voice to citizens and civil society groups through these avenues and provides an opening into the political system and the policy-making processes of the executive government. In this way the Parliament can play an important coercive, or at least persuasive, role with respect to shaping policy decisions taken ultimately by the executive (Norton 2005: 12).

In practice, however, Parliament’s effectiveness can vary across the political systems of different polities. As a result of divergent historical developments, the Parliaments of Australia, the UK and Canada, for example, are constituted slightly differently. This is especially the case with respect to their upper houses, with implications for the institutions’ practical power, willingness to stand up to the executive and political legitimacy. Canada’s Senate, for example, unlike Australia’s, is unelected, a fact which is said to undermine its legitimacy (Malloy 2010: 175). The UK House of Lords, on the other hand, has since 1999 undergone significant reforms to remove hereditary peers, a development which has enhanced its influence (Shephard 2010: 87, 90). In addition, Parliament’s interactions with other political institutions differs across the three polities, with important implications for its oversight functions. One example is the impact that the UK’s membership of the Council of Europe has on the UK Parliament. The establishment of the Joint Committee on Human Rights in 2001 was a direct response by the UK Parliament to its responsibilities imposed by the 1998 Human Rights Act, which incorporated the European Convention on Human Rights (ECHR) into domestic law. This development enhanced the oversight role Parliament has over the human rights policy-making of the executive in the UK, in a way that has not occurred in Australia or Canada (Norton 2005: 150-151).
However there are limits to the influence that domestic institutions can have on policy outcomes. Rules, laws, identities and institutions provide parameters for action, rather than dictating a specific action (March and Olsen 2008: 695).

**C Political Opportunities**

Political opportunity structure draws attention to the opening and closing of political space, and the notion that motivated individuals or groups will respond to the apertures and constraints that the larger political environment offers (Gamson and Meyer 1996: 277; Meyer 2012: 329). Political opportunity structures are dynamic, often fleeting, and sometimes accidental. They can be defined as “consistent – but not necessarily formal or permanent – dimensions of political environment that provide incentives for collective action by affecting people’s expectations for success or failure” (Tarrow 1998: 76-77). The notion of incentives is significant for understanding how changes in the domestic political environment might encourage, or discourage, civil society actors to mobilise on controversial international human rights issues. Contention increases when people acquire the external resources to escape their compliance – and find opportunities in which to use them (Tarrow 1998: 71). Sidney Tarrow explains how this occurs:

The opening of opportunities provides external resources to people who lack internal ones; openings where there were only walls before; alliances that did not previously seem possible; and realignments that appear capable of bringing new groups to power (Tarrow 1998: 89).

Political opportunity structures can therefore assist in understanding variations in the strategies, structures, and outcomes of similar movements that arise in different places (Tarrow 1988: 430). Actors routinely engaged in exercises of state accountability on matters such as protecting human rights, including transnational networkers and social movement activists, watch out for such opportunities ceaselessly (Keck and Sikkink 1998b: 223). One way to think about this vigilance by civil society is in terms of a “briefcase” image. “Sometimes ideas for social change initiatives come in a flash of inspiration, and at other times they are carried around in a briefcase for years until the right opportunity presents itself” (Mertus 2008: 182). In other words, actors interested in political change often bide their time until the right political opportunity presents.
Opportunities reveal allies and expose the weaknesses of enemies and, once they do, communicate crucial information for movement formation (Tarrow 1998: 72). According to Tarrow, there are four major ways in which political opportunity structures can be seen to expand (Tarrow 1991: 14-15). One enlargement of opportunity structure occurs when levels of access to institutional participation have begun to open up. In a liberal democracy this may occur at election time. Another expansion emerges when political alignments are in disarray and new realignments have not yet formed. Such shifting alignments may occur when a new coalition government results from an indeterminate election outcome. Yet another kind of political opportunity structure presents when there are major conflicts within the political elite that challengers can take advantage of, such as in the case of a divided government. A final avenue of expanded opportunity occurs when challengers are offered the help of influential allies from within, or outside, the system. The nature of political opportunity structures can vary, in that they can be relatively stable, appearing very gradually over decades or centuries in the form of a changing political regime, or they can be more volatile, shifting with events, policies, and political actors (Gamson and Meyer 1996: 277). Furthermore, political opportunity structures have effects at different, interacting, levels, including that of citizens, groups and elites (Tarrow 1991: 15). For example, increasing political opportunities can widen the space within which citizens perceive that they can legitimately make claims. They can provide new openings for organisers to build movements and attract more support. Expanding political opportunities can also offer new possibilities for elites within the polity to expand their influence and achieve their policy goals.

Political opportunities may be limited in terms of the change they can precipitate. External, more stable structural factors, such as the strength or weakness of the state, and the forms of repression used by the state, can inhibit the potential effectiveness of political opportunities (Tarrow 1998: 71). Peter Eisinger argued that the relationship between protest and political opportunity was curvilinear, in that neither full access to the political system nor its complete absence resulted in the greatest degree of protest (Eisinger 1973). Rather, he maintained, protest occurs most frequently in polities whose structures of political opportunities reflect a mix of open and closed characteristics (Eisinger 1973: 23). Framed another way, while state toleration for contention provides
a low-risk environment for protest, it also deprives organisers of the potent weapon of outrage (Tarrow 1998: 84). In addition, most opportunities and constraints are situational, and cannot compensate for long for weaknesses in cultural, ideological, and organisational resources (Tarrow 1998: 77). The effective exploitation of opportunities relies on their being perceived as such by political challengers, insurgents, or activists. The use of external opportunities requires challengers to employ known repertoires of contention, to frame their messages dynamically and to access or construct unifying mobilising structures (Tarrow 1998: 71-72). Political opportunities thus have an inevitable cultural component requiring recognition and framing (Zald 1996: 271). Hence, symbolic and institutionalised cultural assumptions feed into the defining of political opportunities.

**IV CONCLUSION**

The purpose of this chapter has been to outline a theoretical structure to consider why three liberal democracies responded differently to the alleged torture of their citizens by (or at the behest of) a foreign ally. At the most general level, the thesis is concerned with the power of international law. The liberal literature focuses on the role of domestic factors, and the impact of international human rights principles in empowering local citizenries to make claims against their governments. Treaties embody fundamental human rights that are sometimes taken for granted by citizenries in liberal democracies, including in situations where those rights are not clearly enshrined in domestic law. Domestic actors engaging in the contentious politics of making human rights claims against the state and its arbitrary and oppressive actions and structures use these powerful tools of international law because they are there – and because of what they represent.

I take issue, however, with the tendency of this international liberal theory to generalise about the behaviour of similar regime types on human rights matters. I used the concept of civil society to interrogate this aspect of the literature, arguing that in order to understand variation between liberal democracies, we should examine why the civil societies of some states mobilised on the international torture issue and others did not. In short, I argue that the differences in the behaviour of the liberal allies on the torture of their citizens in the war on terror depended on the enabling and constraining factors
that influence civil society to mobilise in some cases, and not in others. These factors are heavily dependent on the local political context, and on the various fixed and temporal domestic structures that can encourage or inhibit protest: political rights culture, political institutions and political opportunity structure.
CHAPTER THREE – AMERICA’S RESPONSES TO TORTURE AFTER 11 SEPTEMBER 2001

The 11 September 2001 terrorist attacks against the United States triggered a profound shift in human rights discourse and policy. For decades, the US had been a world leader – if a sometimes inconsistent one – on human rights (Finnemore 2009: 84). Yet the US-led counter-terrorism response to the tragic events of that day embody what Martin Scheinin has described as the “worst-ever backlash” against the promotion and protection of human rights since their emergence after World War Two (Scheinin 2012: 293). According to the Bush Administration, the 11 September attacks “changed everything” (NBC News 14 Sep. 2003). America, it claimed, faced an unparalleled threat, which necessitated a new approach to fighting terrorism. This “new paradigm”, as President George W Bush described it, was one in which respect for human rights was effectively treated as a luxury that could no longer be indulged (Memorandum from Bush 7 Feb. 2002).

This chapter chronicles the US’s deviation on basic human rights values prompted by the terrorist attacks. It explains how torture became an important policy weapon in the Bush Administration’s counter-terrorism armoury, and examines the impact that the 2004 Abu Ghraib torture revelations had in pressuring the US to change its positions on detainee treatment. It argues that the shift in US policy on torture after 11 September had significant implications for the US’s close allies, Australia, Canada and the United Kingdom. This was for reasons of alliance politics, where the three countries were all junior partners in the US’s war on terror, but it was also in terms of America’s influence on shared principles and ideas. The first part of this chapter examines the role of the executive in leading the change in US policy on torture after 11 September 2001. The remaining sections consider the role played by Congress, the courts and civil society in supporting, acquiescing to, or pushing back against and contesting the Bush Administration’s war on terror torture policies.
Prior to the 11 September 2001 attacks, the US’s public support for the prohibition against torture appeared unequivocal (Koh 2004: 642). Certainly the US Constitution, domestic laws and jurisprudence supported this stance, as did America’s commitment to relevant international treaties and its public diplomacy. The US’s public position on torture in this period is best summed up by a 1999 State Department statement to the United Nations Committee Against Torture, emphatically rejecting the use of state torture:

Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention [Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] constitutes a criminal offence under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture (United States of America 9 Feb. 2000: [6]).

The US Constitution does not prohibit torture as such, but rather, under the Eighth Amendment, bans “cruel and unusual punishments”. Finding an absolute constitutional ban on torture is difficult (Parry 2005: 528). Because of this, US courts have looked to a number of different Amendments, including the Fourth (on unreasonable searches and seizures), Fifth (on self-incrimination) and Fourteenth (on due process) (Alston and Goodman 2013: 264). Read together, these provisions have been interpreted as providing a nationwide standard of treatment forbidding torture, beneath which no government entity may fall (Mayerfeld 2007: 123; see also United States of America 9 Feb. 2000: [49]).

In addition, the US has ratified a number of treaties that expressly prohibit the use of torture. The US participated in the international conference that produced the 1929 Geneva Convention Relative to the Treatment of Prisoners of War and complied with it in the course of its detention of prisoners of war during World War Two (Margulies 2006: 74). Following World War Two, the US was again instrumental in the conference
that gave rise to the 1949 Geneva Conventions, which prohibit the torture of prisoners of war (Margulies 2006: 76). It ratified them in 1955, and applied them to detainees captured in the Korean and Vietnam wars – even when its own soldiers were mistreated (Margulies 2006: 77-78). The US is a party to two further treaties banning torture (and cruel, inhuman or degrading treatment or punishment): the 1966 International Covenant on Civil and Political Rights (ICCPR), ratified in 1992, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified in 1994.16

Torture is also illegal under a number of domestic US laws, including the Federal Torture Statute, which prohibits torture carried out outside of the US. The War Crimes Act makes it an offence for a US national or member of the US armed forces to commit a war crime, defined as a “grave breach” of the Geneva Conventions, including torture, punishable by (up to) the death penalty. In addition, the US has enacted a number of other statutes to implement its treaty obligations, including the Torture Victim Protection Act of 1991, which provides a civil cause of action in the US against people who torture under the auspices of a foreign government; the Foreign Affairs Reform and Restructuring Act of 1998, which states that it is not US policy to send people to countries where they will face torture; and the Alien Tort Statute (ATS), which gives US courts jurisdiction over any civil action by an alien for a tort committed in violation of the law of nations or treaty of the US.17

Despite these legal prohibitions, there is evidence that the US has sanctioned torture in particular situations. The participation of the Central Intelligence Agency (CIA) in clandestine programs involving torture in the second half of the 20th century has been well documented, particularly in Vietnam but also in Central and South America (McCoy 2006: 60; Parry 2010; Cohn 2011). However there was, until 11 September, no

16 In respect of both the ICCPR and CAT, the US ratified them with the declaration that they were not self-executing and with the reservation that they went no further than pre-existing constitutional rights (Parry 2010: 60). Mayerfeld argues that the US’s use of RUDs (reservations, understandings and declarations) has the effect of watering down its treaty obligations with respect to torture (Mayerfeld 2007: 95).
17 The ATS was successfully invoked in the case of Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), brought by two Paraguayan citizens who sued a Paraguayan official (all three were resident in the US) over the torture and killing of their family member in Paraguay. However, the 2013 US Supreme Court decision in Kiobel v Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) curtailed future applications of the ATS, with the Court ruling that it generally does not apply beyond America’s borders.


11 September 2001 marked a shift in US policy with respect to state torture with the US President explicitly claiming the authority to ignore domestic and international prohibitions against its use (McCoy 2006: 211; Hafetz 2011: 25). After 11 September, for example, senior members of the executive government admitted they had approved the waterboarding of detainees and expressed no regret for this (Human Rights Watch (HRW) 12 Jul. 2011: 71, 72; Rumsfeld 2011: 583). US courts had previously found waterboarding – a procedure in which subjects are made to feel like they are being suffocated or drowned – constituted torture (The Constitution Project 2013: 355; HRW 12 Jul. 2011: 55).18

The 11 September attacks were devastating, shocking in their scale, method and location. Nearly 3000 people were killed when terrorists hijacked four commercial jet airliners, crashing two into the World Trade Center in New York, one into the Pentagon, and another into a field in Pennsylvania (Hafetz 2011: 11; Roach 2011: 174). The attacks sent the Bush Administration into panic, with officials fearing further assaults (Tenet 2007: 236, 342; Goldsmith 2007, 2009: 72, 165; Sands 2008: 88; Zelikow 2012: 6-7; Mayer 2008: 4; Rice 2011: 104; Cole 2009:13). President Bush described the attacks, soon attributed to al Qaeda, a global Islamist terrorist group headed by Osama bin Laden, as “acts of war” (Bush 12 Sep. 2001; 20 Sep. 2001).

The legal basis for the US’s “war on terror” that ensued was founded in a “use of force” joint resolution, approved by Congress and signed into law on 18 September 2001 (SJ Res 2001). The Bush Administration’s framing of the 11 September attacks, legally and discursively, as acts of war, rather than criminal acts, was a deliberate political strategy designed to allow the President more expansive powers (Owens 2010: 43; Rumsfeld 2011: 557; Hafetz 2011: 12; Rice 2011: 104-105). This was reflected in a legal

18 Waterboarding was described by Bush Administration officials as involving the binding of a detainee to an inclined bench, then a “cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner” so that the cloth covers the nose and mouth, restricting airflow for 20-40 seconds, which “produces the perception of suffocation and incipient panic” i.e., the perception of drowning” (Memorandum from Bybee 1 Aug. 2002b).
memorandum of the Department of Justice’s Office of Legal Counsel (OLC), which claimed Presidential power during wartime was “at its zenith” (Memorandum from Yoo 25 Sep. 2001).

A second feature of the Bush Administration’s discourse responding to 11 September was the characterisation of the conflict as unprecedented. According to President Bush, this was “a different kind of war that requires a different type of approach and a different type of mentality” (Bush 11 Oct. 2001). The framing of the al Qaeda threat as novel legitimised the Administration’s position that the war on terror necessitated its own unique rules, and the long-established laws of war no longer applied (Jackson 2007: 355; Murphy 2003: 614). The Attorney General, John Ashcroft, articulated this argument: “Every day that passes with out-dated statutes and the old rules of engagement is a day that terrorists have a competitive advantage” (Evidence to House Committee 24 Sep. 2001). Vice President Cheney hinted more closely at the lawlessness to come:

We also have to work, though, sort of the dark side, if you will. ... A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies (Cheney 16 Sep. 2001).

On 7 October 2001, America launched airstrikes against Afghanistan, where the Taliban regime was accused of harbouring al Qaeda (Bush 7 Oct. 2001). Australia, the UK and Canada all committed military forces to the ensuing conflict. An immediate consequence was the detention of large numbers of people suspected of either being members of the Taliban or al Qaeda (Sands 2005: 155). Many were held in Afghanistan, while others were taken there after being arrested in other countries (Alston and Goodman 2013: 415). The vast majority of detainees were handed over to US military forces by either Pakistan or the Afghan Northern Alliance, the group fighting the Taliban inside Afghanistan (Margulies 2006: 69).\(^{19}\) The Bush Administration grappled with what to do with the detainees (Rumsfeld 2011: 565-566). In 13 November 2001, President Bush issued a military order announcing detainees would be tried by military commissions outside the usual US military courts-martial system (Exec. Order 16 Nov. 2001; see also Hafetz 2011: 17). This decision caused considerable consternation within

\(^{19}\) The US promised large rewards for the capture of “al-Qaida and Taliban murderers” (Denbeaux et al. 8 Feb. 2006: 15, 25).
the US government, especially among military lawyers (Hafetz 2011: 17; Mayer 3 Jul. 2006; Mayer 2008: 88). The proposed military commissions lacked the presumption of innocence and the right of appeal to a civilian court, permitted evidence obtained through coercion, and claimed the authority to try offences never before recognised as war crimes (Hafetz 2011: 17-18). In late December 2001, Defense Secretary Rumsfeld announced the detainees would be held at the US Naval Base at Guantánamo Bay, Cuba (Rumsfeld 27 Dec. 2001). This location, previously used by the US to hold Haitian and Cuban refugees, was selected because, the Bush Administration argued, foreign nationals held there would not have access to US courts (Hafetz 2011: 28-30; Rumsfeld 2011: 566-567). According to an OLC memorandum, detainees at Guantánamo Bay could not bring habeas corpus claims, nor challenge the constitutionality of their detention, the use of military commissions, or their denial of rights under international treaties (Memorandum from Philbin and Yoo 28 Dec. 2001). The first detainees began arriving at Guantánamo Bay on 11 January 2002; in time, some 775 prisoners in total were held there (Hafetz 2011: 31). Among the prisoners detained at Guantánamo Bay were two Australian citizens, one Canadian citizen, nine UK citizens and a number of UK residents.

With the arrival of prisoners at Guantánamo Bay, Rumsfeld announced the detainees would be regarded as “unlawful combatants”, and would be denied any rights under the 

*Geneva Conventions* (Rumsfeld 11 Jan. 2002). The decision had far-reaching repercussions for how detainees came to be treated, and has been described as the “original sin” that made the adoption of torture at Guantánamo Bay and in secret CIA prisons possible (Danner 2004: 42; see also Sands 2008: 18; The Constitution Project 2013: 4; Goldsmith 2012: 180). The *Geneva Conventions* form part of international humanitarian law and set out the rules governing the detention, interrogation, and release of prisoners by states (Hafetz 2011: 15). While the *Geneva Conventions* acknowledge not all detainees qualify as prisoners of war, Common Article 3 establishes a baseline of treatment for all captives. It states in part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

---

20 This decision announced by Rumsfeld reversed one taken earlier by the US commander in Afghanistan, General Tommy Franks, on 17 October 2001, that the *Geneva Conventions* did apply (Margulies 2006: 83).
Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely...

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The Bush Administration’s arguments justifying the decision not to apply the *Geneva Conventions* to detainees are set out in legal memoranda written in early 2002 (Memorandum from Yoo and Delhunty 9 Jan. 2002; Memorandum from Bybee 22 Jan. 2002; Memorandum from Gonzales 25 Jan. 2002; Memorandum from Powell 26 Jan. 2002; Memorandum from Bush 7 Feb. 2002). White House Counsel, Alberto Gonzales, encapsulated the Administration’s thinking, writing that the war against terrorism was a “new kind of war”, which placed a “high premium ... on the ability to quickly obtain information from captured terrorists” (Memorandum from Gonzales 25 Jan. 2002). This “new paradigm renders obsolete Geneva’s strict provisions on questioning of enemy prisoners and renders quaint some of its provisions”, he wrote.21 Not all members of the Bush Administration agreed with the *Geneva Conventions* decision (Danner 2004: 75; Sands 2008: 32; Greenberg 2006: 16; Hafetz 2011: 20; The Constitution Project 2013: 135). The Secretary of State, Colin Powell, argued that not applying the *Geneva Conventions* to the conflict in Afghanistan would “reverse over a century of US policy and practice” (Memorandum from Powell 26 Jan. 2002). Ultimately, President Bush ignored the warnings of Powell and others. The President determined that the *Geneva Conventions* would not apply to al Qaeda; that although the US would apply the *Conventions* to the conflict with the Taliban, Taliban detainees were not prisoners of war but “unlawful combatants”; and finally, that Common Article 3 applied to neither group (Memorandum from Bush 7 Feb. 2002). As a matter of policy, President Bush

---

21 Underpinning this view was the reasoning that the *Geneva Conventions* did not apply to members of al Qaeda because as a non-state actor it could not be a party to international agreements governing war; second, they did not apply to the Taliban because Afghanistan was a failed state; third, Common Article 3 did not apply at all because of the nature of the conflict (which was international in scope); and further, in response to assertions that the *Geneva Conventions* applied in any event because they had the status of customary law, customary law was non-binding on the President (Memorandum from Yoo and Delahunty 9 Jan. 2002).
stated, detainees would be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva” (Memorandum from Bush 7 Feb. 2002).

As the war on terror continued, the Bush Administration grew increasingly frustrated by the scarcity of intelligence it was obtaining on al Qaeda (Cole 2009: 13). In early to mid 2002, officials began building further practical and legal foundations for the use of more aggressive interrogation techniques (The Constitution Project 2013: 138). This effort was also driven by the capture of some “high value” detainees, who were believed to be withholding crucial information. Military and CIA officials consulted psychologists and instructors versed in the US military’s Survival, Evasion, Resistance, Escape (SERE) program, in which soldiers are trained to resist torture if captured, in order to get ideas about extreme interrogation methods (Cole 2009: 13; The Constitution Project 2013: 141; Mayer 11 Jul. 2005; Sands 2008: 83; Hafetz 2011: 42–44). Meanwhile, OLC lawyers drafted memoranda about the specific legal limitations on interrogations imposed by the domestic and international laws with regards to torture. The critical memoranda were issued over the period 2002 to 2005. They related to interrogations to be carried out by both the military at Guantanamo Bay and the CIA at its various secret prisons (Sands 2008: 74).

Three OLC memoranda issued on 1 August 2002 were the most significant in relation to giving a green light to conduct that amounted to torture. One argued that US interrogation techniques not defined as torture under domestic law would not violate America’s obligations under CAT (Memorandum from Yoo 1 Aug. 2002; see also Sands 2005: 213). A second memorandum addressed the permissible standards of conduct under the federal statute criminalising torture, which implemented the US’s obligations under CAT (Memorandum from Bybee 1 Aug. 2002a; see also Hafetz 2011: 21; Cole 2009: 21, 22; Sands 2008: 74, 75; Sands 2005: 214). This memorandum concluded that the statute prohibited only “extreme acts”, and that for conduct to constitute physical torture, it must “be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even

---

22 They included Mohammed al-Qahtani, suspected of direct involvement in the 11 September attacks, who was captured in Afghanistan in November 2001 and transferred to Guantánamo Bay in January 2002 (Sands 2008: 233; Mayer 27 Feb. 2006; HRW 12 Jul. 2011: 42, 78). Another was Abu Zubaydah, believed to be a high ranking al Qaeda member, who was seized in Pakistan in March 2002 and taken to a secret CIA prison in Thailand (Hafetz 2011: 22; HRW 12 Jul. 2011: 22; Cole 2009: 14).
death”, while mental torture “must result in significant psychological harm of significant duration” (Memorandum from Bybee 1 Aug. 2002a). It also maintained that, even if an interrogator’s conduct amounted to torture, no criminal penalties would apply if the interrogator acted at the behest of the President whose Commander-in-Chief powers could not be constrained by Congress. The third memorandum explicitly concerned 10 interrogation techniques the CIA wished to use (Memorandum from Bybee 1 Aug. 2002b). The methods included waterboarding, repeatedly slamming detainees into walls, extreme sleep deprivation, facial holding and slapping, grasping, confining detainees in boxes for long periods, locking detainees in boxes with insects, wall standing “to induce muscle fatigue” and stress positions. The memorandum determined that even when all of the methods were used in combination, they would not inflict “severe physical pain”, or prolonged mental harm, and would thus not violate the Federal Torture Statute. The underlying purpose of the various memoranda was to ensure legal cover from criminal prosecution for interrogators (Hafetz 2011: 23; Cole 2009: 20; Goldsmith 2007, 2009:144).

By mid-2002, the Bush Administration was aware that many detainees at Guantánamo Bay had no connection to al Qaeda (Horton 9 Apr. 2010). Rumsfeld, however, was frustrated at the lack of intelligence coming from detainees, and pressure was building on interrogators (Sands 2008: 6; Hafetz 2011: 38). In October 2002, the director of intelligence at Guantánamo Bay, Lieutenant Colonel Jerald Phifer, sought approval for three categories of new “counter-resistance strategies” (Memorandum from Phifer 11 Oct. 2002). They ranged from yelling and deception (Category I); to the use of stress positions, isolation, sensory deprivation, loud noise, hooding, 20-hour interrogations, forced nudity, forced grooming and dogs (Category II); to convincing the detainee his family was dead or would be harmed, exposure to cold weather or water, waterboarding and “non-injurious” contact such as grabbing, poking and pushing (Category III). According to the legal advice from Army lawyer Lieutenant Colonel Diane Beaver supporting Phifer’s request, as long as there was a “legitimate governmental objective”, and no specific intention to cause harm, none of these techniques violated US law

23 According to Colin Powell’s chief of staff, “it became apparent to me as early as August 2002, and probably earlier to other State Department personnel who were focused on these issues, that many of the prisoners detained at Guantánamo had been taken into custody without regard to whether they were truly enemy combatants, or in fact whether many of them were enemies at all” (Wilkerson 24 Mar. 2010).
24 Previously the US Army had to comply with the US Army’s Intelligence Interrogation Field Manual 34-52 when conducting its interrogations, which complied with the Geneva Conventions (Sands 2011: 266-267).
(Memorandum from Beaver 11 Oct. 2002a; 11 Oct. 2002b; see also Sands 2008: 66; Hafetz 2011: 39-40). Furthermore, according to Beaver, international law was not applicable because of the Bush Administration’s decision that the *Geneva Conventions* did not apply to detainees (Memorandum from Beaver 11 Oct. 2002b). On 2 December 2002, Rumsfeld approved Category I and II techniques and the “use of mild, non-injurious physical contact” from Category III (Danner 2004: 182).25

The interrogations taking place at Guantánamo Bay caused considerable disquiet in parts of the government, especially the military and the Federal Bureau of Investigation (FBI) (Hafetz 2011: 42; Sands 2008: 45, 112-130; Ip 2009: 58-64). The FBI withdrew its agents from military interrogations and launched an internal investigation in which one FBI officer reported witnessing a detainee “almost unconscious on the floor”, in an unventilated room, with “a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night” (Margulies 2006: 132; Hafetz 2011: 42; Denbeaux and Hafetz 2009: 248-249). Navy General Counsel Alberto Mora was so disturbed by the new interrogation techniques, which he believed could produce “effects reaching the level of torture”, that he took his concerns to Rumsfeld’s staff on multiple occasions, eventually putting them in a memorandum to the Defense Secretary’s General Counsel, William Haynes, in early January 2003 (Sands 2008: 135-140).

In response to these concerns, Rumsfeld rescinded his 2 December 2002 order approving the three categories of interrogation techniques and established a working group to examine detainee interrogations (Memorandum from Rumsfeld 15 Jan. 2003). However, relying on an OLC memorandum that argued the President had complete discretion as Commander-in-Chief over interrogations, the working group approved 35 interrogation techniques including isolation, forced grooming, sleep deprivation, and facial and stomach slapping, 24 of which were later approved by Rumsfeld (Working Group 4 Apr. 2003; Memorandum from Rumsfeld 16 Apr. 2003). In October 2003, in a sign of growing international concern over the Bush Administration’s detainee policies, the International Committee of the Red Cross (ICRC), which had been visiting Guantánamo Bay since January 2002, broke with its traditional public silence and described as intolerable the fact that Guantánamo Bay was being used as “an investigation center, not a detention center” (Lewis 10 Oct. 2003). Privately it raised

---

25 Rumsfeld added a handwritten note when giving his approval, saying “however, I stand for 8-10 hours a day. Why is standing limited to 4 hours? DR” (Memorandum from Haynes 27 Nov. 2002).
concerns with the US as to whether “psychological torture” was being carried out there (Lewis 30 Nov. 2004).


26 The US’s use of renditions first began in the 1980s, when terrorist suspects were captured overseas and brought back to America to face prosecution (The Constitution Project 2013: 165,166; Parry 2010: 179; Hafetz 2011: 51,52). After 11 September 2001, the program changed and expanded, its purpose shifting from delivering suspects to trial to imprisoning them solely to extract intelligence (Hafetz 2011: 53).
The development of harsh interrogation techniques for use by the CIA and interrogators at Guantánamo Bay affected prisoners of war captured in Iraq, which was invaded by the US and its allies (including Australia and the UK, though not Canada) in March 2003 (Zelikow 2012: 3). Although the Geneva Conventions officially applied to detainees in that conflict, such was the confusion and culture created by policy decisions taken by the Bush Administration with respect to detention and interrogation in other theatres of the war on terror, the abusive practices soon spread to Iraq (Hafetz 2011: 44; Senate Committee on Armed Services 2008: xxiii; The Constitution Project 2013: 88, 104).

In April 2004, revelations were aired by the media about abuses of Iraqi prisoners of war at Abu Ghraib prison, attracting worldwide condemnation and drawing fresh scrutiny to the US’s detainee policies (CBS 28 Apr. 2004). The CBS program 60 Minutes II revealed that 17 soldiers in Iraq had been removed from duty and an army investigation launched, after photographs surfaced showing American soldiers abusing and humiliating Iraqi detainees. The photographs showed an Iraqi prisoner standing on a box with his head covered and wires attached to his hands; another showed prisoners stacked naked in a pyramid; some showed Iraqi men cowering before aggressive dogs; one showed a naked Iraqi man lying on the floor with a dog leash around his neck being held by a female American soldier; yet others showed the corpses of dead Iraqis (Danner 2004: 217-224). A few days after the initial CBS story, The New Yorker's Seymour Hersh revealed details of the damning report by the Army investigator into the abuse (Hersh 10 May 2004; 17 May 2004). Major General Antonio Tabuga had examined the actions of the military police running the US prisons in Iraq and found “numerous incidents of sadistic, blatant, and wanton abuses were inflicted on several detainees” between October and December 2003 (‘The Tabuga Report’, in Danner 2004: 279-328). Tabuga also discovered that “ghost detainees” had been brought into Abu Ghraib by the CIA, who were hidden from ICRC survey teams (‘The Tabuga Report’, in Danner 2004: 303).
The global reaction to the Abu Ghraib revelations was scathing. The international media called for Rumsfeld’s resignation (‘Resign, Rumsfeld’ 6 May 2004). Human rights non-governmental organisations (NGOs) accused the Bush Administration of war crimes (Amnesty International 7 May 2004; HRW 9 Jun. 2004). UN human rights experts demanded access to detainees held by the US in Iraq, Afghanistan and Guantanamo Bay (Lynch 26 Jun. 2004). The US military launched further investigations into the Abu Ghraib abuses. Among them, the report of Major General George Fay and Lieutenant General Anthony Jones found that the primary causes of abuse were misconduct by a “small group of morally corrupt soldiers and civilians” and a failure of leadership (‘The Fay-Jones Report’, in Greenberg and Dratel 2005: 989). They also found widespread confusion about which interrogation techniques were authorised in Iraq, resulting from “the proliferation of guidance and information from other theaters of operation” (‘The Fay-Jones Report’, in Greenberg and Dratel 2005: 989). Fay and Jones also observed that the presence of the CIA, who appeared to operate by their own rules, created a “permissive and compromising climate for soldiers” (‘The Fay-Jones Report’, in Greenberg and Dratel 2005: 990, 1016-1017). Another report, by former Defense Secretary James Schlesinger, found that the “augmented techniques” developed for interrogations at Guantanamo Bay “migrated to Afghanistan and Iraq where they were neither limited nor safeguarded” (‘The Schlesinger Report’, in Greenberg and Dratel 2005: 915).

The Bush Administration’s response to the furore surrounding the Abu Ghraib abuse revelations was inconsistent and misleading. Publicly, President Bush and his Defense Secretary dissociated themselves from the conduct, blaming it on a few renegade soldiers (Bush 30 Apr. 2004; NBC 5 May 2004; Rumsfeld 13 May 2004). President Bush also reaffirmed the US’s commitment to the prohibition on torture, declaring on the UN International Day in Support of Victims of Torture that “America stands against and will not tolerate torture” (Bush 26 Jun. 2004). The abuse of detainees at Abu Ghraib, President Bush said, was “inconsistent with our policies and our values as a nation”. Under pressure, the Bush Administration released a number of its interrogation memoranda, including two of the August 2002 OLC memoranda, some of which had already been leaked to the press (Goldsmith 2007, 2009: 157). In a June 2004 media briefing, White House Counsel Alberto Gonzales denied any link between the interrogation memoranda and the Abu Ghraib abuses (Gonzales 22 Jun. 2004).
Following Gonzales' press conference, the Bush Administration rescinded the controversial 1 August 2002 memorandum redefining torture and publicly issued a replacement (Goldsmith 2007, 2009: 159). The new 30 December 2004 memorandum repudiated torture, saying it was “abhorrent to both American law and values and to international norms” (Memorandum from Levin 30 Dec. 2004, in Cole 2009: 130). However, the new memorandum declined to address the issue of the President’s power to authorise torture, saying it was unnecessary to do so, since he had given an “unequivocal directive” that the US did not torture (Memorandum from Levin 30 Dec. 2004, in Cole 2009: 130; see also Cole 2009: 25). Moreover, buried in a footnote in the memorandum was the remark that, having reviewed the OLC’s prior opinions addressing the treatment of detainees, “we ... do not believe that any of their conclusions would be different under the standard set forth in this memorandum” (Memorandum from Levin 30 Dec. 2004, in Cole 2009: 130, footnote 8).

In addition, in May 2005 the US Justice Department prepared a series of new memoranda making it clear that the President’s assurances on the US’s commitment to the prohibition against torture did not affect the CIA’s detainee interrogation programs (Cole 2009: 11). One memorandum determined that specific techniques intended for use by the CIA on al Qaeda detainees – including dietary manipulation, nudity, walling, facial slap or insult slap, abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation and waterboarding – did not, on their own, constitute torture (Memorandum from Bradbury 10 May 2005a, in Cole 2009: 152; see also Cole 2009: 27). A second memorandum concluded that when all of the techniques were applied to a single suspect in combination, they still did not rise to the level of torture (Memorandum from Bradbury 10 May 2005b, in Cole 2009: 199; see also Cole 2009: 29-30). A third memorandum concluded that none of the CIA techniques constituted cruel, inhuman, or degrading treatment and so did not breach the US’s obligations under CAT (Memorandum from Bradbury 30 May 2005, in Cole 2009: 225). Some Bush Administration officials, including the Secretary of State, Condoleezza Rice, and the President himself, were uneasy with aspects of the CIA detention policies, but efforts by State Department lawyers to contest the OLC’s opinions on what constituted “cruel, inhuman, and degrading treatment” came to nought (Zelikow 2012: 33-37, 40). Together, memoranda drafted in the wake of the Abu Ghraib scandal assured the CIA that efforts underway in Congress to unambiguously prohibit all cruel, inhuman and
degrading treatment would not impact on its activities (Cole 2009: 35). These Congressional efforts are the subject of the following section.

Any official sanctioning by the US government of state torture came to a halt with the inauguration of a new President, Barack Obama, in 2009. In an interview before taking office, the President-elect declared: “I have said repeatedly that America doesn't torture. And I'm gonna make sure that we don't torture. Those are part and parcel of an effort to regain America's moral stature in the world” (CBS 16 Nov. 2008). In one of President Obama’s first acts, he signed executive orders shutting down the CIA’s remaining detention centres; he prohibited officials from subjecting detainees to any interrogation techniques not listed in the US Army’s *Intelligence Interrogation Field Manual 34-52*; he revoked the OLC torture memoranda; and he reaffirmed the Common Article 3 minimum standard of treatment for all detainees in US custody (Exec. Order 22 Jan. 2009; see also The Constitution Project 2013: 313). President Obama also described waterboarding unequivocally as torture (Obama 29 Apr. 2009).

Despite this, some of the changes instituted by the Bush Administration in the war on terror downgrading the rights of detainees became institutionalised under the Obama Administration (Goldsmith 2012: 5; Owens 2010: 67; Hafetz 2011: 239-240). For example, President Obama continues to rely for his counter-terrorism policies on the use of force resolution passed by Congress in 2001, preferring the war characterisation with its expansive view of presidential discretion, over the criminal justice system which would have circumscribed his powers (Owens 2010: 68; Goldsmith 2012: 5). President Obama has been unable to close the Guantánamo Bay detention facility, despite issuing an executive order to do so. This is largely because of a hostile Congress, which opposed the transfer of detainees to the US mainland for trial and incarceration and used votes in the House and the Senate on appropriations bills to prohibit the use of funding for such purposes (Owens 2010: 67; Cole 14 Oct. 2010). In 2014, President Obama renewed his push to close Guantánamo Bay, saying “this needs to be the year ... we close the prison” (Obama 28 Jan. 2014). President Obama has continued the use of military commissions (Obama 21 May 2009; see also Goldsmith 2012: 8). He has also continued the policy of extraordinary rendition, despite its close connection with the torture of detainees (Department of Justice 24 Aug. 2009; see also Goldsmith 2012: 14-15). In May 2009, President Obama announced that he would continue to hold
individual detainees who could not be prosecuted, but still posed a danger, indefinitely (Obama 21 May 2009; see also Hafetz 2011: 240-242; The Constitution Project 2013: 317-318; Goldsmith 2012: 6-7). Indefinite military detention was codified into law for the first time with the 2011 *National Defense Authorization Act* (see also American Civil Liberties Union (ACLU) 22 Feb. 2012).

President Obama also refused to engage in any form of political accountability for state torture carried out during the war on terror, declining to prosecute any officials, maintaining that “nothing will be gained by spending our time and energy laying blame for the past” (Obama 16 Apr. 2009; see also HRW 12 Jul. 2011). A 6300-page report into the CIA’s detention program completed by the Senate Intelligence Committee was delivered to Obama in December 2012, but has not been released to the public (Feinstein 13 Dec. 2012). The report is said to conclude that the CIA concealed from the government and the public details about the severity of its interrogation methods, “overstating the significance of plots and prisoners, and taking credit for critical pieces of intelligence that detainees had in fact surrendered before they were subjected to harsh techniques” (Miller at al. 1 Apr. 2014). Because of President Obama’s refusal to engage in any official accountability over the Bush Administration’s torture policies, Michael Ratner writes that “a future president can, with the stroke of a pen, put the United States back in the torture business” (Ratner 2011: 211; see also The Constitution project 2013: 334; HRW 12 Jul. 2011: 5). The US remains in a situation where indefinite detention and the countenancing of coercive interrogations have become mainstream, while criminal prosecution for torture, in accordance with the Constitution, is optional (Hafetz 2011: 255).

II CONGRESSIONAL ACQUIESCENCE

The chronology of the steps that led to torture becoming official US policy in the war on terror sketched thus far has focused almost exclusively on the conduct of the

---

27 Attorney General Eric Holder did launch a preliminary review in August 2009 into whether federal laws were violated in the interrogations of detainees overseas. This followed the release by the Obama Administration of a redacted version of a 2004 report by the CIA Inspector General, which found that CIA agents used unauthorised interrogation techniques. They included threatening detainees with a revolver and a power drill, and threatening to sexually abuse a detainee’s mother and kill a detainee’s children. As a result, in June 2011, criminal investigations were opened into the deaths of two detainees in CIA custody (while 99 other cases of detainee abuse were closed without proceeding to a full investigation). However, in August 2012, Holder announced no charges would be brought in connection with the two cases (Cole 8 Oct. 2009; Hafetz 2011: 252; The Constitution Project 2013: 330).
executive government. As Kent Roach argues, the “real story” of much of what the US did in response to 11 September 2001 is founded in executive action (Roach 2011: 162). The Bush Administration’s response to the terrorist attacks was one of unilateral executive action, supported by dubious claims of legality. A small coterie of powerful White House officials, including White House Counsel (later Attorney General) Alberto Gonzales, Vice Presidential adviser David Addington, and OLC lawyer John Yoo, drove this approach, which was based on assertions of unfettered presidential power in dealing with the terrorist problem, founded in the war-time model. Roach argues that the adoption of extra-legal means to achieve its detainee policies (torture and rendition for instance) meant the executive was able to “break the law in real or perceived emergencies”, while maintaining the appearance of formal legal restraints (Roach 2011: 163). This freed the Administration from having to seek Congressional approval for legislative changes. This section considers what Congress was doing at this time, and why, especially in the first few years immediately following 11 September, it apparently had little impact on the conduct of the executive.

The oversight role of the US Congress in the war on terror has been roundly criticised as ineffective (Oikarinen 2012: 948; Owens 2010; Parry 2010; The Constitution Project 2013: 337). The Congress’s typical response to President Bush’s assertions of presidential authority, and to a White House that was disrespectful of its role in a separated system, was acquiescence (Owens 2010: 62). This pattern commenced with Congress authorising what John Owens calls a limitless war on terror, with its approval of the all-embracing “use of force” congressional resolution (referred to above) (Owens 2010: 42-43; Parry 2010: 168). The President’s party, the Republicans, controlled the House of Representatives in the US Congress on 11 September 2001 (Owens 2010: 42). A lone Democratic Congressman in the House of Representatives, John Tierney, sought to limit the resolution by requiring the President to report to Congress every 60 days, but his efforts were rejected (Owens 2010: 42).28 The Senate, narrowly controlled by the Democrats, unanimously approved the resolution (Owens 2010: 43). The result, argues Owens, was that Congress “ceded authority to the president to define unilaterally the post-9/11 contours of US national security and anti-terrorism policy” (Owens 2010: 42). OLC lawyers subsequently interpreted Congress’s passage of the use of force resolution as demonstrating its acceptance of the President’s unilateral war powers in an

28 This requirement would have been in line with the War Powers Act of 1973.
emergency such as that created by the 11 September attacks (Memorandum from Yoo 25 Sep. 2001; see also Parry 2010: 168).

More specifically, a cowed Congress failed for many years to question or investigate growing evidence of detainee mistreatment (The Constitution Project 2012: 337; Oikarinen 2012: 947; Owens 2010: 59). Congress was silent in response to alarms raised by the media and civil liberties groups about detainee abuse, and left it to the courts to challenge the denial of habeas corpus rights to detainees (Owens 2010: 59, 61). According to The Constitution Project’s Task Force on Detainee Treatment (a bipartisan watchdog group), Congress demonstrated great resistance to investigating the issue of detainee treatment on the basis that it would hinder intelligence collection and damage morale (The Constitution Project 2012: 339). Concerns were not raised by members after they were privately briefed on the CIA’s programs and early attempts of Congressmen or women who did try to enforce the US’s obligations with respect to torture through legislation were routinely thwarted (The Constitution Project 2012: 340-341). It was not until revelations in the media about abuse and torture at Abu Ghraib that Congress displayed any concern about the treatment of detainees in the war on terror – but, at least at this time, there was no follow through (The Constitution Project 2012: 339). The Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence have very powerful statutory mandates over the US intelligence machine, yet they failed to conduct any serious or adequate investigations into the CIA rendition program (Oikarinen 2012: 947-948). This has been put down to a lack of political will on the part of the leaders of the congressional intelligence committees (Goldsmith 2012: 104). The first public hearings on rendition took place in 2007, and were arranged by the Subcommittees of the House Foreign Affairs and Judiciary Committees after the Republicans lost control of the Congress (President Bush’s party held control of both houses from 2003 until 2007) (Oikarinen 2012: 948).

There was one notable exception to Congress’s inaction on the Bush Administration detainee policies. In July 2005, Republican Senator John McCain, a former prisoner of war in Vietnam, attempted to legislate changes to the US’s interrogation and detention policies in the war on terror to bring them into line with its international legal obligations regarding torture and cruel, inhumane and degrading treatment (Margulies 2006: 239). McCain proposed two amendments to a Defense Department authorisation
bill (Margulies 2006: 239; Owens 2010: 59). The first stipulated that no person in the custody of the Defense Department be subjected to any treatment not authorised by the US Army’s *Intelligence Interrogation Field Manual 34-52*, while the second prohibited the infliction of “cruel, inhuman, or degrading treatment” upon any person in US custody regardless of nationality or location. McCain had the support of former retired high-ranking military officers and the former Secretary of State, Colin Powell (Margulies 2006: 240-241, 244). *The Detainee Treatment Act* was eventually signed into law in December 2005 – but it came at a price (Mayerfeld 2007: 122; Hafetz 2011: 143). By then, it had been combined with further amendments, introduced by Republican Senators Lindsey Graham and Jon Kyl and Democrat Senator Carl Levin, stripping the federal courts of jurisdiction to hear habeas corpus claims brought by Guantánamo Bay detainees, following the US Supreme Court decision in *Rasul v Bush* (which will be discussed below) (Margulies 2006: 245). Finally, accompanying the law was a Presidential “signing statement”, proclaiming that the President would obey the amendment only to the extent that it did not interfere with his decisions as commander-in-chief (Bush 30 Dec. 2005; see also Margulies 2006: 247; Hafetz 2011: 143-144).

The Bush White House did not eschew its “go-it-alone” approach to counter-terrorism policy until it was forced to by the US Supreme Court (Goldsmith 2007, 2009: 205). It consulted Congress in 2006, following the US Supreme Court decision in *Hamdan v Rumsfeld*.

### III AMERICAN COURTS

In contrast to Congress, the American judiciary’s response to the Bush Administration’s war on terror detainee policies was one of progressive resistance. This can be traced through three key US Supreme Court decisions over six years: *Rasul v Bush* in 2004; *Hamdan v Rumsfeld* in 2006; and *Boumediene v Bush* in 2008. The ability to avoid

---

29 The second legislative amendment was intended to close a loophole opened by the Bush Administration in its interpretation of *CAT*. The Bush Administration had argued that the prohibition on cruel, inhuman and degrading treatment of foreign nationals did not apply overseas because the definition of such treatment was linked to the Eighth Amendment ban on cruel and unusual punishment, which did not apply outside the US (Margulies 2006: 24; Mayerfeld 2007: 122).
judicial review, as demonstrated by the decision to hold detainees at Guantánamo Bay, was critical to the successful operation of the Bush Administration’s detainee policies (Hafetz 2011: 27). However, as Helen Duffy notes, Guantánamo Bay was not a legal “black hole” - international law did apply there; the Bush Administration just opted not to recognise this (Duffy 2005: 441). Over time, the US judiciary drove this point home to the executive government. Jack Goldsmith, who headed the OLC for two years in the Bush Administration’s first term, writes that the Supreme Court pushed back slowly, methodically and with increasing fortitude against the President – “ultimately proving to be one of the most important agents for making the Constitution’s checks and balances work” (Goldsmith 2012: 166). Two main issues regarding detentions at Guantánamo Bay were litigated in the US Supreme Court: the right to habeas corpus and the lawfulness of the military commissions (Duffy 2008: 575).

A Rasul v Bush

The first of the Supreme Court’s decisions, Rasul v Bush, was delivered in June 2004. The case was brought by the Center for Constitutional Rights (CCR), a non-profit legal advocacy organisation based in New York, on behalf of a number of Guantánamo Bay detainees, including two UK citizens, Shafiq Rasul and Asif Iqbal, and an Australian, David Hicks (Hafetz 2011: 117). Rasul v Bush concerned the issue of habeas corpus, and whether US courts had jurisdiction to hear detainees’ applications challenging the basis of their detention at Guantánamo Bay. The Supreme Court found in the detainees’ favour, on the basis that the Guantánamo Bay Naval base was under the control of the US government. However, the Court grounded its finding in statute (the Federal Habeas Corpus Statute), not the Constitution. This left the door open to subsequent attempts by the Bush Administration to legislate away habeas corpus rights (Ratner 2011: 207; Hafetz 2011: 119).

The Bush Administration responded to the Rasul v Bush decision by announcing the creation of Combatant Status Review Tribunals (CSRTs), an apparent attempt to create a habeas corpus substitute (United States Department of Defense 7 Jul. 2004; see also Duffy 2008: 576). Based loosely on the status tribunals provided for by Article 5 of the Third Geneva Convention, a panel of three commissioned officers would determine

---

whether detainees at Guantánamo Bay were enemy combatants (also known as unlawful combatants) (Margulies 2006: 159-160; see also Ip 2007: 812-816). The Department of Defense defined the term “enemy combatant” as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners” (Deputy Secretary of Defense 7 July 2004; see also Duffy 2005: 397). The CSRTs were widely criticised – including by panel members themselves – as lacking every element of a fair process, and being no more than “mini show trials” (Hafetz 2011: 130, 152-154). For instance, evidence against the detainees was kept secret from them, evidence obtained through torture and coercion was admissible, detainees were denied access to lawyers and were not allowed to call witnesses (Margulies 2006: 162-163, 166; Denbeaux and Hafetz 2009: 149; Hafetz 2011: 130-131). Congress meanwhile, as noted, passed The Detainee Treatment Act, making it explicit that there was no habeas corpus right for Guantánamo Bay detainees (Duffy 2008: 576).

B Hamdan v Rumsfeld

The basis of Guantánamo Bay detentions was again challenged in the US courts, and in June 2006 the US Supreme Court delivered its decision in Hamdan v Rumsfeld.34 Salim Ahmed Hamdan, a Yemeni national captured in Afghanistan and transferred to Guantánamo Bay, was among the first detainees to be listed for trial by military commission, being formally charged in July 2004 with conspiracy to commit war crimes (Hafetz 2011: 138). Hamdan’s lawyers challenged the validity of the military commissions process. The Supreme Court ruled that the military commissions suffered two fatal flaws (Hafetz 2011: 147). First, they deviated from courts-martial procedures, for example by denying detainees the right to be at their own trial and allowing the use of evidence obtained by coercion.35 Second, the Court ruled that the military commissions violated Common Article 3 of the Geneva Conventions (which establishes a baseline of treatment for all captives).36 The Common Article 3 finding was a devastating blow to the Bush Administration’s post-11 September global detention regime, which had assumed “enemy combatants” had no rights and their treatment was

35 Ibid., 613-25.
36 Ibid., 630-33.
a matter of executive discretion (Hafetz 2011: 148). The *Hamdan v Rumsfeld* decision had significant limitations, however. One was that it rested on the President’s failure to seek appropriate authorisation from Congress for the military commissions and thus did not prevent Congress from creating new military commissions in the future (Hafetz 2011: 149).

Following the *Hamdan v Rumsfeld* decision, the Bush Administration ordered the US military to comply with Common Article 3 (Memorandum from England 7 Jul. 2006). President Bush, for the first time, publicly acknowledged the existence of CIA “black sites”, and the agency’s use of an “alternative set of procedures” in interrogations, and he announced that 14 of the CIA’s detainees had been transferred to Guantánamo Bay, where the ICRC would have access to them for the first time (Bush 6 Sep. 2006). President Bush also declared he would send legislation to Congress to specifically authorise the creation of military commissions. These policy decisions were contested inside the Administration, with Vice President Dick Cheney opposed to publicly acknowledging the CIA’s secret detention and interrogation program and the formal adoption of the Common Article 3 standard for detainees (Rice 2011: 498, 502). Cheney said publicly that dunking terrorists in the water – in other words waterboarding – was a “no brainer” (Eggen 27 Oct. 2006). The *Military Commissions Act* became law on 17 October 2006 (Margulies 2006: 259). The legislation stripped US courts of jurisdiction to hear habeas corpus claims of enemy combatants, substituting them with CSRTs and limited oversight by the DC Court of Appeals (Margulies: 2006: 260). The *Military Commissions Act* allowed for the use of coerced evidence in military commissions, as long as it was obtained before the passage of the 2005 *Detainee Treatment Act* (Hafetz 2011: 152).

**C Boumediene v Bush**

The final US Supreme Court decision on detainees was delivered in June 2008. *Boumediene v Bush* went further than previous decisions, in that the Court on this

---

37 The Court disagreed with the Bush Administration’s interpretation of the words “conflict not of an international character” and said it was used in the *Geneva Conventions* “in contradistinction to a conflict between nations”, and that Common Article 3 had to be read “as wide as possible” *Hamdan v Rumsfeld*, 548 US 577, 633-34 (Stephens J) (2006).
occasion found a constitutional basis for the detainees’ rights to habeas corpus. It determined that the Military Commissions Act did not provide an adequate habeas substitute, given the many deficiencies in the CSRT process. Justice Kennedy, delivering the Court’s majority opinion, said the:

writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

The Boumediene v Bush decision rejected one of the central ideas underpinning the post-11 September global detention system, that foreign nationals could be denied habeas corpus review, as long as they were held outside the US (Hafetz 2011: 164). While acknowledging the importance of this decision, its timing – six years into the establishment of the Guantánamo prison camp – has been criticised. Duffy, for instance, asks “whether the judicial process has not been characterised by undue constitutional avoidance, as well as excessive judicial deference to the executive and congressional decision-making role” (Duffy 2008: 578). In addition, on the issue of rendition, the American courts have been unwilling to review executive action (Duffy 2008: 589).

The US Supreme Court decisions provide a backdrop for the debates around the legitimacy of torture which occurred in the three countries I am studying. They also afforded important points of leverage for American civil society.

IV CIVIL SOCIETY CHALLENGES THE EXECUTIVE

America’s human rights civil sector is strong, comprising many active human rights NGOs, civil liberties groups, immigrants’ rights groups, ethnic and religiously identified groups, lawyers’ professional organisations and grassroots organisations (Cole 2007: 262). These civil society organisations, buttressed by a reasonably strong local investigative media, played a crucial role in challenging core aspects of the Bush Administration’s detainee policies. Their methods included issuing critical reports, holding press conferences, launching lawsuits, lobbying Congress and working

---

38 Boumediene v Bush, 553 US 723 (2008). The Court originally declined to hear further habeas challenges, but is said to have changed its mind after becoming aware of a “new and devastating critique of Guantánamo’s CSRT process from within the military itself” – the sworn declaration of Lt Col Stephen Abraham who had served on the CSRTs (Hafetz 2011: 157).

collaboratively to publish media reports exposing details of the Bush Administration’s human rights abuses carried out in the war on terror (Cole 2007: 262-263).

The impact of civil society is most apparent in the Guantánamo Bay litigation, where legal advocacy organisations took on the Bush Administration, despite the unpopularity of the detainees’ cause. America’s legal profession, notes Richard Abel, “invented public interest law nearly a century ago” (Abel 2007: 361). The Rasul v Bush case, as discussed, was launched by the CCR, an organisation founded by lawyers representing civil rights movement activists in the 1960s. Michael Ratner, one of the CCR lawyers involved in the action, writes that his organisation was the first, and for a long time the only, human rights organisation willing to take on any Guantánamo Bay cases (Ratner 2011: 204; Goldsmith 2012: 164). Lawyers and human rights groups were afraid of two things: losing and the national outrage that would be directed against them if they got involved (Ratner 2011: 206). Such was the political climate after 11 September 2001 that human rights organisations, for example, reported government pressure on themselves and their funders “to downplay their reporting of America’s own human rights abusers” (Mertus 2005: 319). Joseph Margulies, another of the Rasul v Bush legal team, notes that despite this reluctance, the detainees’ lawyers had the support of several retired federal judges (Democrats and Republicans), a number of current and former military lawyers and a group of former American POWs (Margulies 2006: 145-149; see also Goldsmith 2012: 168-175). The amicus briefs filed in the 2004 US Supreme Court detainee litigation (Rasul v Bush, and also Hamdi v Rumsfeld and Rumsfeld v Padilla – the last two cases which were concerned with the rights of US citizens detained in the war on terror) reflect this support from America’s legal establishment. It is said, for example, that briefs filed on behalf of the government by conservative public interest law firms were outnumbered 10 to one by government critics, while law professors for detainees outnumbered those for government more than 20 to one (Abel 2007: 394-395).

The Guantánamo litigation highlights civil society’s role in contesting the Bush Administration, beyond the actions of the particular individuals and groups who

---

40 Even the CCR hesitated before taking on the Guantánamo cases. Goldsmith writes that staff were worried about the effect on fundraising; how it fit with CCR’s objectives to promote progressive social change; and whether it would be personally dangerous (Goldsmith 2012: 162).

launched the original cases for detainees. Successive US Supreme Court rulings in the detainees’ favour led to the further mobilisation of other sections of the civil society sphere, in terms of generating confidence and spurring new actors into taking a stand. Following the *Rasul v Bush* decision, other US law firms came forward to offer their pro bono services to represent Guantánamo Bay detainees in bringing habeas corpus petitions (Ratner 2011: 207; Marguilies 2006: 158). By the time of the *Boumediene v Bush* decision, the Guantánamo Bay lawyers had built a network of lawyer-activists around the US who lobbied tirelessly on the habeas corpus issue. The *Boumediene v Bush* decision marked, for this group, the pinnacle of their efforts. Mark Denbeaux and Jonathan Hafetz write that “what was initially a little band of habeas lawyers – that later grew into a brigade – took on two branches of government, over a seven-year period, and won the fight to preserve habeas corpus” (Denbeaux and Hafetz 2009: 218).

The collective effort to which different sections of America’s legal profession contributed in challenging the Bush Administration’s war on terror policies illustrates Lucien Karpik’s and Terence Halliday’s concept of the “legal complex” (Karpik and Halliday 2011). This concept helps in understanding the role that a country’s legal profession – and the connections between different components of it – play in mobilising collectively on a particular issue (Karpik and Halliday 2011). They write: “[T]he legal complex denotes legal occupations that mobilize on a given issue at a given historical moment, usually through collective action that is enabled through discernible structures of ties” (Karpik and Halliday 2011: 221). America’s legal complex, comprising the judiciary, private lawyers, military lawyers, bar associations and law professors, was ultimately successful in restoring some semblance of legality to the US’s detainee treatment practices after 11 September 2001, though human rights concerns remain. I return to the legal complex concept, and explore it further, in the case study chapters.

For Jack Goldsmith, writing from the perspective of a former government insider, the “distributed forces” of actors beyond the traditional institutions such as Congress were critical in checking Presidential power in the war on terror (Goldsmith 2012: xiii). NGOs such as CCR and the American Civil Liberties Union (ACLU) connected with “thousands of like-minded lawyers and activists”, as well as sympathetic journalists, in the US and overseas:
Together, these forces ... swarmed the government with hundreds of critical reports and lawsuits that challenged every aspect of the President's war powers. They also brought thousands of critical minds to bear on the government’s activities, resulting in best-selling books, reports, blog posts, and press tips that shaped the public’s view of presidential action and informed congressional responses, lawsuits, and mainstream media reporting (Goldsmith 2012: xii).

Civil society groups dedicated to constitutional and rule of law values played an important checking role of executive government. David Cole singles out a number of organisations including the American Bar Association (ABA), the Bill of Rights Defense Committee, The Constitution Project, the Muslim Public Affairs Council and the Council on American Islamic Relations, and argues their collective efforts amounted to more than what either the Supreme Court or Congress did (Cole 2012b: 1205). The ABA in 2004, for example, approved a resolution urging Congress and the President to ensure all military commission defendants had access to civilian lawyers, while its panel on Enemy Combatants declared “we must defend those whom we dislike or even despise” (Abel 2007: 392). Cole argues that such civil society groups:

[H]elped to inculcate and reinforce a culture of legality, and provided a critically important voice for rule-of-law values. Absent that voice, it is far from clear that legality would have been restored to the extent that it was, or that the Supreme Court’s opinions in the military detention and trial cases would have been as strong as they were (Cole 2012b: 1267).

Transnational NGOs such as Human Rights Watch and Amnesty International became more active on Guantánamo Bay and CIA interrogation over time. The Bush Administration criticised the Secretary General of Amnesty International, Irene Khan, for being anti-American in 2005, after she described Guantánamo Bay as “the gulag of our times” (Amnesty International 24 May 2005; Nash 2009: 89).

Other accounts of civil society’s response to the Bush Administration’s detainee policies are less glowing. Certainly there were instances of conservative legal associations and prominent academics who supported the US government’s approach. The Washington Legal Foundation was one such example. It accused the US Supreme Court after its *Rasul v Bush* decision of issuing – at the urging of “radical legal activists” – several “sweeping decisions which extended new rights to enemy combatants and opened up the federal courts to a terrorist litigation explosion” (Abel
2007: 391). In addition, while there were many cases of high profile legal academics condemning the Bush Administration’s detainee policies, especially after the publication of the OLC torture memoranda, others supported the use of torture against terrorist suspects. Alan Dershowitz, professor of law at Harvard Law School, advocated using “torture warrants” in rare situations in which torture was determined by a judge to be justified in order to prevent an imminent terrorist attack (Deshowitz 2002: 158-159). Jean Bethke Elshtain, who was a professor of social and political ethics at the University of Chicago Divinity School, argued that “Torture 2”, by which she meant modest physical pressure or coercive interrogation, might, “with regret, be used” to save innocent lives (Elshtain 2004: 86-87). Jeremy Waldron writes that by 2003 and 2004, once it became apparent that the US government was using (or contemplating using) torture, one might have expected an outpouring of public condemnation (Waldron 2010: 6). Instead he argues “there was a great deal of enthusiasm for torture” among the American citizenry (Waldron 2010: 6). Waldron’s claim about the high level of public support for torture is only partially backed by opinion polling. A Gallup poll taken in October 2001 reveals that 45 per cent of those surveyed supported the torture of terrorists “if they know details about future terrorists attacks in the US” (Carlson 1 Mar. 2005). However, by 2005 – after the Abu Ghraib revelations – this had dropped to 39 per cent, suggesting some members of the public did change their minds after being confronted, graphically, with the reality of torture.

The media’s role in holding the Bush Administration accountable was mixed, although ultimately they did play a pivotal role in exposing some of the CIA’s secret torture practices. Certain journalists reinforced the executive’s narrative that human rights would hinder the successful prosecution of the war on terror. For example, Jonathan Alter, a senior journalist with Newsweek, wrote soon after 11 September 2001 that “we need to keep an open mind about certain measures to fight terrorism, like court-sanctioned psychological interrogation” (Alter 4 Nov. 2001). Another influential columnist, Charles Krauthammer, wrote later in The Weekly Standard that there were circumstances where “by any rational moral calculus” torture would not only be permissible but required (Krauthammer 5 Dec. 2005). On the other hand, the media brought about intense scrutiny of the Bush Administration’s human rights abuses

---

42 Examples of legal academics criticising the OLC torture memoranda include Harold Koh (Yale), Jack Balkin (Yale), Cass Sunstein (University of Chicago), Walter Dellinger (Duke), Douglass Cassel (Northwestern), Stephen Gillers (New York University) (Abel 2007: 368-369).
through their publication of the leaked OLC torture memoranda, by exposing details of the CIA’s secret prisons, and the reporting of the Abu Ghraib abuses (Cole 2012b: 1226). Jack Goldsmith has written of the enormous impact created by The Washington Post journalist Dana Priest’s 2005 exposé of the CIA’s network of “black sites” (Priest 2 Nov. 2005). According to Goldsmith, Priest’s article bolstered Congressional efforts to pass The Detainee Treatment Act, led to outrage and recriminations among the US’s allies in Europe and “almost certainly” influenced the US Supreme Court’s decision in Hamdan v Rumsfeld (Goldsmith 2012: 56). Media freedom in the US is protected by the First Amendment, a fact that helps explain its important role in exposing Bush Administration torture (Roach 2011: 229).

V CONCLUSION

This chapter has documented the story of America’s panic after 11 September 2001 and the shift that followed in the US’s attitude to a basic principle of international human rights: the norm against torture. Bush Administration officials and their supporters achieved this change in what was viewed as acceptable practice by the US government through the employment of a powerful discourse, which suggested that the threat posed by al Qaeda terrorists was novel and unprecedented, requiring a new approach. This approach entailed casting off the old restrictive rules governing detainee treatment, in favour of more aggressive methods, underpinned by strained interpretations of existing laws on torture. The most effective resistance the executive confronted was external, emanating largely from the US Supreme Court and elements of civil society, especially legal advocacy groups. Gradually, over a period of six years, they forced the Bush Administration to conform more closely to its human rights obligations.

This narrative assists in understanding the ways the US’s allies responded to the torture of their own citizens in the war on terror. The US’s war on terror defined and shaped the foreign and domestic policies of many other states (Owens and Pelizzo 2010: 4). Its influence can be thought of in two, interrelated, ways: in terms of realpolitik and moral leadership.

Nine days after the 11 September 2001 attacks, President Bush declared that every state, liberal or otherwise, faced a choice. “Every nation, in every region, now has a decision
to make. Either you are with us, or you are with the terrorists” (Bush 20 Sep. 2001). For
the US’s allies, this was not a difficult choice. From a realist perspective, America after
11 September 2001 was the world’s only superpower. This condition of unipolarity had
profound effects on the nature of contemporary alliances, argues Stephen Walt (Walt
2009: 86). This “gross distribution of capabilities... inevitably shapes the alliance
choices that are available to different states” (Walt 2009: 86). As junior allies, Australia,
Canada and the UK were reliant on the US’s friendship for different reasons, ranging
from geographic insecurity, to trade, to a desire to exercise global influence. The three
states threw their support behind America and joined its war on terror launched in
Afghanistan. They were hence implicated in the Bush Administration’s detainee
policies as alliance partners fighting in the same war. When their own citizens became
captured in that war as detainees accused of terrorism, however, the allies were faced
with the prospect of their own nationals being cast as enemies of America. The question
then became whether these allies would tolerate their citizens being subjected to the
legally dubious detention regime constructed by the Bush Administration for dealing
with prisoners taken in the war on terror.

This leads us to the issue of the US’s influence on the allies’ shared liberal values and
principles. The US and its liberal allies are members of the Anglosphere, an informal
grouping of states united by a common British heritage and identity based on shared
commitments, including to human rights (Katzenstein 2012: 2). When the US took a
path after 11 September 2001 that involved a clear undermining of human rights, the
allies faced a choice: to follow the Bush Administration’s lead, or reject the
downgrading of the norm against torture. The influence of not only America’s executive
government, but its other arms of government, especially the judiciary which took an
opposing view of the US’s human rights obligations in its treatment of detainees, must
be also taken into account in considering this question. How each country – Australia,
the UK and Canada– responded to this challenge is the subject of the following three
chapters.
CHAPTER FOUR – AUSTRALIA

No country was quicker in supporting the United States-led war on terror than Australia. Australia was the first ally to pledge military support to America, on the day of the 11 September 2001 attacks (Kelly 2009: 583; Larkin and Uhr 2010: 137). Australia’s unwillingness to challenge the US’s conduct of the war was evident in its response to the detention and treatment of the two Australian citizens at Guantánamo Bay, David Hicks and Mamdouh Habib. Both Australians claimed they were tortured in detention. The Liberal-National Coalition government of Prime Minister John Howard was slow to intervene in these individuals’ cases and only stepped in when their detention became a source of political embarrassment or liability. In Hicks’s case, no official public inquiry has been held into his allegations of mistreatment and torture. In the case of Habib, who was subject to extraordinary rendition to Egypt, it took until late 2010 for the government of Labor Prime Minister Julia Gillard to order a closed inquiry by the Inspector-General of Intelligence and Security into his detention (Thom 2011).

The actions of domestic actors are crucial to understanding why Australia was so reluctant to represent its citizens allegedly tortured in the war on terror. The chapter begins with a discussion of Australia’s involvement in the war on terror and gives an overview of Australia’s legal position with respect to torture. I introduce the Hicks and Habib cases and the allegations regarding their mistreatment and torture in detention. The discussion then turns to the responses of key actors to the citizens’ cases, beginning with the executive government. It also looks at efforts by the legislature and the judiciary to check the executive. The chapter next explores the role Australian civil society played in shifting government policy on the men’s cases. The behaviour of civil society must be viewed through the lens of the domestic political context and the enabling and constraining factors that influenced civil society’s willingness and ability to mobilise.

I AUSTRALIA’S ROLE IN THE WAR ON TERROR

Australia’s alliance with the US is underpinned by the formal architecture of the ANZUS treaty – the 1951 security pact between Australia, New Zealand and the US.43

The Australia-US relationship contains both functional and sentimental dimensions (MacDonald and O’Connor 2012: 176). That is, it is built on Australia’s long-standing perception of geographic vulnerability, but also a strong sense of cultural affinity with the US. For example, in a speech a month before the 11 September attacks, Prime Minister Howard described Australia’s relationship with the US as “the most important we have with any single country” (Langmore 2005: 68). This, he reasoned, was partly because of American strategic, economic and diplomatic power, but mostly because of shared values and aspirations (Langmore 2005: 69; see also Howard 2010: 654; Kelly 2009: 439; Garran 2004: 105). The 11 September attacks provided Prime Minister Howard with an opportunity to demonstrate Australia’s commitment to the US alliance relationship (Kelly 2009: 580). According to political commentator, Paul Kelly: “Having pondered about how to bring Australia and America into a closer strategic partnership Howard got his answer in the most brutal manner. The 9/11 attack enabled Howard to realise his strategy” (Kelly 2009: 580).

Prime Minister Howard was in Washington on 11 September for talks marking the 50th anniversary of ANZUS and he reacted emotionally and instinctively to the terrorist attacks (Larkin and Uhr 2010: 137; Wright-Neville 2006: 4; Kelly 2009: 581; Edwards 2005: 47; Howard 2010: 382). The attacks were not just an assault on the US, the Prime Minister said, they were “an assault on the way of life that we hold dear in common” (Howard 12 Sep. 2001). He agreed with the Bush Administration’s characterisation of 11 September as having changed the world forever (Howard 2010: 392; Channel Nine 16 Sep. 2001). Prime Minister Howard grasped, writes Kelly, that “the rules and norms that had governed international behaviour would change” (Kelly 2009: 587). In a 2004 terrorism white paper, for example, the Howard government emphasised the unprecedented nature of the post 11-September terrorism threat, which demanded “new and innovative forms of response” (Australian Government 2004: vii, xiii).

In the days after the 11 September attacks, the Howard government took a number of policy decisions. Prime Minister Howard pledged “all support that might be requested of us by the United States in relation to any action that might be taken” and his government invoked the ANZUS treaty for the first time in its history (Howard 12 Sep. 2001; see also Kelly 2009: 588; Edwards 2005: 47; Wright-Neville 2006: 4). In October 2001, the government committed Australian troops to the war in Afghanistan (Howard
Australia’s response to 11 September also encompassed the passage of many new domestic counter-terrorism laws – a larger legislative output than countries facing much greater threats, so large it strained the ability of civil society to keep up (Williams 2011: 1144; Roach 2011: 310). Before 11 September, only the Northern Territory in Australia had laws related to terrorism (Williams 2011: 1139). This reflected Australia’s inexperience of terrorism (Larkin and Uhr 2010: 143; Hocking 2007: 217; Williams 2011: 1161). For most of their history, David Wright-Neville argues, “white Australians considered terrorism to be a phenomenon that happened elsewhere” (Wright-Neville 2006: 1). The laws were passed in various waves, initially in response to 11 September, and subsequently in reaction to the 2005 London bombings (Larkin and Uhr 2010: 146; Wright-Neville 2006: 1; Roach 2011: 335). Australia, like Canada, did not experience a terrorist attack in the post-11 September period at home – though it did lose 88 citizens in the terrorist bombings in Bali, Indonesia, in October 2002 (Wright-Neville 2006: 6; Hocking 2004: 232; Howard 9 Oct. 2003). Australia’s legislative exuberance after 11 September reflected a tough-on-terrorism political agenda, integral to which was a readiness to sacrifice personal liberties for the sake of national security imperatives. Australia’s counter-terrorism laws, it is argued, do more to undermine democratic freedoms than the laws of any comparable nation (Williams 2011: 1171). Implicit in Australia’s response to the war on terror more broadly was a re-conceptualisation of rights giving communal rights priority over individual rights. This was spelt out by the Secretary of the Attorney-General’s Department, Robert Cornall, in 2005:

There was not much need to think about community rights in the 20th century because they were not under any obvious challenge. This allowed individual rights to flourish without regard to the broader setting of community rights. ... But things are a bit different now (Cornall 2005).

II AUSTRALIA’S TORTURE LAW

On 11 September 2001 Australia’s laws with respect to torture were piecemeal. Australia had ratified the Convention Against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment (CAT) in 1989. However, the Howard government had refused to sign the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which would have allowed international inspections of Australian detention facilities (Joint Standing Committee on Treaties, 2004: 34). In 2001 there existed no Commonwealth offence against torture – a fact criticised by the UN Committee Against Torture (Committee Against Torture 2008: 2). The Crimes (Torture) Act 1988 only outlawed torture committed outside Australia. Furthermore, Australia had no bill of rights and no constitutional prohibition on torture, a situation that continues.

The Labor government of Kevin Rudd introduced legislation in 2009 (passed the following year) specifically creating a Commonwealth torture offence which outlawed torture committed both within and outside Australia. The Rudd government also signed OPCAT in 2009, although Australia is yet to ratify it. These actions by the Rudd Government on torture should be viewed in the context of its re-engagement with the UN, and its “resetting of Australia’s relationship with the United Nations human rights system”, following a decade of active neglect by the Howard government (Carne 2012: 229; see also Langmore 2005: 72). The legal reforms in particular also reflect the prominence of torture in the war on terrorism, including in the Hicks and Habib cases (Carne 2012: 241-242). This was evident in statements made by the Attorney-General, Robert McClelland, about the new Commonwealth torture offence, in which he specifically cited the UN Committee Against Torture’s criticism of Australia’s legal position and the emergence of torture as a concern after 11 September 2001 (McClelland 22 May 2009).

The Rudd government also launched a National Human Rights Consultation which considered the need for a national charter or bill of rights (McClelland 10 Dec. 2008). The Rudd government subsequently rejected the Committee’s recommendation for a national human rights act (McClelland 21 Apr. 2010). Instead, it introduced legislation establishing Australia’s first Parliamentary Joint Committee on Human Rights dedicated to scrutinising legislation for compliance with human rights. The Human Rights (Parliamentary Scrutiny) Act 2011, eventually enacted by the Gillard government, brought Australia into line with Canada and the UK (Kinley and Ernst

---

2012: 63). The Act will enhance the Australian Parliament’s role in trying to ensure human rights considerations are part of the process of policy and legislative development.

III AUSTRALIAN CITIZENS DETAINED IN THE WAR ON TERROR

A David Hicks

David Hicks, an Australian citizen, was captured by the Northern Alliance in Afghanistan in December 2001 (Sales 2007: 5). There are conflicting accounts as to what the 26-year-old was doing in Afghanistan. Hicks maintains he was there under the command of the Taliban, while Australia and the US claim he was involved with al Qaeda (Hicks 2010a: 6). Hicks was transferred into US custody in Afghanistan by 9 December 2001 (Sales 2007: 48). He was held by the US in various detention facilities and on board US naval vessels (Hicks 2010a: 6). Some time later, Hicks was transported to Guantánamo Bay and was among the first group of prisoners to arrive in January 2002 (Hicks 2010b: 211; Rumsfeld 10 Jan. 2002).

Hicks claims he was subject to various forms of ill-treatment while in US custody, including on US warships and aircraft, and at Guantánamo Bay (Hicks 2010a: 61-62). While detained at Guantánamo Bay, Hicks relayed many of these claims to the International Committee of the Red Cross, his military lawyer Major Michael Mori, Australian officials, his father and other detainees (Hicks 2010b: 242; Hicks 2010a: 62; Hicks 5 Aug. 2004; ABC 31 Oct. 2005; Wilkinson 27 Aug. 2004; Rasul et al. 26 Jul. 2004: 112). Hicks’s claims of ill-treatment include: assaults (beatings, punching, kicking, slapping, being stepped on or trodden on, being hit in the head by rifle-butts and having his arm twisted); sexual abuse and humiliation; repeated threats with weapons; being forced into painful stress positions; prolonged hooding and blindfolding; frequent tight handcuffing and shackling; enforced medication or drugging; sleep disruption and sleep deprivation; prolonged exposure to bright lighting and excessive continual noise; deprivation of adequate food, exercise and hygiene basics; threats of rendition to torture in Egypt; verbal threats and harassment; prolonged solitary confinement (at one stage for 16 months, eight without sunlight); and witnessing or learning of the abuse of other
detainees (Hicks 2010a: 61-62, 66). Hicks says he agreed to everything interrogators put to him to avoid abuse (Hicks 2010b: 276, 278, 284).

Hicks was detained at Guantánamo Bay for more than five years (Hicks 2010a: 6). He returned to Australia in May 2007, after making a plea deal in the US military commission process (Hicks 2010a: 7). Hicks was charged earlier that year with attempted murder in violation of the law of war and providing material support for terrorism (US Department of Defense 2 Feb. 2007). This followed a failed attempt by the US to charge him in 2004, with the US Supreme Court’s 2006 decision in *Hamdan v Rumsfeld* ruling the original military commissions were invalid.45 Hicks pleaded guilty to the material support charge and was sentenced to seven years imprisonment with six years and three months suspended (Hicks 2010a: 7; US Department of Defense 2 Feb. 2007; Hicks 26 Mar. 2007: 271). He served the remainder of his sentence in Adelaide’s Yatala Labour Prison and was released in December 2007 (Hicks 2010a: 7). As a part of his plea deal at Guantánamo Bay, Hicks agreed to a number of additional terms, including that he was never illegally treated while in US custody and that he would not talk to the media for a year about his ordeal (Hicks 26 Mar. 2007: 274-275). Hicks has written that he agreed to this in order “to get out of Guantánamo and return to Australia” (Hicks 2010b: 388). In 2012, the US Court of Appeals ruled the material support for terrorism charge was retrospective and therefore invalid.46

**B Mamdouh Habib**

Mamdouh Habib, a 46-year-old dual Australian-Egyptian citizen, was arrested in Pakistan in October 2001 (Habib 2008: 82-83; Evidence to Senate Legal and Constitutional Affairs Committee 15 Feb. 2005: 31). Habib says he was in Pakistan pursuing new business opportunities (Habib 2008: 45). The Australian government, however, alleged he had attended jihad training camps in Afghanistan (Evidence to Senate Legal and Constitutional Affairs Committee 15 Feb. 2005: 7). Habib was on a bus, having recently crossed the Afghanistan border with Pakistan, when he was arrested along with two German nationals (Habib 2008: 84-86; Thom 2011: 28). While detained in Quetta, Habib was visited by Australian Federal Police (AFP) and Australian Security Intelligence Organisation (ASIO) agents (Evidence to Senate Legal

46 *Hamdan v United States*, (D.C. Circuit, No. 11-1257, 6 December 2012).
and Constitutional Affairs Committee, 15 Feb. 2005: 5-6). The two Germans were soon repatriated after the German government protested their detention (Kremmer 19 Jan. 2002). Habib was taken by “extraordinary rendition” to Egypt – the extrajudicial process used by the US to secretly transfer prisoners to countries known to torture (Priest and Eggen 6 Jan. 2005; Margulies 2006: 188; Thom 2011: 51). In April 2002 Habib was taken back to Pakistan, then transferred to Afghanistan and eventually Guantánamo Bay, where he arrived in May 2002 (Thom 2011: 66).

Habib’s allegations of torture span his time in Pakistan, Egypt and Guantánamo Bay. They have been laid out in a US District Court judgment, a judgment of the Federal Court of Australia, Habib’s memoir, his media interviews and the report of the Inspector-General (Habib 2008: 90-156; Thom 2011: 79; Channel Nine 13 Feb. 2005b). According to an account in the 2005 judgment of US District Court Judge Joyce Hens Green, while in Egypt, Habib was allegedly routinely beaten to the point of unconsciousness; was locked in a room that would fill with water to a level just below his chin as he stood for hours on the tips of his toes; and was suspended from a wall with his feet resting on the side of a large electrified cylindrical drum which applied electric shocks to his feet. Habib was made to listen to noises that sounded like his wife being raped and his children being beaten, was deprived of sleep and drugged (Thom 2011: 79). He also claims he endured sexual assault, electric shocks to his testicles, being burnt with cigarettes and threatened with dogs (Habib 2008: 118-120). Habib described his torture in Egypt to other detainees at Guantánamo Bay, and to Australian officials (Habib 2008: 148-151; Thom 2011: 68, 82, 87, 90, 98; Rasul et al. 26 Jul. 2004: 108). While at Guantánamo Bay, Habib alleges he was kept in isolation, drugged, sleep deprived, beaten, given electric shocks, injected repeatedly, was left naked in freezing cold rooms for long periods, threatened with rape, urinated on and had “menstrual blood” thrown in his face (Habib 2008: 155-156).

Habib was designated eligible for military commission at Guantánamo Bay in July 2004 (Thom 2011: 95). The US’s allegations against Habib, according to American military documents, were based on confessions obtained in Egypt, including that he trained the 11 September hijackers in martial arts and had prior knowledge of the terrorist attacks.

---

48 In re Guantanamo Detainee Cases, 355 F.Supp.2d 443, 473.
(Margulies 2006: 182; Hood 6 Aug. 2004). Later in 2004, Habib’s American lawyer, Joseph Margulies, became aware of the Egyptian government’s interest in repatriating Habib to Egypt and filed a request to block this with the US Justice Department (Margulies 2006: 193). The document, which contained details of Habib’s torture in Egypt, was cleared for public filing on 4 January 2005 (Margulies 2006: 192). That same day the US told Australia there was insufficient evidence to charge Habib (Thom 2011: 101). One week later, the Australian government announced Habib would be returning to Australia (Downer and Ruddock 11 Jan. 2005). He was repatriated on 28 January 2005, released immediately and never charged (Downer 28 Jan. 2005).

IV THE EXECUTIVE’S RESPONSE

Australia had three different governments during the period under study (2001 to 2011). The Howard government was in power from 1996 until November 2007, by which time Hicks and Habib had returned to Australia. The Rudd government was in power from 2007 until June 2010, and the Gillard government from June 2010 until 2013.

A The Howard Government

The Howard government’s attitude towards Hicks and Habib is characterised by its longstanding support for their detention at Guantánamo Bay and its disregard for their allegations of torture. I highlight a number of features of this position, beginning with the government’s preparedness to assume the citizens’ guilt before any trial process had taken place. For example, immediately following Hicks’s transfer to Guantánamo Bay, the Federal Attorney-General, Daryl Williams, declared all the individuals held there to be guilty of terrorism. Williams said: “They have been trained to be terrorists and to act in accordance with the objective of al-Qaida. That makes them about as dangerous as a person can be in modern times” (Williams 14 Jan. 2002). Much later, after Habib was repatriated to Australia and released, a similar willingness to attribute guilt was evident in statements of Williams’s successor, Philip Ruddock, and the Foreign Affairs Minister, Alexander Downer. Although Habib was never charged by the US, Downer and Ruddock noted in a press release: “It remains the strong view of the United States that, based on information available to it, Mr Habib had prior knowledge of the terrorist attacks on or before 11 September 2001” (Downer and Ruddock 11 Jan. 2005). The
Howard government’s continued support for Habib’s detention until 2005 is surprising when considered alongside the views of Australian intelligence and security agencies. For example, the Director-General of ASIO, Dennis Richardson, formed the view in March or April 2002 that “there was no legitimate reason for Habib [to be] anywhere but in Australia” (Thom 2011: 58). The AFP told the Howard government in August 2002 there was insufficient evidence to prosecute Habib (Thom 2011: 58).

Another feature of the Howard government’s position on Hicks and Habib was its ongoing failure to question the harsh conditions of their detention at Guantánamo Bay. For example, the government did not object to the US’s decision to withhold Geneva Conventions protections, maintaining this was a matter for the US (ABC 17 Jan. 2002). Attorney-General Williams also declared Hicks was not entitled to consular access because “the question of consular access does not arise in a circumstance where he has been transgressing the law of a foreign country” (ABC 17 Jan. 2002). 49 Nor did the Howard government, for many years, oppose the indefinite nature of Hicks’s and Habib’s detention. Prime Minister Howard agreed with a radio journalist’s proposition in 2002 that it was “fair” that Hicks be held in indefinite detention, “given the circumstances of Afghanistan” (3AW 2 Aug. 2002). Neither the Attorney-General nor the Secretary of his Department expressed any concern about the denial of access to legal representation. Williams explained after Hicks’s transfer to Guantánamo Bay that “I think it’s not likely that he will have legal representation while he’s in military custody” (Williams 14 Jan. 2002). Two years later when Habib had not yet been allowed to see a lawyer, Robert Cornall, Secretary of the Attorney-General’s Department, observed this was “because defence lawyers are only appointed after people are nominated for eligibility for prosecution” (Evidence to Senate Legal and Constitutional Affairs Committee 24 May 2004: 17).

The Howard government also offered unquestioning support of the US military commissions at Guantánamo Bay. Indeed, Tim McCormack has written that no other government was so willing to endorse the legitimacy of the military commissions (McCormack 2007: 13). When Hicks was named by the US Defense Department in July 2003 as one of the first six detainees to be tried under the new process, the Prime

49 This was a dubious position given Australia’s right under international law to demand consular access to its citizens in prison, custody or detention by a foreign state. See Vienna Convention on Consular Relations, art 36.
Minister's reaction was one of indifference. The rules governing the military commissions at the time included that the US President would have the final right of appeal; evidence obtained by coercion would be permissible; and detainees found not guilty would not necessarily be released (US Department of Defense 21 Mar. 2002; Rumsfeld 21 Mar. 2002). Yet Prime Minister Howard's response to the US announcement of Hicks's nomination was dismissive. For example, he said: “The question of who may or may not be facing trial in the United States is a matter for the United States to announce because the United States has these people in custody” (Howard 4 Jul. 2003). The Howard government did eventually seek and win some concessions in relation to Hicks's military commission, such as a guarantee that the death penalty would not apply to Australians. However when other requests were rejected – such as a more independent review process – Australia accepted this (Sales 2007: 97).

Australia continued to publicly back the military commissions even when the governments, militaries and judiciaries of its war on terror allies rejected them on the basis they were fundamentally flawed. When, for example, the UK Attorney-General announced his government believed the military commissions did not afford sufficient guarantees of a fair trial according to international standards, Prime Minister Howard commented that it had been years “since an Australian Attorney-General felt automatically bound to accede to the views of a British Attorney-General” (ABC 1 Jul. 2004). When correspondence between US military commission prosecutors was published in 2005 disclosing they held serious reservations that the process was “rigged”, Attorney-General Ruddock said the concerns had “no substance” ('News Focus' 4 Aug. 2005). When the US Supreme Court ruled in Hamdan v Rumsfeld that the military commissions were illegal, Prime Minister Howard defended his government's support for the process, saying “our advice had been, as had the American government’s advice ... that it was lawful” (3AW 30 Jun. 2006). The Howard government was similarly dismissive of domestic legal concerns about the military commission process. For example, barrister Lex Lasry QC was appointed independent observer of Hicks's military commission by the Law Council of Australia to Guantánamo Bay and issued a critical report stating that the proceedings were flawed and a miscarriage of justice was highly likely (Lasry 30 Aug. 2004). Ruddock’s response was to accuse Lasry of “chauvinism” and remark that the report “could have
been written without in fact travelling to Guantánamo Bay” (Banham et al. 16 Sep. 2004). While over the years the Howard government grew increasingly agitated for political reasons about the time the Americans were taking to bring the Australians to trial, it stayed resolute in its support for the fairness of the system (Sales 2007: 215).

A further feature of the Howard government’s position on the detention of Hicks and Habib was its lack of concern for their claims of abuse and torture. On the broader issue of the use of torture in the war on terror, the government’s attitude was one of ambivalence, bordering at times on endorsement. For instance, in response to the Abu Ghraib torture revelations, Prime Minister Howard made a distinction between torture committed by the Americans and by Saddam Hussein’s regime. The latter, he implied, was worse. “The prisoner abuse thing is terrible. But it is being dealt with and that is the difference,” Howard said (Channel Nine 20 May 2004). Similarly, Attorney-General Ruddock stated that he did not regard sleep deprivation as torture (ABC 1 Oct. 2006). Ruddock also commented that laws passed by the US in 2006 banning torture “may well limit the capacity of intelligence organisations in the future” (Butterly and Veness 2 Oct. 2006).

With regard to the particular torture allegations of Hicks and Habib, the Howard government’s approach involved a number of moves. The first was to create doubt about the men’s claims. In 2004, when the lawyers for Hicks and Habib made public claims about their clients’ possible abuse, Prime Minister Howard suggested they should be taken “with a grain of salt” (Channel Nine 20 May 2004). This was because of the pair’s alleged terrorist associations and the timing of the claims, which the Prime Minister implied was suspicious coming after the Abu Ghraib revelations. “I find it strange that these allegations of abuse against Mr Hicks and Mr Habib have arisen only since the prisoner abuse scandal erupted in relation to the American forces,” Prime Minister Howard said (Channel Nine 20 May 2004). This comment proved disingenuous when subsequently it was revealed that the government had known about the claims since at least 2002 (Thom 2011: 68, 87). When Habib returned to Australia and described his torture in an interview with the television program 60 Minutes, the government reacted by casting aspersions over his credibility and character (Channel Nine 13 Feb. 2005a). For example, the AFP Commissioner, Mick Keelty, told a Senate Estimates Committee that when interviewed by Australian officials in Pakistan before
his rendition to Egypt, Habib had concocted allegations of kidnapping and torture as a cover “for the period of time that he had been in Afghanistan with al Qaeda” (Evidence to Senate Legal and Constitutional Affairs Committee 15 Feb. 2005: 7). The ASIO Director-General, Dennis Richardson, accused Habib in the same hearings of fabricating torture allegations which were dismissed by officials because “we had a fairly good idea of what he had been up to. He was actually in Afghanistan with people who had a history of murdering innocent civilians” (Evidence to Senate Legal and Constitutional Affairs Committee 15 Feb. 2005: 31).

Another tactic adopted by the Howard government in relation to the torture allegations involved professing ignorance of the circumstances surrounding Habib’s rendition to Egypt, thus deflecting responsibility for what happened to him and his ongoing treatment. At first the government suggested Habib had been sent to Egypt at the Egyptian government’s request (Hill 19 Feb. 2002). This was put in doubt when, in 2004, the Pakistani Interior Minister disclosed that Habib was transferred at the behest of the Americans (SBS 7 Jul. 2004). Yet the Howard government continued to obfuscate, as demonstrated by this excerpt from a 2005 media interview with Downer, which dealt with Habib’s rendition:

LAURIE OAKES: Did we raise it with the US who took him there? In effect abducted him from Pakistan to send him there?
ALEXANDER DOWNER: Well, I don’t have all – I don’t have all the details of that. I don’t have any evidence that the Americans took him there. To the best of my knowledge ...
OAKES: Well, he didn’t walk.
DOWNER: ... Well, he went from Pakistan to Egypt. There are a lot of different ways you can get from Pakistan to Egypt (Channel Nine 13 Feb. 2005a).

The Howard government maintained it had no knowledge of plans for Habib’s transfer to Egypt (Evidence to Senate Legal and Constitutional Affairs Committee 24 May 2004: 17). In fact, Australia was consulted on a number of occasions in October and November 2001, and the matter of Habib’s possible transfer was discussed at an informal meeting of senior government officials in Canberra on 24 October 2001 (Thom 2011: 33, 47-48). An ASIO intelligence report of this meeting noted that “we have advised [a foreign government] that, after consultation with DFAT [Department of Foreign Affairs and Trade], AGD [Attorney-General’s Department], PM&C
[Department of Prime Minister and Cabinet] and the AFP, we could not knowingly agree to Habib being sent to Egypt given that there is no warrant for his arrest and given Egypt’s poor human rights record” (Thom 2011: 34). The Inspector-General subsequently described ASIO’s formulation of words as “an unfortunate choice”. “This formulation risks being misinterpreted as Australia possibly being willing to turn a blind eye to the transfer,” she said (Thom 2011: 35). The Howard government also used the fact that Egypt never officially acknowledged it had Habib in its custody to avoid questions about his treatment (Evidence to Senate Legal and Constitutional Affairs Committee 24 May 2004: 17). For example, in 2005 Foreign Affairs Minister Downer said: “[F]or all I know he may have been badly treated in Egypt but we don’t know because the Egyptians have still not conceded to us that they held him” (2UE 14 Feb. 2005).

One additional move by the Howard government when challenged on Hicks’s and Habib’s torture allegations was to rely wholly on US investigations into the men’s claims which invariably cleared American personnel of wrongdoing. The Howard government refused to conduct its own independent inquiry. Initially the government sought, and received, assurances from the Americans that the Australians at Guantánamo Bay were being treated humanely (Seccombe 12 May 2004; Evidence to Senate Legal and Constitutional Affairs Committee 24 May 2004: 21). Coming under increasing pressure in the wake of the Abu Ghraib allegations, Australia requested more thorough inquiries. The US military conducted two inquiries. One, ordered by the US Deputy Secretary of Defense, found “no information to support the abuse allegations”, but acknowledged Habib had been forcibly removed from his cell by the “IRF” (Initial Reaction Force) team, known to brutalise detainees, four times “as a consequence of his threatening and disruptive behaviour” (Downer 26 Aug. 2004a). The second, by the Naval Criminal Investigative Service (NCIS), cleared the US of allegations its forces abused Hicks and Habib (Sales 2007: 155; Howard 16 Jul. 2005). When the independence and reliability of the US investigations were questioned, the Howard government took exception. Downer suggested “if that's someone's view of America I suppose nothing will help those people” (Downer 26 Aug. 2004b). Howard labelled such questions “cynical” (Howard 16 Jul. 2005; Metherell 18 Jul. 2005).
The Inspector-General of Intelligence and Security noted the government’s reluctance to examine Habib’s allegations of torture in Egypt. Thom commented that, when Habib reported his torture to Australian officials visiting Guantánamo Bay in 2002, it was “not apparent that the Australian Government undertook further liaison with the US, Pakistan or Egyptian Governments at this time with respect to Mr Habib’s allegations” (Thom 2011: 79). The Attorney-General demonstrated a similar disregard for Habib’s treatment in Egypt years later. When asked by a journalist in 2005 whether it was time to ask the US about Habib’s rendition, Ruddock replied: “Well, I mean, what would be the value of it? To make it public?” (SBS 9 Mar. 2005).

The Howard government’s indifference regarding the welfare of citizens at Guantánamo Bay came under direct challenge in 2006, when a discernable shift occurred in the public mood over the treatment of Hicks. The change in Australian public sentiment was signalled by the number of government backbenchers voicing concerns about Hicks, first in the party room in 2005 and, eventually, in 2006, publicly (‘News in Focus’ 13 Aug. 2005; Dodson et al. 15 Jun. 2006; Banham 4 Nov. 2006; Banham and Coorey 10 Nov. 2006). The backbenchers reflected the growing concerns of their constituents (Marr 13 Jan. 2007). Some were also influenced by the sustained advocacy of Hicks’s American military lawyer, Major Michael Mori (Judi Moylan, tel. interview 9 Jan. 2013). They were accompanied by a chorus of high-profile Australians who, during 2006 and early 2007, vented concerns over Hicks’s continuing detention without trial – concerns that deepened when the Hamdan v Rumsfeld decision threw the military commission system into chaos (Sales 2007: 207, 210). These public figures included former High Court justices, diplomats, state premiers, a prime minister, church leaders, a state director of public prosecutions, state (Labor) attorneys-general, the AFP Commissioner and Australian military lawyers (Sales 2007: 212-213; Woolcott 21 Jan. 2006; Pelly 4 Mar. 2006; Stephens 25 Nov. 2006; ‘News Focus’ 20 May 2006; Coorey 3 Jul. 2006; Morris 17 Oct. 2006; 2 Dec. 2006; Carlton 4 Nov. 2006; Dick and Coorey 11 Nov. 2006).

At the close of 2006, a poll commissioned by the grassroots political group GetUp! found that 71 per cent of Australians believed Hicks should be returned home, even if he was not charged (Pearlman 14 Dec. 2006). With a federal election looming in 2007, the media reported that Hicks had become a political problem for Howard (Coorey 15
Dec. 2006). Howard acknowledged this in his memoirs, calling Hicks’s ongoing detention without trial a “barnacle” – that is, an issue “which really aggravated sections of the electorate for no long-term policy gain and where no important principle was at stake” (Howard 2010: 634). With this political realisation, the government’s rhetoric on Hicks changed (Sales 2007: 213). For example, in May 2006 it blamed Hicks’s legal team for delays in bringing him to trial because of its legal appeals against the fairness of the military commission system (Howard 15 May 2006). In January 2007, however, the Prime Minister’s focus turned sharply to the Bush Administration. Howard demanded it charge Hicks under the new post-Hamdan military commissions by mid-February, saying the “acceptability of him being kept in custody diminishes by the day” (Banham 5 Jan. 2007; Howard 23 Jan. 2007).

In February 2007, with government MPs insisting that Prime Minister Howard bring Hicks home “like the Brits did”, and as polls showed voter dissatisfaction over the government’s handling of Hicks stood at 60 per cent, the US issued Hicks with new charges (Sales 2007: 254; Coorey and Banham 7 Feb. 2007; Coorey 12 Feb. 2007). Hicks’s military commission commenced on 26 March 2007, and his plea deal was finalised the same day (Sales 2007: 254). Hicks has since complained of political interference by Australia in the decision by the US to prosecute him, a claim backed up by the chief prosecutor at his trial, Colonel Morris Davis (Hicks 2010a: 40; White 30 Apr. 2008).

B The Rudd Government

The Rudd government maintained some aspects of its predecessor’s approach towards Hicks and Habib. For example, it placed Hicks under a control order in accordance with section 104.4 of the Australian Criminal Code Act 1995 for a year when he was released from prison in Australia, effectively legitimising his military commission plea deal (Independent National Security Legislation Monitor 20 Dec. 2012: 21).

The Rudd government also continued to fight Habib’s Federal Court claim against the Commonwealth, launched under the previous government (Gibson 15 Sep. 2009; O’Brien 21 Nov. 2007). Habib’s claim alleged officers of the Commonwealth aided,

abetted and counselled his torture by foreign officials in Pakistan, Afghanistan, Egypt, and Guantánamo Bay.  In February 2010 the Full Federal Court agreed to hear Habib’s case. The Rudd government resisted calls for an independent inquiry into Habib’s allegations of torture, despite new evidence emerging from Senate Estimates committee hearings about the Australian government’s prior knowledge of his rendition to Egypt (Snow and Marr 16 May 2009). Instead, as the Howard government had done previously, the Labor Attorney-General Robert McClelland pointed to the findings of the US NCIS inquiry which had found “no evidence of maltreatment or abuse” of Hicks or Habib (Snow and Marr 16 May 2009).

C The Gillard Government

In July 2011, with the Gillard government in power, the Commonwealth Director of Public Prosecutions (DPP) launched proceedings against Hicks under the Proceeds of Crime Act 2002 for royalties received from his memoirs, published in 2010 (Edwards and Maley 21 Jul. 2011). The laws used to prosecute Hicks contained amendments made by the Howard government in 2004 that were specifically aimed at Hicks and Habib and at hindering their capacity to reveal details of their treatment once released (Hocking 2007: 223). The DPP discontinued the proceedings against Hicks in July 2012 when new evidence was produced by Hicks’s legal team concerning the reliability of his admissions in the US military commission (Commonwealth DPP 24 Jul. 2012).

In December 2010, the Gillard government settled Habib’s Federal Court case against the Commonwealth for an undisclosed sum (Thom 2011: 14). Following the settlement, Gillard asked the Inspector-General of Intelligence and Security, Vivienne Thom, to conduct an inquiry into the actions of Australian intelligence agencies in relation to Habib’s arrest and detention overseas from 2001 to 2005; this was subsequently expanded to include the Attorney-General’s Department and the Department of the Prime Minister and Cabinet (Thom 2011: 12-13). Gillard’s decision to order the inquiry resulted from a recommendation by the Attorney-General’s Department that this was the appropriate action because Habib’s allegations against

53 Media reported that the government settled Habib’s claim after the emergence of new witness statements, including from a former Egyptian military intelligence officer, allegedly implicating Australian officials in his torture in Egypt (Neighbour 15 Jan. 2011).
officials of the Commonwealth raised in proceedings would not be tested in court (Labor MP, tel. interview 24 Jan. 2013). The government dismissed the option for a royal commission, partly out of a desire not to upset currently serving senior public servants who had been involved in the Habib case (Labor MP, tel. interview 24 Jan. 2013).

An unclassified version of the Inspector-General’s report was released in March 2012. In assessing the actions of Australian officials, Thom adopted a more narrow and restricted definition of complicity than the UK Parliament in relation to the torture issue. Under Thom’s definition of complicity in the torture of a state’s citizens, officials from that state must have had “actual, as opposed to constructive, knowledge of the circumstances of the intentionally wrongful act”, and the aid or assistance provided by the officials must have been given “with a view to facilitating, and in fact facilitate, the commission of the act of torture” (Thom 2011: 108-109). Thom made a number of findings that were critical of Australian government agencies over their handling of Habib’s case, but ultimately found that no Australian officials knew where in Egypt he was detained, nor attended his place of detention, nor were present during his interrogations (Thom 2011: 6). Thom found, however, that ASIO should have made enquiries about how he would be treated in Egypt before providing information for use in his questioning there (Thom 2011: 7). She also found that although Australian officials “gave strong and consistent messages” to foreign governments that they would not agree to his transfer to Egypt, the head of ASIO did not take sufficient action to advise relevant ministers or DFAT that there was an urgent need for Australia to escalate its objections to this occurring (Thom 2011: 8). In addition, Thom said, once Habib was at Guantánamo Bay, Australia had “insufficient regard” to the fact he was held without charge and without access to any legal process for a significant period of time (Thom 2011: 8).

54 The British Parliament’s understanding of complicity encompassed conduct including the provision of questions by UK agents to such foreign intelligence services to be put to a detainee who has been, is being, or is likely to be tortured, as well as the lack of any apparent action taken by the UK personnel/agency to establish whether torture was occurring and to prevent it from continuing (Thom 2011: 108-109).
The Australian Parliament provided modest accountability of the executive’s actions on Hicks and Habib. This occurred mainly through the Senate, with its strong committee system.

\textit{A Cowed Opposition}

I have briefly sketched the position of Labor governments following the defeat of the Howard government in 2007 on the Hicks and Habib cases. In the immediate aftermath of 11 September 2001, the Labor Party, the largest federal opposition party, was demoralised and divided, experiencing five leadership changes in 11 years. Labor’s confidence was shattered by its defeat at the 2001 federal election – an election fought over asylum seekers and national security – and the federal parliamentary party was racked by fear of being viewed by voters as weak on terrorism (Marr and Wilkinson 2003; Wright-Neville 2006: 13). The issue of preserving civil liberties in the war on terror caused internal divisions inside Labor. Those advocating for human rights were a distinct minority (Labor MP, tel. interview 10 Jan. 2013). This attitude extended to Hicks and Habib, who were commonly viewed within the ALP as “electoral poison” (Labor MP, tel. interview 15 Jan. 2013). To be seen advocating for their rights in the years immediately after 11 September would “have been seen to be defending terrorists – that would have been an explosive position to have been held by the leadership”, according to a Labor senator (Nick Bolkus, tel. interview 17 Jan. 2013). Hence for most of Hicks’s (and Habib’s) detention at Guantánamo Bay, the Labor Party “kept reasonably quiet, obviously sharing the government’s assessment that most Australians had no sympathy for the prisoner” (Sales 2007: 220).

The opposition’s approach towards Hicks and Habib was distinct from that of the government in at least two ways. One was that Labor lacked a consistent policy. Its position with respect to Australia’s obligations to stand up for its citizens’ rights was influenced by the views of the party leader at the time. Labor’s leader from 2001 to 2003, Simon Crean, repeatedly called for Hicks and Habib to be returned to Australia and tried at home (Altmann et al. 14 Dec. 2001; Riley and Norrington 24 Oct. 2003; ABC 8 Feb. 2002). By contrast, the Labor leader from 2003 to 2005, Mark Latham,
agreed with the government that Habib’s torture allegations should be treated cautiously since they were from an unreliable source (Chulov and Kerin 21 May 2004). Latham’s position was at odds with some members of his party, with Labor MP Duncan Kerr, for example, accusing the government of turning a blind eye to abusive interrogations at Guantánamo (Wilkinson and Banham 2 Dec 2004). Latham’s successor, Kim Beazley, who led the opposition from 2005 to 2006, continued to disregard Habib’s torture allegations. Following Habib’s return to Australia, Beazley declared that the Senate “should not waste a minute” seeking his testimony about his detention (ABC 18 Feb. 2005). At the same time, Labor’s shadow attorney-general, Nicola Roxon, publicly chided the government over its secrecy in relation to Habib’s release from Guantánamo Bay, labelling his torture allegations “very serious” (Banham 13 Jan. 2005).

A second feature of Labor’s attitude towards Hicks in particular was its opportunism. Labor hardened its approach in 2006, becoming more critical of the government’s position on Hicks, as public concern increased over the length of his detention without trial. Rudd, who was opposition leader, called for the closure of Guantánamo Bay and a fair trial for Hicks (Franklin and Shanahan 16 Dec. 2006). However, Labor’s ambivalence was soon again on display. Despite previously having said Hicks would not receive a fair trial under the US military commission process, once his plea deal was announced, Rudd’s position changed (Coorey 12 Feb. 2007; 21 Feb. 2007). Rudd now advocated allowing the military commission process to unfold without impediment (Coorey 29 Mar. 2007; Price 29 Mar. 2007).

B A Robust Senate

The Australian Senate usually wields considerable power in the federal parliamentary system (Larkin and Uhr 2010: 136). It is elected by a different voting system to the government-dominated House of Representatives. This means the minority parties often hold the balance of power in the Senate. While the House of Representatives is the scene of partisan clashes, the Senate tends to be a more considered forum for the scrutinising of government legislation and policy through its robust committee system. Harry Evans, a former clerk of the Australian Senate, argued that the Senate plays a critical role in constraining arbitrary political power – and that without it, governments would be “freer to practise malfeasance and concealment” (Evans 2008: 77). The
effectiveness of the Senate however depends on its not being under government control (Evans 2008: 71).

One of the Senate's most important roles in checking the executive is its inquiry function, which gives it the power to compel governments to provide information and explain themselves in ways that otherwise would not be required (Evans 2008: 75; see also Kinley and Ernst 2012: 62). Philip Norton argues parliamentary committee systems often serve as the only forum in which civil servants can be questioned and speak publicly about governmental policy and actions, since they are not able to speak freely to the media (Norton 2005: 120). Australia's Senate committee system has been praised for providing locations for strengthening government-citizen connections and broadening participation in the deliberative process (Smith 2003: 124).

The Senate inquiry system enabled executive accountability on the Hicks and Habib cases during Howard's prime ministership and beyond, particularly in terms of obtaining information from the government that would otherwise have remained secret. Senators from Labor, the Australian Greens and the Australian Democrats used Senate Estimates hearings to pursue departmental and agency officials for information about Hicks and Habib. For example, after Habib's repatriation, senators obtained details from public officials about Australia's involvement in and knowledge of his rendition to Egypt. In hearings in 2005, the heads of the AFP and ASIO revealed their officers and agents had interviewed Habib in Pakistan in 2001; that he had made allegations of mistreatment in 2001 and 2002; and that ASIO had established Habib was "definitely" in Egypt by 2002 (Evidence to Senate Legal and Constitutional Affairs Committee 15 Feb. 2005: 5-7, 31). The Senate Standing Committee on Legal and Constitutional Affairs and the Senate Privileges Committee pursued inconsistencies in various officials' accounts of the circumstances surrounding Habib's rendition (Senate Committee of Privileges 2008). Then, in 2008, Australian officials confirmed in the Senate Estimates process that the US had consulted the Australian government before sending Habib to Egypt (Letter From O'Sullivan 23 Jun. 2008). Nick Bolkus, a 25-year Labor veteran of the Senate, explains the importance of the committee process on Habib's case:

The Senate committees, I think, have got their potential to highlight issues in a way that the House of Representatives doesn't, and in a way that is actually acceptable to the
broader community. So I didn’t have to say ‘Habib needs to be let free’, but I could ask questions about his treatment in a way that agencies were starting to worry about what the opposition knew (Bolkus, tel. interview 17 Jan. 2013).

VI THE JUDICIARY

Australian courts played a minor role in checking government policy on Hicks and Habib, with the men launching litigation only after a number of years had passed since their initial detention. Each sued the federal government over its failure to protect their rights as Australian citizens. Habib launched an action in the High Court after his return to Australia, alleging (as noted) Commonwealth officers were complicit in his torture by foreign states while detained overseas.\(^55\) Hicks’s legal team launched an action in the Federal Court in 2006, arguing the Commonwealth was responsible for his ongoing wrongful internment.\(^56\)

In both cases, the Federal Court agreed to hear the men’s claims, rejecting the government’s argument that it lacked jurisdiction because of the “act of state doctrine” (the principle that courts will not make findings about the unlawfulness of an act of a foreign state).\(^57\) In *Hicks v Ruddock* the Court determined that the area of law regarding the act of state doctrine was one where principles were still developing and there were no clear authorities justifying judgment against Hicks. Justice Tamberlin also noted:

> It must be kept firmly in mind that this case concerns the fundamental right to have cause shown as to why a citizen is deprived of liberty for more than five years in a place where he has not had access to the benefit of a duly constituted court without valid charge.\(^58\)

In *Habib v Commonwealth of Australia*, Chief Justice Black found that neither the common law nor domestic torture legislation supported the application of the act of state doctrine where grave breaches of human rights were affected. Black CJ also commented on:

\(^{55}\) The High Court transferred the matter to the Federal Court; see *Habib v Commonwealth of Australia* [2006] HCATrans 202 (26 April 2006).
\(^{56}\) *Hicks v Ruddock* [2007] FCA 299.
\(^{57}\) Ibid., [5].
\(^{58}\) Ibid., [90].
the status of the prohibition against torture as a peremptory norm of international law from which no derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy.59

Neither case proceeded to judgment. In Habib’s case, this was because the Gillard government settled his claim. Hicks’s case was discontinued when the Howard government brought him home. Nevertheless, in both cases the Federal Court signalled a judicial resolve to scrutinise executive action (Tully 2010: 719).

VII CIVIL SOCIETY’S LACK OF PRESSURE

Australia responded to the detention of two of its citizens in the war on terror, and their allegations of torture, with indifference. This position was driven by an executive determined to support the US and its war on terror, even when its ally’s actions clearly undermined international human rights principles enshrined in treaties such as CAT. That the executive was able to sustain this stance over a long period is partly explained by the weak federal opposition and by the fact that the courts had minimal involvement in challenging the executive.

However, questions remain about Australia’s response to its citizens at Guantánamo Bay. Why was the executive unmoved when the UK rejected the military commissions as unfair according to international standards of justice? Why did Hicks’s case only become a difficult political issue for the government in 2006 and, even then, only for a brief period, until he was brought home? Why did Habib’s case, with its compelling narrative of torture at the hands of a foreign regime, never become a political issue for any federal government? Alliance-based explanations would suggest that Australia’s choices were constrained as a junior partner with much lesser capabilities in the war on terror (Walt 2009: 86). Heavily reliant on America for its international security, Australia would do everything possible to guarantee the allegiance of its powerful friend, including supporting a legally questionable detention regime. This realist account, however, fails to explain many dimensions of the executive’s behaviour on the international torture issue. For example, once the Hicks matter became a damaging election issue, the Howard government had no hesitation in demanding the US return the Australian citizen without delay.

Liberal international theory directs attention to domestic factors in order to understand government behaviour on international human rights principles and law (Simmons 2009; Risse, Ropp and Sikkink 2013; Cohen 2012). This is because international law alters domestic politics by focusing citizens’ expectations about government behaviour (Simmons 2009: 13-14). While insightful, this literature, as I argued in Chapter Two, makes generalisations about the homogeneity of civil society in stable liberal democracies. To understand variation between long-term liberal democracies on international torture, we need to pay more attention to the different enabling and constraining factors that characterise individual polities, including rights cultures as well as institutional and political opportunity structures. In this section I employ this framework in my analysis of Australian civil society’s behaviour on the Hicks and Habib cases.

A Prominent Actors

I divide civil society actors who had an interest and involvement in the Hicks and Habib cases into five categories. They are lawyers and legal organisations, human rights and other non-governmental organisations (NGOs), families and other personal advocates, Muslim community groups and the media.

Lawyers and legal organisations played a more vocal and consistent role in criticising Australian government policy on Hicks and Habib than other NGOs. Most prominent was the Law Council of Australia, the peak national body in Australia representing the legal profession.60 The International Commission of Jurists Australian section (ICJ) was active, as was the Human Rights Law Resource Centre (HRLRC) (now the Human Rights Law Centre). Individual lawyers, legal academics and judges also raised concerns about Australia’s position on its citizens at Guantánamo Bay. By contrast, Melbourne legal academics Mirko Bagaric and Julie Clarke argued torture was morally defensible (Bagaric and Clarke 2005; Bagaric 17 May 2005). Bagaric and Clarke were

---

not isolated in this view. For example, their position was defended by barrister and former chairman of the National Crime Authority, Peter Faris QC (O’Connor 23 May 2005). These different legal occupations, in mobilising on the Hicks and Habib cases, can be thought of as comprising Australia’s “legal complex” (Halliday et al. 2007: 3). Terence Halliday and others argue that the politics of a legal complex of legally trained occupations, centred on lawyers and judges, “drives advances or retreats from political liberalism” (Halliday et al. 2007: 3).61 The effectiveness of the legal complex is driven by the legal profession’s structural capacities for mobilisation. In other words, the legal complex will be more successful when the different legal occupations are able to work together and speak with a united voice, and less so where the profession is highly segmented. The record of Australia’s legal complex in bringing about progressive political change in the Hicks and Habib cases was mixed, as evidenced not only by Bagaric and others, but in additional ways that will be explored below.

A small number of human rights and other NGOs engaged in advocacy on the Hicks and Habib cases, including the New South Wales Council for Civil Liberties (NSWCCL) and GetUp!, a web-based political movement. The Australian section of Amnesty International also lobbied the government over the treatment of citizens at Guantánamo Bay. Among families and other personal advocates, three individuals stand out. Hicks’s father Terry and his US military lawyer Major Mori were very effective in mobilising support for David Hicks. Habib’s wife, Maha Habib, though active in pushing her husband’s cause, faced more hurdles in connecting with the Australian public. Muslim community groups were restrained in their lobbying efforts for Hicks and Habib. I focus on two organisations: the Australian Federation of Islamic Councils, the country’s umbrella Muslim organisation (now Muslims Australia) and the Lebanese Muslim Association, which runs Australia’s largest mosque. The Australian media played a minor role in the Hicks and Habib debate. I examine the editorials of two major Australian broadsheets published between 2001 and 2010 that mentioned the men: The Sydney Morning Herald and The Australian.

---

61 By the term political liberalism, the authors refer to the protection of basic legal freedoms through a moderate state and an autonomous civil society (Halliday et al. 2007: 10-11).
Australian civil society faced a difficult and hostile political context after 11 September. One feature of Australia’s political environment was the panic engendered by 11 September, which meant any issue linked to national security was easily and readily politicised. This created risks for NGOs advocating on human rights issues in the context of the war on terror.

Australia’s Muslim community, which encountered intimidation in the wake of 11 September similar to others in Western countries, was particularly affected by this sensitive political climate. Muslims felt singled out by the Howard government’s counter-terrorism rhetoric and laws (Wright-Neville 2006). This bred alienation, suspicion and paranoia, and affected the Muslim community’s readiness to take action on Hicks and Habib. Its apprehension about publicly supporting the men was not assisted by the fact that before 11 September, key Muslim organisations were divided and plagued by infighting, which diminished their ability to form a united front on political issues more generally (Patel, tel. interview 18 Jan. 2013). Prominent Australian Muslim leaders support this analysis of the community’s behaviour. For example Keysar Trad, spokesman for the Lebanese Muslim Association, said: “The political climate immediately following September 11 was very, very tense and certainly many Muslims in Australia were made to feel either unwelcome or to feel that we were under a very huge spotlight” (Trad, tel. interview 14 Jan. 2013). Another Muslim leader, Ikabel Patel, former president of the Australian Federation of Islamic Councils, explained: “At that time to show yourself as a leader and to articulate for the Muslim interests or to try and calm the situation you had to be very, very courageous” (Patel, tel. interview 18 Jan. 2013). The Muslim community feared that taking up Hicks’s and Habib’s causes would invite suspicion (Harris 16 Feb. 2005). Patel notes:

I felt at that time both for Mamdouh as well as for Hicks that the Muslim community did not do as much as we could in trying to organise the civil society around what was their incarceration and what was going on. ... I think one of the main reasons certainly from my perspective was we didn’t know enough about what their involvement was. ... To go and support somebody, you can’t do it blindly (Patel, tel. interview 18 Jan. 2013).

My analysis of Australian media reveals that in 2004, the year before Habib’s return to Australia, there were no mentions of any Australian Muslim organisations in The Sydney Morning Herald in connection with Hicks or Habib. In The Australian, two articles mentioned Australian Muslim organisations; one attributed only negative comments about Habib to such organisations (Stewart and Harris 17 Jul. 2004; the other was Stewart and Perry 25 May 2004).
The Law Council also experienced intimidation in advocating for human rights in relation to the war on terror. The Law Council was highly critical of the Australian government over its treatment of Hicks and Habib, particularly its support for the US’s military commissions. It released 56 press releases on the subject over the period 2001 to 2010. As a result of its sustained advocacy, the Law Council was accused by the government of “imperial overreach” (Ruddock 3 Nov. 2006). “For the nation's peak professional body to have so little to say about the profession and so much to say about fashionable issues is surprising,” Attorney-General Philip Ruddock commented (Ruddock 3 Nov. 2006). While this did not deter the Law Council, its legal observer to Hicks’s military commission, Lasry, says those advocating for the rights of Australians at Guantánamo Bay were “treated as apologists for terrorism” and those prepared to do such work were “very much in the minority” (Lasry, tel. interview 8 Jan. 2013).

The Attorney-General’s attacks on the Law Council point to another feature of the challenging political context confronting civil society after 11 September, which was the Howard government’s strained relationship with the NGO sector. This tension was a product of the government’s ideological position, namely that NGOs, particularly those engaged in advocacy for the rights of minorities, lacked representative legitimacy (Howard 1996; Maddison, Denniss and Hamilton Jun. 2004: 14-15; Sawer 2004: 40). A result was that the Howard government adopted policies and positions critical of, and occasionally hostile to, the role of NGOs and their critiquing of human rights issues in Australia (Rice and Calnan 2007: 8). It is argued that this marginalisation of NGOs had a demobilising effect on movement actors and resulted in reduced government accountability (Maddison and Martin 2010: 108; Maddison and Denniss 2005: 373). “Australian social movements struggled to develop ‘repertoires of contention’ or protest tactics … that would engage the public and attract media attention during much of the Howard era,” Sarah Maddison and Greg Martin contend (Maddison and Martin 2010: 111). The Howard government’s efforts to delegitimise the engagement of domestic advocacy groups in public debate extended to international forums. In 2000, for example, Foreign Affairs Minister Downer said UN committees were losing credibility because they were too accepting of NGO submissions (Downer 18 Sep. 2000). The Howard government’s adverse views of NGOs resulted in a relatively closed political
system. Combined with the fact that for many years Prime Minister Howard led a highly disciplined government, with few internal public dissenters, this meant there were few openings for civil society actors to access the policy-making process.

A further feature of the testing domestic political context for civil society concerns the high volume of human rights issues that confronted NGOs after 11 September, overwhelming Australia’s modest and poorly organised human rights sector. This avalanche of issues included the Howard government’s draconian counter-terrorism laws and its harsh asylum seeker policies. Chris Sidoti, a former Australian Human Rights Commissioner, spoke in 2005 about the demoralisation of the Australian human rights community and of “a lack of focus, a lack of leadership, and a lack of co-ordination” in the sector (Sidoti 20 Jan. 2005: 11). In their study of Australian human rights NGOs, Simon Rice and Scott Calnan noted that many were limited in their capacity to deal with human rights issues and that human rights issues in Australia were not being addressed sufficiently or at all (Rice and Calnan 2007: 8). Australia, unlike most other Western democracies, has no national human rights NGO, though it has a number of NGOs that carry out advocacy in the human rights field (Rice and Calnan 2007: 20-22).

This portrayal of the sector as being swamped after 11 September suggests the operation of powerful domestic political constraints. That is, Australia’s human rights NGOs are hampered by a weak national rights culture and the lack of any federal legislative guarantee of human rights standards, the absence of which limits community understandings and commitments about rights. One result is that “international human rights standards are marginal to political debate and policy development in Australia” (Rice and Calnan 2007: 10). This view was supported by the National Human Rights Consultation which reported that “Australians know little about their human rights – what they are, where they come from and how they are protected” (National Human Rights Consultation Sep. 2009: v). The concept of an Australian rights culture is necessarily a very general one. It does not reflect the country’s complex histories of its indigenous people and different migrant populations, whose encounters with Australian politics and society sometimes involved human rights transgressions. In this sense, the idea of an Australian rights culture assumes a dominant narrative, a part of which is a
lack of familiarity with terrorism or human rights abuses. This is not the experience of all Australians.

Human rights and political activists supported the idea that Australia’s human rights sector was ill-equipped to deal with events after 11 September. Cameron Murphy, former president of the NSWCCL, believes that: “At the time a lot of NGOs just sort of threw their hands up and said ‘what do we do, we can’t argue for anything at the moment’” (Murphy, tel. interview 31 Jan. 2013). GetUp! was formed in August 2005 partly in response to the dejection afflicting Australian civil society, which worsened after the Howard government won control of the Senate in 2004 (Brett Solomon, tel. interview 21 Feb. 2013). It describes itself as “an independent, not-for-profit campaigning organisation using new technologies to inform, connect and empower Australians to have a voice on a range of national issues” (GetUp! 2006: 5). Hicks’s case was one of GetUp!’s core foundation issues (Solomon, tel. interview 21 Feb. 2013). Its former executive director, Brett Solomon, says:

I think that civil society and particularly the progressive side of civil society was extremely despondent, there was no political momentum, there was a series of failed campaigns, and I don’t think it was so much that we were of the opinion that civil society wasn’t doing enough, but that traditional ways of trying to create change were not working (Solomon, tel. interview 21 Feb. 2013).

Another organisation, the HRLRC, was formed around the same time as GetUp!, in late 2005. Its former director, Philip Lynch, recalls that the imperative for the organisation’s establishment was that legal advocacy and strategic litigation, useful tools for human rights change, were not being used as fully or effectively as they could be (Lynch, tel. interview 19 Jun. 2013). As with GetUp!, the Hicks case was one of the first issues in which the HRLRC became involved. The initial work produced by the HRLRC was a 2006 legal opinion co-authored by six eminent jurists, barristers and legal academics, which argued Hicks’s US military commission breached international and Australian law and could constitute a war crime under the Australian Criminal Code Act 1995 (which incorporates the Rome Statute of the International Criminal Court into domestic law) (Nicholson et al. 9 Nov. 2006). Lynch says “more should have been done” on the issue of the lack of accountability for international torture alleged by Hicks and Habib, “but for [HRLRC] to have taken this on, this would have meant forgoing work on some other human rights issue” (Lynch, tel. interview 19 Jun. 2013). The fact that Australian
human rights NGOs did not organise around the issue of torture accountability in their domestic advocacy partly reflected the limited size and capacity of the sphere. Says Lynch:

Part of the reason you see certainly in the UK more focus [on torture accountability] is because … it’s a bigger society, it’s a bigger civil society, and there are larger and also more specifically focused organisations (Lynch, tel. interview 19 Jun. 2013).

The formation of new domestic civil society actors such as GetUp! and the HRLRC around the issues of the Australian government’s treatment of Hicks, both established to fill a perceived gap in the Australian human rights sphere, is an example of transgressive contentious politics discussed in Chapter Two (McAdam et al. 2001: 7-8). This encompasses the idea that substantial short-term political and social change more often emerges from transgressive contention, where newly self-identified political actors emerge (McAdam et al 2001: 8). Political change eventuated with respect to the issues around which groups like GetUp! and the HRLRC mobilised – namely the repatriation of Hicks and the illegality of his military commission. However the same cannot be said of the torture issue, an issue that largely remained untouched by these civil society groups.

C Civil Society’s Approach

Against this challenging domestic political context of closed political opportunity structures and a weak rights culture, I examine some distinctive themes that arose in relation to Australian civil society’s approach to the Hicks and Habib cases.

1. A Delayed Response

The first feature of civil society’s approach is that it was slow to organise around the issue of Australians at Guantánamo Bay. Activism on the issue only gathered momentum in 2006, a year after Habib had returned home and two years after the UK began repatriating its nationals. Human rights campaigners talk about the convergence of a number of indirectly connected issues that ultimately turned public opinion on Hicks’s situation around this time. They include two high-profile wrongful immigration detention cases and the protracted length of time Hicks had spent at Guantánamo Bay
Lasry says it took until Hicks had been in custody for five years without a trial, or much prospect of one, for Australians to begin thinking “whatever he’s done, this just doesn’t seem fair” (Lasry, tel. interview 8 Jan. 2013). Although individuals and organisations in civil society aired concerns over the detention of Hicks and Habib before then, media reporting of the cases in *The Australian* and *The Sydney Morning Herald* prior to 2006 makes it clear this did not occur with any intensity. The churches, for instance, only publicly criticised Australian government policy on Hicks from late 2006 and did not touch the torture issue (Morris 17 Oct. 2006; 2 Dec. 2006; Wallace et al. 8 Feb. 2007; Stewart 10 Mar. 2007).

This delayed mobilisation is further illustrated by an examination of the more active civil society groups. Amnesty International Australia issued 19 press releases on Hicks and Habib between 2001 and 2010. Its main focus in Australia from 2001 to 2005 was refugees (Katie Wood, tel. interview 18 Jan. 2013). Its campaign on Hicks accelerated in 2006. Amnesty International’s tardy activism was influenced by decisions taken at the International Secretariat level, which fixed the organisation’s position on the Australians detained at Guantánamo Bay (Wood, tel. interview 18 Jan. 2013). Until 2006, that position was characterised by a reluctance to call for detainees to be brought home while the US was still making changes to the military commissions. This stance shifted with the visit of the organisation’s Secretary-General, Irene Khan, to Australia in 2006, who forced a change in Amnesty International’s policy and rhetoric. One of Amnesty International’s most high-profile campaign events following this shift involved touring the eastern states of Australia with a replica of Hicks’s cell at Guantánamo Bay (Gibson 19 Mar. 2007). This tour only launched in March 2007.

The campaigns of the HRLRC and GetUp! began in late 2005, when the organisations were established. The HRLRC’s former director, Lynch, says while the Hicks case itself did not drive the establishment of the Centre, “it was a relevant factor in identifying the need for such an organisation and the kinds of strategies it might use” (Lynch, tel. interview 19 Jun. 2013). GetUp!’s decision to take up the Hicks issue was driven partly by member concerns (ascertained through surveys, emails and comments on its blog)

---

63 The cases involved permanent resident Cornelia Rau in 2005 and Indian national DrMohmaed Haneef in 2007.
64 This is based on the Amnesty International website, and the provision by Amnesty International Australia of its records of all press releases on the Hicks and Habib cases.
and because of pressure from Hicks’s family and its lobby group, Fair Go For David (Solomon, tel. interview 21 Feb. 2013). In mid-2006, Solomon, GetUp!’s executive director, realised the Hicks case had progressed from being a “niche” human rights issue into a mainstream political concern. That moment of realisation came when GetUp! organised a public candlelight vigil for Hicks in central Adelaide (ABC 23 Aug. 2006). It was attended by approximately 2000 people, says Solomon, “all these beautiful families – I’m not talking ratbag activists but families, mums and dads with grandmothers and kids” (Solomon, tel. interview 21 Feb. 2013).

In the legal sector, the ICJ expressed concerns about the Australians at Guantánamo Bay in 2002 (Banham and Alcorn 12 Jan. 2002; Banham et al. 19 Jan. 2002). However, the ICJ’s campaign over Hicks began in earnest in 2006, with the drafting of an open letter to the Prime Minister containing 76 signatories, including four former Supreme Court and Federal Court judges (Kerbaj 3 Jun. 2006). The president of the ICJ’s Australian section, John Dowd QC, says by this time Hicks’s treatment “had become a significant electoral image damaging the government, so that a number of us formed the view that we could force Howard’s hand by raising the issue” (Dowd, tel. interview 20 Feb. 2013). The timing of the open letter points to the tardy response by Australia’s judicial sphere to the situation of citizens at Guantánamo Bay. At least two former High Court justices had publicly criticised the treatment of detainees before 2005 – but five more former and sitting High Court justices did in 2005 and 2006 (Macfarlane 30 May 2003; Gibbs 27 Jan. 2004; Horin 1 Nov. 2004; 6 Aug. 2005; ‘Hicks Furore’ 5 Aug. 2005; Pelly 4 Mar. 2006; Stephens 25 Nov. 2006; Ramsey 10 Sep. 2005; Wilkinson 7 Oct. 2006; Gleeson 6 Oct. 2006). In 2003, an editorial in The Sydney Morning Herald criticised the failure of Australia’s judiciary to speak out earlier, drawing a contrast with the UK where Lord Steyn had publicly condemned the Guantánamo Bay military commissions. “It is a pity that in Australia, all too few jurists are speaking out in this way,” it commented (Editorial 27 Nov. 2003).

In Australia, then, public opinion, which I distinguish from civil society, appears to have led civil society activism, rather than the other way around.65 This was evident from comments by the ICJ’s president and GetUp!’s executive director. A separate

---

65 See Chapter Two for my definition of civil society, which was founded on Jürgen Habermas’ concept of the public sphere, a domain of social life where “public opinion can be formed” (Seidman 1989, 2005: 232).
point is that, upon examining the role of Australia’s various legal professions, it is clear that the legal complex was not, from an early stage, speaking with a unified voice on the cases of Hicks and Habib. Moreover, it was not speaking much at all on the issue of torture, a second feature of civil society’s approach to which I now turn.

2. A Focus on Legal Process

A consistent theme that emerges from the civil society activism that occurred over the Guantánamo cases is that it concentrated on securing the releases of the Australians and on ensuring they received fair trials. Most of these efforts centred on Hicks, since he was detained for longer. Very little mobilisation occurred domestically around the torture issue and civil society applied no sustained pressure on the government to hold an independent inquiry into the men’s allegations. The torture issue was rarely mentioned again once the men’s releases were secured. The Law Council, the most active civil society organisation on the issue of Australians detained at Guantánamo Bay, is a case in point. Of the 56 press releases produced by the Law Council, three mentioned torture and none referred to Habib after January 2005, when he was released from Guantánamo Bay (Law Council of Australia 8 Oct. 2003; 6 May 2004; 21 Jul. 2005). The bulk of the Law Council’s interest in the Hicks and Habib cases, and most of its criticisms of the Australian government were directed at the men’s rights to a fair legal hearing. The Law Council mobilised earlier than other civil society organisations, with 2004 its busiest year for press releases. During that year, Lasry was appointed independent observer of Hicks’s military commission and attended a preliminary hearing at Guantánamo Bay (Law Council of Australia 17 Aug. 2004; Lasry 20 Jun. 2007).

NGOs made some calls for an official torture investigation, particularly in relation to Habib’s experiences, however this pressure was not sustained. NGOs were pessimistic about the impact of lobbying over torture accountability in Australia, believing it to be futile. The prevalent attitude of NGOs was that no government (whether Liberal-Nationals Coalition or Labor) would hold a torture inquiry anyway and arguing for a fair trial and repatriation were more achievable goals. For example, the ICJ’s Australian

---

section president said: “Issues like that [torture] are murky and people switch off ... there’s no point in trying to get the press excited about complicated issues because the press like it simple” (Dowd, tel. interview 20 Feb. 2013). Amnesty International lawyer Katie Wood noted:

No one in government wanted to or saw the need for it [a torture inquiry], and the reality is, it is fair to say once David Hicks came home, within a year of coming home, the Australian public went ‘yeah, cool, done’, so it just wasn’t an issue that was ever going to get traction with politicians (Wood, tel. interview 18 Jan. 2013).

The NSWCCL former president explained this sense of pointlessness was not limited to lobbying the Howard government for accountability on torture:

We did [push Labor for a torture inquiry] but they just ruled it out and said ‘we’re not going to do it is the answer’, and Habib had taken his own action and sued the government, and at that stage we thought ‘well, it will come out in court’ (Murphy, tel. interview 31 Jan. 2013).

Australia’s major broadsheet newspapers, The Australian (owned by News Limited) and The Sydney Morning Herald (owned by Fairfax Media), displayed little interest in the need for accountability for the alleged torture of Australian detainees in the war on terror. For almost a decade, neither newspaper pushed for an independent commission of inquiry into Hicks’s and Habib’s allegations. On the broader question of the prohibition against torture, The Sydney Morning Herald supported the prohibition absolutely (Editorial 8 Mar. 2005). The Australian argued there were circumstances where a democratic government could be obliged to torture. A 2007 editorial opined that “it is possible – possible – to argue that there can be cases in the age of terror where torture is an act democratic governments could be obliged to undertake” (Editorial 18 Jun. 2007). The position of these two publications is especially noteworthy when considered against the background of the wider context of the Australian newspaper industry, which is the most concentrated in the developed world (Finkelstein and Ricketson 2012: 59). The top two companies, News Limited and Fairfax Media, account for 86 per cent of the market (compared to the United Kingdom and Canada, where the figure is 54 per cent) (Finkelstein and Ricketson 2012: 60). Moreover, News

67 However, in 2011, The Australian editorialised that the Australian government must “do all it can to ascertain exactly what happened to Mr Habib while he was in custody of the Egyptian authorities” (Editorial 28 Apr. 2011).
Limited represents 58 per cent of the total newspaper market in Australia (in the UK the top company represents 34 per cent and in Canada 28 per cent) (Finkelstein and Ricketson 2012: 58, 60). Media have the potential to play a powerful mobilising role on human rights (Arat 2006: 14; Lasner 2006: 266; Nash 2009: 52). On the other hand, a docile media – one which keeps silent or even condones human rights abuses – can achieve the reverse outcome. Australia’s media arguably helped legitimise inaction on state accountability for torture.

Why was civil society so despondent about, or uninterested in, accountability on torture? Lynch, from the HRLRC, links the lack of prominence of the issue of torture accountability in civil society’s advocacy to the inadequacies of the Australian constitutional and legal framework (Lynch, tel. interview 19 Jun. 2013). On the one hand, Lynch suggests there was not as much concrete evidence of the direct involvement of Australian complicity in torture as there was in the UK. But Lynch also cites the absence of a specific federal torture offence or a constitutional prohibition on torture in Australia at the time as a reason advocates framed their claims around fair trial and due process guarantees, rather than torture (Lynch, tel. interview 19 Jun. 2013).

Lynch argues:

To the extent that the Australian legal framework and particularly the constitutional framework provides hooks, it tends to be around due process, a fair trial, and rule of law issues, rather than around human rights and human dignity, and in particular the prohibition against torture or ill-treatment. ... In comparable liberal democracies like Canada with its Charter of Rights and Freedoms, and the UK domestically incorporating the European Convention on Human Rights through the Human Rights Act, there are constitutionally or legislatively enshrined rights to life, rights to liberty and security of the person, and prohibitions against torture and ill-treatment. So part of it is, for advocates, the legal hooks we had available to us (Lynch, tel. interview 19 Jun. 2013).

This pattern of civil society behaviour illustrates the literature on domestic structures in terms of the impact institutions have in shaping policy outcomes by mediating the interests and capacities of groups and individuals (Ikenberry 1988: 222). Australia’s institutional settings directed NGOs to formulate the perception that agitating on torture was pointless. The absence of critical institutional levers constrained the capacities of legal and human rights NGOs to frame arguments based on the right not to be tortured.

---

68 This view was also put by Paris Aristotle, who said torture was an issue “happening elsewhere, but to our allies”, and that Australia’s involvement was too minimal to justify pushing for an inquiry (Paris Aristotle, tel. interview 10 Apr. 2013).
and helped shape their interests about whether they should attempt to contest the breach of this right. This factor also assists in understanding why Hicks and Habib had such little recourse to the courts. By contrast, most of Australian civil society’s calls for accountability on torture were instead made in the international forum of the UN Committee Against Torture. The NSWCCL, the HRLRC and Amnesty International urged Australia to conduct a public inquiry in shadow reports made in the context of the Committee’s third periodic report of Australia, in 2008. These NGOs invoked Australia’s obligations under CAT in their submissions in failing to act on allegations of torture (Amnesty International Oct. 2007: 20; NSWCCL 27 Jul. 2007; HRLRC Apr. 2008). The NSWCCL recommended Australia establish a Royal Commission along the lines of Canada’s Arar Commission (NSWCCL 27 Jul. 2007: 36). This referencing of CAT is consistent with the finding of Rice and Calnan that almost all Australian human rights NGOs (83 per cent) say they rely on international human rights instruments or law in their work (Rice and Calnan 2007: 35).

3. Victim Likeability

Another feature of Australian civil society’s behaviour on Hicks and Habib is that its support for the men was influenced by the personal attributes of individual victims, their family members and close advocates. This aspect of civil society’s approach illustrates the literature on issue selection. Issue selection refers to the opportunistic behaviour that can result from the harsh political and economic imperatives facing human rights NGOs, including competitive pressures and fiscal uncertainty (Cooley and Ron 2002: 6). A comparison of the experiences of Hicks’s father, Terry Hicks, and his American military lawyer, Major Michael Mori, who received significant media attention, with those of Habib’s wife, Maha Habib, who did not, exemplifies this feature of civil society’s activism.69

Terry Hicks and Mori were sympathetic and articulate figures who frequently engaged with the media. They humanised David Hicks for the public through their careful

69 That Hicks’s family and close advocates received greater media attention than Habib’s may in part be because Hicks was detained for longer. Nevertheless the disparity is sizeable. At least 69 news articles that mentioned Terry Hicks appeared in The Sydney Morning Herald, and 77 in The Australian between 2001 and 2010. For Mori, the volume was also significant: 51 in The Sydney Morning Herald and 44 in The Australian. This compares to 21 articles in The Sydney Morning Herald and 26 in The Australian that mentioned Habib’s family.
portrayal of him as a “naïve young man” and “somebody’s son”, and because of the loyalty and support they were prepared to give despite the terrorism-related accusations against him (Stewart 10 Mar. 2007). Terry Hicks and Mori connected with mainstream Australia for different reasons. Terry Hicks was white, working class, unassuming and unworldly, “a quintessential Aussie bloke” as a Greens senator described him, “a real salt of the earth character” (Kerry Nettle, tel. interview 9 Jan. 2013). A Labor Senator explained “he looked like everyone else” (Bolkus, tel. interview 17 Jan. 2013). GetUp!’s Solomon described Terry Hicks’s appeal as attributable to the public’s identification with him as “everybody’s dad – he was so transparent in his love and transparent in the way he communicated” (Solomon, tel. interview 21 Feb. 2013). Terry Hicks demonstrated an unconditional love for his wayward son that resonated with the public. His willingness to plunge himself into a deeply unfamiliar world to help David – for instance, standing in a cage and orange jumpsuit on Broadway in New York to raise awareness of his son’s plight – ultimately won over many Australians, and earned him sympathetic media coverage (Sales 2007: 89; Eccleston 26 Aug. 2004). A Liberal MP reinforced this view of Terry Hicks: “Here was the father, like any parents of teenagers, on the airwaves, on the television, pleading for his son, and it brings it home graphically to people” (Moylan, tel. interview 9 Jan. 2013). The NSWCCL’s Murphy describes the impact the father had in popularising his son’s cause over time:

You had a public sentiment at the time where, frankly, the public couldn’t care less if you tortured somebody if they were accused of terrorism. And then it sort of went from one extreme to another where, once David Hicks was humanised by the work his father did, explaining what sort of a person he was, how he was still an idiot, he’d got himself involved in this but did he really deserve to be in Guantánamo Bay and so on, then public sentiment shifted to the other extreme (Murphy, tel. interview 31 Jan. 2013).

Mori was also a critical asset to Hicks’s cause. His appeal stemmed from his audacity as a relatively junior US marine willing to stand up to the American government to defend the rights of his Australian client (Sales 2007: 221). The military lawyer’s courageous advocacy was evident from his first public press conference in January 2004, when he accused the Australian government of accepting a lower standard of justice than the UK government had for their citizens (Wilkinson and Pearlman 23 Jan. 2004). Mori made frequent trips to Australia to lobby parliamentarians and attend public speaking events (Gawenda 19 Nov. 2005). Politicians and civil society actors speak in reverent terms of his impact. “Mori was just such a charismatic fellow and such a good advocate,” said
one (Labor MP, tel. interview 24 Jan. 2013). Another noted that “people were very much inspired by his independence and his capacity to stand up to his own masters” (Solomon, tel. interview 21 Feb. 2013). A third commented that “his preparedness to be outspoken, given that he was a military lawyer, was very powerful in the end in getting things progressing” (Paris Aristotle, tel. interview 10 Apr. 2013).

Compared to Terry Hicks, who was a powerful catalyst in transforming public opinion around David, Habib’s wife faced far greater obstacles in attracting sympathy. Maha Habib tried to raise awareness of her husband’s situation (Lewis et al. 24 Oct. 2003). However she was isolated in her advocacy, ostracised by the Muslim community because of its dislike of her husband and from the wider Australian community because they were foreign-born Muslims (Stewart 17 Jul. 2004). The Sydney Morning Herald, for example, described Maha Habib as a “lonely voice of protest” (Morris 13 Jan. 2005). Former Greens Senator Kerry Nettle was a key player in questioning government officials in Senate Estimates hearings about Habib’s extraordinary rendition to Egypt and worked closely with his wife during and after his detention. Nettle says the public response to Maha Habib “was about not relating to her” (Nettle, tel. interview 9 Jan. 2013). “People in the Australian community don’t connect with Maha in same way because of who she is and her experience in life,” says Nettle. Maha Habib’s relationship with the media was not as easy as that of Terry Hicks. The Habib family’s former lawyer, Stephen Hopper, says:

> It was much harder for Maha in that respect, and me working with Maha Habib, because she didn’t have the same comprehension of how the Australian community perceives things as someone born here. ... It involved quite a deal of preparation with Maha, particularly at first, before she went and did something with the media, and it was always a concern to me that things could go horribly wrong if either Maha or the journalist misunderstood each other’s cultural perspective (Hopper, tel. interview 19 Jan. 2013).

The Habib family’s failure to establish a connection with Australians is apparent from the views of parliamentarians and activists. “I’m not conscious of someone clearly articulating his case the way it was articulated in Hicks’s case,” noted one civil society actor (Dowd, tel. interview 20 Feb. 2013). Habib “never really had any major supporters in the broader community, so this guy was very much on his own” said Labor Senator Bolkus (Bolkus, tel. interview 17 Jan. 2013). Bolkus also notes “the media and the
public didn’t want to know about Habib. He was one of them, [Hicks] was very much one of us” (Bolkus, tel. interview 17 Jan. 2013).

Habib was a polarising figure, unpopular in his local Sydney Muslim community, some of whom described him as “interfering” and “aggressive” (ABC 20 Jul. 2004; Stewart and Harris 17 Jul. 2004). Habib’s Muslim identity, personal attributes and difficulties in communicating once he was released alienated him even further from the broader public and civil society. “Terry was able to communicate in a language that people understood and I don’t think Mamdouh was able to do that,” noted GetUp!’s Solomon (Solomon, tel. interview 21 Feb. 2013). A Labor MP said: “We regarded him as a bit of a lunatic” (Labor MP, tel. interview 24 Jan. 2013). One civil society activist observed:

He didn’t endear himself to the broader population; certainly from the kind of more activist side of civil society there was just as much commitment to his issue but maybe not as much commitment to him as a person (Civil society activist, tel. interview 2013).

Paris Aristotle, the Chief Executive Officer of Foundation House (The Victorian Foundation for Survivors of Torture), observed:

I think people find it easier to sympathise with people they can align themselves to more or see themselves in, so Hicks being a white Australian, from a working class family, with a senior lawyer from the US military representing him, had a very different presentation to Habib (Aristotle, tel. interview 10 Apr. 2013).

The failure of Habib to connect with people ultimately affected attitudes towards his torture allegations. For Muslim activist Trad, Habib’s religion and race directly contributed to the reluctance of the public and civil society to back Habib’s demands for accountability on torture:

There’s an attitude that seems to come across very regularly, and it is really perpetuated through some of the mainstream media, that Muslims are not to be trusted. With respect to the issue of torture, for a long time the comments from the Australian government and comments from some of the more right-wing commentators was that these claims should not be believed (Trad, tel. interview 14 Jan. 2013).

The contrasting experiences of Hicks’s and Habib’s inner circles indicates that Australian civil society’s willingness to mobilise around the Guantánamo detainee issue depended, to an extent, on the saleability of the individual victim to the wider public.
Amnesty International’s Wood acknowledged the role the individual’s likeability had in the Hicks and Habib cases:

It really did come down to whether or not a sympathetic and normal picture was able to be painted of that particular individual, so that the ordinary Australian could actually relate to this person and not see them as something completely outside normal. ... If that was able to be achieved, then it is certainly true to say civil society was much more readily able to get behind that person and the natural consequence of that was politicians pricked up their ears and listened (Wood, tel. interview 18 Jan. 2013).

This dimension of civil society behaviour was not viewed as surprising by actors in the sector. Lasry, the independent legal observer to Hicks’s military commission, commented that “I think it’s just a quirk of human nature that people like to have someone they can feel sorry for before they can make any emotional investment” (Lasry, tel. interview 8 Jan. 2013). The HRLRC’s Lynch suggested that although civil society often takes up cases where it can get traction, “they’re not necessarily taking it up because they think it’s more important or compelling – but because it may be the case through which they can effect change, which then becomes more systemic change” (Lynch, tel. interview 19 Jun. 2013).

David and Terry Hicks, as white men of traditional working-class backgrounds, were familiar and therefore non-threatening to Australians. Their stories – the forgiving father from the suburbs, and his prodigal son who came to grief seeking adventure in the wrong places – resonated more readily with the wider Australian public who could identify themselves in those narratives. In a country with a history of institutional racism including white-only immigration policies, the last vestiges of which were only removed in the 1970s, Habib and his wife were too different, too “other” (Commonwealth of Australian 2009). Not only were they Muslims, but Muslims who had not assimilated into Australian society. This was evidenced by their imperfect English and the fact that Habib was arrested in Pakistan while – according to his account – seeking opportunities overseas to bring up his children in a Muslim country (Habib 2008: 37).

4. Using Political Opportunities

While in the early years of the war on terror Australia’s political system was relatively closed, political opportunity structures began to shift in 2006, and opportunities for
activism revealed themselves. A few civil society groups were able to exploit these openings effectively on issues connected to the treatment of Hicks and Habib, though not directly on torture accountability. The actions of these groups exemplify the idea, theorised in the social movement literature, that motivated individuals and groups will respond to the openings and closings offered by the larger political environment (Gamson and Meyer 1996: 277). Two organisations were particularly successful in achieving their political aims in this way: GetUp! and the NSWCCL.

GetUp!’s specific campaign goal was to bring Hicks home from Guantánamo Bay (GetUp! 2006: 5). Two political opportunities emerged in 2006 that GetUp! identified and acted upon to successfully achieve this aim: the shift in 2006 of public opinion on Hicks’s detention and the impending 2007 federal election. These apertures in the Australian political system were closely linked in GetUp!’s activism. The more the group was able to demonstrate the growing public disquiet over Hicks’s treatment through its various grassroots activities, the more concerned the government became about the repercussions for its re-election prospects. Examples of GetUp!’s tactics included positioning billboards at the entrance of the Sydney Harbour Bridge that commuters and politicians would see on their drive into work (including the Prime Minister and Attorney-General who both resided in Sydney); placing full-page advertisements in national newspapers; holding public rallies in Sydney and Adelaide (the home of Hicks’s family and the Foreign Affairs Minister); and conducting public opinion polling. The polling, explains Solomon, was designed “to take the temperature of what the Australian people wanted, and to demonstrate that the position was actually inconsistent with the government’s position and also was a risk to them” (Solomon, tel. interview 21 Feb. 2013). Other tactics included campaigning in Prime Minister Howard’s seat in the NSW state election (held in March 2007). GetUp! handed out postcards demanding Hicks’s release to all voters in Howard’s Bennelong electorate. More than 11,000 postcards – representing 12 per cent of all voters – were endorsed, returned and forwarded to the Prime Minister.70 Hicks was repatriated six months before the federal election, in November 2007.

A second civil society organisation had a broader and longer-term political goal than GetUp!’s. The NSWCCL aspired to legislative reform with respect to the prohibition of

---

70 According to the Australian Electoral Commission, 92,700 votes were cast in Bennelong in 2007 (Australian Electoral Commission 11 Dec. 2007).
torture; its ambitions took nearly a decade to achieve. In this case, the political opportunity that presented was a change of federal government in late 2007. Murphy, the NSWCCL president, recalls that immediately after the 11 September attacks, his organisation feared human rights would be wound back in Australia (Murphy, tel. interview 31 Jan. 2013). In particular, the NSWCCL was worried about the re-emergence of the death penalty, banned only at the Commonwealth level, where some public figures were calling for its reintroduction against terrorists. Murphy wrote to federal MPs to gauge their interest in working on the issue. This resulted in the establishment of an all-party parliamentary working group that included future Labor Attorney-General Robert McClelland.71 The group had its first meeting in March 2005 (Walton, email 22 Jun. 2013). Over time, according to some accounts, the group also worked on the torture issue, specifically the need for legislation implementing a Commonwealth offence of torture and the ratification by Australia of OPCAT (Murphy, tel. interview 31 Jan. 2013). As a member of the working group, McClelland was well-versed on the torture issue when the Rudd government was elected in 2007, by which time public opinion on the war on terror had shifted in favour of protecting human rights. For example, at a pre-election debate with Foreign Affairs Minister Downer, McClelland signalled his concern over the re-emergence of torture in the war on terror (Barker 16 Nov. 2007). When McClelland became Attorney-General, his Department, alert to his interest in strengthening institutional protections against torture, presented him with a number of recommendations. The Rudd government went on to legislate against torture (and the death penalty) and signed OPCAT, without controversy.72

The NSWCCL example highlights the role of another kind of domestic actor, apart from human rights NGOs, in the exploitation of favourable political opportunity structures to achieve long-term ambitions. Public servants in this case were prepared to pursue a human rights policy objective on the first signals of enthusiasm from elected officials. This episode suggests that human rights transformation can be the result of a collective effort – a coincidence of factors based on timing, persistence and opportunity emanating from different directions that ultimately coalesce to effect change. The actions of the NSWCCL and departmental officials also call to mind the briefcase image mentioned in

71 The group's initial focus was the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, and the “AFP operational guidelines in death penalty cases” (Michael Walton, email 22 Jun. 2013).
Chapter Two, where ideas for social change initiatives are sometimes carried around for years until the right opportunity presents (Mertus 2008: 182). Murphy evokes this idea:

We just find often [with] these things that it’s a matter of opportunity, where suddenly something will happen where you might get a change of government, or you might get dramatic overreach, and then you’ve got to take that opportunity, and you’ve got to have done the ground work to be in a position to change that, because you get very few opportunities. You know it might come along once in a generation, so if you’re not ready, you miss it (Murphy, tel. interview 31 Jan. 2013).

The successes of GetUp! and the NSWCCCL in using the 2007 federal election and the arrival of a new government to achieve their particular objectives demonstrates that, given the right domestic conditions, Australian civil society can effectively exploit political opportunities on human rights.

VIII CONCLUSION

For almost a decade, Australian governments appeared indifferent to the torture allegations of Australian citizens detained at Guantánamo Bay. While initially the US alliance might explain Australia’s apparent disregard for these citizens’ international human rights, to understand the sustained nature of that response, domestic political factors must be examined. Australian governments faced little pressure at home over the need for accountability on torture allegedly carried out overseas. The Howard government confronted minimal pressure from the legislature, particularly the weak federal opposition, or from the judiciary, with Hicks and Habib only resorting to litigation many years after they were first detained. Civil society was slow to mobilise on the Hicks and Habib cases, escalating its efforts in 2006 and 2007. When this finally occurred, civil society groups focused on legal process issues, rather than on the need for accountability on torture. Where domestic legal organisations and human rights NGOs did reference Australia’s international legal obligations with respect to torture, it was generally in shadow reports submitted to the UN Committee Against Torture, rather than in their advocacy at home.

The particular enabling and constraining features of Australia’s national political context help explain civil society’s behaviour on the issue of accountability for the alleged torture of Hicks and Habib. A domestic NGO sector, overwhelmed after 11 September 2001, was constrained by a weak human rights culture, which reflected the
country’s history and its lack of experience of terrorism. Civil society was further inhibited by an inadequate national human rights framework, particularly in relation to torture. This denied Hicks and Habib and their supporters adequate legal levers to bring torture-related claims against the state and influenced how these lawyers and NGOs framed their advocacy, according to what they believed was achievable. They saw agitating about torture as futile. Civil society was also impeded by a relatively closed polity for the first five years of Hicks’s and Habib’s detention, where the highly disciplined Howard government did not attribute a legitimate role to NGOs in public debate, especially in critiquing its human rights policies. When the political system eventually presented cleavages after this time, as the popularity of the Howard government waned and public concerns about treatment of Hicks in particular increased, civil society was able to organise, agitate and inspire political change on human rights. However this did not occur on the issue of accountability for torture, where the legal hooks for framing claims were not available.

Treaties provide focal points for civil society activism where deficiencies exist in domestic human rights structures. Where such lacunae occur, as Australia’s case illustrates, they can also direct the efforts of citizenries overseas, where – largely removed from the realm of domestic politics – their impact on national governments is weaker. Australia was not held to account over the torture of its citizens abroad because there existed little pressure at home on the executive from civil society for such accountability. Where domestic actors do not demonstrate that they care about international human rights transgressions in ways that affect domestic politics, the state has little impetus to act. The Australian case illustrates a range of constraints for mobilisation on international human rights issues which allowed the government to avoid responding to human rights breaches by a dominant ally.
CHAPTER FIVE – THE UNITED KINGDOM

At first glance, the United States had no closer friend in the war on terror than the United Kingdom. Tony Blair’s Labour government, at pains to influence America’s war on terror policies, provided the most substantial political and military backing of any of the US’s alliance partners (Coates and Krieger 2004; Kampfner 2004). This was demonstrated by the UK’s actions on Iraq, including its diplomatic efforts to secure international support for the US invasion (Blair 2010: 415-440). Yet on the issue of torture, and its use against Britons detained in the war on terror, the UK did not keep in step with the US. A number of UK citizens and residents were detained at Guantánamo Bay and alleged they were mistreated and tortured. The UK government refused to allow UK citizens to be tried by US military commissions and brought them all home by 2005 (Tyrie et al. 2011: 93). Its approach to UK residents was, initially, different, with the government arguing it had no legal responsibility for the men. However, beginning in 2007, residents too were repatriated. In 2010, the Conservative-Liberal Democrats coalition government led by David Cameron ordered a public inquiry into the UK’s complicity on the torture of UK nationals and residents detained at Guantánamo Bay (The Detainee Inquiry Dec. 2013: 2).

The behaviour of the UK in standing up to the US for its citizens and residents must be understood with reference to the role of domestic politics and, in particular, the actions of domestic actors who applied strong pressure on successive governments to respect the international human rights of UK detainees. The capacity of these local non-state actors to do this was influenced by the national context in which they operated. The chapter begins with a discussion of the UK’s role in the war on terror, including its relationship with the US and its prior experience of terrorism. This is followed by an overview of the UK’s history and legal framework with respect to torture. Next, I describe the torture allegations of the UK citizens and residents detained at Guantánamo Bay. I outline the response of the executive government to the men’s claims, and the roles of Parliament and the judiciary in holding the executive accountable for its actions and policies. I then address the role of civil society in shaping the executive’s behaviour on the issue of the torture of UK citizens and residents.
The UK’s alliance with the US is often described as the “Special Relationship” (Louis and Bull 1986). The Special Relationship embodies two central ideas. One is that the countries share many values and a common identity (Dunne 2004: 898). The other is that it is in the UK’s interests, as a former imperial power, to stay as close as possible to the US in order to continue to exercise a global influence beyond its current position (Wallace and Phillips 2009: 264; Azubuike 2005: 128; Kennedy-Pipe and Vickers 2007: 209; Dunne 2004: 898). Prime Minister Blair was a strong supporter of the Special Relationship, and arrived in office resolved to rebuild it (Parmar 2005: 226). This resolve was grounded in his conviction that the UK, using the levers of its historical alliances, could once again be an international player with a moral purpose, using its influence to promote the values and aims it believed in (Parmar 2005: 226; Dunne 2004: 904). The events of 11 September 2001 provided Prime Minister Blair with an opportunity to realise this vision (Dumbrell 2006: 462; see also Stephens 2004: 272).

Prime Minister Blair’s inflated rhetoric regarding the significance of the attacks closely matched the Bush Administration’s. For example, according to the Prime Minister, 11 September was “the worst terrorist attack in human history”; left unchallenged “this could threaten our way of life to its fundamentals”; it signalled the start of a war “unlike any other”; and it was an opportunity to “re-order the world around us” (Blair 2010: 345, 369; Dumbrell 2006: 456; Riddell 2003: 145; see also Hewitt 2008: 55).73 For Prime Minister Blair, it was imperative that the UK work as closely as possible with the US so that it might shape the Bush Administration’s response to 11 September (Wallace and Phillips 2009: 275; Dumbrell 2006: 463; see also Blair 2010: 352; Azubuike 2005: 128; Campbell 2005: 323).

The UK’s international response to the war on terror included, in October 2001, the deployment of significant military forces to Afghanistan (Kampfner 2004: 129). Prime Minister Blair also threw himself into the task of helping the US to build a case for war

73 Prime Minister Blair’s understanding of the significance of the attacks for the global order was, according to many observers, underpinned by his personal views about the international community’s obligations to intervene militarily in other sovereign states where compelling humanitarian reasons existed – ideas developed during the Kosovo conflict in the late 1990s (Dumbrell 2006: 456; Kennedy-Pipe and Vickers 2007: 210; Meyer 2006: 284; Stephens 2004: 74; Azubuike 2005: 130).
in Iraq and committed substantial UK military forces to the conflict in March 2003, at personal political cost (Dumbrell 2006: 462; Kampfner 2004: 191, 312). Blair’s unflinching support for the US war on terror, particularly the invasion of Iraq, caused considerable disquiet within his government and was deeply unpopular in the UK more widely (Kampfner 2004: 273, 277; see also Riddell 2003: 202; Cook 2003: 106; Hastings 2008: 1132). Critics, internal and external, viewed the Prime Minister’s approach as servile to Washington (Danchev 2006: 588; House of Commons Foreign Affairs Committee (HCFAC) 2010).

Domestically, the UK’s response to the war on terror included the enactment of further counter-terrorism laws in 2001, 2005, 2006 and 2008 (Shephard 2010: 110-111; Roach 2011: 263). They followed the 2000 Terrorism Act, which had, among other things, expanded the definition of terrorism (Shephard 2010: 88; Roach 2011: 241). The most contentious of the post-11 September laws was the 2001 Anti-terrorism, Crime and Security Act, which authorised the indefinite detention without trial of foreign nationals suspected of involvement in terrorist activity, who could not be deported because of a risk of torture (Kettell 2011: 38-39; Javaid 2007: 866; see also Poynting 2006; Hewitt 2008). Deporting non-citizens to countries where they faced torture is prohibited by the European Convention on Human Rights (ECHR) (under Article 3), to which the UK is a party. In addition, the European Court of Human Rights ruled in 1997 in Chahal v United Kingdom that the protections of the non-derogable Article 3 were absolute, including in the case of a public emergency.74 The 2001 Act was successfully challenged in the UK courts, as I discuss below.

The UK’s post-11 September counter-terrorism laws must be viewed against two domestic terrorism experiences. One was the London bombings of July 2005, when terrorists inspired by al Qaeda ideologies staged a series of attacks on London’s transport system, killing 56 people (BBC News undated; Home Office 11 May 2006). More profoundly, the UK’s domestic response to 11 September was shaped by its previous experience of Northern Ireland terrorism (Roach 2011: 241). Of particular relevance were the government’s Northern Ireland internment policies of the 1970s. The Northern Ireland conflict developed out of a civil rights movement in the 1960s led by the province’s Catholic minority, who were seeking equal rights with the Protestant

74 (1997) 23 EHRR 413.
majority (White and White 1995: 334; Cohn 1979: 160-161). Communal violence erupted between the Catholic and Protestant communities and police, prompting the British government in 1969 to deploy troops to restore order (White and White 1995: 334). From these events, a violent conflict developed between Irish Republican paramilitaries seeking British withdrawal from Northern Ireland, Loyalist paramilitaries opposing this and the state’s security forces (White and White 1995: 334-335).

Security legislation applying to Northern Ireland had existed before this time, including most significantly the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (Special Powers Act), which permitted the imposition of curfews, the banning of printed materials and assemblies, and detention without charge or trial – known as internment (O’Connor and Rumann 2003: 1664-1665). In August 1971, under the Special Powers Act, the British Prime Minister, Edward Heath, authorised the use of internment which continued until 1975, during which time 1981 people were detained without charge or trial – 1874 of them Catholic Nationalists (Mumford 2012: 16; O’Connor and Rumann 2003: 1678). The oppressive and discriminatory internment policies were widely viewed in hindsight as a failure, having led to the detention and mistreatment of innocent people, as well as the alienation of the Catholic population and the escalation of violence (O’Connor and Rumann 2003: 1678-1679; Mumford 2012: 15; White and White 1995: 330). This history familiarised the UK public with terrorism as well as the potential injustices associated with draconian government responses to this threat.

After 11 September 2001, the controversial 2001 Anti-terrorism, Crime and Security Act drew many comparisons to the UK government’s internment policies of the 1970s (Hewitt 2008: 37; Peirce 2010:53; see also Kennedy-Pipe and Mumford 2007; Campbell 2005; Roach 2011). The 2001 Act was subject to legal challenge, and in 2004 the House of Lords ruled in A v Secretary of State for the Home Department (known as the Belmarsh decision after the prison where detainees were held) that the provisions permitting the indefinite detention of non-nationals were not compatible with the ECHR, specifically Article 5 (the right to liberty and security) and Article 14 (the right to non-discrimination). In striking down the laws, the House of Lords singled out the government’s differential and arbitrary treatment of citizens and non-citizens as the

75 [2004] UKHL 56.
principal weakness in the government's case.\(^76\) It found that the laws were predicated on the understanding that non-citizens had lesser liberty rights than citizens, with the government failing to demonstrate why, if the detention measures were not necessary for citizens suspected of international terrorism, they were necessary for non-citizen suspects.\(^77\)

The *Belmarsh* decision is a notable instance of the judicial protection of individual liberty in the face of competing government national security claims (Thwaites 2014: 124). The case is also significant in a war on terror context where frequent reliance was placed on distinctions based on nationality as a basis for inferior treatment (Duffy 2008: 580). The *Belmarsh* decision generated debates in the UK around the discriminatory treatment of non-citizens that informed the responses of civil society to the UK government's differential treatment of nationals and residents at Guantánamo Bay, as will be discussed.

The UK government responded to the *Belmarsh* decision by legislating to establish a system of control orders for both citizens and non-citizens who the government considered to be a threat (Kettell 2011: 78; Moran 2005: 345; Hewitt 2008: 46). It also negotiated a series of memoranda of understanding with countries known to practise torture, in which those states pledged not to torture the UK's deportees (Roach 2011: 290; Blair 5 Aug. 2005). In addition, the UK government sought, unsuccessfully, to overturn the *Chahal* decision, regarding the absolute nature of Article 3 of the *ECHR*.\(^78\) This move was said to signal a shift by some states to a more brazen questioning and undermining of the most sacrosanct human rights protections (Duffy 2008: 586). As the next section indicates, however, the UK's position with respect to torture has long been ambivalent.

II THE UK AND TORTURE

Scholars have argued that British national identity is formed on the basis of the myth that torture, like slavery, has always been alien to the operations of the British state, and

\(^ {76} \) Ibid [76] (Lord Nicholls).
\(^ {77} \) Ibid [65] (Lord Bingham).
\(^ {78} \) See *Saadi v Italy* (European Court of Human Rights, Grand Chamber, Application No 37201/06, 28 February 2008) and *Ramzy v Netherlands* (European Court of Human Rights, Third Section, Application No 25424/05, 20 July 2010).
is something done by other people, or by people in other places (Tulloch 2008: 5; Langebin 1976, 2006: 73; Kelly 2012: 44). For example, Lord Bingham commented in a 2005 House of Lords judgment that “the English common law has regarded torture and its fruits with abhorrence for over 500 years”.\(^79\) It is accurate to say, as John Langbein has argued, that torture was never regularised within English criminal law procedure (Langbein 1976, 2006: 73). However, history shows that torture has long been used as a tool of the British state, and relatively recently was employed by the UK in its counter-insurgency campaigns conducted in the pursuit and maintenance of its colonial empire (Mumford 2012: 10). For example, it was used against prisoners and colonial subjects during and in the aftermath of World War Two, in Kenya in the 1950s against the Mau Mau, in Cyprus during the same decade, Aden in the 1960s and in Northern Ireland in the 1970s (Cobain 2012). Torture also re-emerged, directly and indirectly, in UK counter-terrorism and counter-insurgency practices after 11 September 2001. For example, Human Rights Watch (HRW) accused the Security Service, MI5, and the Secret Intelligence Service, MI6, of effectively condoning torture by visiting and interrogating suspected UK radicals detained in Pakistan who had “obviously been tortured” by Pakistani Intelligence (ISI) (HRW 24 Nov. 2009; Cobain 2012: 257-266). In addition, the UK has been associated with the torture and mistreatment of Iraqi detainees by UK troops in Iraq after 2003 (The Baha Mousa Public Inquiry Sep. 2011; Al-Sweady Public Inquiry 20 Mar. 214).\(^80\) The experiences of Northern Ireland, in particular the UK government’s internment policies, again have resonance with what transpired in Iraq.

Detainees interned by security forces during the political unrest in Northern Ireland in the 1970s were subject to a range of mistreatment.\(^81\) However, it was the systematic use of the so-called “five techniques” of interrogation that became the subject of multiple inquiries, litigation in the European Court of Human Rights and world-wide condemnation (Kennedy-Pipe and Mumford 2007: 122-123). These five “disorientation” or “sensory deprivation” techniques included wall-standing, hooping,

\(^79\) A (FC) v Secretary of State for the Home Department [2005] UKHL 71 [51].
\(^80\) See also Al-Skeini v Secretary of State for Defence [2007] UKHL 26 and Al-Skeini v The United Kingdom [2011] Eur Court HR 1093.
\(^81\) For example, some internees were forced to run barefoot over broken glass, some were dangled while hooded from helicopters hovering above the ground, and others were given electric shock treatment (Kennedy-Pipe and Mumford 2007: 122-123).
continuous "white noise", sleep deprivation and the denial of food and drink. The government held two inquiries into the use of the techniques. One, the 1971 Compton Committee, found they amounted to "ill-treatment" but not "physical brutality" (Kennedy-Pipe and Mumford 2007: 123; Cobain 2012: 148-149; Sarup 1979: 267). The other, known as the Parker Report, found the five techniques to be necessary in security situations, but a minority report argued they were unethical and illegal and in 1972 the UK government officially stopped using them (Kennedy-Pipe and Mumford 2007: 123; Cobain 2012: 151-157; Sarup 1979: 267-268; see also Heymann and Kayyem 2005; Parry 2010). Meanwhile, the Irish government brought a case against the UK for breaching the ECHR (Cobain 2012: 159). The European Commission of Human Rights found in 1976 that the UK’s use of the five techniques amounted to torture (Sarup 1979: 268; Cohn 1979: 184). On appeal by the UK government, a 1978 ruling by the European Court of Human Rights found that the five techniques fell short of torture, though they did constitute "inhuman and degrading treatment" and as such still breached Article 3 (which prohibits torture and inhuman or degrading treatment).

Against this history, the 2011 Baha Mousa Inquiry into the torture and killing of an Iraqi detainee by UK forces in Iraq found that the same five techniques employed in Northern Ireland had migrated to Iraq, three decades later (The Baha Mousa Public Inquiry 2011; see also British Irish Rights Watch May (BIRW) 2012: 2-3). The UK’s ambiguous record on torture is reflected in its law and jurisprudence. On the one hand, the UK is entrenched in the world’s most effective regional human rights system: as a member of the Council of Europe, it is a party, as noted, to the ECHR which expressly prohibits torture. In 1998 the UK enacted the Human Rights Act (HRA), which gave effect to rights under the ECHR as domestic statutory rights and allowed individual rights claimants to bring cases under the Convention in the UK courts, rather than having to go to the European Court of Human Rights in Strasbourg (Thwaites 2014: 137; Wintemute 2006: 210). In addition, the UK ratified the UN Convention

82 Case of Ireland v The United Kingdom [1978] 2 Eur Court HR 25 [96].
83 Case of Ireland v The United Kingdom [1978] 2 Eur Court HR 25 [C] (Judge Zekia).
84 Case of Ireland v The United Kingdom [1978] 2 Eur Court HR 25 [I]. The House of Lords in 2005 said it would have characterised the "five techniques" as torture by contemporary standards: see A (FC) v Secretary of State for the Home Department [2005] UKHL 71 [97].
85 In May 2014 the International Criminal Court announced it would re-open a preliminary investigation into allegations UK officials were responsible for war crimes involving systematic detainee abuse in Iraq between 2003 and 2008 (International Criminal Court 13 May 2014). This followed the submission of further information from the European Centre for Constitutional and Human Rights (an NGO), and Public Interest Lawyers (a law firm which acted for Baha Mousa's family) (Cobain 14 May 2014).
Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1988 and the Optional Protocol to CAT in 2003. On the other hand, while the UK Criminal Justice Act 1988 creates an offence of torture (under section 134), it provides a defence if the perpetrator had “lawful authority, justification or excuse for that conduct”. The UN Committee Against Torture has criticised this so-called “escape clause” (Cobain 9 May 2013; Committee Against Torture 6-31 May 2013).

UK jurisprudence is similarly less than absolute in its disavowal of torture. For example, the House of Lords in the 2005 case A (FC) v Secretary of State for the Home Department ruled that evidence obtained under torture by foreign agencies was not admissible in court. In doing so, it rejected the UK government’s argument that the Special Immigration Appeals Commission should be able to receive such evidence where there was no UK complicity in the torture. However, the House of Lords sanctioned the use by the executive of intelligence obtained by foreign torturers. For example, Lord Nichollss remarked that it would be “absurd” for the police to reject intelligence obtained by torture “if use of such information might save lives”. The judgment has been widely criticised (Roach 2011: 291; Evans 2006; Grief 2006; Parry 2010: 116; Gearty 2005: 31). One critic noted the House of Lords seemed willing to defer to certain security imperatives that undermined the absolute prohibition against torture, “so long as its judicial processes were not tainted” (Samuel 2012: 31). The UK government has since relied on the House of Lords decision to justify practices which would seem at odds with the spirit of the international prohibition on torture. It noted in a 2009 counter-terrorism policy paper, for example, that it was recognised that intelligence obtained under torture “may still be used to investigate and to stop terrorist attacks” (United Kingdom Secretary of State for the Home Department 2009).

III THE UK’S DETAINEES IN THE WAR ON TERROR

A UK Citizens

Nine UK citizens were held at Guantanamo Bay. Rhuhel Ahmed, Shafiq Rasul, Asif Iqbal, Jamal Udeen Al-Harith and Tarek Dergoul were UK-born. Taken into custody in Afghanistan in late 2001, they were transferred to Guantanamo Bay in early 2002 and

---

86 [2005] UKHL 71.
87 [2005] UKHL 71 [68] (Lord Nicholls).
eventually released and returned to the UK in March 2004 (The Detainee Inquiry Dec. 2013: 14). Ahmed, Rasul and Iqbal, known as the “Tipton Three” after their home town, travelled to Pakistan and Afghanistan – by their account – for a wedding (Brook 9 Mar. 2006). They were detained in Afghanistan by Afghan forces and turned over to the American military (Shafiq et al. 26 Jul. 2004). Al-Harith claims he was imprisoned by the Taliban on suspicion of being a British spy while travelling in northern Pakistan (Reid 11 Mar 2004). From his Kandahar jail he made contact with UK diplomats and the International Committee of the Red Cross (ICRC), who were working on plans for his evacuation, but was then taken by US forces (Reid 11 Mar. 2004). Dergoul claims he was on an extended holiday in Pakistan in 2001 when he decided to travel to Afghanistan and buy cheap property after the war started (Rose 16 May 2004). The villa he was staying in was bombed, and Dergoul was found by Northern Alliance troops who turned him over to the US military for a US$5000 bounty (Rose 16 May 2004). The men allege ill-treatment and abuse in Afghanistan including: hooding, beatings, threats and sexual humiliation (Shafiq et al. 26 Jul. 2004; Rose 16 May 2004). The men gave similar accounts of brutal treatment at Guantánamo Bay, which they allege amounted to torture. This included subjection to extreme temperatures, stress positions, loud music, beatings by the “ERF” (Extreme Reaction Force) teams, forced injections, short shackling and long periods in isolation (Shafiq et al. 26 Jul. 2004; 27 Oct. 2004; Branigan 13 Mar. 2004). In addition, Dergoul claimed he was pepper-sprayed, had his eyes poked, his head flushed in a toilet, was kneeled on and kicked and punched (Rose 16 May 2004).

A second group of UK citizens, Feroz Abbasi, Moazzam Begg, Richard Belmar and Martin Mubanga, was released from Guantánamo Bay in January 2005. Begg and Belmar were UK-born, Abbasi was born in Uganda and Mubanga in Zambia. Abbasi was captured by the Northern Alliance in Afghanistan in December 2001, reportedly fighting with the Taliban, and was handed over to the Americans who took him to Guantánamo Bay (Sales 2007: 87-88; Cobain 25 Apr. 2011). Begg, according to his memoirs, was living with his family in Pakistan while he worked on a school project in Afghanistan, and was arrested at his home in January 2002 by a group of American and Pakistani officials (Begg 2006: 1-2, 8, 90, 106). He was interrogated by MI5, before being sent to Afghanistan, where he was again questioned by UK agents, and in

88 The Queen on the Application of Abbasi v The Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 [1].
February 2003 was transported to Guantánamo Bay (Begg 2006: 108-112; The Detainee Inquiry Dec. 2013: 13). Belmar recounts how, having travelled to Afghanistan in July 2001 to study at a religious school, he fled to Pakistan after the start of the war and was arrested by Pakistani intelligence at a house in Karachi in February 2002 (Rose 27 Feb. 2005). Belmar was sent to Afghanistan and then, in October 2002, to Guantánamo Bay (The Detainee Inquiry Dec. 2013: 12). Mubanga, a dual UK-Zambian national, was arrested in March 2002 by Zambian security officers in Zambia (Intelligence and Security Committee of Parliament (ISC) 2007: 31). By Mubanga’s account, he was visiting relatives on his way home to the UK from Pakistan and Afghanistan where he had been since late 2000, studying Islam and Arabic (Rose 6 Feb. 2005; Tyrie et al. 2011: 94; REDRESS Dec. 2008: 41-42). He was questioned by US and UK agents and was sent to Guantánamo Bay in April 2002 (ISC 2007: 31).

Abbasi, Begg, Belmar and Mubanga also allege ill-treatment, which in some cases they claim amounted to torture, before and during their detention at Guantánamo Bay. In Afghanistan this included, for Begg, being hooded, shackled, kicked, kept in isolation, subject to sleep deprivation and loud music, having his family threatened, and witnessing the deaths of other detainees (Begg 2006: 155-158, 170, 172, 183). For Belmar, his alleged mistreatment in Afghanistan included being hooded, shackled in stress positions, sexually assaulted, kicked, hung by his wrists and witnessing the murder of another detainee (Rose 27 Feb. 2005). The four men claim they were treated in a brutal manner at Guantánamo Bay similar to the other UK citizens. Their allegations include: being subject to internal body searches, forced injections, isolation, extreme temperatures, brutal interrogations, beatings by the “ERF” team and having their families threatened (Begg 2006: 33, 195; Rose 2004; 6 Feb. 2005; 27 Feb. 2005; Carrell 30 Jan. 2005; Dodd et al. 26 Jan. 2005). Mubanga also alleges he was mopped with his own urine (Rose 6 Feb. 2005).

B UK Residents

At least nine UK residents were detained at Guantánamo Bay (HCFAC 2007: 28). The UK government ultimately took responsibility for six of them, requesting and – in all but one case obtaining – their repatriation to the UK. Bisher Al Rawi, an Iraqi national resident in the UK since 1983, was the first of the five UK residents to be released,
returning to the UK in March 2007 (REDRESS Dec. 2008: 44). Al Rawi, by his account, had worked as an informant for MI5, acting as an intermediary with the alleged extremist (and Jordanian citizen) Abu Qatada (Tyrie et al. 2011: 81). Al Rawi was arrested with his friend Jamil El Banna, a Jordanian refugee and UK resident since 1994, in November 2002 by Gambian Intelligence while on a business trip to The Gambia (Rose 29 Jul. 2007). Their arrests followed the dispatch of a number of telegrams by MI5 to the CIA advising that the men were carrying a suspected timing device for a bomb (later revealed to be a battery charger) and that they were associated with Qatada, the alleged radical Islamist (Tyrie et al. 2011: 81-82; ISC 2007: 38; Council of Europe Committee on Legal Affairs and Human Rights 2006: 38). A month after their arrests, the pair were taken to Afghanistan where they were kept in the CIA’s “dark prison” in Kabul and later Bagram airbase (Human Rights Council 19 Feb. 2010: 60; REDRESS Dec. 2008: 43). The men allege they were subject to abuse and torture in Afghanistan, including: being kept in continual darkness, shackled, kicked and beaten, as well as being subject to very loud music, sleep deprivation, sexual humiliation and death threats (Human Rights Council 19 Feb. 2010: 60; REDRESS Dec. 2008: 43). Al Rawi and El Banna were taken to Guantanamo Bay in early 2003, where they were visited by UK agents who apologised to Al Rawi over his situation (Tyrie et al. 2011: 82). The pair allege ill-treatment there, including being kept in isolation, subjected to extreme hot and cold temperatures, denied medications and threatened with being sent to the Middle East to be tortured (Brittain 19 Feb. 2005).

El Banna, along with two other UK residents Omar Deghayes and Abdennour Sameur, were repatriated to the UK in December 2007 (The Detainee Inquiry Dec. 2013: 19). Deghayes was a Libyan national who fled the Gaddafi regime, coming to the UK in 1986. Deghayes was said to be in Afghanistan studying the Taliban in 2001, but moved that year with his Afghan wife and child to Pakistan. In April 2002 he was arrested by bounty hunters and turned over to Pakistani authorities (Center For the Study of Human Rights in the Americas 30 Mar. 2005). He was visited by US and UK officials in Pakistan (Tyrie et al. 2011: 97-98). Deghayes’s mistreatment included, in Lahore, beatings, whipping with canes, being electrocuted, coerced into making false

90 Ibid [10].
91 Ibid.
confessions and threatened with rape and receiving threats to his family; and in Islamabad being put in stress positions, subjected to near drowning in a large drum and threatened with snakes (Center For the Study of Human Rights in the Americas 30 Mar. 2005). Deghayes was moved to Afghanistan where he was subject to stress positions, starved, held in a dark room for days, locked in boxes with no air, tied in the “strappado” hanging position, was beaten, kept naked and witnessed rapes and guards forcing petrol into prisoners’ anuses (Center For the Study of Human Rights in the Americas 30 Mar. 2005). Finally, in Guantánamo Bay, Deghayes was “ERFed”, his face was smeared with faeces, his head was flushed in the toilet, he was shackled and beaten up, he had water forced up his nose with a high pressure hose until nearly suffocating, was slammed onto concrete, kept in isolation and humiliated (Center For the Study of Human Rights in the Americas 30 Mar. 2005). Deghayes is blind in one eye, the result, he says, of guards at Guantánamo trying to gouge out his eyes with their fingers (Barkham 21 Jan. 2010). Sameur was an Algerian national who was granted asylum in the UK in 2000 (European Parliament 22 Jun. 2007). He had travelled to Afghanistan in 2001 to “experience life in an Islamic country” and was captured by the Pakistani army where he went after the start of the war, subsequently getting shot by soldiers in both knees and one hand (European Parliament 22 Jun. 2007). He was handed over to the US military and, while in Kandahar, was kicked and denied medical treatment for his infected legs unless he made false confessions (European Parliament 22 Jun. 2007). He was then taken to Guantánamo.

Binyam Mohamed was the last UK resident released from Guantánamo Bay, in February 2009. An Ethiopian national who came to the UK in 1994, he was detained in Pakistan in April 2002 trying to leave on a passport that was not his (Reprieve 10 Jun. 2008: 3). Mohamed claims he had travelled to Afghanistan in 2001, the year he converted to Islam, to overcome a drug habit and see whether it was a “good Islamic country”, though the US claimed he was there fighting anti-Taliban forces (BBC News 12 Feb 2010). UK intelligence was informed of his capture and he was interrogated in Pakistan by the FBI (Reprieve 10 Jun. 2008: 6). While in Pakistan, according to the findings of US District Court Judge Gladys Kessler, Mohamed was tortured.92 He was beaten with a leather strap by Pakistani officials who also staged mock executions of

92 Mohammed v Obama (DDC, Civ No 05-1347, 19 November 2009) slip op 48-57.
him. According to Mohamed, his interrogators also cut his chest and penis with a scalpel 20 to 30 times over two hours, once a month, for 18 months. He was burnt with liquids, was blasted with loud music, given mind-altering substances and sexually humiliated. In January 2004, Mohamed was moved by US soldiers to Afghanistan where he was held in the “dark prison”. There, his head was repeatedly beaten against a wall, he was hung up for two days, was sleep deprived, subject to loud music and scary sounds and given inadequate and inedible food. Judge Kessler noted that the US government did not “challenge or deny the accuracy of Binyam Mohamed’s story of brutal treatment”. Mohamed was taken to Guantánamo Bay in September 2004, where he says he was kept in isolation, subjected to very cold temperatures and was beaten (Reprieve 10 Jun. 2008: 40-41).

Shaker Aamer, a Saudi Arabian national whose wife and children are UK citizens, remains at Guantánamo, the last UK resident there, despite repeated requests by the UK for his repatriation and being cleared for release by Presidents George W Bush and Barack Obama (Norton-Taylor 19 Nov. 2013; Siddique 25 Oct. 2013). While in Afghanistan in US custody in late 2001 and early 2002, Aamer claims to have been abused and tortured in front of UK officials, including repeatedly having his head smashed against a wall (Qureshi 19 Jan. 2011: 9; Townsend 20 Apr. 2013; Cobain 2012: 219).

IV THE EXECUTIVE’S RESPONSE

The Labour Party held power in the UK between 1997 and 2010, first under Tony Blair and, from 2007, Gordon Brown. Following a national election in May 2010, David Cameron became Prime Minister when his Conservative Party formed a coalition government with the Liberal Democrats, led by Nick Clegg. This section will consider the responses of these three governments to the detention and alleged torture of UK citizens and residents at Guantánamo Bay.

93 Ibid 49.
94 Ibid 52.
95 Ibid.
96 Ibid 54.
97 Ibid 55.
98 Ibid 58.
Prime Minister Blair was a close supporter of the war on terror. His successor, Gordon Brown, remained committed to Blair’s counter-terrorism campaign and to close relations with the US (Shephard 2010: 89). The Blair and Brown governments maintained a consistent approach on the Bush Administration’s detainee policies and the issue of UK detainees at Guantánamo. On the specific issue of UK detainees at Guantánamo Bay who alleged they were tortured, the Blair government changed its position reasonably quickly from acceptance of the US’s treatment of the men to non-acceptance. For a long time, however, successive Labour governments discriminated in their positions on citizens and residents.

Broadly speaking, in relation to the more public aspects of the US’s detainee policies, at first the UK was openly supportive of the Bush Administration’s approach, with Prime Minister Blair, for example, describing the use of Guantánamo Bay as “unusual” but necessary for intelligence gathering (Kettell 2011: 41). The UK also defended the US’s decision not to apply Geneva Conventions protections to detainees (Kettell 2011: 41; United Kingdom 14 Feb. 2002). Much is still unknown about how far the UK’s support extended to the more secretive aspects of the US’s detainee policies, including its use of extraordinary rendition – that is, the secret transfer of detainees to countries known to use torture. The Blair and Brown governments strongly denied any involvement with the program until, in 2008, a series of investigations by the media, non-governmental organisations (NGOs) and the UK Parliament forced the Foreign Secretary, David Miliband, to admit that the UK territory Diego Garcia had in fact been used for rendition flights (Tyrie et al. 2011: 70, 73; Cobain and Norton-Taylor 10 Jul. 2014). It has been reported that, shortly after 11 September 2001, the UK pledged logistics support for the rendition program (Cobain 2012: 208, 213; see also Open Society Justice Initiative 2013: 113). The UK government continues to obfuscate over the extent of its involvement in rendition, including whether Diego Garcia hosted an actual CIA prison (Cobain and Norton-Taylor 10 Jul. 2014).

In the months immediately following 11 September, the Blair government supported the transfer of UK citizens detained by the US to Guantánamo Bay. In January 2002,
according to an internal Foreign and Commonwealth Office (Foreign Office or FCO) memorandum, the government decided this was “the best way to meet our counter-terrorism objective,” since if returned home the citizens would have to be released (Tyrie et al. 2011: 93; Cobain 2012: 217). In the case of one citizen, Mubanga, the Blair government actively prevented its embassy officials in Zambia from offering consular assistance to the dual national, in order to ensure he could not be returned to the UK (Tyrie et al. 2011: 95; see also ‘Key Documents and What they Show’ 15 Jul. 2010; Bowcott and Cobain 16 Jul. 2010). Internal FCO documents show that UK consular staff complained this broke with policy concerning UK nationals and left the UK open to “charges of a concealed extradition” (Tyrie et al. 2011: 96). The Blair government also dismissed early allegations that detainees at Guantánamo were being subjected to inhumane treatment as “completely false” (White et al. 22 Jan. 2002). The government stayed supportive of its citizens remaining in US military detention even after concerns were raised in January 2002 by UK intelligence officials conducting interrogations in Afghanistan that UK detainees were being abused and possibly tortured (Cobain 2012: 218, 221; see also The Detainee Inquiry Dec. 2013: 48). MI5 and MI6 agents in the field were subsequently informed by their superiors in London that since the men were not in their custody or control, “the law does not require you to intervene to prevent this” (Cobain 2012: 218). Between 2002 and 2004, UK intelligence conducted 100 interrogations of detainees at Guantánamo (Ratner and Ray 2004: 64; Cobain 2012: 225).

Not all members of the Blair government accepted its approach to Guantánamo Bay. Senior Labour MP Robin Cook wrote that many colleagues were “perplexed” at Prime Minister Blair’s lack of concern over the treatment of detainees (Cook 2003: 82). By mid-2003, the Blair government’s view of the detention of UK citizens at Guantánamo had begun to change. A number of factors contributed to this shift, including the growing concern inside and outside government of Prime Minister Blair’s handling of the Iraq war (Riddell 2003: 280; Stephens 2004: 309, 316). By this time, the failure to find weapons of mass destruction in Iraq had contributed to widening public dissent over the war (Shephard 2010: 89). A significant turning point for the government’s position on detainees came in November 2002, with a UK Court of Appeal ruling in a
case brought by the mother of one of the citizens, Abbasi. She had sought judicial review to compel the Foreign Office to make representations to the US on her son’s behalf. While the Court ruled in the government’s favour, citing the general rule that courts should not interfere in the conduct of foreign relations by the executive, it issued a scathing critique of Guantanamo Bay, noting that Abbasi was “arbitrarily detained in a ‘legal black hole’.” Another turning point occurred in July 2003, when the US listed Begg and Abbasi for trial by military commission, an event that emboldened concerned MPs to speak out (US Department of Defense 3 Jul. 2003; Branigan and Dodd 19 Jul. 2003). Foreign Office Minister, Chris Mullin, told the House of Commons that the government had “strong reservations about the military commission” (Watt and Dodd 8 Jul. 2003).

From this point, momentum continued to build in favour of the Blair government reversing its policy on the Guantanamo Bay citizens. Prime Minister Blair publicly called on the US to ensure the military commissions were fair, and the cases against Begg and Abbasi were suspended as the UK Attorney-General, Lord Goldsmith, began talks with US officials about the trial rules (Watt 10 Jul. 2003; 19 Jul. 2003). The following month, the Foreign Minister, Jack Straw, announced Lord Goldsmith’s negotiations had reached a stalemate. The military commissions, Straw said, “as presently constituted, would not provide the type of process which we would afford UK nationals” (Straw 19 Feb. 2004). Straw also announced the UK and US had agreed on the repatriation of five of the nine UK citizens. Once home, in March 2004, the returned men began publicly describing their experiences. They insisted the Blair government had known about their mistreatment, eventually forcing an admission by the FCO to this effect (Branigan 15 May 2004; 17 May 2004; Dodd 27 Aug. 2004; Cobain 17 Mar. 2009). In June 2004, Lord Goldsmith announced the UK government had been unable to accept that the US military commissions offered “sufficient guarantees of a fair trial in accordance with international standards” (Goldsmith 25 Jun. 2004). Prime Minister Blair asked the US for the remaining four UK citizens to be sent home (Dodd 26 Jun. 2004).


100 Ibid [64].
The Blair and Brown governments were more reluctant to take responsibility for UK residents at Guantánamo Bay, only shifting their position in 2006. Until this time, the approach remained that, as non-nationals, the UK government was unable to act on their behalf (Dodd 11 Jul. 2003). This was spelt out in correspondence from the FCO to the families of the men, which advised them to contact authorities in their countries of birth. In Al Rawi's case, this was Iraq, which at the time of the correspondence was about to be invaded by allied forces; in Deghayes' case, this was Libya, whose Gaddafi regime had allegedly murdered his father. The UK Court of Appeal, in a case brought on behalf of Al Rawi, El Banna and Deghayes seeking to force the UK government to request their release, described the FCO letters as "crass". However, it upheld the legal basis for the UK government's refusal to take up the men's cases with the US, relying on the earlier decision of Abbasi v Secretary of State. The Court there had found that Abbasi, as a citizen, was owed no right to diplomatic assistance beyond a legitimate expectation that the UK government would "consider" a UK national's request that representations be made on his behalf. The Court of Appeal ruled in the Al Rawi case that a non-national resident had no basis to expect even this.

Although the UK government had a legal basis for refusing to help the residents, a series of embarrassing revelations in the courts and the media implicating the UK in the detainees' mistreatment ultimately forced it into a back-down from its position. In March 2005, the media reported Al Rawi's evidence to the Combatant Status Review Tribunal (CSRT) at Guantánamo, that MI5 had urged him to remain close to Qatada so he could inform on the alleged extremist. In addition, the Al Rawi litigation, mentioned above, unveiled a series of documents implicating MI5, forcing admissions from the UK government about the agency's role in providing inaccurate information to the Gambians and Americans that led to the arrests of Al Rawi and El Banna (Norton-Taylor 24 Dec. 2005; 17 Mar. 2006; Norton-Taylor et al. 28 Mar. 2006). In March 2006, Foreign Secretary Straw announced the government would seek Al Rawi's

---

101 The Queen on the Application of Al Rawi v The Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279 [19-20].
102 The Queen on the Application of Al Rawi v The Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279 [19].
103 Ibid [89].
104 The Queen on the Application of Abbasi v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 [69, 106].
105 The Queen on the Application of Al Rawi v The Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279 [89].
106 It was also reported that the CSRT sought corroboration of Al Rawi's account from the Blair government, but it had refused to cooperate (Dodd 22 Mar. 2005).
release from Guantánamo Bay (Norton-Taylor 23 Mar. 2006). A number of other events
served to put further pressure on the Blair and Brown governments over the remaining
residents. Mullin, now a former minister, publicly stated the UK government had a
“moral obligation” to help Al Rawi and El Banna because of its involvement in their
2005). The Council of Europe released a report implicating MI5 in the extraordinary
renditions of UK residents (Council of Europe 2006: 43, 85). Al Rawi returned home
and spoke out about his experiences, including his work for MI5 and his torture
(O’Neill 30 Jul. 2007). In July 2007, the High Court gave the government two weeks to
disclose whether it would accept El Banna’s return to the UK (O’Neill 30 Jul. 2007). A
week later, the government called on the US to release the five remaining UK residents
from Guantánamo: El Banna, Deghayes, Mohamed, Sameur and Aamer (Dodd and

El Banna, Deghayes and Sameur were released in December 2007. Mohamed, the US
claimed, was “particularly dangerous” and would not be freed (Pilkington and Topping
8 Dec. 2007). Mohamed was eventually released in February 2009 (The Detainee
Inquiry Dec. 2013: 20). Leading up to his release, Mohamed was charged in the military
commission system in May 2008 with offences carrying the death penalty.107 Mohamed
claimed the charges were based on false confessions procured through torture and his
lawyers launched a case in the UK High Court seeking the release of documents in the
UK government’s possession that, they argued, proved this (Tyrie et al. 2011: 85).

The UK government opposed disclosure on the grounds that it would “cause significant
damage to national security of the United Kingdom”, as it would harm the UK-US
intelligence sharing relationship.109 In its August 2008 judgment, the High Court made
various findings about the involvement of MI5 and MI6 in Mohamed’s case, including
that it knew about his detention in Pakistan and Morocco and had supplied information
and questions for his interrogations.110 The UK’s involvement, the High Court said,
“was far beyond that of a bystander or witness to the alleged wrongdoing”.111 In

107 The Queen on the Application of Binyam Mohamed v Secretary of State for Foreign and
Commonwealth Affairs [2008] EWHC 2048 (Admin) [2].
108 Ibid.
109 Ibid [3].
110 Ibid [87-88].
111 Ibid [88].
October 2008, the charges against Mohamed were dropped (Reprieve 21 Oct. 2008). The Home Secretary asked the Attorney-General to investigate possible criminal wrongdoing by MI5 over Mohamed’s treatment (Norton-Taylor and Campbell 31 Oct. 2008).112 Evidence of Mohamed’s torture and UK complicity in his ordeal continued to build after his return to the UK, four months later. The High Court, in August 2009, was forced to revise its earlier judgment after it established that, contrary to the government’s account, an MI5 agent had visited Morocco three times during Mohamed’s detention and that MI5 had asked the CIA if it could interrogate him there and provided it with a list of 70 questions for him (Norton-Taylor 1 Aug. 2009). In February 2010, the Court of Appeal ordered the disclosure of the evidence the UK government had fought to keep secret: seven paragraphs describing some of Mohamed’s torture and UK intelligence’s knowledge that it was occurring.113 The Court of Appeal ruled that the “control principle” relied on by the UK government – that only the provider of the intelligence (the US) could release it – did not necessarily trump public interest in every case.114


112 Later, after Mohamed’s release, the Attorney-General called in the Metropolitan Police to investigate claims MI5 colluded in Mohamed’s unlawful interrogation (Operation Hinton) (Cobain 2012: 268). MI6 also referred one of its own officers to the Attorney-General over allegations of complicity in torture, resulting in a parallel police investigation of MI6 officers who interrogated detainees in Afghanistan (Operation Iden) (Norton-Taylor and Cobain 27 Mar. 2009; 12 Sep. 2009). Neither investigation resulted in charges being laid (Cobain 13 Feb. 2012).
113 The Queen on the Application of Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65.
114 Ibid [290].
May 2010 saw the formation of the Conservative-Liberal Democrats government. In an indication of how elevated the issue of torture had become in UK politics, the official coalition agreement contained the following statement rejecting the practice: “We will never condone the use of torture” (HM Government 2010: 20). The document made no mention of holding a torture inquiry, but the new Foreign Secretary William Hague quickly announced there would be one, fulfilling a pledge made in opposition (Wintour et al. 21 May 2010). In July 2010, Prime Minister Cameron announced details of the inquiry, including that it would be independent and judge-led (United Kingdom 6 Jul. 2010: col 175-176). The Detainee Inquiry’s terms of reference specified it would examine whether, and to what extent, the UK government and its security and intelligence agencies were involved in, or were aware of, the improper treatment or rendition of UK nationals and residents after 11 September 2001, primarily those held at Guantánamo Bay (HM Government 2011b). The Prime Minister said the inquiry was “not some political witch hunt to get at Ministers from a previous Government” (United Kingdom 6 Jul. 2010: col 187). Commentary at the time, however, noted it would place pressure on former foreign secretary Miliband, now a contender for leadership of the Labour Party, who the Conservatives previously accused of hiding details about UK involvement in detainee torture (Wintour et al. 21 May 2010; Gimson 7 Jul. 2010).

The Cameron government had other reasons – practical, political, security-related and moral – for holding an inquiry into UK complicity in torture. Addressing Parliament, Prime Minister Cameron emphasised the last imperative, noting “we need to restore Britain's moral leadership in the world” (United Kingdom 6 Jul. 2010: col 175). Accusations had been made in civil cases brought by detainees, Prime Minister Cameron noted, that the UK may have been complicit in the mistreatment of detainees. “The longer these questions remain unanswered, the bigger will grow the stain on our reputation as a country that believes in freedom, fairness and human rights,” he said (United Kingdom 6 Jul. 2010: col 176). More pragmatically, Prime Minister Cameron argued UK intelligence services were unable to do their jobs properly, “paralysed by paperwork as they try to defend themselves in lengthy court cases with uncertain rules” (United Kingdom 6 Jul. 2010: col 175). The Prime Minister was also responding to political pressure (Cobain 2012: 269). This was from the Liberal Democrats, which had
taken a strong position in opposition on the need for an inquiry and now, as coalition partner, had a say on government policy (Cobain 21 May 2010; 7 Jul. 2010). There was also pressure from Conservative MPs, such as Tyrie, who were pushing hard for an inquiry (Tyrie et al. 2011: 2). Furthermore, the new government was concerned to prevent more sensitive disclosures in detainee court proceedings, and Prime Minister Cameron simultaneously announced compensation negotiations had commenced with the UK’s Guantánamo Bay detainees to settle their civil claims (United Kingdom 6 Jul. 2010: col 177; see also Roach 2011: 293; Norton-Taylor and Cobain 7 Jul. 2010). In November 2010, the Cameron government announced it had reached a confidential compensation settlement with the Guantánamo Bay detainees, which avoided admissions of culpability (United Kingdom 16 Nov. 2010).

The Detainee Inquiry attracted extensive criticism from detainees, their lawyers and human rights NGOs, who argued it lacked transparency and independence. Some concerns related to the head of the Detainee Inquiry, Sir Peter Gibson, a former Court of Appeal judge who had served as Intelligence Services Commissioner, prompting questions about his impartiality (Cobain 2012: 269; Roach 2011: 295). Other concerns stemmed from the Detainee Inquiry rules (HMGovernment 2011a). These included that the government had the final say as to what evidence should be disclosed to the public and that, apart from the heads of the security and intelligence services, all other members of these agencies would give their evidence in private, meaning former detainees could not challenge the official version of events (Letter from Christian Khan Solicitors 3 Aug. 2011; Letter from Liberty et al. 3 Aug. 2011; HRW 20 Jan. 2014; REDRESS 4 Aug. 2011; JUSTICE 6 Jul. 2011). These concerns resulted in widespread boycotting of the Detainee Inquiry in August 2011 – a development that significantly undermined its legitimacy (Cobain 2012: 270).

The government abandoned the Detainee Inquiry in January 2012 (The Detainee Inquiry 18 Jan. 2012). The official reason given was the launch of a new police investigation into allegations of UK involvement in the extraordinary rendition of Libyan dissidents, their wives and children to Libya where the men were tortured (Cobain 2012: 271-272; Open Society Justice Initiative 2013: 114; United Kingdom 18 Jan. 2012). Because of this, said the Secretary of State for Justice, Kenneth Clarke, there was no prospect of the Detainee Inquiry starting in the foreseeable future so the government had decided to
conclude it (United Kingdom 18 Jan. 2012). The government subsequently told the UN Committee Against Torture that “we fully intend to hold an independent judge-led inquiry once all related police investigations are completed” (United Kingdom 2 May 2013). Gibson submitted a report of his preparatory work to the government in June 2012 (The Detainee Inquiry 28 Jun. 2012). It was released by the Cameron government 18 months later (The Detainee Inquiry 19 Dec. 2013).

The Detainee Inquiry report was based entirely on documents, with no evidence taken from witnesses (The Detainee Inquiry 19 Dec. 2013). It made no findings of fact, nor reached any conclusions, but raised 27 issues the panel would have liked to investigate and thought should be taken up by a future inquiry. Those issues were based around four themes: interrogation and treatment; rendition; training and guidance; and policy and communications (The Detainee Inquiry 19 Dec. 2013). Documents examined by the Inquiry indicated there were instances where UK intelligence officers were aware of “inappropriate interrogation techniques and mistreatment or allegations of mistreatment of some detainees by liaison partners from other countries”, and that the UK government or its agencies may have become inappropriately involved in cases of rendition (The Detainee Inquiry 19 Dec. 2013). Among the questions the Inquiry wanted pursued were whether there was reluctance in some cases to raise detainee issues with liaison partners; whether agencies inappropriately continued to engage with liaison partners in the cases of individual detainees after treatment issues had been identified; whether the government responded adequately on becoming aware of renditions or proposed renditions of UK nationals and residents; and whether agencies should have been quicker to identify patterns of detainee ill-treatment by foreign liaison partners (The Detainee Inquiry Dec. 2013: 91-102). The Inquiry also asked whether the government should have done more to secure the release of UK nationals and UK long-term residents (The Detainee Inquiry Dec. 2013: 101).

Upon releasing the Detainee Inquiry report, the Cameron government announced it was handing over the investigation of the 27 issues raised by the panel to the Intelligence and Security Committee of Parliament (ISC) – a parliamentary committee previously criticised over its lack of independence (United Kingdom 19 Dec. 2013; Cobain 2012: 267-268; Tyrie et al. 2011: 5). The government said it would decide, following the ISC’s report, if a further judicial inquiry “still remains necessary” (United Kingdom 19

V THE UK PARLIAMENT

Parliamentary oversight of the torture issue under the Labour governments was, for many years, limited and secondary to the role played by the judiciary (Shephard 2010: 107; De Londras and Davis 2010: 44). This was due to a number of factors. Under Blair, Parliament’s role was reduced by the healthy size of Labour’s House of Commons majority, the quiescence of the Conservative Party and the Prime Minister’s attitude to governing (Shephard 2010: 89, 107). Prime Minister Blair’s governing style was unilateral; his Cabinet was weak and his attitude towards the Parliament and its committees was one of detachment (Shephard 2010: 97, 99; Norton 2005: 243). Running counter to these developments were others, however, that bolstered Parliament’s powers, including the growing status of the UK’s third political party and the unpopularity of the Iraq war. The position of the Liberal Democrats, a party traditionally strong on civil liberties and which campaigned heavily on Guantanamo Bay, was enhanced by 1999 reforms to the House of Lords removing hereditary peers (Russell and Sciara 2007: 300, 316; Shephard 2010: 87, 90; Ashley 14 Jul. 2003; Hall 25 Sep. 2003; Russell 2008: 121). In relation to Iraq, while the Conservatives applied little pressure on Prime Minister Blair over the issue, and supported military action against Saddam Hussein’s regime, growing internal disenchantment with the Prime Minister’s role led to rebellions from Labour ranks (Shephard 2010: 92-95). After 2005, the loss of trust in Prime Minister Blair over Iraq prompted a parliamentary backlash.

115 Though, as Peter Katzenstein and Philip Cowley both note, the shift in the UK of authority from Parliamentary, to Cabinet, to Prime Ministerial government has been in play for over a century (Katzenstein 1977: 894; Cowley 2002: 231).
over security policy generally, including the UK’s involvement in extraordinary rendition (Shephard 2010: 99).

The Parliament imposed some measure of accountability on the Blair and Brown governments on detainees in two ways: through particular parliamentary committees and the work of individual MPs. The record of parliamentary committees on the detainee treatment issue was mixed. On the one hand, the ISC, which oversees the UK’s intelligence agencies, was widely criticised after 11 September for its failure to robustly investigate allegations of complicity by UK intelligence in torture in the war on terror. The ISC’s members are nominated by the Prime Minister, and critics argued it was too believing of the government’s assertions of ignorance of the US’s extraordinary rendition program (Cobain 2012: 267-268). For example, in 2007 the ISC found no evidence of UK complicity in torture and accepted the Prime Minister’s (inaccurate) assurances that US rendition flights never used UK airspace after 11 September (ISC 2007: 64-69). According to the Conservative MP, Tyrie, the ISC “failed in its primary task of obtaining the truth on the public’s behalf” (Tyrie et al. 2011: 5).

On the other hand, the Joint Committee on Human Rights (JCHR) was more critical of the government’s policies and positions with respect to the torture issue and, in 2009, became a vocal proponent for a public inquiry into torture complicity. The JCHR was established after the passage of the HRA and has been an active committee (Norton 2005: 151). Its role includes scrutinising the executive’s record on human rights and its compliance with international treaties and it has been praised by human rights scholars for the diligent way it did this after 11 September 2001 (Hunt et al. 2012: 13; Norton 2005: 150, 151; Hiebert 2005; Gearty 2005: 32). The JCHR’s influence on legislative and judicial outcomes in the UK is mixed; however, there is evidence that it has had some impact on parliamentary debate around human rights (Tolley 2009: 51, 53). It is argued that the language of human rights embodied in the HRA has provided a focus for parliamentarians and has helped frame public discussion around the necessity to balance freedom and security (Gearty 2005: 26-27, 32). This is illustrated by the JCHR’s record on the torture issue. Examples of the JCHR’s work on torture include its 2006 report on CAT, which criticised the Blair government’s attempts to undermine the Chahal v UK ruling on deportations to torture, as well as its MOUs with countries that torture, and was sceptical of its assurances on the UK’s lack of involvement in extraordinary
renditions (JCHR 2006: 3-4). In its 2009 report into allegations of UK complicity in torture, the JCHR called on the government to establish an independent inquiry and singled out Canada’s Arar inquiry as an appropriate model (JCHR 2009: 3, 21, 35).

A number of MPs were active in pressing the government on the rights of citizens and, later, residents, detained at Guantánamo. For example, after Begg and Abbasi were listed for trial by military commission, more than 200 MPs signed a House of Commons motion calling for UK citizens at Guantánamo Bay to be given a fair trial (Branigan and Dodd 19 Jul. 2003). In January 2004, 175 members of both houses of the UK Parliament filed an *amicus curiae* brief in support of the petitioners in the US Supreme Court case *Rasul v Bush* (Ahmed et al. 14 Jan. 2004).116 Tyrie, as noted, formed the APPG on Extraordinary Rendition in late 2005 (Tyrie et al. 2011: ix). Tyrie and his group played a significant role in probing and raising public awareness about the UK’s involvement in rendition (Tyrie et al. 2011: 2; Kevin Laue, tel. interview 30 Jan. 2013). The APPG began agitating from early 2007 on the situation of UK residents at Guantánamo Bay, and worked closely with human rights NGOs and media (Norton-Taylor 9 Jan. 2007). All-party parliamentary groups are increasingly pervasive in UK politics (Norton 2005: 128). They provide a means of contact between outside organisations and MPs and a way of reaching ministers through parliamentarians and are attractive to interest groups, particularly because they operate outside the party context (Norton 2005: 127). Another senior Conservative MP, David Davis, was a strong campaigner on the torture issue and the need for a public inquiry into UK complicity (United Kingdom 5 Feb. 2009; 2 Apr. 2009; 7 Jul. 2009). The local members of some of the UK’s Guantánamo detainees also generated public awareness of the citizens’ and residents’ plights through parliamentary debates and by speaking to the media.117

VI THE JUDICIARY AND THE *HUMAN RIGHTS ACT 1998*

The UK judiciary played a prominent role in reviewing executive action on terrorism (Roach 2011: 239; see also Ip 2010; Duffy 2008; Evans 2006; Grief 2006; De Londras

---


and Davis 2010; Samuel 2012; Gearty 2005; Shah 2005; Feldman 2005). In the course of hearing the cases of individual citizens and residents, the courts brought about changes to the government's policies on Guantánamo detainees, as we saw earlier in this chapter. The formal juridical structures of the domestic courts can be viewed as an institutional conduit through which UK civil society – particularly lawyers of the detainees and their families and human rights NGOs – worked to bring about improvements in their clients' situations and influence government policy more broadly. That detainees and their supporters were able to use the courts in this way owed much to the HRA, which operated in different ways: directly making it easier for individuals to assert their rights contained in the ECHR against the state and indirectly by strengthening the UK's rights culture, a critical component of which was raising rights consciousness. In this section, I focus on the impact the HRA had on elevating the judiciary's awareness about rights. I return to its impact on citizenries and civil society, including individual lawyers, later in the chapter.

The UK's legal culture prior to the HRA has been described as one in which judges were "remarkably conservative", where parliamentary sovereignty was favoured "to the nearly complete exclusion of judicial creativity" on issues of rights (Epp 1998: 111). Despite this, Charles Epp saw evidence of a growing rights consciousness on the part of the UK judiciary which he ascribed to a number of factors, including increasing conflict from the 1960s (especially with regards to Northern Ireland), expanding European human rights law (the UK accepted the jurisdiction of the European Court of Human Rights in 1966) and the development of a deeper "support structure" (Epp 1998: 112, 119, 131). By this, Epp meant the growth of rights-advocacy groups who used litigation tactically, an expanding legal aid program and, partly as a result of this, increasing numbers of solicitors and barristers (Epp 1998: 140-144). Following the HRA, the UK, while still sceptical about resolving public issues in court, is said to be closer to having a rights culture where human rights litigation plays an important role in rights development through judicial interpretation (Maiman 2004: 98, 87). This effect of the HRA in building a legal culture where institutional attitudes towards rights are more alert and receptive to their existence and importance was emphasised by policy makers involved in enacting and promoting the Act. For example, Lord Irvine, the Lord Chancellor who oversaw its introduction, said it would "create a more explicitly moral approach to decisions and decision-making" and would promote a "culture where
positive rights and liberties become the focus and concerns of legislators, administrators and judges” (Irvine Dec. 1997). His successor, Lord Falconer, advocated a definition of rights culture which encompassed a widely shared sense of entitlement to rights, respect for the rights of others and where this influenced all institutional policies and practices (Falconer 17 Feb. 2004).

Many scholarly commentaries on the role of UK courts in the war on terror single out the effect the HRA has had in changing the national legal culture in terms of giving confidence to judges to stand up to the executive on human rights matters. John Ip, for example, writes that the HRA has elevated the judiciary as an institution, giving it a firm mandate to act in cases involving human rights, and has helped it to overcome the traditional judicial reluctance to act in cases involving national security (Ip 2010: 41-42; see also Shephard 2010: 106). In practical terms, the elevated rights consciousness of the UK judiciary played a role in empowering the courts to engage more robustly on issues of human rights in the litigation brought by Guantánamo Bay detainees – even when not ultimately finding in their favour, as occurred in the Abbasi and Al Rawi cases.\footnote{The Queen on the Application of Abbasi v The Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 and The Queen on the Application of Al Rawi v The Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279.} In such cases, the accountability role of courts was more moral than legal. The government was pressured into changing its policies in part as a result of reproachful comments from judges and revelations made in the course of litigation about the potential complicity of UK intelligence agencies on torture. These actions by the judiciary and the courts helped legitimise the concerns being raised by the detainees’ supporters. Hence the power of war on terror litigation to provide state accountability on issues of detainee treatment can be understood in a number of ways that go beyond any particular ruling. In framing the issue as one of law, not politics, litigation carries out a number of different functions. It reasserts the principle of the rule of law in a highly politicised discourse and can send a judicial message to the political branches (Duffy 2008: 595-596). Litigation can also secure access to information and provide graphic illustrations of what euphemisms like “extraordinary rendition” mean in human terms (Duffy 2008: 596-597). Ultimately, litigation can serve as a catalyst to change law or practice – which occurred in the UK in relation to the treatment of detainees in the war on terror (Duffy 2008: 595). Abbasi’s lawyer, Louise Christian, described the effect of his case in 2002 in such terms:
Officially we lost the case, but the Court also described his legal predicament in quite singeing terms, that he was detained in a legal black hole ... and that his detention was arbitrary and outrageous. And this judgment went around the world. So in a way you can say that that view from the judiciary was also a real turning point (Christian, tel. interview 11 Feb. 2013).

Christian attributed the increasing willingness of the courts to challenge the government on human rights to the HRA, saying it “has had an enormous civilising impact on our courts (Christian, tel. interview 11 Feb. 2013).

VII CIVIL SOCIETY’S SUSTAINED PRESSURE

Having positioned itself closely to the US after 11 September 2001, the UK government’s initial reluctance to stand up for the rights of UK detainees allegedly tortured in the war on terror gave way under sustained domestic political pressure. The result was that the UK, unlike other liberal allies, refused to let its citizens be subject to the US’s military commission process, and brought them and – under further pressure – residents home. This section explores more deeply the nature of the domestic political forces which led to this outcome and which went beyond Parliament or the courts.

Liberal international law and international relations literature direct us to the effects international human rights have on citizenries in focusing their expectations about government behaviour (Simmons 2009). Here, I examine the role UK civil society played in compelling the government to take a stand on the treatment of citizens and residents detained at Guantánamo Bay. What was the position of civil society on these issues and what factors caused it to adopt such a stance?

A Prominent Actors

The key civil society actors who mobilised around the issue of detainee torture can be grouped into human rights lawyers, domestic and international human rights NGOs, the media, family members and Muslim organisations.

A small group of human rights lawyers played a significant role on the detainee torture issue in the UK. I treat individual lawyers who represented detainees in litigation as
members of civil society, distinct from the formal institutional structures of the UK judiciary. These lawyers had the backing of legal professional organisations including the Law Society of England and Wales and the Bar Council. Numerous domestic and international NGOs also became involved with the detainee torture issue. They included London-based organisations Reprieve, The AIRE Centre (for the promotion of European law rights), British Irish Rights Watch (BIRW, now Rights Watch (UK)), Justice (the International Commission of Jurists UK section), Liberty (a national civil liberties organisation), Freedom from Torture and REDRESS (both for torture survivors). Key transnational NGOs included London-based Amnesty International and New York-based HRW. Sections of the media campaigned on international torture in the UK case, most prominently *The Guardian*. I analysed editorials published in *The Guardian* on the torture issue, and compared them with those of another mainstream newspaper, *The Times*.

Family members had a limited role on the torture issue, with some exceptions. Begg’s father, Amzat Begg, for example, campaigned intensively for his son, as did Abbasi’s mother Zumrati Juma (Dodd and Branigan 9 Mar. 2004; Vasagar 22 Jan. 2002; Dyer 26 Feb. 2002). After early reticence, the families of some UK residents eventually spoke out publicly (Taylor 18 Mar. 2006; Deghayes 5 Oct. 2006). Established Muslim community organisations engaged in little public advocacy on the detainee torture issue. I consider two of the most prominent: the Islamic Human Rights Commission (IHRC) and the Muslim Council of Britain (MCB). I also look at Cageprisoners, an Islamic-based organisation established in 2003 specifically to advocate for war on terror detainees. Cageprisoners (now Cage) became embroiled in controversy in 2014, with the arrest of one of its directors, former Guantánamo Bay detainee and UK citizen, Moazzam Begg, who was charged with terrorism offences relating to Syria (Cage 6 Mar. 2014; McVeigh 2 Mar. 2014). Cageprisoners has been accused of being an apologist for Muslim fundamentalism (Bennoune 2013: 16).

**B The Political Context**

The UK’s domestic political context after 11 September 2001 presented civil society with conditions that were receptive to mobilisation on the human rights issue of the
torture of detainees in the war on terror. This was in terms of its developing rights culture and the emergence of certain openings in political opportunity structures.

A feature of the UK’s rights culture that was enabling of civil society mobilisation on the detainee torture issue was the UK’s history of Northern Ireland terrorism. This history meant civil society was wary of governments using counter-terrorism responses as an excuse for violating civil liberties. The country’s Northern Ireland experience formed a prism through which civil society viewed the UK government’s response to Islamic extremist terrorism after 2001. Civil society was, as a result, less able to be intimidated by the politics of national security surrounding 11 September. For example, one human rights lawyer said compared to the London transport bombings in 2005, the IRA bombings of the mid-1990s, leading up to the Good Friday Agreement in 1998, were “much, much more significant” in creating a more hostile political environment for human rights NGOs working on terrorism (Human rights lawyer ‘B’, tel. interview 15 Feb. 2013). Civil society actors familiar with Northern Ireland terrorism were also more ready to recognise signs of repressive laws and policies that targeted particular groups in UK society (in this case, UK Muslims). For example, Christopher Stanley from BIRW, a domestic NGO dedicated to “promoting human rights and holding government to account, building on lessons learned in Northern Ireland”, said the re-emergence of torture after 11 September rekindled collective memories. “People have started to re-engage and re-remember in that sense about what happened in Northern Ireland in terms of internment” (Stanley, tel. interview 7 Feb. 2013). This feature of UK civil society’s more experienced perspective on terrorism is an example of social learning (Tushnet 2003: 274). This occurs where past examples of what come to be understood as incursions on civil liberties progressively reduce the scope of such violations in troubled times like war (Tushnet 2003: 274; see also Ip 2010: 33-34).

A number of lawyers and human rights activists spoke about how the circumspection learnt from the Northern Ireland experience influenced their work on detainee torture after 11 September. One human rights lawyer activist said: “I think the Northern Ireland experience was very pertinent because we had a decade of familiarity with complicity in

---

119 The Good Friday Agreement signed on 10 April 1998 was a political settlement between the UK and Irish governments involving political parties in Northern Ireland (Blair 2010: 152-199).
torture in the context of that situation, so it wasn’t new (Human rights lawyer ‘A’, tel. interview 5 Feb. 2013). Another noted:

There is a tradition in this country of questioning government responses to terrorism, particularly because of Northern Ireland and what happened there, and that probably makes us more aware of the dangers of government overreaction to terrorism (Christian, tel. interview 11 Feb. 2013).

The UK’s Northern Ireland experience meant there existed a group of lawyers and NGOs well-versed on issues of human rights and counter-terrorism, who were primed to act and campaign for the war on terror detainees. As Arzu Merali, an activist from the Islamic Human Rights Commission (IHRC) said, the lawyers of UK detainees in the war on terror “had already seen the reintroduction of the same policies, the same types of laws that had happened with Northern Ireland – in a way they were ready for it” (Merali, tel. interview 5 Mar. 2013). One such lawyer was Gareth Peirce, a seasoned campaigner on Northern Ireland who had previously acted for the Guilford Four and the Birmingham Six, two high profile cases of miscarriages of justice relating to IRA bombings in the 1970s (Peirce 2010). Peirce wrote about the parallels between the Irish and Muslim experience, and described Muslims as the “new suspect community in this country” (Peirce 10 Apr. 2008). Asim Qureshi, a human rights activist from Cageprisoners, said:

Gareth has so much experience with the Irish issue that for her, Guantánamo was readily identifiable, it wasn’t something that was alien in any way. She understood the politics surrounding these things such as political violence (Qureshi, tel. interview 11 Feb. 2013).

Despite this history and experience, the political climate in the UK was toxic for Muslims, as it was in other liberal democracies, a factor indicative of a closed political opportunity structure. For example, Peirce, at a Muslim community event in 2004, said “I have never known such venom and such hatred ... as there has been against the Muslim community” (Blackstock 1 Apr. 2004; German 13 Jul. 2004). This sentiment created an inhibiting environment for Muslim community groups and families for mobilising on concerns over human rights in the context of the war on terror. I return to this issue in the next section.
Another important development in UK society indicating the opening of political opportunity structures was the building criticism of the Iraq War and the Blair government’s role. In February 2003, in the biggest public rally in the UK’s history, up to two million people took to the streets of London to protest against the imminent invasion of Iraq (BBC News 16 Feb. 2003). As mentioned earlier, the public outrage at the Iraq War caused divisions inside the Labour Party, producing cleavages among government elites that could be exploited by civil society. The war’s unpopularity also contributed to a more general dissatisfaction among the wider public that Prime Minister Blair’s attitude towards the US was too deferential. This anti-Iraq War sentiment fed into concerns about the treatment of UK detainees at Guantánamo Bay and, according to one UK human rights lawyer, by 2004 or 2005, the notion that Prime Minister Blair was “sacrificing British citizens” to the Bush Administration had currency (Human rights lawyer ‘B’, tel. interview 15 Feb. 2013). REDRESS’s Kevin Laue also emphasised the role public disquiet over Iraq – particularly revelations about the torture and killing of Iraqis by UK forces – had in increasing the pressure on the Blair government over the treatment of UK detainees at Guantánamo Bay (Laue, tel. interview 30 Jan. 2013). Laue noted that “the climate was all kind of intertwined”. “I’m convinced that you cannot separate it [Guantánamo] from the huge furore which Iraq caused” (Laue, tel. interview 30 Jan. 2013). Ultimately the protests over the Iraq War did not move Prime Minister Blair; it is arguable, however, that they contributed to his early reversal on the detention of UK citizens at Guantánamo Bay – possibly a more palatable back-down to mollify public opinion.

A final factor that suggests UK civil society faced a more open political system for mobilising was the Blair government’s positive framework for state and civil society relations (Kendall 2000: 554; Morison 2000: 111-112). Blair’s New Labour came to power with strong views about the voluntary and community sector, which are embodied in ‘The Compact” of 1998 (United Kingdom Secretary of State for the Home Department 1998; Lewis 1999: 264). Underpinning these views was a philosophy that voluntary and community activity is fundamental to the development of a democratic, social inclusive society (National Council for Voluntary Organisations undated). The Compact was a non-legally binding framework that explicitly recognised the sector’s independence and right to campaign and comment on, and challenge, government policy (Lewis 1999: 264). The significance of The Compact should not be overstated,
but it gave a level of legitimacy, and hence confidence, to civil society in publicly advocating on areas of contentious government policy, including counter-terrorism.

C Civil Society’s Approach

The mobilisation of UK civil society around the issue of the torture of detainees was characterised by the early activism of lawyers and the media and, much later, NGOs. Their focus was on state impunity rather than individual victims. Muslim community organisations, on the other hand, played a more limited role.

1. Campaigning Lawyers

Human rights lawyers were the earliest and most forthright civil society actors to take up the cases of the UK’s Guantánamo detainees. A small band of them appeared regularly in the media challenging the Blair government on its detainee policies, well over a year before concerned politicians went public, and much earlier than human rights NGOs. In 2003, The Guardian noted that the detainees’ families’ “only real support has come from campaigning lawyers… and a handful of sympathetic MPs” (Branigan and Dodd 19 Jul. 2003). One of those lawyers, Christian, who launched the first legal challenge of the Blair government’s detainee policies in the Abbasi case, supported this view. She said:

I think that the people who were most active really early on were the lawyers and a small section of the left wing press, but it took time for the mainstream media and for other NGOs and for the public generally to become aware of the issues (Christian, tel. interview 11 Feb. 2013).

Peirce was another lawyer who, according to UK media reports, was instrumental in the government’s decision to bring home UK citizens from Guantánamo (Bowcott 14 Jan. 2005; Jeffries 12 Oct. 2010). Clive Stafford Smith was a US-trained and based UK death penalty lawyer who founded the legal charity Reprieve (Dodd 10 Aug. 2007; Taylor 15 Jun. 2004). These lawyers worked with legal professional organisations and sections of the progressive media. They were publicly critical of the UK government’s policies on detainees’ rights and treatment, and were backed in their stances by a few

---

120 The Queen on the Application of Abbasi v The Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598.
outspoken judges. Together, these actors – lawyers, professional legal organisations and judges – comprised a reasonably effective “legal complex” (Halliday et al. 2007: 3). Different legal occupations were able to speak with a united voice for the individual rights of UK detainees, enhancing the impact of their interventions. The best known UK judge to speak out on Guantánamo Bay was Lord Steyn, a member of the Judicial Committee of the House of Lords, whose comments made headlines around the world. In November 2003, while the Blair government was in negotiations with the US over the military commission rules, Lord Steyn called the proposed trials a “monstrous failure of justice” (Dyer 26 Nov. 2003). In 2006, after retiring from the bench, Lord Steyn called Guantánamo Bay “a stain on American justice” and described Blair’s failure to condemn it as “shaming for our country” (Steyn 2006).

Litigation was a key component of the lawyers’ arsenal for pressuring the UK government on detainees and often relied on the HRA, which was invoked in the Abbasi, Al Rawi and Mohamed cases, and in legal claims lodged by detainees seeking compensation for their treatment. However, the lawyers’ activism for detainees went beyond the courts. It was clear from the beginning that acting for the detainees “was very much going to be a case of campaigning” (Christian, tel. interview 11 Feb. 2013). In addition to vigorously pursuing litigation domestically (at the same time as American lawyers were doing so on behalf of Guantánamo detainees in US courts – for example in Rasul v Bush), lawyers engaged in public advocacy through the media and partnered with various family members of detainees to lobby the UK and American governments. Christian recalled that an early success was getting the Law Society of England and Wales and the Bar Council on board on the detainee rights issue in 2002, at a time when “not a lot of people had a lot to say on it” (Christian, tel. interview 11 Feb. 2013). The organisations, representing more than 100 000 lawyers in England and Wales, demanded Guantánamo detainees be given access to legal advice (Dyer 26 Feb. 2002).

Stafford Smith, with his transatlantic connections, was well-placed to take on the UK detainee cases. By August 2007, he was acting for 70 current or former Guantánamo Bay detainees, including Mohamed (Dodd 10 Aug. 2007; Taylor 15 Jun. 2004). Crucial

to his effectiveness was that Stafford Smith, shaped by his experiences working in the US, was not afraid to use the media in his campaigning for detainees. He conducted interviews with journalists and wrote opinion pieces for different newspapers. Qureshi from Cageprisoners said of Stafford Smith’s “media-centric approach”:

He understood the role straight away, that there was a narrative that was trying to come out that they [the UK and US governments] needed to supress in whatever way they could, and so he did openly speak about the abuses that were taking place and that really helped (Qureshi, tel. interview 11 Feb. 2013).

The lawyers’ use of the media over time succeeded in humanising the detainees for the public and exerting moral pressure on the UK government. For example, Christian, in an opinion article in *The Guardian*, accused the UK government of “nothing less than a collusion in an international experiment in inhumanity” over its policies regarding UK citizens at Guantánamo (Christian 10 Jan. 2004). Stafford Smith, also in *The Guardian*, wrote about his first visit to Guantánamo Bay to see his client, Begg. He questioned the role the UK had played in Begg’s treatment, including his possible torture, and wrote: “As a nation, our morality is defined by whether we join the gang that is casting stones, or stand between the mob and its target” (Stafford Smith 20 Dec. 2004).

A number of factors are important to understanding why lawyers played such a prominent role on the international torture issue. Northern Ireland experiences influenced this particular group of human rights lawyers, as noted. In addition, the Guantánamo cases were not viewed in isolation from other developments. The counter-terrorism legislation being simultaneously implemented by the Blair government (particularly regarding the indefinite detention of non-nationals) informed the activism of lawyers, increasing their suspicion of a “growing disrespect for the rule of law” (Human rights lawyer ‘B’, tel. interview 15 Feb. 2013; Human rights lawyer ‘A’, tel. interview 5 Feb. 2013). The *HRA* was also significant in equipping lawyers with effective domestic legal levers by which to make rights claims on behalf of detainees and in influencing the expectations of legal practitioners as to how such claims would be received. UK human rights NGOs emphasised the importance of the *HRA* in the legal and campaigning strategies adopted by lawyers in the Guantánamo cases. Kevin Laue, from REDRESS, said the *HRA* was “crucial”:
As soon as the *European Convention [on Human Rights]* could be used directly by British courts, that gave a huge input or impetus – it gave a whole new arsenal to the lawyers, to the barristers and the people like Gareth Peirce and a whole host of QCs and people, to argue that you had to look at the principles that had been laid down in the *Convention*. Particularly, there had to be proper inquiries into allegations of torture (Laue, tel. interview 30 Jan. 2013).

Greater emphasis was placed on the *HRA* (and the *ECHR*) than on UN conventions in pressing for state accountability on torture. European torture law, it is argued, is more operational and influential than *CAT* (Parry 2010: 44). Fionnuala Ni Aoláin, for example, describes a 'uniquely European approach to the prohibition on torture’, with an unparalleled body of case law (Ní Aoláin 2004: 213, 218). Human rights lawyers involved in the UK detainee torture issue noted the preference for European law, with one commenting that international law outside the *ECHR* “is hardly mentioned in the UK by lawyers” (Human rights lawyer ‘B’, tel. interview 15 Feb. 2013). Despite this, human rights NGOs used the UN treaty system to complain about the UK’s conduct in relation to the alleged torture of its Guantánamo detainees. A number of NGOs, for example, submitted shadow reports to the 2004 reporting cycle of CAT (see for example REDRESS 15 Oct. 2004). In the 2013 reporting cycle, Shaker Aamer’s lawyers submitted a shadow report in which they criticised the UK government for, among other things, failing to make an interstate complaint to the Committee Against Torture over the US’s failure to release him (Birnberg Peirce & Partners 17 Apr. 2013).

2. *The Investigative Media*

Certain sections of the media made significant contributions from early on to raising public awareness and pressure on the UK government over the issue of detainee torture in the war on terror. The most prominent media outlet to campaign on the torture issue was *The Guardian*, which was consistently critical in editorials, from 2002 onwards, of the Blair government’s “sotto voce” approach regarding detainees at Guantánamo Bay (Editorial 9 Jul. 2003; see also Editorial 12 Jun. 2002).

*The Guardian* has received wide acclaim for its role on the issue of the torture of UK detainees, including its investigative journalism on the complicity of UK intelligence in their mistreatment and, by applying constant pressure, helping to bring about the Detainee Inquiry (something for which the newspaper itself took credit (Cobain 21 May 2010; Editorial 27 May 2009; Editorial 21 May 2010)). For example, the Leveson
Inquiry into the culture, practices and ethics of the UK press, which reported in 2012, paid tribute to *The Guardian* and its journalist Ian Cobain, who it said had “painstakingly uncovered the extent of the UK’s complicity in the torture and rendition of detainees in the face of countless official denials” (Leveson 2012: 457). Cobain’s reporting, it said, “was one of the key factors leading to the Government’s decision to order an inquiry into allegations of British complicity in torture” (Leveson 2012: 457). The Conservative MP Tyrie similarly credited investigative journalists, along with NGOs, with having “uncovered much of what is known about rendition and highlighted issues that became part of the APPG’s campaign” (Tyrie et al. 2011: ix). Other civil society actors singled out *The Guardian* for its early reporting of the treatment of UK detainees at Guantánamo. Kevin Laue, a human rights lawyer with REDRESSS, described *The Guardian’s* role as “critical”, and said:

> [T]here was a period for a year or two when it was only the media who was exposing these things and a very limited number – I don’t think even REDRESS was involved – of the big main human rights organisations just raising questions, criticising, saying this needed to be investigated (Kevin Laue, tel. interview 30 Jan. 2013).

A couple of features stand out with respect to *The Guardian’s* coverage of the detainee torture issue. One is that it worked with other civil society actors, including human rights lawyers, NGOs and Tyrie’s APPG. A second is that *The Guardian* was not, at least for a long time, typical of other UK media in campaigning so strongly on the subject. In relation to the first point, one civil society actor, Laue, described the relationship between *The Guardian* and Tyrie as “symbiotic”, in that the two “would feed into each other”. Laue explained: “*The Guardian* would expose things, and Tyrie could pick up and report on it and raise it in Parliament” (Kevin Laue, tel. interview 30 Jan. 2013). Likewise with the newspaper and human rights organisations, Laue said *The Guardian* would “give publicity to what the NGOs were saying virtually whenever they said it because it also supported their own agenda. *The Guardian* definitely decided editorially this was fundamental, let’s put all our resources into it” (Kevin Laue, tel. interview 30 Jan. 2013). Laue’s observation illustrates the power media can wield in relation to human rights, through its selection of particular issues and actors in its reporting. By determining which voices to make visible and give credibility to, media set agendas and frame human rights issues in ways that may influence human rights outcomes (Nash 2009: 52). For example, in its reporting of letters sent home by
detainees through the ICRC, The Guardian contributed to supporters’ efforts to humanise the men (when governments would have preferred they remained faceless individuals). In one article, The Guardian used a letter to juxtapose Begg’s US military-issued identity with his family’s depiction of him as a loving father:

Moazzam Begg – or detainee JJEEH#00558 to his captors – is described by his family as a deeply religious man and devoted father, though his sole contact with his children is now through letters he sends home via the Red Cross. In one, he urges them to work on their English spelling. In another, he asks his family to video his youngest child, born a few months after he was seized and whom he has never seen (Branigan and Dodd 19 Jul. 2003).

The Guardian’s active role on the detainee torture issue can be seen as a part of a wider tradition of the UK press in openly campaigning on issues of public importance (as determined, often, according to a newspaper’s particular agenda). As noted, for a long time The Guardian was not reflective of the wider mainstream UK media on the specific issue of detainee torture. For example, the editorial position of The Times, a more politically conservative newspaper owned by News Corporation, was much more circumspect on the torture issue (Leveson 2012: 99, 101, 105). Early on, The Times argued that the “intelligence war is, of necessity, a campaign waged in the shadows”, and described the allegations of torture at Guantánamo Bay as “exaggerated” (Editorial 5 Mar. 2002; 7 May 2003). The Times’ attitude shifted however, increasingly becoming more questioning of the US and UK’s war on terror policies. In April 2006, it called for Guantánamo Bay to close and, in 2010, The Times welcomed Cameron’s announcement of a torture inquiry (Editorial 28 Apr. 2006; 7 Jul. 2010).

Media are a crucial mobilising tool, but they have the potential to both promote and inhibit human rights (Lasner 2006: 249). On the one hand they can document and report violations, increasing people’s awareness and understanding of human rights – as The Guardian did. On the other, they can reinforce stereotypes and discrimination, suppress news about human rights violations and activists’ work, or serve as tools of instigation and mobilisation for perpetration (Arat 2006: 14). The Guardian is unique in the UK as the only national newspaper to be owned by a Trust rather than a traditional proprietor owner (Leveson 2012: 134). It is known for its “liberal journalism,” which reflects the

---

122 The Leveson Inquiry, in setting out the history of all mainstream British newspapers, repeatedly referred to this campaigning mandate as a point of pride for the various publications (Leveson 2012: 99-155).
Trust’s objective of securing editorial independence for *The Guardian* as a quality newspaper without party affiliation, while remaining “faithful to the liberal tradition” (Leveson 2012: 134). BIRW’s Stanley for example notes that “popular opinion is not in *The Guardian*” though it is “politically influential” (Stanley, tel. interview 7 Feb. 2013). Christian described the majority of UK media as being “cowed”. She said: “*The Guardian* obviously is an important media outlet on the left, but you have to win round more than *The Guardian* to get somewhere in a campaign” (Christian, tel. interview 11 Feb. 2013). For this reason, a number of civil society actors nominated the moment the conservative *The Daily Mail* began reporting on the Mohamed case as a more significant contribution to the public debate and pressure on the detainee torture issue (Human rights lawyer ‘B’, tel. interview 15 Feb. 2013). *The Daily Mail* in 2002 had a circulation of nearly 2.5 million; *The Guardian’s* was under 400 000 (Leveson 2006: 95). *The Daily Mail* describes itself as being “in touch with the hearts and minds of ‘Middle England’”, and takes pride in its “campaigning stance” and the fact that “it is not afraid to expose the wrongs and shortcomings of people in power” (Leveson 2006: 114). In February 2009, after a series of reports about Mohamed’s torture and the UK’s alleged complicity, *The Daily Mail* editorialised: “There must now be a full judicial inquiry into all the allegations, otherwise our international reputation as a just and law-abiding nation will continue to be dragged through the mud” (Daily Mail Comment 27 Feb. 2009).

3. The Role of NGOs

Human rights NGOs were slower than lawyers and liberal sections of the media to take up the cause of UK Guantánamo detainees. Despite this, over the course of the post-11 September decade, spurred on by media revelations and developments in the detainees’ court cases, a significant number of NGOs mobilised around the issue. Among these groups was at least one new NGO dedicated to the issue of detainees: Cageprisoners. The Guantánamo detainee issue also inspired the expansion of existing NGOs, including Reprieve, which before 2001 focused on death penalty cases. Christian noted: “There are actually more NGOs now as a result of what’s happened than there were at the time – at the time there was only really Amnesty” (Christian, tel. interview 11 Feb. 2013).

By the time the Cameron government announced the Detainee Inquiry in 2010, a group of 10 domestic and international NGOs had developed high profiles around the torture issue (Liberty, Amnesty International, REDRESS, Cageprisoners, The AIRE Centre, Freedom from Torture, HRW, Justice, Reprieve and BIRW). These 10 NGOs worked together with detainee lawyers on the Inquiry, first cooperating with the government and then, in a coordinated fashion, boycotting it. The competitive pressures that can exist between NGOs were discussed in Chapter Two. Some UK NGOs, including Liberty, have spoken about the effect of the HRA in intensifying this rivalry because it has made it easier and more profitable to argue about human rights in domestic courts.
Against this background, the alliance formed between the NGOs and lawyers on the detainee torture issue was lauded by some civil society actors as unusual, a case of putting principle before self-interest. For example, BIRW’s Stanley said that for such a group of “high-profile, high-end NGOs, high-profile radical lawyers – to put it crudely – Gareth Peirce, Louise Christian and so forth, to come together on that single issue, that was unprecedented” (Stanley, tel. interview 7 Feb. 2013). REDRESS’s Laue made a similar observation:

The NGOs here we work together, Amnesty, Human Rights Watch, Liberty, everybody, Reprieve - we’re all on the same side basically, but there’s a degree of competition to some extent and specialisation, and everybody is looking for funding from donors and so on. So we don’t always work in a close coalition. But with the Detainee Inquiry, thanks to some individual NGOs including especially Amnesty, I think they realised how important this was (Kevin Laue, tel. interview 30 Jan. 2013).

The decision by the major UK and transnational human rights NGOs and lawyers to boycott the Detainee Inquiry collectively – having previously argued so vigorously for one – was in some ways surprising and, arguably, self-defeating. The 10 NGOs wrote to the Detainee Inquiry in August 2011 advising that due to the lack of credibility and transparency of the process, the organisations were ceasing their involvement (Letter from Liberty et al. 3 Aug. 2011). The same day, the law firm Christian Khan, representing detainees, wrote to the Detainee Inquiry advising of their clients’ decisions not to give evidence (Letter from Christian Khan Solicitors 3 Aug. 2011). Not all those involved were comfortable with the decision to boycott. One human rights lawyer indicated that some organisations only joined the boycott when it became untenable to do otherwise because other groups had already pulled out (Human rights lawyer ‘A’, tel. interview 5 Feb. 2013). After Reprieve withdrew, this person said, “then either civil society organisations had to speak with two or three different voices or just tacitly go along with non-cooperation, and that’s what happened in the end” (Human rights lawyer ‘A’, tel. interview 5 Feb. 2013). Another human rights lawyer believed that some NGOs were “much too eager to pull out and shut it down” (Human rights lawyer ‘B’, tel. interview 15 Feb. 2013). This was “because in any event it was a unique opportunity – I don’t think any investigation into the secret services had ever been done before”. To see NGOs pulling out, said this person, “was a very sad moment” (Human rights lawyer ‘B’, tel. interview 15 Feb. 2013).
The activism of lawyers, the media and NGOs on the detainee torture issue was distinguished by its focus on state impunity, not individual victims. Factors such as the detainees’ personal attributes, whether they seemed innocent or guilty and whether they had charismatic family members were not overtly material to determining civil society’s support for their cause. BIRW’s Stanley explained civil society’s approach as “more about questioning the impunity of the state in relation to the victim than the victim themselves” (Stanley, tel. interview 7 Feb. 2013). Similarly, the IHRC’s Merali said: “I can’t recall anyone ever saying ‘this poor person trapped in Guantánamo’ and singling out some more than others” (Merali, tel. interview 5 Mar. 2013). Having said this, Muslim organisations did question whether the behaviour of some human rights NGOs was influenced by the detainees’ Muslim identity. There was a sense that some transnational NGOs were initially reluctant to advocate for Guantánamo detainees at all because, in the words of one Muslim activist, “there was almost a tacit acceptance that these are not really the type of people you want to advocate for” (Merali, tel. interview 5 Mar. 2013).

Another feature of civil society’s non-discriminatory approach to the issue of detainees who were tortured was that it did not, in general, accept the UK government’s attempts to distinguish between its obligations to citizens and residents at Guantánamo Bay. In 2003, for instance, Amnesty International criticised the government’s decision not to help Al Rawi and El Banna because they were not citizens as “questionable morally and legally” (Dodd 11 Jul. 2003). Peirce, who acted for UK citizens and residents, commented after the court in the Al Rawi case found for the government (that it did not have to lobby for the release of residents) that: “This is not an area where the government is entitled to discriminate and it has discriminated between nationals and residents” (Norton-Taylor 5 May 2006). Similarly, in NGO reports calling for UK government accountability over the treatment of UK citizens and residents, the organisations did not differentiate between the two groups (Amnesty International 23 Mar. 2010; Reprieve 10 Jun. 2008; REDRESS Dec. 2008; HRW Jun. 2010; Qureshi 10 Aug. 2005; 28 Mar. 2006; Apr. 2009; 19 Jan. 2011). This attitude was also apparent from media reporting on the residents, particularly The Guardian, which first reported

123 The Queen on the Application of Al Rawi v The Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279 [89].
on the UK government’s abandonment of Al Rawi and El Banna in July 2003 (Dodd 11 Jul. 2003). UK civil society saw no difference in the state’s responsibilities towards either category of persons, where their fundamental human rights – including the right not to be tortured – were being transgressed by a foreign power.

Civil society actors based their challenge of UK government policy differentiating between citizens and residents on moral and legal grounds. Morally, UK intelligence services were closely involved in the original detention and early interrogations of some residents, particularly Al Rawi, El Banna and Mohamed. In addition, many of the residents had close connections to the UK. This was in terms of their lives and families being embedded in UK society, because of the length of time they had lived there and because many had UK wives and children. Media reporting of El Banna, for example, emphasised his family’s UK links. Before he was arrested El Banna, his wife and children “enjoyed a very happy and settled life in London”; his son wrote to Prince Charles asking for help to bring his “daddy” home (Taylor 18 Mar. 2006). One human rights lawyer explained the connection of residents to the UK as:

They were denizens, they were such embedded residents that they were a hop and skip away from being citizens. Their links with the UK were very strong without the technicality of citizenship. Some had British wives, British children – you were not looking at people who had just come off the boat or tourists, these were people who had been an integral part of British society for a long time. There was no question if and when these people were released, the place they would come back to would be the UK, not their country of birth (Human rights lawyer ‘A’, tel. interview 5 Feb. 2013).

The other grounds for UK civil society’s non-discriminating position on citizens and residents were legal and normative. This was founded in the universality underpinning international human rights law, including the *Universal Declaration of Human Rights* (UDHR), of which the right to equality between nationals and non-nationals is a “critical manifestation” (Duffy 2008: 580). As noted in Chapter One, the universal application of international human rights law has influenced state practice on citizenship in the post-World War Two era. According to traditional conceptions, citizenship defines bounded populations with a specific set of rights and duties, excluding “others” on grounds of nationality (Soysal 1994: 2). However, a growing body of scholarship argues that the emergence of the international human rights regime has resulted in the corrosion of traditional notions of nation-based citizenship and the absolute distinction
between citizens and non-citizens is being called into question (Soysal 1994: 1; Sassen 2006, 2008: 307; Nash 2009: 18; Benhabib 2004: 144). It is argued that a “new and more universal concept of citizenship has unfolded in the post-war era, one whose organising and legitimising principles are based on universal personhood rather than national belonging” (Soysal 1994: 1).

The legal notion of universality refers to states having obligations to protect the international human rights of non-nationals within their jurisdictions (Duffy 2005: 289). It is arguable, however, that the post-UDHR questioning of the citizen/non-citizen distinction in relation to human rights has influenced ideas more widely about states’ obligations to protect individuals’ human rights, in situations where there is a connection to those states. I contend that these ideas of universality influenced the civil society discourse on UK residents detained overseas. Where a link could be established between the state and the individual, claims could be made that obligations for protection existed. The literature on the modern expansion of understandings about citizenship draw attention to the role of global civil society in driving universalist ideas and in giving human rights “an expanded role in the normative regulation of politics as politics becomes more global” (Sassen 2006: 286). I draw attention to such contests between civil society and the state over the boundaries of citizenship occurring at the domestic level. In the face of resistance from the UK government, local civil society actors successfully pressed for more universal notions of citizenship in terms of the state’s obligations to defend individual human rights, to include residents with strong connections to the state.

Why was civil society non-discriminating in its approach to detainees? A number of factors influenced its position. They included ideas about the universality of international human rights and the UK’s rights culture, forged out of its prior history of terrorism and internment and shaped by its membership of a powerful regional human rights regime. Civil society’s attitude was also informed by domestic debates occurring around the discriminatory internment laws targeting non-citizens (overturned in the Belmarsh case). The fact that these debates were occurring created an opening in the UK’s political system that meant it would be easier for supporters of the residents detained at Guantánamo to gain traction on their cases which, they argued, had parallels with what was occurring domestically. One other possibility was the effect of the sheer
volume of cases of detainees alleging they were tortured with the complicity of the UK’s intelligence agencies. This may have helped focus civil society more on the state’s actions and on issues of general principle – and less on the particular victim.

5. The Limited Role of Muslim Community Groups and Families

Established Muslim community organisations played a negligible role in the detainee torture debate in the UK. Similarly, many of the families of the UK’s Guantánamo detainees engaged in little public lobbying over their situations. In both cases this was due to intimidation and fear caused by the “poisonous” political climate that existed after 11 September for Muslims (Merali, tel. interview 5 Mar. 2013; Vertigans 2010; Brittain 2009; Peirce 2010). For example, there were references in the press to Muslim organisations speaking out about Guantánamo Bay, such as the Muslim Council of Britain (MCB) and the Islamic Human Rights Commission (IHRC), but not of concerted campaigning by them on the issue of UK detainees. An analysis of press releases published by the MCB illustrates this point. Only seven press releases were issued on the subject of Guantánamo Bay between 2001 and the end of 2010; three of them welcomed the return of UK citizens and none of them related to UK residents (MCB 23 Jul. 2003; 9 Sep. 2003; 9 Mar. 2004; 12 Jan. 2005; 25 Jan. 2005; 15 May 2005; 12 Jan. 2007). Likewise with respect to families, an analysis of news articles in The Guardian and The Times over the period 2001 to 2010 suggests they were not a major driver in bringing pressure to bear on the UK government. The Guardian reported that families “kept their heads down, fearing that anything they say could be used against their loved ones,” and tried to avoid being branded guilty by association with Muslim extremists – including other detainees and their families (Branigan and Dodd 19 Jul. 2003). According to the IHRC’s Merali, “there was absolute panic” by most Muslim organisations after 11 September and a lack of “a strategy or understanding of how to cope with what was going on” (Merali, tel. interview 5 Mar. 2013). Merali illustrated this high level of apprehension with an anecdote from January 2002, when the first pictures of detainees at Guantánamo were released by the US government (BBC News 20 Jan. 2002):
I was shopping with my family and saw the headlines in the newsagent’s, and my husband ... started ringing around people to say “we need to mobilise and start campaigning, this is really unacceptable”. And people were saying “no we can’t do that, we can’t associate ourselves, otherwise we will be tarnished, tarred with the same brush” and people were in that kind of panic – that was almost universal (Merali, tel. interview 5 Mar. 2013).

The IHRC was alone among Muslim organisations agitating on the Guantánamo detainee issue and, overwhelmed by the high volume of Muslim civil liberties cases more generally, moved away from advocating on the subject (Merali, tel. interview 5 Mar. 2013). The IHRC did no original work on the torture issue because other NGOs were and it has a policy “not to replicate work if somebody else is doing it and they know what they’re doing” (Merali, tel. interview 5 Mar. 2013). Qureshi from Cageprisoners backed this analysis of the Muslim community’s lack of activism on the UK’s Guantánamo detainees and their torture allegations. Qureshi said one of the reasons behind Cageprisoners’ formation was that existing organisations were unwilling to get involved in these issues (Qureshi, tel. interview 11 Feb. 2013). Cageprisoners, for example, was the only Muslim representative organisation involved in the Detainee Inquiry (Stanley, tel. interview 7 Feb. 2013). Qureshi said UK human rights activists originally approached the major Muslim organisations about getting involved in the Guantánamo Bay detainee issue, but were rebuffed.

They literally turned around and said “look, the Americans don’t hold people without charge or trial, they have due process, if the Americans have got these guys it’s probably because they are terrorists” – so nobody was willing to stick their neck out (Qureshi, tel. interview 11 Feb. 2013).

American international law professor, Karima Bennoune, has accused Cageprisoners, the IHRC and the MCB (as well as the Council on American Islamic Relations, whose Canadian arm is discussed in Chapter Six) of being apologists for Muslim fundamentalist political movements which use or advocate violence (Bennoune 2013: 16). Others make similar accusations, including UK-based conservative think tank, the Henry Jackson Society (Murray and Simcox 21 Jul. 2014). They illustrate Jai Sen’s ideas about the representativeness of civil society and its attempts to subjugate or tame those who do not conform to its ideas about what it means to be “civilised”, discussed in Chapter Two (Sen 2007: 54). Bennoune’s and others’ contestations of the motivations and activities of these Muslim human rights groups effectively challenge their rights to exist and to occupy a legitimate place in civil society, because of their
alleged sympathies. Their representations of groups such as Cageprisoners as apologists for Muslim fundamentalists are examples of what Sen terms the “incivil” – by which he means those insurgent societies challenging existing power structures dominated by the “civil” – as well as the “uncivil” (Sen 2007: 60). The term “uncivil” refers to those also resisting civil society but whose motives and work are “far more limited, material, and in general criminal and exploitative” (Sen 2007: 60). Sen suggests the line between the incivil and uncivil is often blurred. What is important is to recognise tensions between these different worlds, the civil and incivil or uncivil, exist. There is not one civil society in the UK, and its membership is contested.

Amzat Begg, Moazzam’s father, was one of the few family members who campaigned stridently for his son. He was described by The Guardian in 2004 as “the most vocal campaigner among the UK families of Guantánamo prisoners” (Dodd and Branigan 9 Mar. 2004). Merali said Amzat “literally didn’t sleep for all those years, he made sure he kept on pushing, and it did eventually succeed” (Merali, tel. interview 5 Mar. 2013; see also Begg 2006: 272). Amzat first spoke out when news of his son’s arrest in Pakistan became public in March 2002 and was, from then, a regular voice in the media (Gillan 9 Mar. 2002; Dodd 10 Feb. 2003). He lobbied at the European Parliament (Campbell 1 Oct. 2003). In 2004 he helped launch the “Guantánamo Bay Human Rights Commission” (founded by the British actors Vanessa and Corin Redgrave), and later took part in a delegation supported by the American Civil Liberties Union which travelled to Washington to lobby US politicians (Branigan 21 Jan. 2004). Amzat lobbied UK MPs and US diplomats and helped launch a new political party, “Peace and Progress” (Dodd 17 Sep. 2004; 16 Dec. 2004; Branigan 17 Nov. 2004). Abbasi’s mother also gave media interviews criticising the UK and American governments, launched legal proceedings, attended events with Begg’s father and lobbied parliamentarians (Vasagar 22 Jan. 2002; Dyer 26 Feb. 2002; Dodd 21 Feb. 2004; Watt and Dodd 8 Jul. 2003).

In time, the families of UK residents also turned to the media to raise awareness and pressure the government. El Banna’s wife began to give media interviews from 2006. She and the families of Al Rawi and Deghayes also launched legal action against the UK government (part of their claim was based on being deprived of the right to family
life under Article 8 of the *HRA*). The *Guardian* noted that in the first couple of years after El Banna’s disappearance, his wife “tried to shield her children from the truth about their father’s whereabouts. But now she has decided she must speak out to try to get Jamil home” (Taylor 18 Mar. 2006). The Deghayes family, in 2007, released a “detailed dossier” of Omar’s torture (Dodd 11 Aug. 2007). Al Rawi’s mother also went public for the first time in 2006, prompted by the Court of Appeal ruling against her son into speaking out after years of silence (Taylor 13 Oct. 2006). The *Guardian* reported when the UK government reversed its position on residents at Guantánamo Bay that “Whitehall officials admitted the decision had come after relentless pressure from the men’s families and lawyers” (Dodd and Norton-Taylor 8 Aug. 2007). Likewise, the reluctance of Muslim community organisations to speak out on the issue of detainees in the war on terror decreased over time as citizens were released from Guantánamo (and spoke about their treatment), as concerns about torture being used against detainees grew in the wider community and with the campaign around the laws regarding the indefinite detention of non-nationals (Merali, tel. interview 5 Mar. 2013; Qureshi, tel. interview 11 Feb. 2013).

**VIII CONCLUSION**

UK governments were responsive to allegations of mistreatment and torture by UK citizens and residents detained in the war on terror. This was illustrated by the Blair government’s early decisions not to allow its citizens to be tried by the US military commissions at Guantánamo Bay and to bring them home. It was further illustrated by UK governments’ decisions to repatriate residents, towards whom the state owed less obligations to defend their rights against the actions of a foreign detaining power. The responsiveness of UK governments was also evident in the decision to hold an independent inquiry into citizens’ and residents’ allegations of torture and UK complicity. UK governments faced intensive political pressure at home from the judiciary and civil society over their policies towards citizens and residents detained in the war on terror. UK lawyers, in particular, mobilised soon after prisoners arrived at Guantánamo Bay and the first judicial ruling on the situation of detained UK citizens was delivered the same year. Civil society did not discriminate between victims based

---

124 *The Queen on the Application of Al Rawi v The Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279 [91].
on whether they were appealing characters or appeared to be innocent or not, nor did it differentiate between citizens and residents. Its focus was, instead, on state impunity.

Civil society’s behaviour in applying sustained pressure on the UK government can be understood through an examination of the domestic political context, various features of which facilitated mobilisation on the torture issue. These features include a rights culture that was informed by the state’s previous experience of terrorism and executive overreach in responding to such a threat, as well as an increasing rights consciousness precipitated by the introduction of the HRA. The HRA elevated the right consciousness of the judiciary as well as civil society groups. The UK’s membership of an effective regional human rights regime, which entailed it being a party to the ECHR, also meant legal levers were available to detainees and their supporters for bringing rights claims against the state, including claims based on the right not to be tortured. The HRA meant this could be done in UK courts. Civil society groups did not emphasise the UK’s obligations under international conventions because they did not need to, having sufficient domestic mechanisms. Civil society also faced a relatively open political system, which was receptive to mobilisation on issues to do with human rights and the war on terror. This was because of the unpopularity of the Iraq war, with public perceptions that Prime Minister Blair was too deferential to the US, and because of debates occurring at home over the government’s counter-terrorism laws, which the UK courts found discriminated against non-citizens suspected of terrorism.

In summary, the combination of these factors – a cultural awareness of the need to balance security and rights, institutional levers to contest human rights transgressions and apertures in the political system through which to gain a sympathetic hearing – meant civil society groups were ready and able to mobilise on the issue of the torture of detainees and the need for government accountability. Quite simply, civil society did not allow the UK government to get away with ignoring the international human rights of nationals and other individuals closely connected to the state detained in the war on terror. Ultimately the UK was shamed, or otherwise persuaded, by domestic actors into protecting its citizens’ and residents’ international human rights that were being violated by a foreign power and into engaging in accountability for its own complicity in those transgressions. The UK polity illustrates that governments will respond to breaches of
human rights by a powerful ally when there is a strong rights culture, facilitating institutions and open political opportunity structures.
CHAPTER SIX – CANADA

Canada’s contribution to the war on terror was more limited than either Australia’s or the United Kingdom’s. Its involvement featured a robust military commitment to the conflict in Afghanistan, but a refusal to embroil itself in the United States’ invasion of Iraq (Stein and Lang 2007: 75). Canada’s partial support for the US’s war on terror was reflected in its inconsistent responses to the alleged torture of its citizens detained in the course of that war. In one case it stood up to the US; in another, it did not. In the case of Maher Arar, who was subject to the US practice of extraordinary rendition, Canada undertook thorough accountability of its own involvement and issued a public apology (Harper 26 Jan. 2007). Yet in Omar Khadr’s case, Canada refused to defend his human rights or accept responsibility for him for a decade, even though he was just 15 when detained (Neve 24 Jul. 2012).

Most literature on Canada considers its behaviour on international human rights in the light of its complex relationship with the US (Holmes 1981; Hawes 2004; Pauly and Reus-Smit 2012; Roach 2011; Harvey 2005; Molot 2003). This chapter argues that such explanations are inadequate in explaining Canada’s ambivalent positions on torture, and that domestic factors played a large role in shaping its behaviour in the war on terror. The chapter commences with an overview of Canada’s role in the war on terror and its relationship with the US and outlines its constitutional and jurisprudential stances on torture. It introduces the cases of Arar and Khadr and sets out their torture allegations. It then examines the actions of the executive government on the two cases, as well as the roles played by the legislature and the judiciary in checking the executive’s policies and positions. Finally, the chapter explores the role Canadian civil society played in influencing government policy on the men’s cases.

I CANADA’S ROLE IN THE WAR ON TERROR

Canada’s response to 11 September must be viewed against the background of its – at times – irritable relationship with the US. Former US Secretary of State Condoleezza Rice called America’s relationship with Canada “the most complex we have with any country” (Cellucci 2007: 235). The complexities stem in part from Canada’s geographic proximity to such a powerful and overbearing ally, or, as Seymour Martin Lipset called
it, “the giant Republic” (Kornberg and Clarke 1992: 18; Lipset 1990: 5). Many of Canada’s concerns about the US centre around two particular themes. The first is a preoccupation with retaining a distinct identity from its culturally similar neighbour. One way in which Canada has tried to differentiate itself is by carving out a distinctive global identity as a “good international citizen” (Vucetic 2006: 142). For example, Alison Brysk writes about Canada as “the so-called moral superpower of the Americas”, where its human rights promotion distinguishes it from the US to the world and to its own citizens (Brysk 2009: 66). Canada’s other concern is to maintain sovereignty, especially over its defence and foreign policy – a sometimes difficult mission given its strategic importance to Washington (Barry and Bratt 2008). As a middle power, Canada has sought to achieve this objective through its embrace of multilateralism, its full participation in the evolving international system, and its involvement in North American defence (Hawes 2004: 593; Vucetic 2006: 142; Barry and Bratt 2008: 63).  

The tensions between Canada and the US over identity and sovereignty came to the fore during Prime Minister Jean Chrétien’s government (1993 to 2003). Prime Minister Chrétien made it one of his top priorities upon taking government “to reassert our independence and protect Canada from being seen as the fifty-first state of the United States” (Chrétien 2007, 2008: 42). His decision not to support the US invasion of Iraq without the formal sanction of the United Nations exemplifies this position. The decision played to domestic politics, particularly anti-Americanism most prominent in Québec, and led to a near-breakdown in bilateral relations (Thompson 2003: 21; Nossal 2007: 24-25; Barry 2005: 235; Stein and Lang 2007: 73). Chrétien’s successors as prime minister, Paul Martin and Stephen Harper, came to government promising to improve the Canada-US relationship (Nossal 2007: 25-26). For example, Harper, who had supported the US invasion of Iraq, on becoming prime minister envisioned a Canadian global identity based on proud membership of the “Anglosphere” and the status of loyal ally of the US (Cody 2010: 20; see also Eagles 2006: 821-822).

Canada had another, more pragmatic, concern in the immediate aftermath of 11 September. This was to protect its economy from collateral damage arising out of the

---

125 The last of these three strategies is known as “defense against help”, which entails Canada participating in the shared North American defence and security in order to ensure national control over its territory (Barry and Bratt 2008: 63).
US tightening border control on movements across its northern border (Whitaker 2003: 27; Sokolsky 2004/5: 35; Harvey 2005: 272; Roach 2003: 134; see also Molot 2003). At the time, over 85 per cent of Canada’s foreign trade relied on open access to the American market, which depended on the free flow of goods and people across the Canadian-US border (Sokolsky 2004/5: 35). According to one Canadian security analyst, the attacks on the US and consequent (temporary) closure of the Canadian border ushered in a completely new paradigm in Canada-US relations, one based on “an iron linkage between security and economic interests” (Campbell 2003: 174). Put simply, the terrorist attacks presented an economic risk to Canada. US scepticism about Canada’s supposedly lax border security stemmed partly from a 1999 incident in which an Algerian man, Ahmed Ressam, who had claimed refugee status in Canada, was arrested at the US border with explosives intended for use in an attack on the Los Angeles International Airport (Wark 2004/2005: 73; Courteaux 2009: 42; Charters 2008: 21). The Ressam case took on added significance after 11 September as some American politicians and commentators wrongly suggested the hijackers had entered the US from Canada (Charters 2008: 21; Roach 2003: 5; Courteaux 2009: 115). For example, the US Ambassador to Canada, Paul Cellucci, said it was “inevitable that terrorists would look to Canada as a potential launching pad to get into the US” (Ackleson 2009: 341). Many Canadians, including Prime Minister Chrétien, felt Americans were using 11 September as “a convenient way” to attack Canada’s multiculturalism and social and immigration policies (Chrétien 2007, 2008: 300; see also Roach 2003: 6; Courteaux 2009: 43; Whitaker 2004/2005: 57). This view was reinforced by a 2005 US State Department report that noted: “Terrorists and their supporters have capitalized on liberal Canadian immigration policies to raise funds and undertake other activities” (US Department of State Apr. 2006: 160).

Canada’s own experience of terrorism before 11 September was limited to two major events. The first was the October crisis of 1970, in which the extremist organisation Front de libération du Québec (FLQ) kidnapped a British diplomat and killed a Quebec provincial cabinet minister (Roach 2011: 366; Malloy 2010: 158; Adelman 2007: 138). The second terrorist event was the 1985 bombing of an Air India jet by Sikh

---

126 Indeed, the _USA Patriot Act_ 2001 singled out Canada for mention in a section entitled “Protecting the Northern Border” which directly responded to American security fears about Canada (Roach 2011: 361).

127 The Trudeau government responded by invoking the 1914 _War Measures Act_ and sending 6000 troops into Montreal – a response later viewed by Canadians as excessive (Roach 2011: 368).
terrorists, which had left Canada from Vancouver’s airport, and killed 329 people (Roach 2011: 369; Malloy 2010: 158). Despite these experiences, neither the Canadian Parliament nor the public considered counter-terrorism a high priority before 2001 (Charters 2008: 3). After the 11 September attacks, the Chrétien government took a number of swift policy decisions designed to reassure a sceptical Washington of its diligence on terrorism and thus protect Canadian economic interests (Sokolsky 2004/5: 35; Roach 2011: 361). It established an ad hoc Cabinet Committee on Public Security and Anti-Terrorism, allocated $8 billion to new security measures, committed military forces to the war in Afghanistan, signed the Smart Border Accord with the US (designed to secure and improve management of the border) and passed new counter-terrorism laws, including the Anti-terrorism Act 2001 (Whitaker 2003: 46; Roach 2011: 121-122; see also Chrétien 2007, 2008; Courteaux 2009; Roach 2003; Wark 2004/2005; Barry and Bratt 2008).

II CANADA’S TORTURE LAW AND JURISPRUDENCE

Canada’s legal position with respect to torture is permissive in some respects. On the one hand, “cruel and unusual treatment or punishment” is prohibited under the Canadian Charter of Rights and Freedoms (s 12) and the use of torture both in and outside Canada is banned by Canada’s Criminal Code (s 269.1). Canada ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1987 but has not signed or ratified the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). However, Canadian jurisprudence on torture is more ambivalent. For example, in the 2002 case Suresh v Canada (Minister of Citizenship and Immigration), the Canadian Supreme Court decided that in “exceptional circumstances”, where there was a high risk to national security, the government could deport individuals to places where they faced a risk of torture. The Suresh decision has been widely criticised, including by the UN Committee Against Torture and a Canadian parliamentary Senate Committee, which called for legislative amendments to repeal the Suresh exception (Committee Against Torture 25 Jun. 2012: 2; Special

---

128 In its Sixth Periodic Report to the Committee Against Torture, Canada stated it was “presently considering whether to become a party” to OPCAT (Canada 22 Jun. 2011: 6).


Another international human rights treaty of relevance to the Canadian case is the 1989 UN *Convention on the Rights of the Child* (CRC), which Canada ratified in 1991. This Convention specifically states that children should not be subjected to torture or other cruel, inhuman or degrading treatment or punishment (art 37(a)). Canada was one of the first countries to ratify the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (OPCRC). The OPCRC sets the minimum age of military involvement at 18 years and requires states to accord former child soldiers “all appropriate assistance for their physical and psychological recovery and their social reintegration” (Dore 2007/2008: 1298).

**III CANADIAN CITIZENS DETAINED IN THE WAR ON TERROR**

I have selected the cases of Maher Arar and Omar Khadr because they represent the two extremes of Canada’s response to the international torture issue. They were not the only Canadian citizens tortured in the war on terror, however. Three other men, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, were also tortured in Syria and Egypt between 2001 and 2004. Their experiences and the role of Canadian officials were examined in an inquiry conducted by Justice Frank Iacobucci QC (Iacobucci Oct. 2008: 29). I do not examine their cases further here.

*A Maher Arar*

Maher Arar was a Syrian-born Canadian citizen. He was 32 when detained at New York’s John F Kennedy International Airport by US immigration officials on his way home from a family holiday in Tunisia on 26 September 2002 (Mazigh 2008: 2; Arar 4 Nov. 2003). Arar was questioned by the FBI and New York Police about Osama bin Laden and Abdullah Almalki, a Canadian citizen from Syria who was under investigation by Canadian police (Arar 4 Nov. 2003; The Arar Commission 2006: 78). He was placed in chains and ordered to volunteer to go to Syria, which he refused to do (Arar 4 Nov. 2003). Arar was then taken to the Metropolitan Detention Centre where he

---

130 The Iacobucci inquiry came out of a recommendation of Justice Dennis O’Connor who conducted the Commission of Inquiry into Arar’s case (The Arar Commission 2006: 278).
was held for 12 days and was permitted to see a Canadian consular official, a US lawyer and make a phone call to his family (Arar 4 Nov. 2003; The Arar Commission 2006: 54). On 7 October, the US Immigration and Naturalization Service (INS) issued an order finding Arar to be a member of al Qaeda and directing he be removed from the US (The Arar Commission 2006: 139). The next day Arar was told he was being deported to Syria. Against his protestations that he would be tortured in Syria, Arar was flown to Jordan, then driven to Syria arriving on 9 October (Arar 4 Nov. 2003). The US Inspector General of Homeland Security subsequently found that the INS had originally decided to send Arar to Zurich, assessing he would face torture in Syria, but this was overridden by the Acting US Attorney General (United States Department of Homeland Security Mar. 2008: 21-22). The Inspector General could not rule out the possibility Arar was sent to Syria to be interrogated under torture (Evidence to Joint Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties 5 Jun. 2008: 53).

Upon his arrival in Damascus, Arar was taken to the Far Falestin detention centre, run by Syrian Military Intelligence (The Arar Commission 2006: 55). Arar was questioned for four hours by the head of interrogation, who threatened him with “the chair”, a torture implement (Toope 14 Oct. 2005: 14). He was taken to his cell, which Arar described as “like a grave”, as it had no light and was three feet wide and six feet deep (Arar 4 Nov. 2003). He spent ten months and ten days inside this cell, which was cold and damp, infested with rats and into which cats urinated (Arar 4 Nov. 2003). Throughout the first two weeks of his detention, Arar was interrogated and subjected to severe beatings. He was struck with a two-inch thick electric cable all over his body and was threatened with various forms of torture (Arar 4 Nov. 2003). The most intense beating occurred on the third day of this interrogation, lasting 18 hours. Arar heard other prisoners screaming and being tortured and was beaten until he urinated on himself and made false confessions. The beatings then subsided (Arar 4 Nov. 2003).

The Canadian embassy in Damascus obtained confirmation from Syrian authorities on 21 October 2002 that Arar was in Syria and Arar received his first of nine consular visits two days later (Arar 4 Nov. 2003; The Arar Commission 2006: 184, 229; Mazigh 2008: 117). Arar was warned by his interrogators, who attended the meeting, not to mention the beatings. However, during his last consular visit on 14 August 2003, with
the head of Syrian Military Intelligence in the room, Arar told the Canadian consular official of his beatings (Mazigh 2008: 220; Arar 4 Nov. 2003). Six days later, Arar was transferred to Sednaya Prison where conditions improved (Toope 14 Oct. 2005: 17). On 5 October 2003, following a court visit where Arar signed a confession, he was released and returned to Canada the next day (Toope 14 Oct. 2005: 17). Stephen Toope, the Fact Finder to the Commission of Inquiry into Arar’s case, concluded that Arar’s treatment in Far Falestin prison “constituted torture as understood in international law” (Toope 14 Oct. 2005: 17).

B Omar Khadr

Omar Khadr was a Canadian citizen by birth. He was 15 when taken into custody by the US military in Afghanistan in July 2002 (Memorandum from US Department of Defense 2 Feb. 2007). Khadr was the son of Egyptian-born parents who met and married in Canada, but frequently moved their family between Canada, Pakistan and Afghanistan (Shephard 2008: 17,19, 61-63). Khadr’s family had a history of associating with senior al Qaeda figures. His father, Ahmed Said Khadr, sent Omar’s elder brothers to al Qaeda training camps in the mid 1990s and in 1997 the family moved into Osama bin Laden’s compound in Afghanistan for a period (Shephard 2008: 44, 61-63). In mid-2002, Omar Khadr was sent by his father on a trip into Afghanistan to be translator for a senior al Qaeda figure (Shephard 2002: 82). It was there that Khadr found himself in a fire fight with the US military after they surrounded a compound he and al Qaeda members were housed in (Memorandum from US Department of Defense 2 Feb. 2007). According to the US military’s version of events, which has been disputed, when US forces entered the compound upon completion of the fight, Khadr threw a grenade, killing a medic (Memorandum from US Department of Defense 2 Feb. 2007). Khadr was severely wounded in the fire fight. By Khadr’s own account, he was shot twice in the back and once through his left shoulder, was struck with shrapnel in his left eye and was wounded in his left thigh, knee, ankle and foot (Khadr 22 Feb. 2008). Khadr eventually went almost completely blind in his left eye (Freeze 11 Nov. 2003).

131 This version of events was called into question when, in February 2008 at Khadr’s pre-trial military commission hearing, a document was accidentally released to reporters which revealed that Khadr was not the only person alive inside the compound who could have thrown the grenade, and that no witnesses had actually seen Khadr throw the grenade (Shephard 2008: 224-5; El Akkad 5 Feb. 2008). In addition, it was revealed that a US commander had changed his report of the fire fight (El Akkad 14 Mar. 2008).
Khadr was taken unconscious into custody by US soldiers. His interrogations began in hospital as soon as he regained consciousness a week later and continued when he was moved to the US military camp at Bagram (Khadr 22 Feb. 2008). Khadr was considered to be “an intelligence treasure trove” because of his father’s connections to al Qaeda (Shephard 2008: 103). In an affidavit, he recounted crying during questioning as a result of his rough treatment and pain and told interrogators “whatever I thought they wanted to hear” (Khadr 22 Feb. 2008). Interrogators covered his head with a bag, used barking dogs to scare him and poured cold water over him (Khadr 22 Feb. 2008). While his wounds were still healing, Khadr was forced to clean the floors on his hands and knees for hours, carry heavy buckets of water and pick up rubbish; he was not allowed to use the bathroom so would urinate on himself, was threatened with rape and had his hands tied to the top of a door frame or ceiling and made to stand in this position for hours (Khadr 22 Feb. 2008; United States of America 7 Nov. 2008: [5c (9)]). He was transferred to Guantánamo Bay after turning 16 in October 2002, where he was interrogated by US and, from 2003, Canadian officials (Khadr 22 Feb. 2008). Khadr told the Canadian officials he had been tortured (Shephard 2008: 123). Khadr alleges he was subject to various forms of ill-treatment while at Guantánamo Bay including isolation, cold temperatures, being kept with adult detainees despite his age, being threatened with removal to various Middle Eastern countries to be raped or tortured, being short-shackled by his hands and feet to a bolt in the floor for hours, having his hair pulled, being spat on, kicked, dropped and grabbed in painful pressure points (Khadr 22 Feb. 2008; United States of America 7 Nov. 2008: [5d(5)]). On two occasions in 2003, military police used Khadr’s body, with his hands and feet cuffed together behind him, to mop up his urine and cleaning fluid off the floor after interrogation sessions (Khadr 22 Feb. 2008).

Khadr was initially charged in the military commission process in November 2005 and again following the US Supreme Court *Hamdan v Rumsfeld* decision in April 2007 (Shephard 2008: 177, 204).\(^{132}\) His charges included murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism and spying (Shephard 2008: 160-161). Khadr’s lawyers unsuccessfully sought rulings in the military commission that incriminating statements he had made during interrogations be struck out because they were procured using

torture and because of his age (United States of America 7 Nov. 2008; United States of America 12 Dec. 2008). His lawyers also, again unsuccessfully, sued the US government in the American courts to stop his torture and interrogation and sought his transfer into a juvenile detention facility. In October 2010, Khadr entered a plea agreement with the US, admitting guilt to all charges in exchange for an eight-year sentence on top of time already spent in US detention (Khadr 13 Oct. 2010).

IV THE EXECUTIVE’S RESPONSE

This section considers the responses of three Canadian governments to the Arar and Khadr cases. They are the centre-left Liberal governments of Jean Chrétien (1993 to 2003) and Paul Martin (2003 to 2006) and the Conservative Harper government (2006 to the present). I consider the executive government’s responses to the two cases separately. This is because of the clear disparity between the way governments – irrespective of who was in power – responded to Arar and Khadr.

A The Arar Case

Arar’s detention in Syria occurred entirely under the Chrétien government. The behaviour of the executive throughout Arar’s imprisonment was marked by the panicked and over-zealous actions of security agencies (the Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP)), as well as discord between different parts of the government as to how the case should be handled (Roach 2011: 374-375). Arar’s arrest came about as a result of the RCMP’s post-11 September counter-terrorism operation, Project A-O Canada, established amid pressure from the US over fears of a second wave of terrorist attacks (The Arar Commission 2006: 65-66). Arar became a “person of interest” when he met with Abdullah Almalki, the focus of Project A-O Canada, at a café in Ottawa in October 2001 (The Arar Commission 2006: 78). Canadian investigators provided information to American agencies about Arar that overstated his importance in the investigation and was wrong – including a description of him as an “Islamic Extremist” with suspected links to al Qaeda (The Arar Commission 2006: 78, 101, 113). Project A-O Canada

investigators also asked Canada Customs and US Customs to place “border lookouts” for Arar and his wife (The Arar Commission 2006: 80).

These operational details of the RCMP’s involvement in Arar’s predicament were unknown to Canada’s Foreign Minister, Bill Graham, when he first raised concerns about the case with the US Secretary of State, Colin Powell, in November 2002 (The Arar Commission 2006: 203-204). Indeed, from the time Canada’s Department of Foreign Affairs and International Trade (DFAIT) confirmed Arar’s presence in Syria with the Syrian government, Canadian officials worked at cross-purposes on his case (The Arar Commission 2006: 182-184). For example, DFAIT officials downplayed the likelihood Arar was tortured and took actions that implied Canada condoned his torture. Both Canada’s Ambassador to Syria, Franco Pillarella, who met with the head of Syrian Military Intelligence, and consular official, Leo Martel, who visited Arar, failed to report or acknowledge obvious signs of his mistreatment (The Arar Commission 2006: 185, 187, 190, 230). This meant the Foreign Affairs Minister was never properly informed of the likelihood of Arar’s torture, leading to his making inaccurate public statements that the Canadian prisoner was in a good condition and had rejected allegations of torture (The Arar Commission 2006: 192, 240). Pillarella also requested from the Syrians a “bout de papier”, summarising the results of their interrogations of Arar, and distributed it to various government agencies without warnings that torture was likely used to obtain it (The Arar Commission 2006: 192). This action “could have been viewed as condoning the use of torture and even encouraging it in other cases”, according to Justice Dennis O’Connor, who carried out the public commission of inquiry into Arar’s case (The Arar Commission 2006: 195). The distribution of the document increased suspicion among Canadian security agencies of Arar (The Arar Commission 2006: 193-194, 222-223). After receiving the “bout de papier”, CSIS officials travelled to Syria to obtain further information from Syrian Military Intelligence about Arar, which they shared with other agencies – again without warnings about torture (The Arar Commission 2006: 197-199, 227). They also informed the Syrians they did not want Arar returned to Canada. When, in mid-2003, DFAIT consular official Guy Pardy tried to obtain a joint letter from the Foreign Affairs Minister and the Solicitor General (responsible for the RCMP and CSIS) seeking Arar’s release, the agencies baulked (The Arar Commission 2006: 222-223). In July 2003, Prime Minister Chrétien wrote to the Syrian President asking for Arar’s release, stating:
“I can assure you that there is no Canadian government impediment to his return” (The Arar Commission 2006: 228).

Canadian security agencies and DFAIT continued to work against Arar’s interests after he returned home three months later. For example, anonymous officials leaked damaging information to the media about Arar (The Arar Commission 2006: 251). In addition, Martel, who accompanied Arar back to Canada, provided an incorrect account to the Foreign Affairs Minister of Arar’s treatment, wrongly reporting that he had not been beaten by his Syrian jailers (The Arar Commission 2006: 253). A month after his return to Canada, Arar made an unequivocal public statement outlining his torture (Mazigh 2008: 230–231; The Arar Commission 2006: 253). The most explosive official leak against Arar occurred four days later (The Arar Commission 2006: 259). Ottawa Citizen journalist Juliet O’Neill wrote an article containing previously classified material, which included that Arar had told Syrian Military Intelligence “minute details” of seven months of training at a camp in Afghanistan with the Mujahadeen in 1993, as well as the “code name” he confessed to; that the RCMP had caught Arar in their sights while investigating the activities of members of an alleged al Qaeda logistical support group in Ottawa; and that the existence of this al Qaeda cell explained why the Canadian government opposed a public inquiry into his case (O’Neill 8 Nov. 2003).

Meanwhile, Prime Minister Chrétien resisted increasing calls for a public inquiry into Arar’s deportation and treatment – some of them from government MPs (Whitaker 2008: 10; Sallot 8 Oct. 2003; 5 Nov. 2003; Chase and Fagan 6 Nov. 2003). His successor, Paul Martin, who became prime minister on 12 December 2003 following a bitter leadership contest between the men, was more open to a public inquiry into Arar’s case (Martin 2008, 2009: 228, 230; Dawson 24 Dec. 2003). On 21 January 2004, the RCMP raided the home of O’Neill, ostensibly as a part of its investigation into whether the journalist had breached the Security of Information Act. Overnight, this action by the RCMP intensified calls in the media for a public inquiry (Whitaker 2008: 23; Editorial 22 Jan. 2004). This instance of agency overreach was the trigger point for Prime Minister Martin, who described it as “the last straw” (Martin 2008, 2009: 405). A week after the raid, the prime minister ordered a public inquiry into Arar’s case (The Arar Commission 2006: 260). Its head, Justice O’Connor, had a reputation for fierce independence and his terms of reference were broad (Whitaker 2008: 11). O’Connor
was to inquire into the actions of Canadian officials dealing with Arar’s deportation and detention (McLellan 5 Feb. 2004).

The Arar Commission issued its findings in September 2006, by which time the Harper government held power (The Arar Commission 2006). The Inquiry, and Harper’s response, marked a significant milestone in government accountability in the war on terror (Macklin 2008: 12). The Commission provided the first officially documented description of the US practice of extraordinary rendition and inspired subsequent investigations, including one conducted by the Council of Europe into European complicity (Whitaker 2008: 9). It also drew another clear line of demarcation between Canada and the US in the war on terror, following the earlier rupture over Iraq (Whitaker 2008: 10). O’Connor was very critical of the actions of Canadian officials in Arar’s case. He cleared Arar of any involvement in terrorism and reached a series of conclusions about the contributing roles the RCMP, DFAIT and CSIS played in his ordeal (The Arar Commission 2006: 9, 13-16). They included that the RCMP provided inaccurate information to the Americans about Arar without caveats, which the US then relied on; that Canadian officials took actions that could have prolonged his detention in Syria; and that following his return to Canada, Canadian officials leaked confidential, sometimes inaccurate, information to the media for the purposes of damaging his reputation or protecting their or the government’s interests (The Arar Commission 2006: 13-16). O’Connor made 23 recommendations, including that the Canadian government should compensate Arar (The Arar Commission 2006: 364-369).

Immediately following the release of O’Connor’s report, the Canadian House of Commons voted unanimously to apologise to Arar. The RCMP commissioner also apologised and later resigned for reasons connected to the case (Malloy 2010: 168; Sallot and Freeze 21 Sep. 2006; Sallot 29 Sep. 2006; Leblanc 7 Dec. 2006). In response to O’Connor’s recommendations, the Harper government ordered another inquiry into the treatment of three other Canadians tortured in Syria (the Iacobucci inquiry), formally apologised to Arar and paid him C$11.5 million compensation (Sallot 13 Dec. 2006; 27 Jan. 2007). Harper’s apology contained a pointed reference to previous Liberal governments, noting: “Although these events occurred under the last government, please rest assured that this government will do everything in its power to ensure that the issues raised by Commissioner O’Connor are addressed” (Harper 26 Jan. 2007).
has been suggested that the Harper government was so responsive to O’Connor’s findings partly because they enabled the Conservatives to highlight the Liberals’ failings (Alexa McDonough, tel. interview 12 Jan. 2013). Regardless, the Arar torture inquiry – where an investigation was followed by compensation and an unqualified apology and hence public acknowledgement of victimisation – has been hailed as a model for other states (Duffy and Kostas 2012: 577). The Harper government also lodged a formal protest with the US over its treatment of Arar (Sallot 7 Oct. 2006). This was despite Harper’s determination to improve the Canada-US relationship, which had grown “frosty” under the Liberal governments (Nossal 2007: 23). The US, however, refused to apologise to Arar or remove him from its terrorist “watch list” (‘US Won’t Apologize Over Arar Case, CTV Reports’ 28 Oct. 2006; Koring 22 Dec. 2006; Koring and Galloway 25 Oct. 2007).134

B The Khadr Case

By contrast with the Arar case, successive Liberal and Conservative governments adopted a tougher, more rigid, position on Khadr, whose allegations of torture and pleas for Canada to help in his case were largely ignored for a decade. Their positions must be viewed through the lens of what is termed in Canadian politics “the Khadr effect”. This refers to an episode in the mid-1990s when Prime Minister Chrétien, unaware of Ahmed Said Khadr’s terrorist links, intervened in his case after his arrest in Pakistan in connection with the 1995 bombing of the Egyptian embassy in Islamabad (Shephard 2008: 46, 48, 54). Prime Minister Chrétien’s intervention in Omar Khadr’s father’s case was seen as “an appalling political error” and, thereafter, served as a warning to Canadian officials and politicians not to get involved in cases that could potentially embarrass them (Shephard 2008: 58).135 No Canadian government wanted to risk its reputation among voters by being seen to be defending “Canada’s first family of terrorism”, as the Khadrs were known (Shephard 2008: xiii).

134 Arar did however receive an apology from some members of the US Congress (Evidence to House of Representatives Subcommittee on International Organizations, Human Rights and Oversight 18 Oct. 2007).
135 This was illustrated in Arar’s case, where the RCMP warned Prime Minister Chrétien against getting involved because of the potential for embarrassment similar to that following his intervention for Khadr’s father (Freeze 27 Nov. 2004; Mazigh 2008: 107).
The Chrétien government’s initial response to Omar Khadr’s capture in Afghanistan was one of concern for his welfare and age. At first, the government sought consular access, which the Americans refused, with Prime Minister Chrétien noting: “When a Canadian has been arrested abroad we always ask to serve a Canadian citizen according to the rules, we try to get access for the consul rights of a citizen” (Campbell 16 Sep. 2002; Thompson 6 Sep. 2002). In addition, DFAIT publicly suggested Khadr could have been recruited into terrorism as a child soldier, noted Canada’s work on the child soldier issue and implored the US to take his age into account in determining treatment (Thompson 6 Sep. 2002). This concern for Khadr’s welfare was, however, short-lived. For example, DFAIT’s legal advisor asked that in future public communications on Khadr, officials “claw back on the fact that [Omar] is a minor” (Shephard 2008: 117). After Khadr’s transfer to Guantánamo Bay, the Chrétien government’s attitude hardened further. While it protested the US’s failure to consult it before transferring Khadr, once at Guantánamo Bay, Prime Minister Chrétien did not question the treatment of detainees and publicly rebuked MPs who did (Shephard 2008: 119, 121; Freeze 1 Nov. 2002).

Canada was anxious to get access for its intelligence agents to Khadr at Guantánamo Bay, which it obtained in February 2003 (Shephard 2008: 114, 116). These visits continued for two years. One official report following an interrogation of Khadr in 2004 noted how “thoroughly screwed up” Khadr was. “All those persons who have been in positions of authority over him have abused him and his trust for their own purposes,” it said (Shephard 2008: 114, 123-126). Khadr’s lawyers sued the Canadian government over its interrogations of him. In 2005, the CSIS admitted to the Canadian Federal Court that it had shared information obtained from Khadr in its interrogations with the US without seeking guarantees that it would not be used in any future prosecution (Perkel 11 Apr. 2005). An unrepentant CSIS deputy director, Jack Hooper, said “we have the choice, talk to Omar, don’t talk to Omar. Well, excuse me if my decision falls on the side of the greater good and the greater good is for the majority of Canadians” (Shephard 2008: 167). In August 2005, Khadr’s lawyers won an injunction preventing Canadian officials from further interrogating Khadr. When the first set of US military commission charges were laid against Khadr in November 2005, the Martin government

---

136 A diplomatic note was also sent in July 2003 requesting Khadr get special consideration for his age and not be sent to Guantánamo; see: Khadr v Canada (Prime Minister) [2010] 1 FCR 73 [12].

made little comment beyond noting its support for Khadr’s right to legal representation and obtaining the US’s assurance that he would not face the death penalty (Shephard 2008: 178; Freeman and Freeze 8 Nov. 2005).

Throughout the remainder of Khadr’s detention at Guantánamo Bay, the Harper government demonstrated little concern for his welfare. Its position was backed by a majority of public opinion. A July 2010 poll, for example, found 52 per cent of Canadians had “no sympathy at all” for Khadr (Selley 16 Jul. 2010). Once Khadr’s military commission got underway, the Harper government used a carefully scripted justification for its approach (Macklin 2010: 296). This comprised three “talking points”: Khadr’s charges were serious, the government had been assured he was being treated humanely and any effort to act on his case while it was still before the courts would be premature (El Akkad 14 May 2008). The Harper government fought efforts by Khadr’s lawyers in the Canadian Supreme Court to force it to intervene in his case.138

While the Harper government displayed little interest in Khadr’s military commission plea deal in October 2010, the Obama Administration began lobbying for Canada to allow Khadr to serve his prison sentence at home (Ibbitson 16 Oct. 2010; Leblanc 23 Oct. 2010). In late October 2010, the Canadian government exchanged diplomatic notes with the US in which it agreed to “favourably consider” any request by Khadr, following his completion of one more year at Guantánamo Bay, to serve the remainder of his sentence in Canada (Memorandum from Mull 24 Oct. 2010). By July 2012, the Harper government had failed to repatriate Khadr to Canada and his lawyers commenced action in the Canadian Federal Court to bring him home (Perkel 19 Jul. 2012). One newspaper report commented: “Stephen Harper’s Conservative government had done everything in its legal power, short of a diplomatic breach with the US government, to keep him interned at Guantánamo Bay” (Ibbitson 29 Sep. 2012). Finally, in September 2012, the Harper government reluctantly allowed Khadr to return to Canada, where he was imprisoned in a maximum security prison (Shephard 29 Sep. 2012; 21 Dec. 2012; Memorandum from Mull 24 Oct. 2010). The Minister of Public Safety, Vic Toews, issued a statement noting Khadr was a “known supporter” of al Qaeda, who idealised his dead father and denied his father’s lengthy history of terrorism (Toews 28 Sep. 2012).

138 Canada (Justice) v. Khadr [2008] 2 SCR 125; Canada (Prime Minister) v Khadr [2010] 1 SCR 44.
The Canadian Parliament played a modest role in checking the executive on the Arar case and an even lesser role, for many years, on Khadr's. Broadly speaking, Canada’s Parliament does not have a significant tradition of providing parliamentary oversight in relation to security issues (Malloy 2010: 159). Such scrutiny has historically been left to judicial commissions rather than parliamentary inquiries, a pattern described as “‘fire alarm’ oversight driven by scandal and partisan fishing, rather than sustained in-depth ‘police patrol’ inquiry” (Malloy 2010: 159). The Senate comes in for particular criticism given it is unelected, with its members appointed by the prime minister (Thomas 2008: 130). Its actions are said to lack political legitimacy, and the majority of senators, it is complained, are normally unwilling, or are unable effectively, to challenge the executive (Malloy 2010: 175; Thomas 2008: 130-131). Despite this, the Senate has a positive record protecting private rights – especially those of unpopular minorities – against arbitrary procedure by ministers or officials, precisely because its members are not directly answerable to voters (Smith 2003: 110). MPs are subject to popular pressures which senators do not experience, putting the latter in a position “to speak as the conscience of Parliament” (Smith 2003: 111). Finally, a more recent development in Canadian politics increased Parliament’s influence over the executive in the war on terror. This was the emergence of a less firmly majoritarian party system, which meant governing parties did not for many years (from 2004 to 2011) control a majority of seats in the House of Commons (Malloy 2010: 157).139

Viewed against these general features, a number of observations can be made about Parliament’s actions on the Arar and Khadr cases. Parliamentary committees were mostly ineffective in pressuring the executive over the two cases. For example, the Canadian Parliament’s two human rights committees – the House of Commons Standing Committee on Justice and Human Rights and the Senate Standing Committee on Human Rights – held no inquiries and issued no reports into either of the men’s cases. This was despite the Senate Standing Committee on Human Rights conducting

139 Prime Minister Martin formed a minority government in the 2004 federal election, while Prime Minister Harper’s first two governments, formed after the 2006 and 2008 elections, were also minority governments. Prime Minister Harper formed his first majority government in 2011.
significant work on the issue of children’s rights during Khadr’s detention at Guantánamo Bay (Senate Standing Committee on Human Rights Apr. 2007).

With respect to Arar’s case, Parliament played a part in drawing attention to Arar’s plight, but its role overall has been described as “at best supplementary” (Malloy 2010: 168). There were no significant parliamentary inquiries into Arar’s situation and treatment, although the House of Commons Standing Committee on Foreign Affairs and International Trade (HCSCFAIT) did hear testimony from Arar’s wife (Malloy 2010: 167; Evidence to HCSCFAIT 25 Sep. 2003; HCSCFAIT 2003). A number of individual MPs were, however, quite active on the Arar case. Three in particular were close allies of Arar’s wife Monia Mazigh during her husband’s imprisonment (Mazigh 2008). They were the minority New Democratic Party (NDP) leader (until 2003) Alexa McDonough and Liberal MPs Marlene Catterall and Irwin Cotier (who was later Justice Minister in the Martin government). McDonough introduced Mazigh to key parliamentarians and members of the Muslim community who became important supporters of Arar’s cause (Mazigh 2008: 32, 71, 82, 107, 109, 129, 145). Catterall visited Arar in his Syrian prison, lobbied the Syrian authorities and organised meetings with senior Liberal government ministers (Mazigh 2008: 28, 102-103, 127, 140, 152). Cotier, an international human rights lawyer, acted pro bono for Arar and lobbied his government (Mazigh 2008: 136, 174). McDonough believes Parliament’s role in bringing pressure on Arar’s case was effective. She says:

> By and large the parliamentary system was responsive at a micro level of this compelling crisis for this family and this particular individual. But also on a kind of macro level, on a public policy level, I think it worked the way it was supposed to work (McDonough, tel. interview 12 Jan. 2013).

On Khadr’s case, Parliament’s role is best described as negligible until six years into his detention at Guantánamo Bay. One factor influencing this shift in 2008 was that the Liberal Party became more sceptical of the war on terror after it lost government in 2006 and, reflecting this, changed its position on Khadr (Malloy 2010: 170; Waldie 26 Sep. 2007). For example, in 2008 a number of former senior Liberal government ministers, including former Prime Minister Martin, expressed regret for not having acted while in power to bring Khadr home (Freeze 21 Jul. 2008; Martin 2008, 2009: 407). In February 2008, the three federal opposition and minor parties – the Liberal Party, the NDP and the Bloc Québécois– issued a joint call on the Harper government to
bring Khadr home, admitting they had previously failed to protect Khadr’s rights (El Akkad 26 Feb. 2008).

The first parliamentary committee hearing on Khadr occurred in 2008, when the House of Commons Standing Committee on Foreign Affairs and International Development (HCSCFAID) held an inquiry into his detention and prosecution (Shephard 30 Apr. 2008). The majority, controlled by opposition and minor parties, found that Khadr should be considered a “child involved in armed conflict” and be given special protection as outlined in the OPCRC (HCSCFAID 2008: 4, 6). It also recommended the Harper government demand the immediate termination of the military commission proceedings against Khadr and seek his release from US custody. Conservative government MPs on the committee, however, dissented and accused the opposition and minor parties of downplaying Khadr’s alleged crimes and links to terrorism. They wrote:

Mr Khadr could become a litmus test on Canada’s commitment to impeding global terrorism and the results of our actions today could result in consequences that are not in the long-term interest of the country (HCSCFAID 2008: 15).

Khadr also acquired a lone parliamentary ally in 2008, in the form of Liberal Senator Roméo Dallaire. Dallaire is a retired Canadian Army Lieutenant-General who, after his experience as Force Commander of the UN Assistance Mission in Rwanda, became an advocate on child soldiers (Shephard 1 May 2008). According to journalist Michelle Shephard, no other parliamentarian has been as consistent or as willing to risk the political ramifications involved in supporting Khadr as Dallaire (Shephard, tel. interview 21 February 2013). From 2008, Dallaire was an outspoken critic of the Harper government’s position on Khadr and said Canada’s treatment of him “makes us look like a damn bunch of hypocrites” (Shephard 1 May 2008). In 2012, Dallaire launched an online petition to pressure the Harper government to bring Khadr home from Guantánamo Bay (CBC News 17 Jul. 2012; Shephard 6 Sep. 2012). The petition was framed in terms of Khadr’s rights under the CRC and the OPCRC (Dallaire Sep. 2012). Dallaire described the Harper government’s eventual repatriation of Khadr as a “victory” for the 35 000 signatories to the petition and “an unmistakeable step towards protecting human rights and the rights of children in armed conflict” (Dallaire Sep. 2012).
Canada’s courts, it is argued, play a strong role in holding governments to account through the interpretive power they exercise via the *Canadian Charter of Rights and Freedoms* (Malloy 2010: 157; Morton and Knopff 2000). It is also claimed, however, that in the war on terror, Canada’s judiciary showed too much deference to the executive (Roach 2008: 52; Macklin 2010: 298). Canadian courts played no role on the Arar case. This is because he had a large number of influential allies in civil society and the Parliament who – without recourse to the courts – helped secure his freedom and a public inquiry. Khadr, on the other hand, had minimal allies in Parliament or anywhere else. For Khadr, Canada’s judiciary offered, for many years, his only forum for contesting Canada’s involvement in his coercive treatment. This occurred through legal actions brought by his lawyers against the Canadian government to enforce his rights under the *Charter*. Canada’s Supreme Court, where two of Khadr’s cases were ultimately heard, showed itself willing to hold the executive to account – but within limits.

The first Supreme Court decision on Khadr was delivered in 2008. The Court found that Khadr’s *Charter* rights (particularly under section 7 which guarantees the “right to life, liberty and security of the person”) were violated when Canadian officials shared the results of their interrogations of Khadr with the US. The Court ordered the government to release documentation relating to Canadian interrogations of Khadr, which revealed that ahead of his interrogations, Khadr was placed in a “frequent flyer program” (Freeze and El Akkad 10 Jul. 2008). Under this program, Khadr was moved from cell to cell every three hours, 24 hours a day, and was placed in isolation for three weeks in order to make him more susceptible to interrogation.

---

140 Charles R. Epp argues that the effect the *Charter* has on the Canadian Supreme Court agenda is often overstated, and that the Court has also been influenced by the growth of the support structure for legal mobilisation which grew up before the introduction of the *Charter*, in the 1960s and 1970s. By this he means the resources that enable litigants to pursue their rights claims in courts: organised group support (such as civil liberties organisations), financing (including legal aid), and the structure of the legal profession (for example the diversification of the profession’s ethnic, gender and racial make-up) (Epp 1996: 765-767).

141 *Canada (Justice) v. Khadr*, [2008] 2 SCR 125.
In the second case in 2010, the Supreme Court overturned two decisions of lower courts that had ordered the Harper government to seek Khadr’s repatriation. On the one hand the Supreme Court agreed with the lower courts that Khadr’s Charter rights had been violated. It found:

The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

However the Supreme Court disagreed with the lower courts by ruling that because of the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the appropriate remedy was to grant Khadr a declaration that his Charter rights had been infringed and leave the government “a measure of discretion in deciding how best to respond”. The Supreme Court decision was criticised for its failure to issue a meaningful remedy for a citizen who was tortured and indefinitely detained (Macklin 2010: 329). The role of the Charter in executive accountability on the treatment of Khadr is returned to below.

VII CIVIL SOCIETY: HOLDING A MIRROR TO THE EXECUTIVE

Canada’s split personality in dealing with the torture of its citizens detained in the war on terror is clear from the above exposition of the responses of the executive government and the Parliament. On Arar, Canada’s record in seeking accountability for the international human rights breaches of its citizen was exemplary (Duffy and Kostas 2012: 577). On Khadr, Canada achieved global condemnation as the last Western nation to bring its citizen home from Guantánamo Bay, having never examined his torture allegations, nor even pressed the US for a full investigation (Shephard 2008: xiv).
The Khadr case does not sit comfortably with the idea, discussed earlier in this chapter, of Canada as a moral superpower possessing a national and global identity intrinsically tied to a respect for human rights. This invites the question of whether the Khadr case is, as some have argued, an aberration: the result of bilateral pressure from the US and over-zealous Canadian security agencies (Brysk 2009: 82-83). I suggest the explanation for Canada’s anomalous behaviour is more complex and goes beyond its testy relationship with its big neighbour and the stresses of the post-11 September security environment.

The writings of Beth Simmons and others on the power and effect of international human rights law and principles direct us to examine the role of citizenries in explaining state behaviour on such matters (Simmons 2009; Risse, Ropp and Sikkink 2013; Cohen 2012). This next section considers how civil society responded to the torture allegations of Arar and Khadr. It examines the enabling and constraining factors particular to Canada’s domestic circumstances that help explain civil society’s behaviour on these two cases, which closely mirrored that of the Canadian government. These factors relate to the influences of political culture, institutions and opportunity structures.

**A Prominent Actors**

I divide the civil society actors most concerned with the Arar and Khadr cases into the categories of family members, the legal profession, human rights activists and non-governmental organisations (NGOs), Muslim organisations and the Canadian media.

Among family members, Arar’s wife Monia Mazigh was an exceptional advocate for his cause – the complete opposite of Khadr’s family. Khadr’s staunchest ally was his (Scottish-born) Canadian lawyer, Dennis Edney. Apart from Edney, lawyers and legal groups played a minor role in either case before 2007. The Canadian Bar Association (CBA), the country’s largest legal organisation, agitated for a public inquiry into Arar’s case and, only much later, lobbied the government on Khadr’s situation as well (CBA 24 Nov. 2003; 12 Aug. 2007). Legal academics advocated for both citizens, as did lawyers’ advocacy groups such as Lawyers Rights Watch Canada.
Human rights NGOs played an important role in pressuring the government over Arar’s case including, from early on, Amnesty International Canada and its Secretary General, Alex Neve. Kerry Pither, an activist backed by her trade union-funded NGO, the Solidarity Network, played a central role in Arar’s case. A range of additional domestic, international and transnational organisations were active in the Arar case including the International Civil Liberties Monitoring Group (a Canadian coalition of civil society organisations established after 11 September 2001), the London-based Syrian Human Rights Committee, the New York-based Center for Constitutional Rights (which acted for Arar in his litigation against US officials) and Human Rights Watch (HRW). Other domestic NGOs were engaged in the lead-up to and during the Commission of Inquiry, including Canada’s two principal rights advocacy groups, the British Columbia Civil Liberties Association (BCCLA) and the Canadian Civil Liberties Association (CCLA) (Epp 1996: 769). On Khadr’s case, few human rights NGOs engaged in any significant advocacy before 2007 (Shephard 2008: 147). From 2008, a number of transnational NGOs became quite outspoken on Khadr’s case, including Amnesty International, HRW, Physicians for Human Rights, UNICEF, Save the Children, the International Bureau for Children’s Rights, as well as local children’s rights groups (Letter from HRW et al. 1 Feb. 2008). Domestic NGOs also became involved in the Khadr case after 2008, including the BCCLA and the CCLA which intervened in his Supreme Court litigation.

Muslim organisations were vocal on Arar’s case, including the Council on American-Islamic Relations Canada (CAIR-CAN) (which changed its name in 2013 to the National Council of Canadian Muslims) and the Canadian Arab Federation. Muslim women’s organisations mobilised on Arar’s case, in particular the Canadian Council of Muslim Women and the Ottawa Muslim Women’s Organization (Mazigh 2008: 71). In a similar pattern to other NGOs, Muslim organisations were slow to take up Khadr’s cause. The media played a relatively significant role in both the Arar and Khadr cases, in contrasting ways. Sections of the media were manipulated by security agencies wishing to discredit Arar to the public. Other parts of the media, however, were important in raising awareness about the men’s cases. In addition to considering some

---

146 The National Council of Canadian Muslims, as CAIR-CAN is now known, has recently become involved in a dispute with the Harper government, with the Prime Minister’s spokesman accusing the organisation of having “documented ties to a terrorist organisation such as Hamas”. In May 2014 the organisation launched defamation proceedings against the Prime Minister’s Office (National Council of Canadian Muslims 16 Sep. 2014).
stand-out examples of both these types of roles, I examined the editorials of two major Canadian newspapers to ascertain media attitudes towards the issue of accountability for the torture of Canadian citizens: The Globe and Mail and the National Post.

B The Political Context

Changing political opportunity structures and a complex rights culture characterised the domestic political context in which Canadian civil society operated after 11 September.

As was the case with other US liberal allies, Canada’s Muslim community confronted a toxic political environment following the terrorist attacks. This climate of fear and pressure directly affected Muslims and inhibited the community’s preparedness to advocate publicly on human rights cases associated with the war on terror. Human rights activists involved in Arar’s case, for example, attest to the unwillingness, especially initially, of members of the Muslim community to involve themselves with his cause, due to nervousness about associating themselves with someone publicly branded as having terrorist links. CAIR-CAN’s Riad Saloojee said: “When Maher’s case first came out, people were very reluctant … to get involved at all, simply because of the accusations surrounding him” (Saloojee, tel. interview 13 Jan. 2013). Similarly, activist Pither noted the Muslim community “stayed scared for a long time” (Pither, tel. interview 28 Jan. 2013). “A lot of people were just terrified and were being harassed by the security and intelligence services here,” she said. According to Amnesty International’s Neve, Muslim organisations “did not want to be out there publicly associated with a case that had the words ‘Muslim terrorist’, even if the word ‘accused’ might be there” (Neve, tel. interview 21 Feb. 2013). Neve noted, however, that for human rights activists defending the rights of detainees in the war on terror, Canada’s political climate was not as constraining as that in the US. “You weren’t risking being publicly vilified as a traitor and all that sort of thing, but certainly the space in which to express a human rights view about events was tenuous,” he said (Neve, tel. interview 21 Feb. 2013). This closed aspect of political opportunity structure gradually gave way as 11 September receded into the past, positively influencing civil society’s disposition towards the two cases. Counteracting this, however, the opposite scenario was concurrently playing out with respect to another temporal feature of the Canadian
political context. This feature concerned the relationship between the NGO sector and government, which was becoming more difficult.

During the decade after 11 September, the level of access NGOs, known in Canada as the “third sector”, had to government altered considerably, with consequences for their ability to influence the policy-making process. The trigger for this shift was the change of government from the Liberals to the Conservatives. Writers such as Brysk extol Canadian civil society as the “best case” for human rights promotion (Brysk 2009: 87). For Brysk, Canada’s civil society is “dense, internationalist, and well connected to channels of influence on foreign policy” (Brysk 2009: 89). This idea taps into the notion of Canada’s global identity as a good international citizen. Yet an examination of the relationship between governments and civil society in Canada over recent times suggests this view is somewhat simplistic. As Jeffrey Ayres writes, national politics still matters in considerations of contentious civic politics in Canada (Ayres 2004: 622). A number of different arguments are proffered as to why this is so. Some argue civil society organisations have little impact on public policy because “they are not very good at it”, while federal governments have become less permeable with fewer mechanisms for ongoing dialogue with civil society (Phillips 2010: 65, 69). Others emphasise the difference that an individual government minister can make in empowering civil society to influence public policy-making (Capling and Nossal 2003: 276, 291). A further contention is that the 11 September attacks had a direct impact on third sector-state relations by rekindling citizens’ trust in government and diminishing public confidence in transnational NGOs (Capling and Nossal 2003: 277, 292).

Another perspective suggests that the effectiveness of civil society is partly determined by the political party in power and its particular ideology regarding the legitimate role of NGOs in publicly advocating on government policy. This is especially so with respect to human rights policy. Human rights claims, as I argue in Chapter Two, are made against the state and are thus inherently political in nature. Some parties or governments are more hostile to NGOs contesting human rights issues than others. A brief look at the contrasting approaches of Liberal and Conservative governments towards the third sector in Canada supports the view that party attitudes towards civil society can affect the success of NGO advocacy. In 2001, Prime Minister Chrétien signed an accord with Canada’s voluntary sector (Voluntary Sector Initiative Dec.
2001). Inspired by a similar compact negotiated by the UK Blair government, it promised the promotion of better working relationships between the state and civil society (Phillips 2003: 18-19). The accord came out of work undertaken in the late 1990s by a concerned voluntary sector and a willing and cooperative government, both keen to relieve tensions and improve relations with the other (Brock 2000: 2). This followed a “rocky” previous two decades under the influence of the neo-liberal policies of the Conservative Brian Mulroney government (1984 to 1993) (Phillips 2003: 18, 22). However, the conciliatory and collaborative attitude of the Liberals did not continue under the Harper government (Phillips 2010: 65). Prime Minister Harper adopted a populist discourse evocative of that of Australian Prime Minister John Howard. That is, Prime Minister Harper promised to govern for the “mainstream” and promoted the idea that social movements were elitist and motivated by self-interest (Sawer and Laycock 2009: 137-138; see also Snow and Moffitt 2012: 285; Flanagan 2009: 264).

A number of actors from the NGO sector who were involved in the Arar case directly attribute their success or failure in shifting government policy to the political party in power. Neve, for instance, argued: “I think in some respects if Maher [Arar]’s case had come along just a little bit later, once the Conservatives were a little bit more into governing, he may not have had quite the same warm final chapter that he did” (Neve, tel. interview 21 Feb. 2013). Similarly, Pither believes Chretien, had he remained in power, would have eventually ordered a public inquiry into Arar’s case under pressure from his party – but the Harper government never would have. “If it had been the Conservative majority government we have now, I’m not sure that we would have won this,” says Pither (Pither, tel. interview 28 Jan. 2013). We thus see in this feature of post-11 September Canadian politics an example of the closing of political opportunity structure, where it became more difficult in some respects for civil society to influence public policy on human rights matters because of the new government’s unaccommodating attitude towards the third sector.

147 During this time, funding was dramatically cut to a number of NGOs, particularly those engaged in advocacy, many MPs questioned the credibility and legitimacy of voluntary organisations, and a number of Canada’s charitable institutions became embroiled in scandals which led to a loss of public trust (Phillips 2003: 18; Pross and Webb 2003: 66; Brock 2000: 8).
A more profound, less changeable, feature of Canada’s domestic political context that is relevant to civil society behaviour on human rights is its national rights culture – or, more precisely, its aspirations for one. Claims about Canada’s moral superpower identity, noted at the beginning of this chapter, tend to gloss over deep cleavages within the Canadian polity which have had important consequences for the development of a common political culture and understandings about rights. These unresolved tensions are a result of Canada’s dual heritage. Canadian society was borne out of counter-revolutionary forces: conservative English Tories fleeing the American revolution and conservative Catholics escaping the French revolution (Lipset 1990: 10; Epp 1998: 157-158; see also Ignatieff 2000, 2007: 129; Taylor 1993: 63). As a result, Canadian society is said to be law-abiding, deferential to authority, statist, conservative, communitarian and collectivity-oriented (Lipset 1990: 10; Epp 1998: 157; Taylor 1993: 158). Canadians also see themselves as a cultural mosaic, where diverse ethnic groups exist in an environment more protective of their distinct cultures than America’s melting pot, which insists on assimilation (Lipset 1990: 172, 179). This cultural mosaic has been identified as important for relatively recent developments in Canada’s “rights-focused” legal culture (Epp 1998: 159).

Canada’s two dominant and distinct cultural groupings – the Francophone community based mostly in Québec and the majority English-speaking Canadians – have had a significant bearing on modern understandings about rights. The growing preoccupations of the minority Québécois in the second half of the 20th century with preserving their language and distinct cultural heritage meant Canadians have struggled to develop a single national identity and a unifying political culture (Taylor 1993: 100; Kornberg and Clarke 1992: 16). Indeed, Lipset wrote that Canada is “almost alone among modern developed countries” in continuing to debate its self-conception (Lipset 1990: 43).148 These divisions have left Canadians feeling deeply uncertain about the future of their nation and Québec’s place in it (Ignatieff 2000, 2007: 6, 78). The same divisions also led to an awakening, from the 1960s onwards, about the importance of human rights, initially among Québécois, and subsequently newer immigrant groups and indigenous groups as well (Epp 1998: 158-159). The federal government seized on this new rights awareness and actively cultivated it as a part of its strategy to counteract the separatist forces in Québec (Epp 1998: 159). This was the motivation behind Prime Minister

148 Lipset also noted that Canadians are, however, sure about what they are not: Americans (Lipset 1990: 53; see also Kornberg and Clarke 1992: 17).
Pierre Trudeau’s early push in the late 1960s and early 1970s for a constitutional bill of rights (Epp 1998: 160). One of his hopes was to encourage the development of rights-based loyalties that would unite Canadians across provincial boundaries (Epp 1998: 160). This history forms the basis for arguments today that, despite Canada’s dual ancestry, common ground should, and can, be found in a commitment to rights. A proponent of this view is Canadian scholar and former leader of the Liberal Party, Michael Ignatieff. He argues that because “the principles of national unity cannot be found by joint appeal to common origins .... Canada has no choice but to gamble on rights” (Ignatieff 2000, 2007: 129). Rights, not roots, Ignatieff argues, “are what will hold us together in the future” (Ignatieff 2000, 2007: 130).

The 1982 Canadian Charter of Rights and Freedoms was a clear attempt at unifying the Canadian polity (Ignatieff 2000, 2007: 77). It came about as a result of the failed 1980 referendum on granting Québec political sovereignty, and fulfilled a promise of Prime Minister Trudeau made to the people of that province for voting no (Kornberg and Clarke 1992: 1). It has, however, been contentious among Québécois who have questioned its legitimacy (Kornberg and Clarke 1992: 1; Ignatieff 2000, 2007: 77). Canadian philosopher Charles Taylor, while arguing that over time the Charter has become “not just an additional bulwark of rights”, but “part of the indispensable common ground on which all Canadians ought to stand”, also acknowledges that the primacy it affords individual rights over collective rights clashes with basic Québec policy and values (Taylor 1993: 162, 173). The Charter shines a light on what Taylor calls a genuine difference in philosophy concerning the bases of a liberal society (Taylor 1993: 174). On one side sits the Anglo-American view, influenced by the thinking of Immanuel Kant and epitomised in the Charter, that individual rights must always come first. On the other sits the views of Québec governments, prioritising the fundamental collective goal of the survival and flourishing of French culture (Taylor 1993: 174-175). Despite the Charter’s focus on individual rights, it preserves the principles of parliamentary sovereignty and retains the traditional Canadian emphasis in favour of collective or group rights as, for example, with respect to language rights (Lipset 1990: 3, 103-105). These complexities within the Canadian polity provide a more nuanced perspective on the common assumptions made about the country’s strong global identity based on a national commitment to human rights.
C Civil Society’s Approach

Against this background of shifting political opportunity structures and Canada’s aspirational rights culture, I consider a number of prominent themes and patterns that emerge in civil society’s behaviour on the Arar and Khadr cases.

1. Inconsistency

The most striking feature of Canadian civil society’s actions on Arar and Khadr is the difference between its responses to the two cases. Canada’s domestic civil society engaged in intense lobbying on Arar’s case from an early time and his wife amassed a large collective of activists during the first 10 months of her husband’s detention (Mazigh 2008). For the first five years of Khadr’s detention, by contrast, civil society was largely absent (Edney, tel. interview 16 Jan. 2013).

Monia Mazigh documented in her memoirs how she came to assemble her supporters after her husband’s arrest (Mazigh 2008). It is apparent from her narrative that civil society’s immediate willingness to help was vital to her success in shifting Canada’s position on Arar, first in bringing him home from Syria, and then in getting the inquiry. Saloojee, from CAIR-CAN, was one of her first allies, and facilitated Mazigh’s communications with journalists a fortnight after Arar’s arrest (Mazigh 2008: 27). Following this, Neve agreed to launch an Amnesty International emergency campaign on Arar’s case after just one conversation with Mazigh (Mazigh 2008: 32). The turning point for Mazigh arrived in May 2003 when she met Pither (Mazigh 2008: 114-115). Pither’s participation in the Arar campaign came at a critical time: Arar had been detained for eight months and his story was disappearing from the news. According to Pither, his wife had little support from the Muslim community and was struggling financially to raise her two small children (Pither, tel. interview 28 Jan. 2013). Her main backers, Saloojee and Neve, lacked the time or skills to run an effective campaign; Pither, on the other hand, had vast amounts of both. She had strategic experience working with the political media and with Canadian foreign policy issues due to her background as an activist in East Timor (Pither, tel. interview 28 Jan. 2013). In addition, Pither’s current job at the Solidarity Network involved building alliances between social justice movements from around the country (Pither, tel. interview 28
Jan. 2013). Most crucially, her organisation’s board voted to allow her to work full-time, in a salaried position, on the Arar case (Pither, tel. interview 28 Jan. 2013). Her involvement, according to other activists on the Arar case, was pivotal (Saloojee, tel. interview 13 Jan. 2013).

Mazigh’s band of trusted supporters stands in stark opposition to Khadr’s case, where his only advocates were his legal team, in particular the loyal Edney. Journalist Michelle Shephard, who reported closely on the case, says:

I remember from early days when I was reporting you could not get comments from grass roots groups, and some of even the most strident groups were unwilling to touch the Khadr case and people would tell me “off the record” they just didn’t want to go near it (Shephard, tel. interview 21 Feb. 2013).

Similarly, Edney says: “There was no organisation, no group, willing to step up and advocate for Omar Khadr, other than myself and my co-counsel, Nate Whitling” (Edney, tel. interview 16 Jan. 2013). Civil society’s reticence was noted in newspaper editorials at the time. The Globe and Mail, for example, editorialised that:

It is not just the government that has been mute. Until recently, most of civil society was silent. The Canadian Bar Association, representing the country’s lawyers and judges, took four years before denouncing Guantanamo, and another year before it mentioned Mr Khadr by name (Editorial 21 Aug. 2007).

In 2007, Neve acknowledged that the Khadr family’s reputation for associating with terrorists had kept NGOs away from the case before then. “There has been some nervousness about the dynamic associated with the Khadr family,” he said at the time (Shephard 2008: 215). When interviewed for this study, Neve maintained he had not been referring to Amnesty (Neve, tel. interview 21 Feb. 2013).¹⁴⁹ The Khadr family factor was also acknowledged in one of the first examples of organised, collective civil society mobilisation on Khadr: a letter to Prime Minister Harper in June 2007 asking him to intervene in the case (Axworthy et al. 14 Jun. 2007). The signatories – among them 25 current and former parliamentarians, a number of domestic, international and transnational NGOs and over 100 individual lawyers and legal academics – noted “the

¹⁴⁹ Neve’s recollections sit at odds with the recollections of Shephard and Edney regarding Amnesty’s involvement with Khadr’s case before 2007 (Shephard tel. interview 21 Feb. 2013; Edney, tel. interview 16 Jan. 2013).
notoriety of his family makes him unsympathetic in the eyes of some”, but it was “plainly unjust to punish the son for the sins of the father”.

Civil society attitudes towards Khadr began to shift noticeably in 2007 and gathered pace in 2008, becoming increasingly forceful in pressing for his return and condemning the Canadian government over its treatment of him (Shephard, tel. interview 21 Feb. 2013). A number of factors help explain the change in civil society’s behaviour on Khadr. One was the time elapsed since 11 September. As Shephard said, “I think all cases picked up the further we got away from 9/11” (Shephard, tel. interview 21 Feb. 2013). Another was limited resources: before this time, civil society was preoccupied with the Arar case. Shephard said: “As cynical as this is to say, there is only so much capacity to advocate for cases, and this goes for the media as well, we sort of fixate on one case at a time” (Shephard, tel. interview 21 Feb. 2013). Additional factors explaining civil society’s increasing mobilisation were the Canadian Supreme Court decisions in favour of Khadr and developments at Guantánamo Bay. The latter included the plea deal and repatriation of Australian detainee David Hicks in early 2007 and the chaos surrounding Khadr’s military commission, precipitated by the military judge’s dismissal that year of all charges against Khadr for lack of jurisdiction.\footnote{The dismissal occurred because Khadr had not been found to be an “unlawful enemy combatant” by the Combatant Status Review Tribunal as required by the \textit{Military Commissions Act 2006} (Koring 5 Jun. 2007).} Further, having observed the impact Hicks’s US military lawyer, Major Michael Mori, had on public opinion in Australia through his intensive public relations campaigning, Khadr’s US military lawyers launched a similar offensive in Canada (Shephard, tel. interview 21 Feb. 2013). In August 2007, Lt Cmdr William Kuebler, one of Khadr’s US military lawyers, addressed the annual meeting of the Canadian Bar Association (CBA) (Shephard 2008: 215). The impact of Kuebler’s advocacy was immediate. The CBA wrote to Harper the next day and, in its first public advocacy for Khadr, called on the Prime Minister to negotiate Khadr’s release (CBA 12 Aug. 2007).

International and transnational actors played a prominent role in lobbying the Harper government over its treatment of Khadr after 2007. For example, in addition to Amnesty International, the US-based Center for Constitutional Rights, HRW and Physicians for Human Rights were all signatories to the June 2007 letter to Prime Minister Harper mentioned earlier (Axworthy et al. 14 Jun. 2007). In another letter to
Prime Minister Harper in February 2008, HRW, Human Rights First, the Coalition to Stop the Use of Child Soldiers and Amnesty International appealed to Canada’s “global leadership regarding children and armed conflict” and asked it to intervene to “prevent the continued mistreatment of its own citizen and former child soldier” (HRW et al. 1 Feb. 2008). In January 2008, under the headline “Campaign to Free Khadr Escalates”, the *Toronto Star* published comments from David Crane, the former Chief Prosecutor of the Special Court for Sierra Leone (an international war crimes tribunal), who described Khadr’s military commission as “horrific” and said it was the first time in history that a child had been prosecuted for war crimes (Shephard 7 Jan. 2008). In February 2008, five UK parliamentarians – including former UK Attorney-General, Lord Goldsmith and former Secretary of State for Justice, Kenneth Clarke – wrote to Prime Minister Harper urging him to intervene in Khadr’s case and pointing out that his military commission was in breach of the US’s international legal obligations under the CRC and the OPCRC (Lord Carlile et al. 7 Feb. 2008). These are but a few examples of the heavy lobbying by international and transnational actors of Canada over the Khadr case which occurred in the latter part of his detention at Guantánamo Bay. The effect this lobbying had on Harper government policy is unclear, since Canada did not intervene in Khadr’s situation until two years after the finalisation of his military commission. However, it is possible that international and transnational advocacy helped domestic civil society actors in Canada overcome their reticence to publicly speak out on the Khadr case – in the same way that the Canadian Supreme Court decisions did, for example.

Civil society lobbying from 2007 over the Khadr case contained frequent references to Canada’s obligations under international human rights and humanitarian law. Furthermore, NGOs and other non-state actors used UN processes such as the Committee Against Torture and the Human Rights Council quite extensively. For example, the CBA appealed to Canada’s commitments under the OPCRC in its lobbying of Prime Minister Harper (CBA 12 Aug. 2007). Similarly, the British Columbia Civil Liberties Association (BCCLA), which intervened in Khadr’s 2008 Canadian Supreme Court case, referred in its submission to the Court to Canada’s international legal obligations under the *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)* (BCCLA 20 Jan. 2008; BCCLA et al. 21 Feb. 2008). Amnesty International, Lawyers Rights Watch Canada (LRW), the
International Civil Liberties Monitoring Group (ICLMG) and the Canadian Civil Liberties Association (CCLA) all used the Committee Against Torture to raise awareness of Khadr’s case during its consideration of Canada’s sixth periodic report in 2012 (Amnesty International Apr. 2012; LRW and ICLMG 18 Feb. 2012; ICLMG 16 Apr. 2012; CCLA Apr. 2012). In another example of civil society groups using the UN forums to criticise the Harper government on its treatment of Khadr, NGOs also raised his case with the Human Rights Council at the Universal Periodic Review of Canada in 2009 (Human Rights Council 24 Nov. 2008). Khadr was “an example of a child soldier who under international law should be considered a victim,” a number of groups noted, including Amnesty International and Lawyers Rights Watch Canada (Human Rights Council 24 Nov. 2008: 11).

The adoption of international human rights law and procedures suggests that, despite the existence of the Canadian Charter of Rights and Freedoms, NGOs still believed that it was necessary and worthwhile to subject Canada to the international spotlight of the UN as a means of applying pressure to the Harper government. The Harper government was irritated by the criticisms of the Committee Against Torture, which in its Concluding Observations urged Canada to repatriate Khadr and provide him with “appropriate redress for human rights violations” (Committee Against Torture 25 Jun. 2012: 5). The Harper government dismissed the Committee’s concerns in disparaging terms. “When there are serious concerns regarding human rights violations across the world, it is disappointing that the UN would spend its time decrying Canada,” said the Minister of Public Safety, Toews (Morris 10 Oct. 2012).

2. Victims’ Families

A major reason Arar’s case attracted civil society support more readily than Khadr’s was to do with the sympathetic figure of Mazigh and the savvy way she went about advocating for his cause. The Khadr family was the opposite to Mazigh in both respects – repulsive to Canadians and seemingly oblivious to the damage their public comments caused Omar. The impact that Arar and Khadr’s families had on their ability to find allies illustrates quite powerfully the literature on civil society and issue selection examined in Chapter Two (Bob 2005).
Mazigh's appeal lay in a number of her personal attributes. First, she was a mother of an eight-month-old son and a five-year-old daughter (Mazigh 2008: 1). Alexa McDonough noted the effect this had in winning sympathy: "[T]his is a human interest story of a young mother with two small children who is desperate at what has happened" (McDonough, tel. interview 12 Jan. 2013). A result was that other women wanted to help Mazigh, including parliamentarians McDonough and Catterall, and Muslim women from various community organisations. Mazigh was also intelligent, holding a doctorate in finance, articulate and trilingual in English, Arabic and French (Mazigh 2008:53). Her command of French was important politically given Canada’s bilingual status. Pither, for example, remarked: “I can’t tell you enough how much language matters here because Québec and French-speaking Canadians have a lot of power, especially for the Liberals who were in power at the time” (Pither, tel. interview 28 Jan. 2013). It helped too that Arar did not appear to be guilty. McDonough notes: “[I]t was such a strong sense that he just was a completely, totally innocent, uninvolved – not even a bystander on anything – he was just an innocent victim of fabricated identity by accusers” (McDonough, tel. interview 12 Jan. 2013).

In addition, Mazigh was astute in her advocacy for her husband. She was not afraid to engage the media, believing that “for me, the media was my only hope of ever seeing Maher again” (Mazigh 2008: 28). The media in turn warmed to Mazigh. McDonough described her as “a media dream” (McDonough, tel. interview 12 Jan. 2013). Saloojee echoed this:

She was a very sensitive media figure because of her articulate person, because of the fact that she could speak both languages, so she was able to keep that fire burning, the fire of interest in Maher’s case at every level: at the social level within the Muslim community; she was able to communicate more broadly with Canadians at the media level, she was able to do media interviews and speak intelligently to the issue and she was able to liaise with public officials as well (Saloojee, tel. interview 13 Jan. 2013).

Mazigh was not intimidated by government and, in the face of obvious disapproval from DFAIT over her high media profile, ran a tireless campaign on her own terms. “I would speak out to the media, I would hold vigils, I would keep writing letters, I would visit human rights organizations, I would do everything I could to see justice done,” she recalled (Mazigh 2008: 85). In addition, Mazigh was always measured and dignified in her statements and lobbying – a tactic that won over wary civil society actors. For instance, when asked why he was so quick to support Mazigh, Neve says:
It always struck me how even from the early days, she wasn’t out there screaming about the fascist US government, and wasn’t even out there necessarily insisting on her husband’s innocence, even though I’m sure there was never any doubt of that in her heart (Neve, tel. interview 21 Feb. 2013).

As Neve implies, Mazigh’s framing of the issues was judicious. She was cautious not to direct her anger and frustration at Canada, but rather emphasised her faith and pride in being Canadian. For example, in the evidence she gave to the House of Commons Standing Committee, Mazigh appealed to Canadian values of justice and to the meaning of Canadian citizenship (rather than, as she might have been tempted to do, Canada’s failure to live up to its obligations under international law). Mazigh told the Committee:

> I believe in the Canadian values of justice. I will try to educate my children to believe in them, and I hope that one day they will be proud to see Canada doing all it can to bring their father back home (Evidence to HCSCFAIT 25 Sep. 2003).

Mazigh, though a migrant and a Muslim, was non-threatening – “one of us”. She demonstrated, including through her testimony, that she had bought into Canadian culture and integrated into its society. As McDonough explained, Mazigh was, along with her husband, “part of the Canadian model of immigrants, who were engaged in building the country and building constructive lives” (McDonough, tel. interview 12 Jan. 2013).

The impact Mazigh had on her husband’s case is apparent in the public commentary at the time. For instance, MPs honoured her work in the House of Commons in late 2003, The Globe and Mail nominated Mazigh as a “Nation Builder of the Year” and the NDP approached her to enter politics in 2004 (Pither 2008: 302; ‘Meet the Class of 2003’ 6 Dec. 2003; Chase 11 Feb. 2004). Civil society actors maintain that Arar would have died if not for his wife. McDonough, for instance, says: “I’m almost prepared to say if Maher Arar hadn’t had Monia Mazigh for a wife, or somebody close to her magnificence, he probably would have died in that hell hole” (McDonough, tel. interview 12 Jan. 2013). After Arar’s return from Syria, the husband and wife kept up the campaign for a public inquiry (Mazigh 2008: 213). Their appeal as a couple continued to attract civil society support during this period. Neve described their effect:

> “Both Maher and Monia were so inspiring and irresistible that I think certainly for Amnesty but a number of other organisations, there was just never any question that we
would do everything we could to back them in that call” (Neve, tel. Interview 21 Feb. 2013).

By contrast, the Khadr family, because of their well-documented history of associating with terrorists and ongoing sympathy for al Qaeda, alienated the Canadian public and had a repellent effect on Canadian civil society. Shephard describes the role of Khadr’s family in shaping Canada’s response to Omar’s case as “huge”:

I think a lot of people, when they look at the case on its facts, question why Canada acted as it did. Because of his age, and Canada’s strong stance on child soldiers, people ask why Canada wasn’t more forceful in advocating for him at various stages. But really it has so much to do with the family because Canadians just loathe, they just loathe the family (Shephard, tel. interview 21 Feb. 2013).

A critical event that cemented Canadians’ dislike for the Khadrs was the airing of a CBC documentary, “Al Qaeda family”, in 2004 (Shephard 2008: 137). The program featured another Khadr son, Abdurahman, who revealed he was sent to Afghanistan by his father “to become an al-Qaeda, was raised to become a suicide bomber” (CBC News 4 Mar. 2004). Omar Khadr’s mother and sister also appeared in the documentary making incendiary comments. Khadr’s mother for instance, asked how she reacted to the 11 September attacks, answered “I said, ‘let them have it’”, while his sister said, “you just sort of think, ‘well, they deserve it’” (Shephard 2008: 146-147). Khadr’s mother also disparaged Canadian society: “You would like me to raise my child in Canada and by the time he’s twelve or thirteen he’ll be on drugs or having some homosexual relation or this and that?” (Shephard 2008: 146). Many Canadians regarded the Khadrs as “Canadians of convenience”, rejecting those aspects of Canada’s progressive society that did not fit with their fundamentalist religious beliefs, yet availing themselves of Canada’s generous welfare system (Greenbery 14 Apr. 2004). Pither says Khadr’s mother’s and sister’s appearances in the television documentary “turned Canada against him” (Pither, tel. interview 28 Jan. 2013). Comparing Khadr’s case with Arar’s, she says: “They weren’t reaching out to the public and trying to make friends with the public. His mother and sister went on national television and essentially just really screwed up his case, it was terrible” (Pither, tel. interview 28 Jan. 2013).

Khadr’s lawyers despaired of the impact his family had on his case in Canada. For example, Edney said: “The fundamental problem for Omar Khadr was the fact that he
was branded with the same reputation as his family” (Edney, tel. interview 16 Jan. 2013). The first time one of his US military lawyers, Lt Col Colby Vokey, met the family, in 2006, he told them to stop speaking publicly because: “Every time you open your mouths ... you hurt Omar’s case” (Shephard 2008: 196). Vokey contrasted Khadr’s case with that of Australian citizen David Hicks. Recognising Hicks’s father’s role in influencing public opinion in his son’s favour, Vokey noted: “Hicks’s dad never stood up and said, ‘I’d rather my son be a suicide bomber than sell drugs in the streets of Melbourne’” (Shephard 2008: 206).

Civil society actors acknowledge the damaging role Khadr’s family played in discouraging or frightening off NGOs from supporting his case, particularly in the early years after his incarceration. Neve notes that “it was more the family effect than anything else, they were pretty notorious, and every once in a while they did or said something in the media that only made things worse” (Neve, tel. interview 21 Feb. 2013). One Muslim activist says Khadr’s was a “very difficult case to bring forward into the media” because of his unsympathetic family who was “almost seen at that time as a family of outcasts, and even casting them as Canadian Muslims was extremely difficult” (Muslim human rights activist, tel. interview 2013). This activist said: “[I]t seemed as though the activism for them could not really get off the ground... . There really wasn’t anyone in the family to actually bring the case forward in the way that Maher had Monia”. McDonough notes that Khadr’s case “never seemed to be as compelling for people” as Arar’s. “There were some worrisome events there, and whether people were willing to buy the idea that he was just really a kid or not - it was just a very different set of circumstances,” she said (McDonough, tel. interview 12 Jan. 2013).

From this discussion it is clear that the perceived guilt of the victim, as well as whether their families were liable to cause embarrassment and alienate the public, were powerful factors in determining whether civil society readily flocked to their cause. Civil society actors with limited resources – for which they relied on public and/or government goodwill and support – were particularly susceptible to selecting the more innocent-looking victim with the more appealing back-story or family situation.
3. A Focal Point for Muslim Community Organisations

Muslim community organisations responded in a similar way to other NGOs to the two cases in that they were quite active on Arar’s case but were reluctant to get involved in Khadr’s. A noticeable feature of the Muslim community’s behaviour on Arar was that his case became a focal point around which organisations mobilised. In time, Arar’s case was used as a platform on which groups were able to speak more confidently about wider human rights issues affecting Muslims. This pattern illustrates the literature on political opportunity structures, as Muslim human rights activists were able to harness the Arar case to pursue their wider agendas of empowering their community in the face of post-11 September challenges (Gamson and Meyer 1996: 277). The Muslim community’s capitalisation on the opening in the political system offered by the Arar case was alluded to by Saloojee. He described how prior to 11 September, Canada’s Muslim community was fractured and diverse, and Arar’s case helped unify it:

As the details of his case began to emerge, Maher’s case began to be almost the case that epitomised some of the challenges that the community would face after 9/11, and it exemplified many of those nagging issues that kept cropping up after 9/11 in terms of security visitations, in terms of the curtailment of certain basic rights, cross border travel, racial profiling, the idea of loyalty to Canada. ... So his case became a focal point for Canadian Muslims and Canadian Muslims began to become much better educated about these things through his case and actually found in the resolution of his case a type of collective and popular struggle to some of the challenges around 9/11 (Saloojee, tel. interview 13 Jan. 2013).

Organisations led by and for Muslim women demonstrated a particularly sympathetic attitude towards Mazigh (McDonough, tel. interview 12 Jan. 2013). Mazigh was introduced to a key Muslim community organiser, Nazira Tareen, president of the prominent Ottawa Muslim Women’s Organization, by McDonough (Mazigh 2008: 70). McDonough recalls that the organisation became involved after hearing the NDP leader speak in Parliament and to the media after 11 September. “They approached me about coming to talk to them, and at that point I introduced them to Monia Mazigh,” she says (McDonough, tel. interview 12 Jan. 2013). Tareen became an important ally to Mazigh, arranging government lobbying opportunities for her (Mazigh 2008: 129). McDonough says although the Muslim women had not engaged in much activism previously, they demonstrated a high degree of perceptiveness about the most effective tactics to use in Arar’s case, given the sensitive times. At one particular meeting, for example, the women agreed to hold a candlelight vigil, which was “all about peace and calm and
trying to move towards the light” (McDonough, tel. interview 12 Jan. 2013). The women ruled out a noisy demonstration because it might precipitate fears about violence and the eruption of hostilities.

The Khadr case, on the other hand, proved too noxious for Canada’s Muslim civil rights groups who “would not utter Omar’s name” (Shephard 2008: 147). Working against Khadr was, as always, his unpopular family. Journalist Michelle Shephard says:

> I think at the beginning the Muslim communities were worried to speak out about the case for the same reason that the NGOs were – it was seen as such a hot potato with such unlikeable relatives of his that no one wanted to get involved (Shephard, tel. interview 21 Feb. 2013).

To illustrate this reserve on the part of Muslim community, it is instructive to look at the website of CAIR-CAN. This reveals that the first press release the organisation issued on Khadr was in March 2004 and its purpose was to distance itself from the Khadr family (CAIR-CAN 5 Mar. 2004). By comparison, CAIR-CAN’s first press release on Arar was issued in October 2002 and it demanded his release (CAIR-CAN 12 Oct. 2012). The first press release CAIR-CAN issued protesting Khadr’s treatment at Guantánamo Bay was in March 2006 (CAIR-CAN 6 Mar. 2006). When, three years later, CAIR-CAN wrote to Prime Minister Harper demanding Khadr’s repatriation to Canada, it had the backing of 185 organisations and individuals, many of them Muslim (CAIR-CAN 3 Feb. 2009). This suggests that the Arar case, though it built solidarity among the Muslim community, did not assist with Khadr’s more risky cause. It took more distance from 11 September, and for the wider civil society to back Khadr, before Muslim groups would get behind him also.

4. *The Canadian Charter of Rights and Freedoms*

The influence of Canada’s *Charter of Rights and Freedoms*, particularly in providing Canadian citizens with a judicial mechanism by which to enforce their individual rights, was most apparent in Khadr’s case. The *Charter* operated in Khadr’s case in two distinct ways. It provided legal levers to Khadr and his lawyers to challenge the executive’s intractable position in the courts. It also, eventually, gave much-needed confidence to a timid civil society to support his cause. The prominence of the *Charter* in Khadr’s case illustrates the literature on domestic institutions. This is in terms of the
way institutions affect the degree of power actors have over policy outcomes and the influence they wield on how actors define their interests (Hall 1986: 19).

Amnesty International’s Neve credits the Charter with opening up innovative legal strategies to Khadr’s lawyers (Neve, tel. interview 21 Feb. 2013). Khadr’s primary advocate, Edney, emphasises the way the Charter empowered Canadian courts in his client’s case. For example, Edney said of the Charter: “I love it, it talks about fundamental rights, it’s a young Charter, it’s a young Constitution, and therefore the Canadian courts are alive to the development of its Constitution” (Edney, tel. interview 16 Jan. 2013). He praised the Canadian courts for being “stellar in carrying out [their] duty to uphold the rule of law”.

Neve also emphasised the mobilising effect the Supreme Court Charter decisions had on the rest of civil society. For example, he says judicial findings that Khadr’s Charter rights were breached gave civil society organisations more focus and fuel in their campaigning for Khadr. “[A]ll of that gave greater confidence to organisations,” said Neve. “[M]ore and more organisations I think started to come forward as we got more and more court rulings, but the court rulings themselves also became real focal points for activism” (Neve, tel. interview 21 Feb. 2013).

5. The Media’s Dual Role

Canada’s media played a reasonably high-profile role in the Arar and Khadr cases, in different ways. The publication of leaked intelligence on Arar by the Ottawa Citizen and subsequent police raid on its journalist’s home acted as a catalyst for the Martin government to order the Commission of Inquiry. The reporting of disparaging leaks from anonymous officials with little questioning or testing of information, as occurred in the incident involving the Ottawa Citizen, was replicated by other parts of the Canadian media (for example, see Fife 24 Jul. 2003; 30 Dec. 2003). This ready manipulation of the media by security agencies is suggestive of an element of Canadian political culture often commented on: its deference to authority, and in particular the laudatory way in which Canadians treat their police (Lipset 1990: 90-91).\footnote{Lipset quotes Canadian novelist Margaret Atwood noting that “Canada must be the only country in the world where a policeman [the Mountie] is used as a national symbol” (Lipset 1990: 90).}

The behaviour of sections of the media, in thoughtlessly smearing Arar by publishing
scandalous and inaccurate information, might also be put down to what activist Pither described as journalistic ambition. There was, she said, “this campaign of reaching out to the journalists who were ambitious and using them to portray Maher Arar as something scary” (Pither, tel. interview 28 Jan. 2013).

On the other hand, the media also played a more positive role in the Arar and Khadr cases, keeping attention on their allegations of human rights breaches when the public’s interest waned. According to activists in Arar’s case, one of the reasons for the campaign’s success was “continued and sustained media activism” (Saloojee, tel. interview 13 Jan. 2013). Frequent media engagement was central to Mazigh’s strategy, as observed earlier. In a similar way, Pither’s media expertise was vital to the Arar campaign. Muslim human rights activist Saloojee noted Pither was “constantly on the media case 24 hours a day with Maher’s case before he was released” (Saloojee, tel. interview 13 Jan. 2013). Another way in which the media acted as a positive force to promote consciousness of the torture cases was that individual journalists worked to keep the cases alive in the media. This occurred in the Khadr case, with Toronto Star reporter Michelle Shephard hailed by Edney as a “hero” for her unceasing coverage (Edney, tel. interview 16 Jan. 2013). “Without the media’s persistence, the Omar Khadr story may have gotten lost”, Edney said. “She has been brilliant, and there were others as well, but Michelle, in my personal view, was the primary Canadian journalist who kept fighting to keep that story alive” (Edney, tel. interview 16 Jan. 2013). Shephard’s reporting of Khadr is an example of how media can play an important role in documenting and reporting violations and increasing people’s awareness and understanding of human rights (Arat 2006: 14).

More generally, Canadian media adopted positions on the issue of torture in the war on terror that were unequivocal in their support of the prohibition against it. This was the case with respect to the editorial stances of The Globe and Mail, a centrist newspaper in its political views owned by Globe and Mail Inc, and the more politically conservative National Post, owned by Postmedia Network Inc (Canadian Newspaper Association and the Canadian Community Newspaper Association May 2014; Editorial 12 Jun. 2004; 23 Oct. 2008). Both newspapers also called for an inquiry into Arar’s detention and treatment (Editorial 5 Nov. 2003; 11 Oct. 2003). These calls intensified when journalists became the target of the RCMP, following the raid on O’Neill (Editorial 22
Jan. 2004). Pither wrote that by the morning after the raid, “anyone who hadn’t already been calling for a full public inquiry was, and pretty much every journalist and media outlet in the country made it their mission to win one” (Pither 2008: 324). This demonstrates the power of the media in influencing the government’s agenda – but also the role that self-interest can play in determining when the media chooses to exercise this potentially sizeable clout. On the Khadr case, by comparison, the positions of the newspapers differed. The Globe and Mail was steady in firstly warning that Khadr’s family history “did not automatically confer guilt” on his part, and later on, from 2005, in criticising the Canadian government over its treatment of him (Editorial 5 Nov. 2002; 11 Aug. 2005). The National Post took an inconsistent and less supportive stance on Khadr’s treatment (Editorial 17 Jul. 2008; 30 Jan. 2010).

VIII CONCLUSION

Canada’s response to the torture abroad of its citizens was the most engaged of the three case studies. Canada was, however, inconsistent in its responses to the issue of the international torture of its citizens, Arar and Khadr. On Arar, Canada engaged in robust accountability of its own actions in his extraordinary rendition to Syria. On Khadr, a child when first detained, Canada refused for a decade to take seriously concerns that he had experienced serious breaches of his human rights under domestic and international law. The behaviour of Canadian civil society mirrored that of the executive government. It displayed one set of responses to the case of Arar, an attractive victim who appeared to be innocent and who had an appealing wife who was an effective advocate, and another for Khadr. Khadr was an unattractive victim because of his family’ associations with, and sympathy for, terrorists. Civil society mobilised around the Arar case from an early stage, while for half a decade at least it was absent on Khadr. This was despite Canada’s legal structures for the protection of individual rights, in form of the Canadian Charter of Rights and Freedoms.

Canada’s geographic proximity to the US means it is concerned with carving out a separate identity from its more powerful neighbour, and is often used as a lens through which to understand the former’s behaviour on the international stage. It does not, however, adequately explain Canada’s inconsistency on the Arar and Khadr cases. Canada’s global image is connected to the high value it places on human rights. Yet, in
Khadr’s case, governments engaged in behaviour that flouted this celebrated identity and for many years civil society did not hold them accountable for this. The behaviour of Canadian civil society can be understood through the enabling and constraining factors of the domestic political context. Canada’s political rights culture is more complex than often assumed, imbued with tensions tied to its dual linguistic and cultural heritage. Canada’s legal institutions afforded Khadr a measure of accountability where none was forthcoming from the executive, legislature or civil society. Khadr successfully invoked the Charter in the domestic courts and, in time, this encouraged Canadian civil society to overcome some of its fear about advocating for his cause. While the judicial system offered Khadr his only forum for accountability on torture, Arar did not need it. This was because civil society was so effective in holding the executive to account in Arar’s case. In the first years after 11 September, Canadian politics was characterised by open political opportunity structures, with a government that was receptive to the advocacy role of NGOs. This worked powerfully in Arar’s case, where his supporters were able to attract individual champions in the Canadian Parliament who lobbied the government over his case. However, by the time civil society awoke to Khadr’s situation, political opportunity structures in Canada had shifted. A government less receptive to civil society’s input on its human rights policies was in power – one similar in ideology to that which existed in Australia immediately after 11 September 2001 – and it was too late for civil society mobilisation to have any real effect.

The cases of Arar and Khadr illustrate the importance of civil society seizing on political opportunities when they exist. The cases are also revealing about the vulnerability of human rights NGOs to competitive, financial and survival imperatives and show how this can drive organisations to choose popular causes. It was easier for NGOs to attract public sympathy for Arar, while Khadr represented a gamble on rights. In this situation, domestic institutional human rights structures did not make a difference because civil society was too timid to capitalise on them. Global civil society, which did eventually engage with the Khadr case, referenced Canada’s international legal obligations on human rights, but this made little difference to a government confident of domestic public support. The case of Canada suggests that civil society possesses significant power to shape government behaviour on international human rights issues when it organises early and collectively, and when domestic political
conditions are favourable. Canada was a polity that had many features that were enabling of mobilisation on international human rights, but ultimately they were not strong or developed enough to overcome the powerful competing interests of civil society groups concerned with their own survival.
CHAPTER SEVEN - CONCLUSION

This thesis has investigated how three liberal democracies, sharing a common Anglo legal and political culture that values the protection of individual rights, could react differently to the violation of a core principle of international human rights law: the prohibition against torture. Chapter Two argued that liberal international law literature dealing with the realisation of global human rights principles does not offer a satisfactorily nuanced explanation of this problem. An important strand of that literature emphasises the role of domestic politics — and domestic civil society — in explaining how international treaties influence the behaviour of states on human rights (Simmons 2009; Risse et al. 2013). However, it assumes that stable liberal democracies will respond to international human rights issues in a similar fashion. This is because political rights in these open, democratic systems are largely protected, leading to citizenries being complacent about human rights (Simmons 2009: 16). I have challenged this aspect of the literature, arguing that it does not pay close enough attention to powerful domestic forces that can affect the way civil societies in liberal democracies behave. In particular, the literature does not deal with how civil society’s willingness and ability to mobilise can differ significantly according to the constraints or freedoms of its domestic political context. I have argued that the behaviour and effectiveness of civil society need to be understood in the context of the particular domestic rights cultures, institutional frameworks and political opportunity structures in which they operate.

This chapter analyses the behaviour of civil society through a different lens, by drawing on literature on political accountability (Braithwaite et al. 2012; Moore 2014; Peruzzotti 2012). This literature, introduced in Chapter Two, is founded in republican conceptions of freedom as freedom from domination. It proposes a broadening of the concept of democratic accountability, beyond the traditional tripartite model of the executive, legislature and judiciary checking one another, to encompass those actors that operate outside formal legal frameworks and that seek to impose external accountability on government. I begin the chapter by outlining how the concept of “accountability agents” permits a more profound understanding of civil society’s role in influencing liberal state behaviour on the torture issue. I then turn to the case studies and highlight examples of successes and failures with respect to state accountability over the torture of citizens. I
conclude with a discussion of the conditions under which civil society is likely to be most effective in checking the arbitrary exercise of state power during politically testing times, such as those that followed 11 September.

I CIVIL SOCIETY AS AGENTS OF ACCOUNTABILITY

Political accountability is the obligation of democratically elected governments (the executive, in particular) to account to their citizenries for certain types of activities. In the three cases examined in this thesis, those activities related to the state’s responses to the alleged torture of citizens (and residents) overseas and the role of its intelligence and security agencies in that treatment. Liberal democracy as a political system is founded on the belief that the state’s power should be limited for the purposes of protecting individual liberties. How can this be achieved? Traditional mechanisms such as the tripartite separation of powers are one way, but as the cases demonstrate, the willingness and ability of the legislature and the judiciary to check executive power when individual rights are threatened is sometimes absent or inadequate to ensure accountability. Republican thought emphasises the dispersal of power in a democratic polity beyond the traditional three arms of government in order to achieve political liberty and hence provides a helpful framework within which to view the puzzle at hand. John Braithwaite et al. argue for the importance of pluralised “separations of power”, an idea introduced in Chapter One (Braithwaite et al. 2012: 296). A separated power is an entity that acts as a check and balance on the power with the greatest capacity to dominate citizens, usually, though not always, the executive government (Braithwaite et al. 2012: 292). Civil society is an example of a separated power – one that works alongside, through and sometimes in collaboration with other established liberal democratic institutions, including Parliament and the courts.

Civil society actors can be conceived as “accountability agents” who seek to impose external accountability on powerful organisations and governments (Moore 2014: 633). Mark Moore writes:

Accountability agents not only pay attention to the conduct and performance of powerful governmental and private institutions, but also make evaluative judgments about whether they are sufficiently respectful of the rights of individuals, or appropriately accountable for the effects of their actions, and more generally whether
the enterprise seems legitimate or not. Having made such judgments, accountability agents give voice to their claims and rouse others to support them (Moore 2014: 633).

As noted in Chapter Two, accountability agents are often self-appointed and self-authorised. They may or may not have a legal basis to press their claim, but believe they have a moral claim for which they can gain support in the court of public opinion (Moore 2014: 633). Domestic civil society derives its legitimacy to carry out the role of accountability agents from the fact that it is a part of the national polity, yet sits outside the embedded structure of influence in the political system (Diamond 2001: 8). Another way of conceiving this is civil society balancing government from below, through its connection to the citizenry (Tazreiter 2010: 204). Often, it is only when accountability agents call powerful public (or private) organisations to account that those institutions can be expected to act in the public interest (Moore 2014: 633).

From the three cases, we saw that accountability agents included a diverse range of non-government actors, including individual lawyers and human rights activists, legal advocacy groups, human rights non-governmental organisations (NGOs), political advocacy groups, professional associations, Muslim community groups, media and family members of the citizens and residents alleging torture. Their roles in demanding and obtaining accountability varied. One means of obtaining accountability was to expose governmental wrongdoing. This occurred in the UK case, for example, where media exposed details of official complicity in the torture of citizens and residents. Another means of obtaining accountability was through activating the traditional institutional accountability mechanisms such as the judiciary, parliamentary committees or commissions of inquiry, which otherwise would not have acted. The idea of vertical and horizontal accountability is useful here. Vertical forms of accountability – citizen-led actions such as public denunciation of government policy in the media – can trigger horizontal forms of accountability, which include parliamentary, judicial, or ombudsmen-led inquiries (Peruzzotti 2012: 246-247). This occurred in the UK and Canada cases, where accountability agents contributed to the establishment of public inquiries. Accountability agents were not as active, nor as effective, on the issue of torture in the Australia case. The cases thus demonstrate that the interests, capacities and effectiveness of accountability agents in holding executive governments to account on human rights are not assured. Whether or not accountability occurs depends on the domestic context in which these agents operate.
I have hypothesised that the checking of power – and whether or not it occurs – is significant for understanding the responses of states to contentious international human rights issues. This section considers this argument in the context of the case studies. It singles out examples of accountability successes with respect to state responses to the torture of citizens overseas, as well as examples of accountability failures. By accountability successes, I mean situations where a national government’s policies or actions relating to the alleged torture of detained citizens (and residents) were changed because of outside pressure, or where the government agreed to subject itself to external scrutiny. By failures, I refer to cases where the executive government remained indifferent towards allegations of a breach, or alleged breach, of a citizen’s human right not to be tortured, and any state involvement in that treatment went unchecked.

The examples highlighted in the following discussion focus almost exclusively on one traditional locus of power: the executive. This is because critical events including terrorist attacks and wars tend to strengthen the power of the executive (Owens and Pelizzo 2010: 1). Moreover, it is the nature of modern democracies that presidents and prime ministers are expected to, and do, take primary responsibility for responding to crises (Owens and Pelizzo 2010: 3). Certainly, this was the case in the aftermath of 11 September 2001, especially in the early decisions by the liberal allies to join the war in Afghanistan and to introduce new counter-terrorism laws. There were, as the cases have shown, other sources of political influence at this time, including the legislature.

**A Accountability Successes**

1. *Standing Up to the US*

One example of executive power being successfully constrained by civil society is where liberal allies stood up to the US for the human rights of their citizens detained in the war on terror. This occurred in the UK case where the Blair government refused – after a year – to allow UK citizens to be subject to the US’s detainee policies any longer. This refusal comprised rejecting military commission trials of UK citizens under
the US’s proposed rules, and seeking their release and repatriation from Guantánamo
Bay where they were being held without the protections of international humanitarian
law. These US detainee policies both engaged the issue of torture. The original military
commissions permitted the use of evidence obtained by coercion and, as documented in
Chapter Three, by 2003 there was widespread international concern that detainees, who
were not given *Geneva Conventions* protections, were being mistreated and possibly
tortured at Guantánamo Bay.

While the three allies all had citizens detained at Guantánamo Bay, the UK was the first
to stand up to the Bush Administration and insist that its citizens be returned home (this
occurred in March 2004 and January 2005) (Tyrie et al. 2011: 93). In time, the UK also
repatriated five residents from Guantánamo Bay (The Detainee Inquiry Dec. 2013: 19-
20). In addition, the UK was alone among the allies in refusing to allow its citizens to
be tried under the US military commission system. This was on the basis that the system
failed to offer sufficient guarantees of a fair trial (Goldsmith 25 Jun. 2004). By contrast,
neither the Australian nor Canadian governments made any such criticism of the
military commission process. Australia, in fact, defended the military commissions in
the face of the UK’s pronouncements on their lack of fairness (McCormack 2007: 13).
Australia and Canada both had citizens who were tried in the military commission
system and were only repatriated after making guilty pleas (Australia’s David Hicks
returned home in 2007 and Canada’s Omar Khadr in 2012) (Hicks 2010a: 7; Toews 28

The UK government’s defence of its citizens’ rights in 2004 represented a reversal of its
initial policies on the detention of nationals in Cuba. The Blair government’s position in
January 2002 was to support the transfer of UK citizens detained in the war on terror to
Guantánamo because this met with its counter-terrorism objectives (Tyrie et al. 2011:
93; Cobain 2012: 217). Chapter Five documented various sources of pressure and
influence in the lead up to the UK government’s change of position on its citizens at
Guantánamo Bay. It is clear from that narrative that the executive government faced
significant pressure from a variety of actors pushing for accountability. This included
the traditional separated powers mechanisms, the Parliament and the judiciary, as well
as a variety of external accountability agents who were pressing for UK government
intervention in the cases of detained citizens. Among these agents was a variety of
different civil society actors including a band of progressive lawyers, some family members, the liberal media, at least one Muslim community organisation and a small number of human rights NGOs. The most active from an early stage were the lawyers, who had the backing of the national legal professional organisations, used the UK courts effectively and worked with progressive sections of the media to bring about a change in government policy. I have used the concept of the “legal complex” to describe the way these different legal sectors were able to speak with one voice on the issue of the human rights of UK detainees (Halliday et al. 2007: 3). I now analyse how the legal complex operated to achieve its objective of securing the liberty of detainees through the lens of accountability, although a torture inquiry was a longer term policy aim.

The work of the UK legal profession on detainees illustrates some of the features highlighted in the earlier discussion on accountability agents. This includes their tendency to be self-authorised, and their decisions to act on the basis of evaluative judgments about the lack of respect demonstrated by governments for individual rights. The small cohort of UK human rights lawyers who acted for citizens were in many instances approached by their families to take on individual cases (Peirce 2010: 18). However, the lawyers already had backgrounds campaigning for civil liberties, had made personal judgments that the US’s war on terror detainee policies were illegal or immoral and were primed to act. They were, in a way, self-appointed. Clive Stafford Smith, for example, recalled hearing in January 2002 of the US’s plans to hold prisoners at Guantánamo Bay. The Reprieve director recounted that “I emailed round some friends in the death penalty world to find out who else wanted to sue Bush and put a stop to this ill-conceived plan” (Stafford Smith 2007: 22). Stafford Smith went on to act for a number of detainees (including UK citizen Moazzam Begg).

The lawyers gave powerful voice to their claims that the UK government was obliged to protect the detained citizens’ rights and intervene in their cases, using press conferences, the media and the courts to do so and rousing other parts of the legal complex to their cause, including the Law Society of England and Wales and the Bar Council (Christian, tel. interview 11 Feb. 2013). For example, lawyer Louise Christian, in a letter to the editor published in The Guardian, wrote about her “tortured clients”, citizens Martin Mubanga and Feroz Abbasi, and pleaded with the UK government “to
do something for them” (Christian 15 Sep. 2004). Christian noted that “if the British
government were not so craven, it would be demanding a proper inquiry” into citizens’
claims of mistreatment (Christian 15 Sep. 2004). Here Christian was tapping into UK
anti-Iraq war sentiment, and the general belief that the Blair government was too
deferential to the US; framing the detainee issue in this way maximised any sympathy
her concerns would get with the public. Lawyers activated the traditional mechanisms
for executive government accountability, seeking recourse for their detained clients in
the courts, and had early success with the UK Court of Appeal judgment in the Abbasi
were more receptive to human rights claims. The Court of Appeal found for the UK
government in that case, ruling that it could not order the executive to lobby for citizens
to be released from Guantánamo Bay. However, the Court leant significant moral
weight to the detainees’ claims for government intervention by describing Guantánamo
Bay as a “legal black hole”. Christian hailed the judgment as a “turning point” in
shifting UK government policy (Christian, tel. interview 11 Feb. 2013). It is arguable
that without the lawyers’ active, organised, collaborative and multi-pronged style of
campaigning, UK citizens detained at Guantánamo Bay may not have got the outcome
they did, when they did.

2. Public Commissions of Inquiry

Another example of successful accountability of executive government is where public
commissions of inquiry were established into detained citizens’ allegations they were
tortured overseas. These inquiries risked embarrassment for governments, given they
would reveal information regarding their own or their agencies’ knowledge about, or
complicity in, the detainees’ treatment. Despite these risks, both Canada and the UK
established public inquiries.

The Canadian government established the Commission of Inquiry into the Actions of
Canadian Officials in Relation to Maher Arar, a Canadian citizen subjected to
extraordinary rendition from the US to Syria, in 2004 (The Arar Commission 2006:
260). The Inquiry was the first instance where any of the three allies subjected itself to

152 The Queen on the Application of Abbasi v The Secretary of State for Foreign and Commonwealth
153 Ibid [64].
public scrutiny on the issue of the torture of their citizens in the war on terror – and it remains the most thorough exercise of its kind (Whitaker 2008: 9; Adelman 2007: 140). The Inquiry was headed by a judge with a reputation for independence; it held 127 days of hearings, many of them public; and it released 2461 previously unseen government documents (The Arar Commission 14 Sep. 2005). Its final report, issued in 2006, ran to four volumes and was highly critical of the actions of Canadian officials (The Arar Commission 2006: 9, 13-16). This included one volume of analysis and recommendations (376 pages), two volumes of factual background findings (828 pages in total) and a policy review of the Royal Canadian Mounted Police (RCMP) (636 pages) (The Arar Commission 12 Dec. 2006).

The UK Cameron government ordered a public inquiry into citizens’ and residents’ claims of torture and UK complicity in 2010 (The Detainee Inquiry Dec. 2013: 2). This followed the refusals of previous Labour Blair and Brown governments to do so. The Detainee Inquiry was abandoned prematurely, ostensibly because of a police investigation into new allegations of UK complicity in the extraordinary rendition of Libyan dissidents to Libya, but also after it lost the backing of detainee lawyers and human rights NGOs (United Kingdom 18 Jan. 2012). The 115-page interim report of the Detainee Inquiry was released in 2013, and raised serious questions – but made no findings – about government policy and actions of intelligence agencies in relation to the detention and mistreatment of UK citizens and residents in the war on terror (The Detainee Inquiry 19 Dec. 2013). By contrast, in 2010 Australia’s Inspector-General of Intelligence and Security conducted a closed inquiry into the extraordinary rendition of Mamdouh Habib, an Australian citizen, to Egypt. A 116-page public version of its report was released in 2011 and raised some concerns about the actions of Australian officials (Thom 2011).

Canada’s Arar Commission stands out as the model exercise in accountability of executive government, using the traditional mechanism of the judicial commission of inquiry. It has been described as “an extraordinary exercise in accountability for secret national security activities” (Roach 2011: 413). As documented in Chapter Six, the government’s decision followed a build-up of political pressure, a large contributor to which was the effective activism of Arar’s wife, Monia Mazigh, and her supporters. Arar’s appealing, intelligent and persistent wife was fortunate to gain the backing of
experienced human rights activists and individual parliamentarians. Mazigh’s most important ally was the activist Kerry Pither, whose organisation enabled her to work full-time on the case and who had a well-honed understanding of how to use the media in human rights campaigning (Pither, tel. interview 28 Jan. 2013).

Viewed through the lens of accountability, the work of Mazigh, Pither and others can be understood in terms of the interaction of vertical and horizontal systems, where civil society actors, acting as self-appointed external accountability agents, triggered traditional accountability mechanisms that would otherwise not have been activated, namely, the judicial commission of inquiry. Pither’s media strategy, in particular, illustrates many features of how accountability agents work to bring about changes in governments’ human rights policies. Pither used the media to raise questions about government wrongdoing and, in doing so, galvanised the support of the wider public for Arar’s cause. She was relentless in her pursuit of positive media coverage, being described as “constantly on the media case 24 hours a day” (Saloojee, tel. interview 13 Jan. 2013). Pither was receptive to media demands, organising interviews with Amnesty International when a “human rights perspective” was sought and the Council on American-Islamic Relations Canada (CAIR-CAN) when a “Muslim perspective” was required (Saloojee, tel. interview 13 Jan. 2013). Pither was also unemotional and factual in her approach. “We did not tell Canadians they should believe Maher Arar was innocent. ... We were also very careful not to ‘accuse’ Canadian authorities of misconduct,” said Pither (Pither, tel. interview 28 Jan. 2013). Instead, Pither presented journalists with un-editorialised material in the form of detailed chronologies and asked questions about the nature of the RCMP’s involvement in Arar’s situation. She said: “I believe that we were able to bring the majority of Canadians on side because we asked for something very few could disagree with: the right to due process” (Pither, tel. interview 28 Jan. 2013).

The media in the Canadian case played a more passive role as a conduit through which activists like Pither worked to generate public awareness about the torture of a citizen and the role of the Canadian government in his human rights abuses. Canadian national security agencies also used the media, leaking salacious information designed to disparage Arar in the minds of the public and thus counter the forces pushing for an inquiry into the role of those agencies in his mistreatment. The media were more active
accountability agents in the UK where they directly contributed to the Cameron government’s decision to establish the Detainee Inquiry. As described in Chapter Five, other civil society actors including lawyers and human rights NGOs credited The Guardian in particular with helping to bring about the Inquiry through its investigative journalism and uncovering of UK complicity in the torture of UK citizens and residents. Lord Justice Leveson, who conducted an inquiry into the UK media, noted The Guardian’s reporting was “one of the key factors” leading to the Detainee Inquiry’s establishment (Leveson 2012: 457). As one human rights lawyer noted, The Guardian took a decision to “give publicity to what the NGOs were saying, virtually whenever they said it, because it also supported their own agenda” (Kevin Laue, tel. interview 30 Jan. 2013). That agenda was one of demanding executive government accountability for what happened to UK detainees in the war on terror – an accountability role the newspaper assumed for itself. More than just a forum for public deliberation on the detainee torture issue, the UK media occupied a public watchdog role acting as a check on political power (Leveson 2012: 65). The notion of “watchdog journalism” is a classical liberal idea, and advocates that journalists should be watchdogs of public interest (Norris 2014: 525). Through fulfilling this role, independent media are believed to strengthen the accountability of powerful decision-makers (Norris 2014: 525). By contrast, the Australian media played no such accountability role on torture, as Chapter Four showed.

3. National Elections

A further example of successful accountability of the executive government by civil society on the detainee torture issue concerns the effect national elections can have in bringing about changes in government policy. Regular, free and competitive elections are paradigmatic institutional external accountability mechanisms that rely on the actions of the citizenry (Peruzzotti 2012: 249). Elections are blunt instruments for holding politicians to account, in that they retain or reject sitting politicians but do not necessarily clearly signal what voters did or did not like (Franklin et al. 2014: 389). However elections can make politicians pay attention to what the public wants and reflect public demands in their policies and performance (Franklin et al. 2014: 399). Elections can thus sometimes offer critical points of pressure, providing important opportunities to influence the executive in the course of ongoing, cumulative, human
rights campaigns. The case of Australian citizen, Hicks, and the 2007 federal election illustrate this idea.

As noted in Chapter Four, the campaign to bring Hicks home from Guantánamo had been gradually building throughout 2006, with opinion polling indicating an overwhelming majority of Australians opposed his ongoing detention (Pearlman 14 Dec. 2006). Australia’s Howard government had been steadfastly indifferent to Hicks’s situation since he was first detained in 2002. This changed in 2007 with the looming election and indications that the issue was finally exercising ordinary voters. Prime Minister John Howard was sensitive to this shift in public opinion and acutely aware of the potential consequences for his government’s future if he ignored it. In a demonstration of this, in November 2006 and February 2007, Prime Minister Howard – by his own account – spoke to US President George W Bush about Hicks and the urgency of bringing him to trial, “stressing the domestic political problems for my Government” (Howard 2010: 634). In the UK and Canada, national elections also had an impact on the executive’s policies on citizens and residents detained in the war on terror – though not as dramatically as in Australia. In the UK, the decision of the executive to establish the Detainee Inquiry was tied to the election the same year of a new coalition government comprised of the Conservatives and Liberal Democrats (Cobain 2012: 269; Tyrie 2011: 2). The minor coalition partner, the Liberal Democrats, had argued for a detainee torture inquiry before the 2010 election. In Canada, national elections did not play a role in moving government policy on the detainee torture issue, though leadership changes did. A change of Liberal prime minister in 2003, from Jean Chrétien to his rival, Paul Martin, provided an opportunity for Arar’s supporters who were campaigning for a public inquiry. The politicians held different views on the need for an inquiry, with Martin more open to establishing one and also keen to differentiate himself from his predecessor (Chrétien 2007, 2008: 185-186; Martin 2008, 2009: 405). In the case of Canada’s sole citizen at Guantánamo Bay, Khadr, national elections provided no openings for campaigners wanting to influence the executive on his case, since Khadr stayed unpopular with the Canadian public.

Why, in the Hicks case, did the 2007 federal election prove to be a pressure point for the executive in Australia, when the previous poll in 2004 did not? There were two critical factors. One was the shifting mood in the Australian electorate, which reflected growing
dissatisfaction with the incumbent government including its treatment of Hicks. The other was the formation in 2005 of new human rights NGOs whose founders identified a gap in civil society’s constraining of the executive’s power in relation to the war on terror and then capitalised on the change in public opinion. The new organisations included the Human Rights Law Resource Centre (HRLRC) and GetUp!. The main features of accountability agents were again present in the work of these civil society actors.

The founders of the HRLRC saw a need in the Australian human rights sector for strategic litigation in important human rights cases (Lynch, tel. Interview 19 Jun. 2013). The Hicks case was one of the first issues the organisation took up. A number of eminent jurists, barristers and legal academics produced a legal opinion that argued the Australian government, by permitting Hicks to be subject to the US military commission system, breached international and Australian law (Nicholson et al. 2006). The HRLRC’s claim for Australian government action on Hicks thus had a legal foundation and its work was an example of Australia’s legal complex mobilising around the human rights issue of Australia’s detainees in the war on terror. Arguably, however, GetUp!’s activism had a more profound effect on shifting government policy on Hicks, because it directly targeted the government’s re-election prospects.

The Hicks case was also one of GetUp!’s core foundational campaigns (Solomon, tel. interview 21 Feb. 2013).154 Nothing like GetUp! – an online, grassroots political movement – existed before in Australian civil society, and it transformed the campaign to bring Hicks home. It was established partly in response to dejection gripping the sphere at the time – an indication of the limited success civil society had in checking the government’s war on terror policies until then. GetUp!’s claim for government intervention in Hicks’s case was based on a judgment formed by the organisation and its members that the government’s position in relation to the detained citizen was out of step with Australian values as a liberal democracy. GetUp!’s executive director, Brett Solomon, described the Hicks campaign in terms of reclaiming Australia’s independence and autonomy and standing up to the US for its beliefs in the rule of law, including the right to a fair trial (Solomon, tel. interview 21 Feb. 2013). In the pre-2007 election climate, this was a view that was gaining increasing popularity in the

154 The others were the Howard government’s inaction on climate change and its refusal to issue a national apology to Australia’s indigenous people (Solomon, tel. interview 21 Feb. 2013).
Australian community. GetUp!’s campaign on Hicks was built around the exploitation of opportunities connected to the federal election. Its tactics included conducting public opinion polling to make the government fully aware of how public sentiment on Hicks was moving in the lead up to the election. Solomon believes the Hicks campaign was “extremely effective in demonstrating and expanding the opposition to the government’s policies, in terms of it being a human rights issue, into it being a political hot potato that needed to be solved by the government quickly” (Solomon, tel. interview 21 Feb. 2013). The effect of GetUp!’s campaigning on Hicks was an example of accountability agents holding the executive to account on human rights. However, their claims were framed in terms of due process – legal rights more familiar to Australian domestic law – rather than international human rights law and the prohibition against torture contained in UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), a right not well-established in Australian law.

B Accountability Failures

The previous section highlighted instances where the executive government was successfully held to account by civil society actors acting as accountability agents on issues related to the treatment of the liberal allies’ citizens (and residents) detained in the war on terror. Common to all three situations was that the executive was unable to dominate other spheres of the political system or society and citizenry, because of the organisation and agitation of individuals and groups from civil society. The accountability agents succeeded in demanding executive accountability on the basis of a moral, not necessarily a legal, claim. I now turn to examples of the opposite scenario. That is, instances where this did not occur, and executive governments’ policies on detainees went unchecked, because of a failure by civil society to exercise this accountability role.

1. Failing to Stand Up to the US

One example of the failure to constrain executive power in connection with the detainee torture issue relates to the refusal by the state, over a sustained period, to defend its citizens’ rights, where multiple breaches under domestic and international law were
unquestionably occurring. This occurred in Khadr’s case, who was 15 when captured by US forces in Afghanistan, transferred to Guantánamo Bay and only permitted to return to Canada ten years later.

The breaches of Khadr’s rights included the failure to treat him as a child soldier in accordance with the US’s and Canada’s obligations under the 2000 *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPCRC)*. In addition, Khadr alleged he was tortured in Afghanistan and at Guantánamo Bay in contravention of *CAT*, to which the US and Canada are parties. The Canadian Supreme Court found that aspects of Khadr’s treatment, including being placed in a “frequent flyer program” (involving sleep deprivation and lengthy periods of isolation, ahead of his being interrogated), violated his rights under the *Canadian Charter of Rights and Freedoms*.\(^{155}\) Despite this, as Chapter Six documented, Canadian governments refused to accept responsibility for Khadr or challenge the US over the alleged abuses of his rights. It was only in 2012, under pressure from the US Obama Administration which wanted to close the Guantánamo Bay detention facility, that Canada agreed to return Khadr to Canada to serve out his prison sentence, after he made a plea deal in the US military commission system (Ibbítson 29 Sep. 2012).

Canada was able to maintain such an intransigent position on the breaches of Khadr’s human rights overseas because, for many years following his detention, he had few supporters in Canadian civil society. Potential accountability agents failed to stand up for Khadr and make sustained demands that the executive government intervene on his behalf. A major reason for this lack of civil society support was that Khadr’s family alienated Canadian society by its associations and sympathies with al Qaeda and Osama bin Laden (Shephard 2008: 146, 147). Khadr’s lawyer, Dennis Edney, and Canadian journalist, Michelle Shephard, who reported closely on his case, attest to the reluctance for many years of human rights NGOs and other civil society groups, including legal professional organisations, to advocate for his rights or pressure the government over his situation (Edney, tel. interview 16 Jan. 2013; Shephard, tel. interview 21 Feb. 2013). Shephard observed that the fact that the Canadian government and public were unable to separate Khadr from his family “left Canada standing virtually alone in its support of Guantánamo Bay” (Shephard 2008: xiv). Khadr’s case presented too big a risk for

\(^{155}\) *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44.
politicians concerned about their standing in the electorate; for human rights NGOs and legal professional associations worried about their memberships; and for Muslim community organisations preoccupied with negative public sentiment about Muslims in the post-11 September environment. As one Muslim community activist explained, Khadr’s was a “very difficult case to actually present and package and convince policy makers and the public of” (Muslim human rights activist, tel. interview 2013). This was due to his unsympathetic family and the nature of the charges against Khadr – killing an American soldier. Such charges, whether true or not, “had a tremendous chilling effect on the climate around the activism” (Muslim human rights activist, tel. interview 2013).

The Khadr case indicates civil society actors lacked neither a moral nor legal basis for taking on the Canadian government over its position on his detention and treatment. Even before the Canadian Supreme Court’s favourable decisions on Khadr, in 2008 and 2010, Khadr’s age and Canada’s strong commitment on the rights of child soldiers provided concerned individuals and organisations with a firm basis on which to protest the Canadian government’s behaviour. This was underlined in a 2008 letter from Human Rights Watch (HRW) and other transnational human rights NGOs to Prime Minister Stephen Harper about Canada’s failure to defend Khadr’s rights. HRW noted Canada had “long been at the forefront of international efforts to end the use of child soldiers” and had taken a leading role during negotiations of the OPCRC (Letter from HRW et al. 1 Feb. 2008). Despite this strong background of Canada’s advocacy on the child soldier issue on which to draw and the arguable application of the OPCRC to Khadr given his age (under 18), civil society actors failed to act as accountability agents for at least the first five years following 11 September 2001.

Accountability agents, the earlier discussion suggested, act when they have a claim for which they believe they can get backing from the public. Canadian civil society evidently judged Khadr’s case to be one where it would be difficult to find wider popular support and, furthermore, that actively lobbying for him could damage their own or their organisation’s reputation or viability. The case highlights the vulnerabilities or weaknesses inherent in human rights NGOs to do with market-driven imperatives to survive and succeed. These internal concerns of NGOs can lead them to select only certain issues or victims around which to mobilise – that is, ones where they

156 Canada (Justice) v. Khadr, [2008] 2 SCR 125; Canada (Prime Minister) v Khadr [2010] 1 SCR 44.
are likely to win more support (Carpenter 2007a; Carpenter 2007b; Cooley and Ron 2002; Bob 2005). Civil society was unable or unwilling to separate Khadr, the child soldier, from his deeply unpopular family. As Amnesty International Canada’s Secretary General, Alex Neve, admitted in 2007, there had been “nervousness about the dynamic associated with the Khadr family” (Shephard 2008: 215). This only changed from 2007 when, aided by the passage of time, the outcome in Hicks’s case, Canadian Supreme Court decisions in Khadr’s favour and the increasing involvement of international NGOs in advocating for him, domestic civil society attitudes began to shift.

2. Failing to Investigate Torture Allegations

Another example of executive power going unchecked concerns the failure to publicly and independently investigate substantive allegations of human rights abuses, including torture. This happened in Australia with regard to the claims of Hicks and Habib (as well as in Canada in relation to Khadr’s torture claims). There has been no Australian investigation into Hicks’ torture allegations. In relation to Habib’s torture claims, no Australian government ever conducted a public investigation into his treatment, although a closed inquiry was carried out by Australia’s Inspector-General of Intelligence and Security in 2010 under the Labor Gillard government (Thom 2011). Prior to this, the Howard government responded to the men’s torture allegations by suggesting they should not be believed (Channel Nine 20 May 2004). In addition, the government questioned the motives, or “prejudice”, of anyone who suggested that the claims should be tested (2UE 14 Feb. 2005). Members of the government also professed to have no knowledge of Habib’s extraordinary rendition to Egypt and used this ignorance to deflect questions about Australia’s involvement, though it was eventually revealed that its officials were consulted before he was taken there from Pakistan (Channel Nine 13 Feb. 2005; Thom 2011: 33). Finally, the Howard government sought to rely on assurances and internal investigations of the Bush Administration that Hicks and Habib had not been mistreated. The Labor Rudd government continued to rely on those US assurances of no ill-treatment to fend off calls for an independent investigation into the men’s allegations (Snow and Marr 16 May 2009).
Australia failed to properly investigate the torture allegations of Hicks and Habib because there was no concerted domestic campaign around the need for an inquiry. Civil society’s calls for accountability on the torture of citizens overseas were sporadic and mostly concentrated on international forums – namely the Committee Against Torture – rather than at home. Parts of the legal profession did mobilise from an early time on the issue of Australians detained at Guantánamo Bay, most prominently the Law Council of Australia. However this advocacy was mostly limited to issues of procedural fairness tied to Hicks’s military commission, not torture. Civil society actors believed that arguing for a fair trial and repatriation were more achievable objectives than campaigning for a torture inquiry, partly because of the absence of legal institutional levers around torture. Australia has no bill of rights and hence no constitutional prohibition on torture. Until 2009, it also had no federal torture offence. Accordingly, when Australian advocates framed their claims, it was around fair trial and due process guarantees rather than around prohibitions against torture. In other words, Australia’s institutional settings constrained the capacities of lawyers and human rights NGOs to make claims based on the right not to be tortured and, in so doing, shaped their interests about whether they should attempt to contest breaches of this right. As one legal activist noted, it was about “the legal hooks we had available to us” and these were around due process, a fair trial and the rule of law, rather than human rights, human dignity and torture (Lynch, tel. interview 19 Jun. 2013).

Australian civil society did not act as accountability agents on the torture of citizens detained overseas because it did not believe it would find support on the issue at home. Human rights activists from a variety of backgrounds – legal, judicial, civil liberties, NGOs – shared a belief in the futility of campaigning for a torture inquiry. For example, one commented that issues like torture were “murky and people switch off” (Dowd, tel, interview 20 Feb. 2013). Another rights activist said torture “just wasn’t an issue that was ever going to get traction with politicians’ (Wood, tel. interview 18 Jan. 2013). A third said once Habib sued the Australian government himself his organisation thought “well, it will come out in court” (Murphy, tel. interview 31 Jan. 2013). Having formed the perception that agitating on torture was pointless, civil society focused its attention elsewhere – on getting Hicks home, for instance. The result was that any exposure of government wrongdoing over Habib’s torture in Egypt was left to the traditional
separation of power mechanisms: the Parliament, the judiciary and, eventually, the executive in checking itself, as I discuss below.

III EFFECTIVE ACCOUNTABILITY ON HUMAN RIGHTS

The examples of both successful and failed accountability measures illustrate attempts to constrain arbitrary power in the three case studies on the issue of the torture of citizens overseas. In Chapter One, I defined arbitrary power as the subjection of individuals to unconstrained and unreasonable exercises of power at the discretion of the state. This was based on the meaning of "arbitrariness" developed in international human rights law, which goes beyond simply being against the law, to include elements of inappropriateness, injustice, a lack of predictability and due process of law (Human Rights Committee 21 Jul. 1994: [9.8]). An example of inappropriateness was the Australian government failing to object robustly to US proposals to transfer a citizen to detention in Egypt, where Australia knew torture was used against prisoners, or failing to make inquiries about how that citizen would be treated in Egypt before providing information for use in his questioning there (Thom 2011: 7-8). Another example of arbitrary power which illustrates a failure of due process of law is the UK government preventing its embassy officials from offering consular assistance to a dual citizen in Zambia, in breach of established policies regarding UK nationals (Tyrie et al. 2011: 95). The elements of injustice and a lack of predictability are illustrated by the Canadian government ignoring its obligations under international law with respect to child soldiers. Another example of a lack of predictability, as well as injustice, was the Canadian government failing to respond to a Supreme Court finding that Khadr's rights under the Canadian Charter of Rights and Freedoms had been breached.157 These different acts, and failures to act, by governments in Australia, the UK and Canada demonstrate exercises of power that, regardless of whether or not they were lawful, were unconstrained and unreasonable and hence arbitrary according to the criteria I have outlined. These examples highlight how liberal democracies are vulnerable to exercises of arbitrary executive power that can encroach on individual rights in times of heightened national security fear. Whether or not the executive is checked by other arms of government or actors external to the formal political process when such exercises of

157 Canada (Prime Minister) v Khadr [2010] 1 SCR 44.
arbitrary power occur is a test of the effectiveness of political accountability in that liberal democracy.

The accountability mechanisms identified in the three cases ranged from traditional institutions including Parliament and the courts, to self-appointed accountability agents who sought to impose external accountability on their governments. Some accountability agents pre-existed the detainee torture issue and others only formed as a result of it. None of the accountability mechanisms identified was perfect. But the comparisons of different occurrences of executive accountability demonstrate that, although the liberal allies shared similar political systems, each system had strengths and weaknesses when it came to constraining arbitrary power. The political systems of Australia, the UK and Canada contained important, sometimes subtle, differences that affected how the multifarious mechanisms of accountability were used and to what effect. How power was constrained, and by how much, occurred in diverse ways. Executive power was constrained on the detainee torture issue mostly where external pressure was applied on the government. Governments responded where they were held to account by domestic civil society. This occurred when the detainees' cases became political issues that threatened a government's future political success, or when embarrassing details of official complicity were exposed, undermining the executive's legitimacy with its citizenry. Governments responded by reversing their policies of neglecting the detainees and ignoring their torture allegations and, in some cases, permitting their own actions to be subjected to independent, public scrutiny.

This section draws out some more general ideas about liberal democratic accountability on international human rights and how it works in practice. These ideas concern the relationship between civil society and institutional accountability. They also relate to why civil society was more able to resist executive domination in some liberal democracies, and in some contexts, but not others.

A The Relationship Between Civil Society and Institutional Accountability

The traditional mechanisms of executive accountability that comprise the parliamentary systems common to Australia, Canada and the UK were visible on the detainee torture issue. However, the checking roles played by the Parliament and the judiciary varied. In
some cases they played important roles; in others their roles were negligible. Often, traditional institutions were most effective in holding the executive to account when they acted in collaboration with, or alongside, civil society acting as external accountability agents.

In Australia, the Parliamentary committee system was a source of some accountability, especially the Senate Estimates process, because of its unique ability to question civil servants publicly. A minority party Greens senator in particular worked closely with Habib’s wife, Maha, and her lawyer to expose information about the knowledge of government officials in Habib’s extraordinary rendition (Nettle, tel. interview 9 Jan. 2013). Further accountability by the Parliament was limited. This was due to the Howard government’s control of both houses of Parliament from 2004 to 2007, which limited the ability of opposition parties to hold inquiries beyond the Estimates process, as well as a largely weak and disinterested federal opposition. The Australian courts played minor roles in the Hicks and Habib cases, a fact which may reflect the inadequate human rights legal framework in Australia, especially on the right not to be tortured. Hicks only brought a case in the Australian courts in the last 12 months of his detention at Guantánamo Bay, and discontinued it after his repatriation; Habib sued the Australian government in the domestic courts after his release and settled his claim.158

Habib’s settlement indirectly precipitated the Gillard government’s decision to have the Inspector-General of Intelligence and Security conduct an inquiry into his case. The way that decision came about exemplifies how internal executive processes can sometimes achieve a measure of accountability of the executive itself. According to some accounts of the government’s decision-making, it was not informed by any pressure from civil society, which was not pushing for an inquiry on torture. Rather, it reflected departmental recommendations that referring the matter to the Inspector-General was appropriate given Habib had made allegations about the Australian government’s role in his torture in Egypt in litigation that, because of the settlement, would not be tested in court (Labor MP, tel. interview 24 Jan. 2013). Accountability in this instance came from civil servants identifying as custodians of proper process, who were “very proper about process and procedure” and believed an inquiry should be held to “tie off the ends” (Labor MP, tel. interview 24 Jan. 2013). They followed the “logic

of appropriateness” that characterises the behaviour of formally organised liberal democratic political institutions, in being driven by rules of exemplary behaviour to do what they saw as appropriate in the situation (March and Olsen 2008: 689). A level of accountability was thus achieved because of internal departmental concerns to do the proper thing, rather than some external moral or legal-based push for the state to respect the international human rights of its citizens.

In the UK, the role of Parliament was limited in relation to the detainee torture issue, with the committee charged with oversight of intelligence agencies (the Intelligence and Security Committee) adopting an unquestioning approach of executive government. On the other hand, individual MPs formed an All Party Parliamentary Group (APPG) whose mission was to expose governmental wrongdoing in relation to extraordinary rendition in the war on terror. UK courts played a major role in pressuring the executive government over the UK’s detainees at Guantánamo Bay, criticising their policies and releasing embarrassing information about official complicity in the men’s cases. These judicial actions provided crucial ammunition to civil society actors pushing for the release of citizens and residents from Guantánamo and for a torture inquiry. The UK case demonstrates most pointedly the high level of accountability that can come from collaboration between, or through the concurrent operation of, accountability agents and political and legal institutions. For example, collaboration occurred between the media and MPs (particularly the APPG) in relation to the issue of torture complicity. In addition, detainees’ lawyers used the courts to put pressure on the government, through legal claims framed under the HRA.

In Canada, where Parliament’s role in scrutinising government is traditionally weak, committees played a minor role on the issue of the torture of detainees. The first significant inquiry held into Khadr’s case only occurred in 2008 (House of Commons Standing Committee on Foreign Affairs and International Development 2008). A small number of active individual parliamentarians did, however, join the campaign for Arar, providing another example of collaboration between traditional institutional mechanisms of accountability and civil society. The activists in this instance used the MPs to access government and parliamentary processes. The Canadian courts played no
role in Arar’s case but, from 2008, Supreme Court judgments had an important impact on Khadr’s case, finding his Charter rights had been violated.159

The three cases illustrate the various mechanisms of accountability that can operate in liberal democratic systems, across the traditional tripartite separation of powers and also external accountability agents. No one source of accountability can be relied on to be activated in every situation implicating citizens’ (and residents’) human rights breaches. Accountability is most thorough and effective where multiple mechanisms are active and, in some situations, where there is cooperation or coordination between them. Braithwaite writes that: “The republican should want a world where different branches of business, public, and civil society power are all checking each other” (Braithwaite 1997: 344). The cases confirm Braithwaite’s urging for multiple sources of accountability, because the checking of power between branches of government is often not enough, but also because it cannot be assumed that external accountability agents will necessarily act either. All these mechanisms – both formal and informal – are, in addition, subject to the freedoms and constraints of the domestic political context in which they operate.

B Civil Society Attributes

What makes civil society actors effective accountability agents? Of the examples highlighted in this chapter, civil society was most organised and effective on the issue of the mistreatment and torture of detainees in the UK. There, against a background of increasing disquiet over the UK’s involvement in the Iraq war, a legal complex highly attuned to government overreaction to terrorism, made up of individuals and organisations from different parts of the legal profession, used receptive domestic courts to bring claims on behalf of detainees based on the HRA. Meanwhile an active, campaigning media collaborated with MPs and human rights NGOs to expose government involvement on extraordinary rendition and torture. These agents constituted the more pluralised “separated powers” envisaged by Braithwaite et al. (Braithwaite et al. 2012). They existed outside the traditional and formal accountability mechanisms of government (the courts and the Parliament), though they interacted with them in many situations. They are examples of weaker actors shaping the behaviour of

159 Canada (Justice) v. Khadr [2008] 2 SCR 125; Canada (Prime Minister) v Khadr [2010] 1 SCR 44.
more powerful actors on international human rights concerns, influencing government policies on detainees in the war on terror that they regarded as being arbitrary or out of step with the rights and expected treatment of citizens.

In the Australian and Canadian cases, the record of civil society acting as agents of accountability was more mixed. In Australia, a swamped and dejected civil society was limited by an inadequate human rights legal framework and the absence of legal hooks around which to frame human rights claims about torture. Once political opportunities emerged, however, in the form of an increasingly vulnerable government facing bad public opinion polls in the lead-up to a federal election, civil society successfully exploited openings in the political system to pressure the government to bring the remaining detained Australian citizen home from Guantánamo Bay. In Canada’s case, where one particular torture victim had an appealing wife who attracted an array of dedicated and experienced human rights activists as well as MPs early to her cause, a judicial commission of inquiry into torture more thorough than occurred in any other liberal democracy was triggered. Yet in another case, where the torture victim’s family was deeply unpopular with the Canadian public, civil society stayed away for many years out of concern for its own reputation. The result was the sustained neglect of a citizen by successive governments in the face of grave abuses of his human rights.

This comparison of the three cases indicates that civil societies in each country were subject to different freedoms and constraints particular to their domestic political context which shaped their behaviour as agents of accountability. Certain characteristics of the different polities were conducive to civil society performing the role of accountability agents more readily than were others which hindered such a role. In Chapter Two, I outlined a three-part framework for understanding how civil society behaviour is shaped by the enabling and constraining factors particular to its domestic context, based on the levels of rights culture, political and legal institutions and political opportunity structures. These different, interconnected levels provide a useful way to think about the conditions under which civil society is likely to hold governments to account in a highly politicised national security climate where human rights are more at risk of being compromised. Civil society must be rights-conscious, sceptical of government and resistant to intimidation – factors heavily influenced by a polity’s rights culture. Civil society needs certain institutional tools that it can use in campaigning in
order to access the political and legal system and from which to derive legitimacy in acting. Civil society often also requires opportunities in the form of openings in the political system and it must be prepared to use them cleverly and, where possible, collaboratively.

1. Rights Awareness

I have argued that a nation’s rights culture can act to enable or constrain civil society in mobilising on a contentious human rights issue. A nation’s rights culture influences the way members of a polity think about themselves as rights-bearing individuals, and can help determine their willingness to act with respect to new experiences of rights infractions. It provides civil society actors with an awareness about rights and a sense of legitimacy in contesting rights claims against the government. This notion has also been described as a “constitutional rights consciousness”, meaning “an intense persuasion that we … have rights – that when we are wronged there must be remedies, that patterns of illegitimate authority can be challenged, that public power must contain institutional mechanisms capable of undoing injustice” (Hartog 1987: 1014). A robust rights culture also exists where formal political and legal institutions – as well as citizens – have a strong awareness of rights. The Australian case exemplifies how a weak rights culture affects not only the way civil society actors think about themselves as accountability agents, but also whether the executive government ascribes legitimacy to such actors attempting to carry out this role. This was evident where the Law Council of Australia, which campaigned heavily on the unfairness of Hicks’s military commission, was accused by the government of “imperial overreach” and of neglecting its proper brief (nationalising the legal profession) (Ruddock 3 Nov. 2006).

For rights to have meaning, however, it is up to individual citizens and civil society actors (including NGOs) to demand them. Thus it is argued that rights “will not exist without a rights-bearing culture, that is, a culture in which ordinary people are at least sometimes willing to take serious personal risks by challenging powerful people by insisting that rights are at stake” (Sunstein 1995: 61). Whether civil society is encouraged and supported by its nation’s rights culture to take such a stand depends partly on the country’s history. Rights cultures are shaped by a country’s internal struggles, by legacies of racist policies and by past encounters with political violence.
For example, the UK has had far more experience of terrorism than Australia or Canada and, as a consequence, its civil society had a greater awareness at the time of the 11 September 2001 attacks of the potential for government overreaction. In their discussion of the different responses of the US and Europe to 11 September, Philip Gordon and Jeremy Shapiro address a similar idea (Gordon and Shapiro 2004: 60). They contend that a nation’s past experience of internal political violence can have a deep impact on collective responses to new threats. Prior to the attacks, the US had long been insulated from international violence. Because of this, the US had a “lower tolerance for vulnerability” than Europe did, with its painful experiences, over decades, of terrorism, including in Northern Ireland. America, as a result, was far more willing to be aggressive in responding to 11 September than Europe was. In Europe, by contrast, governments and societies have “internalised the notion that terrorism, given its roots in deep social alienation and its tenacious resistance to purely repressive means, can never be completely eradicated” (Gordon and Shapiro 2004: 60).

The notion of a nation’s rights culture is not static. Domestic rights cultures can be developed in order to improve the human rights policies of states. Julie Mertus argues that a more effective strategy for human rights NGOs wanting to influence government policy is to focus on changing the minds of people in the general public, rather than of those in government (Mertus 2005: 324). Bringing about a cultural shift in favour of human rights creates the conditions to compel rights-based policy choices. Mertus’s argument centres on the creation of a human rights culture, of a shared, rights-based public perspective and “a way of seeing the world through the lens of human rights and consequently with the principles of human dignity and equality” (Mertus 2005: 325). By focusing on the citizenry rather than political elites, this approach seeks to leverage public pressure in order to limit policy options to those consistent with human rights principles (Mertus 2005: 324). Developing or changing a human rights culture, however, is not straightforward. A good illustration of both the potential for changing a national human rights culture, and the obstacles to doing so, is the Australian case.

Australia had little experience of terrorism. Like America, Australia was less familiar with terrorism on 11 September 2001, more easily frightened by it, and more unrealistic in its beliefs that it could be permanently eradicated – even if that meant a significant curtailment of civil liberties to achieve such an outcome. This was demonstrated by its
hyper-legislative response to the attacks (Roach 2011: 309). However, Australia’s terrorism inexperience must also be viewed against the broader backdrop of the country’s utilitarian rights culture. Australia’s rights culture is a product of the peaceful history of the formation of the Australian polity and the benign governing and granting of independence by the British colonial rulers (Hirst 2005: 293, 297). Because of its past, the Australian polity takes an instrumental view of the state, one that is not averse to big government and readily sanctions governments taking an interventionist role (Kinley and Ernst 2012: 59; Emy and Hughes 1988: 38). It is also less concerned with protecting individual freedoms. In Australia, there is a noticeable lack of debate on relations between citizen and state, or over the proper nature and limits of political authority, with the Australian Constitution largely silent on the matter (Emy and Hughes 1988: 41; Charlesworth 2002: 17).

More recent events in Australia underscore the challenges in altering public perceptions on rights. In 2009, the Rudd government established a National Human Rights Consultation Committee to consider the need for a bill of rights or equivalent human rights framework in Australia. The Committee identified a “need to create in Australia a culture in which human rights are better understood and are respected, protected, and promoted” (National Human Rights Consultation 2009: 131). However the government rejected the Committee’s recommendation to introduce a legislative charter of rights, in the face of widespread political opposition to such a move (McClelland 21 Apr. 2010). In 2013, Australia’s incoming Attorney-General in the new Coalition government headed by Liberal Party Prime Minister Tony Abbott, Senator George Brandis, announced a return to a more traditional Australian minimalist approach to human rights. His view was that Australians would be “much better protected” by existing common law rights and freedoms than by any charter of rights (Merritt 30 Aug. 2013). Human rights, it can be argued, are taken for granted by the majority of Australians, who do not regard their lack of legal or constitutional protection to be a concern. This attitude is deeply embedded in Australian political culture, and is significant for understanding why civil society was overwhelmed by a reactive government after 11 September 2001 and was slow to mobilise on the detainee torture issue.

Australia’s situation stands in contrast to the UK’s, where the experience of Northern Ireland had raised the issue of executive overreaction to terrorism. Certain UK lawyers
were quick to mobilise, remained sceptical of government, and were not easily intimidated by the political sensitivities after 11 September. Even so, UK civil society still revealed gaps after 11 September. The organisation Cageprisoners, for example, formed in order to give detainees a voice because Muslim community organisations were reluctant to involve themselves in such a politically hostile climate (Qureshi, tel. interview 11 Feb. 2013).

Canada, on the other hand, had less experience of terrorism than the UK, but more than Australia (Roach 2011: 365-366). Its ambivalent reaction to the detainee torture issue after 11 September reflects this position. Canadian civil society showed high levels of organisation and effectiveness on the Arar case – a case where the victim and his wife were described by one human rights activist as “irresistible” (Neve, tel. interview 21 Feb. 2013). Yet on the Khadr case – where the victim was accused of killing an American soldier, where his family were public supporters of al Qaeda – civil society was, for a long time, intimidated and disengaged. Canada’s political culture, in which the nation’s two dominant Anglo and French cultural strands coexist uneasily, also reflects a duality. Canadian leaders, in their ongoing project to construct a cohesive national identity, have at various times appealed to the notion of respect for individual rights as a distinguishing feature of the Canadian polity (Pauly and Reus-Smit 2012: 140). Canadian scholar and former politician Michael Ignatieff has written that because of its complex inheritance, the principles of national unity cannot be found by joint appeal to common origins, which is why “Canada has no choice but to gamble on rights” (Ignatieff 2000, 2007: 129). The Khadr case reveals significant gaps in Canada’s rights project.

2. Adequate Institutional Tools

Civil society is more likely to hold governments to account on human rights where relevant institutional tools enabling or facilitating successful mobilisation are available. A state’s institutions have a powerful effect on particular policy outcomes (Ikenberry 1988: 222). They create actors and organise relations and interactions between them; they guide behaviour and expectations; they provide vocabularies that frame thought and understandings and define what are legitimate arguments and standards of justification and criticism in different situations; and they allocate resources (March and
In a human rights context, institutions enable citizens to enjoy their individual rights, through the creation of effective national legal systems of human rights enforcement (Donnelly 2006: 76). Yet it is up to states – the principal violators of human rights – to implement such legal systems of enforcement (Donnelly 2006: 76). A bill of rights is an example of an institution for shaping behaviour on human rights. Disagreement exists between proponents and critics of bills of rights over whether the judiciary’s role in interpreting them is a good or a bad mechanism in a liberal democracy (Campbell 2008). However, even detractors acknowledge the powerful effect the bill of rights has in empowering civil society actors (Morton and Knopff 2000: 13). A bill of rights operates in two ways to improve human rights: by providing judicially enforceable mechanisms to those who believe their rights have been violated and by deepening respect for human rights more generally within a polity (Williams 2003: 248).

A bill of rights (or similar human rights framework) was available to civil society in the UK and Canada, but not in Australia. The three cases illustrate the differences strong institutional rights frameworks can make to civil society’s ability and willingness to mobilise on human rights. The UK is unique in that it is the only one of the three states to sit within an effective regional human rights framework. UK civil society is keenly aware of the individual rights enshrined in the European Convention of Human Rights, which in 1998 became easier to litigate in domestic courts with the passage of the HRA. Civil society actors involved in the detainee torture issue in the UK emphasised the importance of the HRA. This was in terms of making it easier to bring cases and also in terms of influencing the judiciary, making UK courts more open to challenging the government on human rights issues (Christian, tel. interview 11 Feb. 2013; Human rights lawyer ‘A’, tel. interview 5 Feb. 2013). The HRA was invoked in many cases brought by the detainees and their lawyers and families against the UK government. A similar scenario existed in Canada, where the government remained intractable on the Khadr case. Litigation brought in the Canadian courts asserting Khadr’s Charter rights not only provided some measure of executive accountability, but favourable Supreme Court judgments also served to embolden civil society and inspire more support for his

---

cause. Alex Neve, the secretary general of Amnesty International in Canada, emphasised this effect of positive Charter decisions relating to Khadr’s treatment, saying “as there started to be a growing number of court decisions saying this is wrong … all of that gave greater confidence to organisations” (Neve, tel. interview 21 Feb. 2013).

Australian civil society was restricted in its campaigning on the detainee torture issue by not having some form of bill of rights. This absence meant civil society was directed by the state’s institutional settings to frame claims in relation to Australian detainees in terms of due process, rather than human rights, human dignity, or torture. George Williams argues that Australia’s political institutions have a limited capacity to protect human rights at a time of community fear of a terrorist attack because of the absence of a bill of rights (Williams 2005: 4). Human rights “do not have a firm foothold” in Australia’s political and legal system; they lack political effectiveness in part because, without a bill of rights, they lack legal force (Williams 2005: 4). The inadequacy of human rights protections in Australia shaped civil society’s view of its capabilities and interests and its beliefs about what was possible in terms of holding the executive accountable for the alleged ill-treatment of its citizens in the war on terror.

3. Taking Political Opportunities

Political opportunities can affect civil society’s ability to effectively mobilise around human rights issues – albeit a much more transitory one. Changes in political opportunities and constraints create the most important incentives for initiating new phases of contention (Tarrow 1998: 7). A number of examples of expanding – and contracting – political opportunity structures emerged from the case studies that illustrate how this idea works in practice in relation to human rights. They included the political party in power and whether it supported NGOs publicly advocating on government policy; the popularity of the government with the electorate at the relevant time, a factor whose effect was more acute in the lead-up to national elections; and the formation of unstable minority governments whose policy-making processes as a result were more malleable and open to external influences.
In Australia, political opportunities were scarce after 11 September. The Howard government harboured negative views about the legitimacy of the non-government sector (Maddison, Denniss and Hamilton 2004: 14-15; Sawer 2004: 40). In addition, Prime Minister Howard ran a tightly controlled ministry and backbench, with few public dissenters. His power over the political process increased further in 2004, when his government won control of the Senate. The openings during this period for civil society to have access to the policy-making process were thus limited. This changed as Howard’s popularity weakened in 2006 and as the 2007 federal election drew near, and opportunities for mobilisation in the political system were identified and successfully exploited by some NGOs. GetUp!, for example, used the Howard government’s vulnerability in the months before the 2007 election to pressure it over the Hicks case (Solomon, tel. interview 21 Feb. 2013).

In Canada, by contrast, the post-11 September decade witnessed the closing of political opportunity structures. This occurred as Liberal governments previously more receptive to the place of civil society in the political process gave way to a Conservative government with a less receptive attitude towards the third sector and its role in advocating on issues of contentious government policy (Phillips 2010: 65). For this reason, Canadian human rights activists believed that the successes of the campaign to free Arar from his Syrian prison, and to hold a public inquiry into his arrest and detention, would not have happened under the Conservative Harper government (Neve, tel. interview 21 Feb. 2013; Pither, tel. interview 28 Jan. 2013). On the Khadr case, the long delay in civil society mobilisation meant that by the time actors began to campaign seriously for his human rights, the opportunities that existed under the Liberal governments which were more open to engagement with the third sector had vanished.

In the UK case, the widespread public disquiet over the 2003 Iraq war provided a political opportunity for civil society actors wishing to protest the Blair government’s broader war on terror policies. Unease within the UK Parliament, and inside Blair’s own government, over the UK’s role in Iraq precipitated a parliamentary backlash over security policy (Shephard 2010: 99). This resulted in a greater willingness by MPs to scrutinise the role the UK government played in extraordinary rendition, which led to cooperation developing between parliamentarians, the media and NGOs (Laue, tel. interview 30 Jan. 2013). A second political opportunity presented itself in the UK’s
political system years later, in 2010, with the emergence of a minority coalition government. The majority coalition partner, the Conservative Party, was constrained by the fact that the minor coalition partner, the Liberal Democrats, had pushed vigorously for a public inquiry into torture while in opposition. The Liberal Democrats’ position provided a lever to human rights NGOs for lobbying for a torture inquiry.

IV CONCLUSION

This study was motivated by an apparent inconsistency concerning liberal democracy after 11 September 2001: a failure by some US allies to protest the use of torture in a war that was premised on defending individual freedom. Specifically, for nearly a decade, Australia’s executive government avoided scrutiny of compelling claims that a citizen was taken to Egypt to be interrogated under torture before ending up in US custody at Guantánamo Bay. This occurred despite the fact that Australia, a liberal democracy, had a solid history of ratifying international human rights conventions, including CAT. Other US allies, namely the UK and Canada, responded more robustly to allegations their citizens were tortured overseas in the war on terror. How three similar countries sharing a common British heritage, legal systems based on the common law and strong records of ratifying global human rights treaties could react so differently on the issue of the torture of their citizens is the question at the heart of this thesis.

Much scholarship has focused on the story of how the US came to use torture in the war on terror; less attention has been given to its allies’ responses to this undermining of the global norm prohibiting torture. This thesis has provided a comprehensive documentary and comparative account of the responses of three US liberal allies to the alleged torture of their citizens overseas after 11 September 2001. It has chronicled the behaviour of Australia, the UK and Canada on this issue. It has examined who the major political players were, what they did, how they justified their actions and how they reacted to the conduct of other institutions or actors. From this, a complex portrait has emerged of successes and failures in influencing executive government power on a contentious international human rights issue. This reminds us that liberal democracies are vulnerable to arbitrary – that is, unreasonable as well as unlawful – exercises of executive power during politically testing times of heightened fear. It also emphasises
the importance of dispersing power in a liberal democracy, in order to better protect important principles and individual liberty.

This thesis has extended the theoretical explanations for when, why, and how international human rights law influences state behaviour. The liberal strand of this literature, exemplified by Beth Simmons, while insightful in directing attention inwards to the way treaties affect domestic politics in order to explain state behaviour on international human rights, is limited in its ability to explain variation between liberal democracies (Simmons 2009). I have suggested that examining the enabling and constraining factors particular to a domestic polity, in terms of how they influence civil society behaviour on international human rights, offers a deeper understanding of how liberal democracies respond to fundamental human rights principles, such as the prohibition on torture.

The three cases, Australia, the UK and Canada, demonstrate that how liberal democracies respond to their citizens’ human rights claims and predicaments depends, to a large degree, on the demands for accountability placed on the executive government by civil society. There was a direct correlation in the cases between a state’s responsiveness to the torture allegations of its citizens and the pressure applied by civil society. Thus an important focus of study for those interested in the realisation of international human rights in liberal democracies must be on the factors that determine when civil society will act. I have analysed the operation of these enabling and constraining factors influencing civil society behaviour in terms of the levels of rights culture, legal and political institutions and political opportunity structures.

Civil society actors behave as agents of political accountability, holding governments to account in relation to their observance of states’ commitments to international human rights principles. Political accountability is central to a properly functioning liberal democracy. Traditionally, this is achieved through the tripartite separation of powers, by which the three arms of government (the executive, legislature and judiciary) check each other. The need for civil society to also engage in political accountability on human rights is based on the pragmatic understanding that the traditional accountability mechanisms of government are not enough to guarantee freedom from domination by any one centre of power. The accountability undertaken by civil society is different to
that of the traditional separation of powers in that civil society actors are self-appointed to this role. Civil society accountability agents base their demands for governments to respond to breaches of international human rights norms on moral, not only legal, judgments.

Civil society is not, however, a panacea for the problem of executive governments exercising arbitrary power in ways that transgress individual rights. Important questions remain as to who civil society represents and who checks civil society’s power. The celebrated stature of civil society as a site of individual empowerment challenging the vast power of the state is criticised, for example, by those who point out that its members (the boards of human rights NGOs in particular) are often drawn from the privileged white middle classes (Sen 2007; Mutua 2001). According to such critiques, global civil society is itself a site of power, of the consolidation of historical inequities, and its claims to democratic representativeness are ill-founded (Sen 2007; Anderson and Rieff 2008).

This critique about the limited representativeness of global civil society was illustrated by the UK case. Muslim human rights activists in the UK questioned the initial reluctance by transnational NGOs to take up the cause of Guantánamo detainees because of what they suspected was an unspoken consensus that the religious beliefs of these individuals made them undesirable subjects for advocacy. This concern of Muslim human rights activists exemplifies Jai Sen’s argument that global civil society is not representative of those individuals and groups with languages, faiths and preferences different to those of the “successfully domesticated and ‘civilised’” – a group he labels the “incivil” (Sen 2007: 58). Recent allegations made about Muslims groups in the UK and Canada further illustrate Sen’s ideas about the complexity of civil society. For example, Karima Bennoune has identified UK Muslim NGOs including Cageprisoners and the Islamic Human Rights Commission, as well as the Council on American Islamic Relations (which has a Canadian arm, until recently known as CAIR-CAN), as apologists for Muslim fundamentalist political movements (Bennoune 2013: 16). Bennoune is not alone in her concerns, with the Canadian Prime Minister’s office, for example, claiming CAIR-CAN (now known as the National Council of Canadian Muslims) has ties to terrorist organisations because of its historical alliance with the Council on American Islamic Relations (National Council of Canadian Muslims 16 Sep.
These accusations cast such Muslim organisations not only as “incivil”, but potentially as belonging to a category of actors Sen terms the “uncivil” – those groups also resisting civil society’s traditional power structures, but whose motives and work can be criminal and exploitative (Sen 2007: 60). These disputes indicate that in the area of international human rights, the notion of civil society, who constitutes its members and what comprises a legitimate political position, is contested.

Connected to issues of civil society’s representativeness are concerns about its accountability, both internal (to members) and external (to the global system) (Spiro 2002). Global civil society has significant influence over international politics. Yet, unlike national (democratic) governments, its members are unelected and self-mandating; their legitimacy is derived from being law-abiding and from moral claims based on the importance of their work in defending individual rights (Spiro 2002; Slim 2002). Civil society groups operating in the sphere of human rights purport to act for individuals whose rights are violated, whoever they may be. Yet civil society actors decide to act on human rights transgressions on the basis of their own evaluations about which – or whose – causes to take up. The cases have demonstrated that sometimes opportunism, and the interests of NGOs in attracting or keeping donors – rather than the merits of the individuals’ cases whose rights are allegedly being violated – shape these judgments. The behaviour of Canadian civil society in relation to Khadr’s case, and the reluctance of human rights NGOs for many years to associate their reputations with his cause because of his unpopular family, illustrate how such opportunistic behaviour can occur and its consequences. Similar forces were at work in Australia, where the attractiveness of victims and their supporters influenced civil society behaviour on the issue of the torture of citizens overseas. Given civil society actors are self-appointed, and demand legitimacy and recognition on the basis of the inherent value of the work they do, it is reasonable to ask who holds civil society to account for its behaviour.

My interest here, however, has been in understanding civil society as a realm of power to protect basic legal freedoms. Civil society has a vital role to play in making human rights meaningful for ordinary citizens, which it does by bringing the politics of human rights to bear on domestic democratic politics in a way that forces states to act. However, the willingness of civil society members to act as agents of accountability and organise against the executive government over human rights concerns, and their
effectiveness when they do so, is not guaranteed. This thesis has shown that the key to
civil society’s decision to assume such a role rests on whether it believes in its own
legitimacy and capacity to do this and, occasionally, on the likelihood it will obtain
wider public support when it does. The sometimes subtle historical, institutional and
political differences that characterise modern liberal democracies help identify and
explain when such beliefs are likely to take hold for civil societies on matters of
international human rights.
BIBLIOGRAPHY

A Articles and Books

Aaron, Henry J, Thomas E Mann and Timothy Taylor (eds), Values and Public Policy (The Brookings Institutions, 1994)


Albrow, Martin, Helmut Anheier, Marlies Glasius, Monroe E Price and Mary Kaldor (eds), Global Civil Society 2007/8 (Sage Publications Inc, 2008)


Andreopoulos, George, Zehra F. Kabasakal Arat and Peter Juviler (eds), Non-State Actors in the Human Rights Universe (Kumarian Press, Inc, 2006)


Arblaster, Anthony, The Rise and Decline of Western Liberalism (Basil Blackwell, 1984)

Aroney, Nicholas, Scott Prasser, and J R Nethercote (eds), Restraining Elective Dictatorship: The Upper House Solution? (University of Western Australia Press, 2008)


Bagaric, Mirko and Julie Clarke, ‘Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable’ (2005) 35 University of San Francisco Law Review 581


Begg, Moazzam, Enemy Combatant: The Terrifying True Story of a Briton in Guantánamo (Pocket Books, 2006)


Bennoune, Karima, Your Fatwa Does Not Apply Here (W. W. Norton & Company, Inc., 2013)


Blair, Tony, A Journey (Hutchinson, 2010)


Bovens, Mark, Robert E Goodin and Thomas Schillemans (eds), The Oxford Handbook of Public Accountability (Oxford University Press, 2014)


Brennan, Geoffrey, Lina Eriksson, Robert Goodin and Nicholas Southwood, Explaining Norms (Oxford University Press, 2013)
Brittain, Victoria, ‘Besieged in Britain’ (2009) 50 (3) Race & Class 1

Brock, Kathy L (ed), Delicate Dances: Public Policy and the Non-Profit Sector (McGill-Queen’s University Press, 2003)

Brysk, Alison and Gershon Shafir (eds) National Insecurity and Human Rights: Democracies Debate Counterterrorism (University of California Press, 2007)

Brysk, Alison, Global Good Samaritans: Human Rights as Foreign Policy (Oxford University Press, 2009)


Burke, Anthony, In Fear of Security: Australia’s Invasion Anxiety (Pluto Press, 2001)


Campbell, Anthony, ‘Canada-United States Intelligence Relations and “Information Sovereignty”’ in David Carment, Fen Osler Hampson and Norman Hillmer (eds), Canada Among Nations 2003: Coping with the American Colossus (Oxford University Press, 2003) 156

Campbell, Colin, ‘“Wars on Terror” and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict’ (2005) 54 International and Comparative Law Quarterly 321


Carment, David, Fen Osler Hampson and Norman Hillmer (eds), Canada Among Nations 2003: Coping with the American Colossus (Oxford University Press, 2003)


259
Carpenter, R Charli, ‘Studying Issue (Non)-Adoption in Transnational Advocacy Networks’ (2007b) 61 International Organization 643

Cellucci, Paul, Unquiet Diplomacy (Key Porter Books, 2007)


Chrétien, Jean, My Years as Prime Minister (Vintage Canada 2007, 2008 ed)

Coates, David and Joel Krieger, with Rhiannon Vickers, Blair’s War (Polity 2004)

Cobain, Ian, A Secret History of Torture (Counterpoint, 2012)


Cohen, Jean and Andrew Arato, Civil Society and Political Theory (The MIT Press, 1992)


Cohen, Stanley, States of Denial: Knowing about Atrocities and Suffering (Polity Press, 2001)

Cohn, Ellen, ‘Torture in Northern Ireland’ (1979) 11 Case Western Reserve Journal of International Law 159

Cohn, Marjorie (ed), The United States and Torture: Interrogations, Incarceration, and Abuse (New York University Press, 2011)

Cole, David, Less Safe, Less Free: Why America is Losing the War on Terror (The New Press, 2007)


Courteaux, Olivier, *The War on Terror: The Canadian Dilemma* (Hispanic Economics, 2009)


Cruft, Rowan, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, forthcoming)


Davis, Fergal, Nicola McGarrity and George Williams, *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014)


Dembour, Marie- Bénédicte, ‘What Are Human Rights? Four Schools of Thought’ (2010) 32 *Human Rights Quarterly* 1


Dryzek, John, David Downes, Christian Hunold and David Schlosberg, with Hans-Kristian Hernes, Green States and Social Movements: Environmentalism in the United States, United Kingdom, Germany and Norway (Oxford University Press, 2003)

Duffy, Helen, The ‘War on Terror’ and the Framework of International Law (Cambridge University Press 2005)

Duffy, Helen, ‘Human Rights Litigation and the “War on Terror”’ (2008) 90 International Review of the Red Cross 573

Duffy, Helen and Stephen A Kostas, ““Extraordinary Rendition”: A Challenge for the Rule of Law’ in Ana Maria Salinas de Frias, Katja LH Samuel and Nigel D White (eds), Counter-Terrorism: International Law and Practice (Oxford University Press, 2012) 539

Dumbrell, John, ‘Working with Allies: The United States, the United Kingdom, and the War on Terror’ (2006) 34 Politics & Policy 452

Dunne, Tim, “‘When the Shooting Starts”: Atlanticism in British Security Strategy’ (2004) 80 International Affairs 893


Emy, Hugh V. and Owen E Hughes, Australia Politics: Realities in Conflict (The Macmillan Company of Australia 1988)


Evans, Malcolm D, “’All the Perfumes of Arabia’: The House of Lords and “Foreign Torture Evidence”” (2006) 19 *Leiden Journal of International Law* 1125


Finnemore, Martha, ‘Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn’t All it’s Cracked Up to Be’ (2009) 61 *World Politics* 58


Franklin, Mark N., Stuart Soroka and Christopher Wlezien, ‘Elections’ in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 389

Gamson, William A. and David S Meyer, ‘Framing political opportunity’ in Doug McAdam, John D McCarthy, Mayer N Zald (eds), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (Cambridge University Press, 1996) 275


Geertz, Clifford, *The Interpretation of Cultures* (Basic Books, 1973)


Greenberg, Karen J. and Joshua L Dratel (eds), *The Torture Papers: the Road to Abu Ghraib* (Cambridge University Press, 2005)


Grey, Stephen, *Ghost Plane: The Untold Story of the CIA’s Torture Programme* (Scribe 2007)


Habib, Mamdouh with Julia Collingwood, *My Story: The Tale of a Terrorist Who Wasn’t* (Scribe, 2008)


Hicks, David, *Guantánamo: My Journey* (William Heinemann, 2010b)


Hirst, John, *Sense and Nonsense in Australian History* (Black Inc Agenda, 2005)


Hurd, Ian, ‘Legitimacy and Authority in International Politics’ (1999) 53 *International Organization* 379


Ip, John, ‘The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?’ (2010) 19 *Michigan State Journal of International Law* 1


Karpik, Lucien and Terence Halliday, ‘The Legal Complex’ (2011) 7 *Annual Review of Law and Social Science* 217


Katzenstein, Peter, ‘The West as Anglo-America’ in Peter Katzenstein (ed), *Anglo-America and its Discontents: Civilizational Identities Beyond West and East* (Routledge, 2012) 1

Katzenstein, Peter (ed), *Anglo-America and its Discontents: Civilizational Identities Beyond West and East* (Routledge, 2012)

Keck, Margaret E. and Kathryn Sikkink, *Activists Beyond Borders* (Cornell University Press, 1998a)


Kettell, Steven, *New Labour and the New World Order: Britain's Role in the War on Terror* (Manchester University Press, 2011)


Kornberg, Allan and Harold D Clarke, *Citizens and Community: Political Support in a Representative Democracy* (Cambridge University Press, 1992)


Langmore, John, *Dealing with America: The UN, the US and Australia* (UNSW Press, 2005)

Larkin, Phil and John Uhr, ‘Bipartisanship, Partnership and Bicameralism in Australia’s “War on Terror”: Forcing Limits on the Extension of Executive Power’ in John E Owens and Riccardo Pelizzo (eds), *The ‘War on Terror’ and the Growth of Executive Power* (Routledge, 2010) 136


Lewis, Jane, ‘Reviewing the Relationship Between the Voluntary Sector and the State in Britain in the 1990s’ (1999) 10 (3) *International Journal of Voluntary and Non-Profit Organizations* 255


Lipset, Seymour Martin, *Continental Divide: The Values and Institutions of the United States and Canada* (Routledge 1990)

Locke, John, Two Treatises of Government (Cambridge University Press, first published 1689, 1988 ed)

Lodge, Martin, ‘Accountability and Transparency in Regulation; Critiques, Doctrines and Instruments’ in Jacinta Jordana and David Levi-Faur (eds), The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance (Edward Elgar Publishing Ltd, 2004) 124


Malloy, Jonathan, ‘Canada’s “War on Terror”, Parliamentary Assertiveness and Minority Government’ in John E Owens and Riccardo Pelizzo (eds), The ‘War on Terror’ and the Growth of Executive Power (Routledge, 2010) 157


Martin, Paul, *Hell or High Water: My Life In and Out of Politics* (Emblem/McClelland & Stewart Ltd, first published 2008, 2009 ed)

Mayer, Jane, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (Doubleday, 2008)


Mazigh, Monia, *Hope and Despair: My Struggle to Free My Husband, Maher Arar* (McClelland and Stewart, 2008)

McAdam, Doug, John D McCarthy and Mayer N Zald (eds), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (Cambridge University Press, 1996)

McAdam, Douglas, Sidney Tarrow and Charles Tilly, *Dynamics of Contention* (Cambridge University Press, 2001)


McCoy, Alfred, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (Holt Paperbacks, 2006)


Moore, Mark H, ‘Accountability, Legitimacy, and the Court of Public Opinion’ in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), The Oxford Handbook of Public Accountability (Oxford University Press, 2014) 632

Moran, Jon, ‘State Power in the War on Terror: A Comparative Analysis of the UK and USA’ (2005) 44 Crime, Law & Social Change 335


Mouffe, Chantal, The Democratic Paradox (Verso, 2000)


Neuman, W Lawrence, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn and Bacon, 6th ed, 2006)

Neve, Alex, ‘Extraordinary Rendition, the Canadian Edition: National Security and the Challenges to the Global Ban on Torture’ (2007) 2 *Societies Without Borders* 117


Owens, John E., ‘Congressional Acquiescence to Presidentialism in the US “War on Terror”’ in John E. Owens and Riccardo Pelizzo (eds), *The “War on Terror” and the Growth of Executive Power* (Routledge, 2010) 34


Pither, Kerry, *Dark Days: The Story of Four Canadians Tortured in the Name of Fighting Terror* (Viking Canada, 2008)


Reus-Smit, Christian and Duncan Snidal (eds), *The Oxford Handbook of International Relations* (Oxford University Press, 2008)


Risse-Kappen, Thomas, ‘Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies’ (1991) 43 *World Politics* 479


Rumsfeld, Donald, *Known and Unknown: A Memoir* (Sentinel, 2011)

Russell, Meg and Maria Sciara, ‘Why Does the Government Get Defeated in the House of Lords?: The Lords, the Party System and British Politics’ (2007) 2 *British Politics* 299

Russell, Meg, ‘Reform of the House of Lords: Lessons for Bicameralism’ in Nicholas Aroney, Scott Prasser and J R Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008) 119

Sales, Leigh, *Detainee 002: The Case of David Hicks* (Melbourne University Press, 2007)

Salinas de Frias, Ana Maria, Katja LH Samuel and Nigel D White *Counter-Terrorism: International Law and Practice* (Oxford University Press, 2012)
Samuel, Katja, 'The Rule of Law Framework and its Lacunae: Normative, Interpretive, and/or Policy Created?' in Ana Maria Salinas de Frias, Katja LH Samuel and Nigel D White (eds), Counter-Terrorism: International Law and Practice (Oxford University Press, 2012) 14


Sawer, Marian, ‘Populism and Public Choice in Australia and Canada: Turning Equality-Seekers into “Special Interests”’ in Marian Sawer and Barry Hindess (eds), Us and Them: Anti-Elitism in Australia (API Network, Australia Research Institute, 2004)

Sawer, Marian and Barry Hindess (eds) Us and Them: Anti-Elitism in Australia (API Network, Australia Research Institute, 2004)

Sawer, Marian and David Laycock, ‘Down with Elites and Up with Inequality: Market Populism in Australia and Canada’ (2009) 47 Commonwealth and Comparative Politics 133


Schmitt, Carl, The Concept of the Political (The University of Chicago Press, 1996)

Schmitt, Carl, Political Theology (The University of Chicago Press, first published 1922, 2005 ed)

Seidman, Steven (ed), Jurgen Habermas On Society and Politics: A Reader (Beacon Press Boston, first published 1989, 2005)

Shephard, Mark, ‘Parliamentary Scrutiny and Oversight of the British “War on terror”: Surrendering Power to Parliament or plus ca change?’ in John E Owens and Riccardo Pelizzo (eds), The ‘War on Terror’ and the Growth of Executive Power (Routledge, 2010) 87

Shephard, Michelle, Guantanamo’s Child (John Wiley & Sons, 2008)


Simmons, Beth A, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press, 2009)


Singh, Uday Mehta, Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought (The University of Chicago Press, 1999)


Smith, David E, The Canadian Senate in Bicameral Perspective (University of Toronto Press, 2003)
Smith, Steven Rathgeb, ‘Accountability and the Nonprofit Sector’ in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), The Oxford Handbook of Public Accountability (Oxford University Press, 2014) 339

Snow, Dave, and Benjamin Moffitt, ‘Straddling the Divide: Mainstream Populism and Conservatism in Howard’s Australia and Harper’s Canada’ (2012) 50 Commonwealth and Comparative Politics 271


Spiro, Peter J. ‘Accounting for NGOs’ (2002) 3 Chicago Journal of International Law 161

Stafford Smith, Clive, Bad Men: Guantánamo Bay and the Secret Prisons (Phoenix, 2007)


Stein, Janice Gross and Eugene Lang, The Unexpected War: Canada in Kandahar (Penguin Canada, 2007)

Steinmo, Sven, Kathleen Thelen and Frank Longstreth (eds), Structuring Politics: Historical Institutionalism in Comparative Analysis (Cambridge University Press, 1992)

Stephens, Philip, Tony Blair: The Price of Leadership (Politico’s, 2004)


Strong, Tracy B, ‘Forward’ in Carl Schmitt, The Concept of the Political (The University of Chicago Press, 1996) ix


Tarrow, Sidney, ‘Aiming at a Moving Target’: Social Science and the Recent Rebellions in Eastern Europe’ (1991) 24 Political Science and Politics 12

Tasioulas, John, ‘Towards a Philosophy of Human Rights’ (2012) 65 *Current Legal Problems* 1


Tazreiter, Claudia, ‘Local to Global Activism: The Movement to Protect the Rights of Refugees and Asylum Seekers’ (2010) 9 *Social Movement Studies: Journal of Social, Cultural and Political Protest* 201

Tenet, George, *At the Center of the Storm: The CIA During America’s Time of Crisis* (Harper Perennial, 2007)


Thwaites, Rayner, *The Liberty of Non-Citizens* (Hart Publishing 2014)


Verba, Sidney, ‘Conclusion: Comparative Political Culture’ in Lucian Pye and Sidney Verba (eds), Political Culture and Political Development (Princeton University Press, 1965) 512


Vincent, R. J., Human Rights and International Relations (Cambridge University Press 1986)


Wallace, William and Christopher Phillips, ‘Reassessing the Special Relationship’ (2009) 85 International Affairs 263


Welch, Claude E., NGOs and Human Rights: Promise and Performance (University of Pennsylvania Press, 2001)


Whitaker, Reg, ‘Arar: The Affair, the Inquiry, the Aftermath’ (2008) 9 (1) IRPP Policy Matters 1


Williams, George, ‘Constructing a Community-Based Bill of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone Protecting Human Rights: Instruments and Institutions (Oxford University Press, 2003) 247


Williams, George, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35 Melbourne University Law Review 1161

Wilson, James, ‘Culture, Incentives, and the Underclass’ in Henry J Aaron, Thomas E Mann and Timothy Taylor (eds), Values and Public Policy (The Brookings Institutions, 1994) 54


Zald, Mayer N, ‘Culture, Ideology, and Strategic Framing’ in Doug McAdam, John D McCarthy and Mayer N Zald (eds), Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings (Cambridge University Press, 1996) 261

Zelikow, Philip, ‘Codes of Conduct For a Twilight War’ 49 (2012) Houston Law Review 1

B Cases

Australia


Habib v Commonwealth of Australia [2010] FCAFC 12

Hicks v Ruddock [2007] FCA 299

Canada

Canada (Justice) v. Khadr [2008] 2 SCR 125
Canada (Prime Minister) v Khadr [2010] 1 SCR 44

Khadr v Canada [2006] 2 F.C.R. 505

Khadr v Canada (Prime Minister) [2010] 1 FCR 73

Suresh v Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3

Council of Europe

Al-Skeini v The United Kingdom [2011] Eur Court HR 1093

Case of Ireland v The United Kingdom [1978] 2 Eur Court HR 25

Chahal v United Kingdom (1997) 23 EHRR 413

Ramzy v Netherlands (European Court of Human Rights, Third Section, Application No 25424/05, 20 July 2010)

Saadi v Italy (European Court of Human Rights, Grand Chamber, Application No 37201/06, 28 February 2008)

United Kingdom

A v Secretary of State for the Home Department [2004] UKHL 56 (The Belmarsh decision)

A (FC) v Secretary of State for the Home Department [2005] UKHL 71

Al Rawi v The Security Service [2010] EWCA Civ 482

Al-Skeini v Secretary of State for Defence [2007] UKHL 26

The Queen on the Application of Abbasi v The Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598

The Queen on the Application of Al Rawi v The Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279

The Queen on the Application of Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 2048 (Admin)

The Queen on the Application of Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65

United States of America


Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)
Hamdan v Rumsfeld, 548 US 577 (2006)

Hamdan v United States, (D.C. Circuit, No. 11-1257, 6 December 2012)


In re Guantánamo Detainee Cases, 355 F.Supp.2d 443

Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013)

Mohammed v Obama, (DDC, Civ No 05-1347, 19 November 2009)

O.K. v Bush, 377 F Supp 2d 102 (DDC, 2005)

Khadr v Bush, (DDC, Civ No 04-1136 (JBD), 24 November 2008)


C Legislation

Australia

Criminal Code Act 1995 (Cth)

Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (Cth)

Crimes (Torture) Act 1988 (Cth)

Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Proceeds of Crime Act 2002 (Cth)

Canada

Anti-terrorism Act, SC 2001, c41

Canada Act 1982 (UK), c 11, sch B pt I (‘Canadian Charter of Rights and Freedoms’)

Criminal Code RSC 1985, c C-46

Security of Information Act RSC 1985, c O-5

War Measures Act 1914, c 2

United Kingdom

Anti-terrorism, Crime and Security Act 2001 (UK) c 24
Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (NI) 12 & 13 Geo 5, c 5

Criminal Justice Act 1988 (UK) c 33

Human Rights Act 1998 (UK) c 42

Terrorism Act 2000 (UK) c 11

United States of America

Alien Tort Statute 28 USC §1350

Federal Habeas Corpus Statute 28 USC §2241

Federal Torture Statute 18 USC § 2340

Foreign Affairs Reform and Restructuring Act of 1998, Pub L No 105-277, § 2242, 112 Stat 2681-822


United States Constitution


War Crimes Act 18 USC § 2441


D Treaties

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 14565 UNTS 85 (entered into force 26 June 1987)


Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931)

Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 18 December 2002, 237 UNTS 237 (entered into force 22 June 2006)


Security Treaty Between Australia, New Zealand and the United States of America, signed 1 September 1951, [1952] ATS 2 (entered into force 29 April 1952)

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)


E. United Nations Treaty Body Documents


Canada, Sixth Periodic Reports of States Parties Due in 2008 – Canada, State Party’s Report to the Committee Against Torture, CAT/C/CAN/6 (22 June 2011)


Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of The Convention – Concluding Observations of the Committee Against Torture, Australia, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008)


Committee Against Torture, Concluding Observations on the Fifth Periodic Report of the United Kingdom, Adopted by the Committee at its Fiftieth Session, 50th sess, (6-31 May 2013)

Hicks, David, ‘Communication to the United Nations Human Rights Committee’, Individual Communication Under the First Optional Protocol to the ICCPR in Hicks v Australia, 23 August 2010a


Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, UNGA, 13th
Human Rights Law Resource Centre, ‘Australia’s Compliance with the Convention Against Torture: Report to the UN Committee Against Torture’, Submission to the Committee Against Torture, April 2008

International Civil Liberties Monitoring Group, ‘Submission of Information by the ICLMG to the Committee Against Torture (CAT) for the Examination of Canada’s 6th Report in May 2012’, 16 April 2012

Lawyers Rights Watch Canada and the International Civil Liberties Monitoring Group, ‘Canada Briefing to the Committee Against Torture, 48th Session, May 2012 on the Omar Khadr Case from Lawyers Rights Watch Canada and the International Civil Liberties Monitoring Group’, 18 February 2012


REDRESS, ‘Comments to the United Kingdom’s 4th Periodic Report to the Committee Against Torture’, Submission to the Committee Against Torture, 15 October 2004


Parliamentary and Congressional Debates, Resolutions and Committee Documents

European Parliament, Parliamentary Questions, 22 June 2007, E-3203/07 (Sajjad Karim (ALDE))

Evidence to House Committee, US Congress, 24 September 2001 (John Ashcroft, Attorney-General)
Evidence to House of Commons Standing Committee on Foreign Affairs and International Trade, Parliament of Canada, Ottawa, 25 September 2003, 1215 (Monia Mazigh)

Evidence to House of Representatives Subcommittee on International Organizations, Human Rights and Oversight of the Committee of Foreign Affairs and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, ‘Rendition to Torture: The Case of Maher Arar’, Washington DC, 18 October 2007 (Jerrold Nadler)


Evidence to Senate Legal and Constitutional Affairs Committee, Budget Estimates, Parliament of Australia, Canberra, 24 May 2004 (Robert Cornall)

Evidence to Senate Legal and Constitutional Affairs Committee, Additional Estimates, Parliament of Australia, Canberra, 15 February 2005 (Mick Keelty)

Evidence to Senate Legal and Constitutional Affairs Committee, Additional Estimates, Parliament of Australia, Canberra, 15 February 2005 (Dennis Richardson)


House of Commons Foreign Affairs Committee, United Kingdom Parliament, Visit to Guantanamo Bay (2007)


Intelligence and Security Committee of Parliament, United Kingdom Parliament, Rendition (2007)

Joint Committee on Human Rights, United Kingdom Parliament, The UN Convention Against Torture (UNCAT) (2006)


Senate Committee of Privileges, Parliament of Australia, *Possible False or Misleading Evidence Before the Legal and Constitutional Affairs Committee or Any Other Committee* (2008)


United Kingdom, *Parliamentary Debates*, House of Commons, 5 February 2009, vol 487, col 997 (David Davis)

United Kingdom, *Parliamentary Debates*, House of Commons, 2 April 2009, vol 490, col 1050 (David Davis)

United Kingdom, *Parliamentary Debates*, House of Commons, 7 July 2009, vol 495, col 940 (David Davis)

United Kingdom, *Parliamentary Debates*, House of Commons, 6 July 2010, vol 513, col 175-190 (David Cameron)

United Kingdom, *Parliamentary Debates*, House of Commons, 16 November 2010, vol 518, col 752 (Kenneth Clarke)

United Kingdom, *Parliamentary Debates*, House of Commons, 18 January 2012, vol 538, col 751 (Kenneth Clarke)

**GReports and Working Papers**


Brock, Kathy L, ‘Sustaining a Relationship: Insights from Canada on Linking the Government and Third Sector’ (Working Paper No 1, School of Policy Studies, 1 June 2000)


Council of Europe Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States* (2006)


Human Rights Watch, ‘“No Questions Asked”: Intelligence Cooperation With Countries that Torture’ (Report, June 2010) <http://www.hrw.org/reports/2010/06/28/no-questions-asked-0>


Hutter, Bridget, ‘The Role of Non-State Actors in Regulation’ (Discussion Paper No 37, Centre for Analysis of Risk and Regulation, The London School of Economics and Political Science, April 2006)

Iacobucci, Frank QC, *Internal Inquiry Into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (October 2008)


Lasry, Lex QC, ‘United States v David Matthew Hicks - Final Report of the
Independent Observer for the Law Council of Australia’ (Report, Law Council of
Australia, 20 June 2007)

Leveson, Lord Justice, An Inquiry into the Culture, Practices and Ethics of the Press –
Report (November 2012) (‘The Leveson Inquiry’)

Maddison, Sarah, Richard Denniss and Clive Hamilton, ‘Silencing Dissent: Non-
Government Organisations and Australian Democracy’ (Discussion Paper No. 65, The
Australia Institute, June 2004)

Malena, Carmen, Reiner Forster and Janmejay Singh, ‘Social Accountability: An
Introduction to the Concept and Emerging Practice’ (Paper No. 76, Social Development

National Human Rights Consultation, National Human Rights Consultation Report
(September 2009)

Open Society Justice Initiative, ‘Globalizing Torture: CIA Secret Detention and
Extraordinary Rendition’ (Report, Open Society Foundations, February 2013)

Qureshi, Asim, ‘The Status of British Residents Held in Guantanamo Bay and the
Obligation on the UK Government to Provide Them Diplomatic Support’ (Report,

Qureshi, Asim, ‘Fabricating Terrorism: British Complicity in Renditions and Torture’

Qureshi, Asim, ‘Fabricating Terrorism II: British Complicity in Renditions and Torture’

Qureshi Asim, ‘Fabricating Terrorism III British Complicity in Renditions and Torture’

REDRESS, ‘The United Kingdom, Torture and Anti-Terrorism: Where the Problems
Lie’ (Report, The Redress Trust, December 2008)


**Letters and Memoranda**


Letter from Maxime Bernier, Foreign Affairs Minister, to Audrey Macklin, Associate Professor University of Toronto, 17 October 2007 <http://www.law.utoronto.ca/documents/Mackin/khadr_MFALetter.pdf>


Letter from Christian Khan Solicitors to Sara Carnegie, Solicitor to The Detainee Inquiry, 3 August 2011


Letter from Paul O’Sullivan, Director-General, Australian Security Intelligence Organisation, to Senator Patricia Crossin, Chair Senate Standing Committee on Legal and Constitutional Affairs, 23 June 2008

Memorandum from Diane Beaver to Commander, Joint Task Force 170, 11 October 2002a in Mark Danner, Torture and Truth: America, Abu Ghraib, and the War on Terror (New York Review Books, 2004), 169
Memorandum from Steven Bradbury, Principal Deputy Assistant Attorney General, to John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, 10 May 2005a in David Cole, *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009), 152

Memorandum from Steven Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, 10 May 2005b in David Cole, *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009), 199

Memorandum from Steven Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, 30 May 2005 in David Cole, *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009), 225

Memorandum from George W Bush to the Vice President et al., 7 February 2002 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 134

Memorandum from Jay S Bybee, Assistant Attorney General, to Alberto R Gonzales, Counsel to the President and William J Haynes II, General Counsel of the Department of Defense, 22 January 2002 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 81

Memorandum from Jay S Bybee, Assistant Attorney General, to Alberto R. Gonzalez, Counsel to the President, 1 August 2002a in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 172

Memorandum from Jay S Bybee, Assistant Attorney General, to John Rizzo, Acting General Counsel of the Central Intelligence Agency, 1 August 2002b in David Cole, *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009) 106

Memorandum from Gordon England to Secretaries of the Military Departments, 7 July 2006
<http://www.defense.gov/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf>

Memorandum from Alberto Gonzales to the President, 25 January 2002 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 118


295
Memorandum from Stephen D Mull, Executive Secretary, United States Department of State, to Michael L Bruhn, Executive Secretary, Department of Defense, 24 October 2010


Memorandum from Patrick Philbin, Deputy Assistant Attorney General, and John Yoo, Deputy Assistant Attorney General, to William J Haynes, General Counsel, Department of Defense, 28 December 2001 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 29

Memorandum from Colin Powell to Counsel to the President [and] Assistant to the President for National Security Affairs, 26 January 2002 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 122

Memorandum from Donald Rumsfeld to Commander USOUTHCOM, 15 January 2003 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 239

Memorandum from Donald Rumsfeld to Commander, US Southern Command, 16 April 2003 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 360


Memorandum from John Yoo, Deputy Assistant Attorney General, to Timothy Flanagan, the Deputy Counsel to the President, 25 September 2001 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 172

Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert Delahunty, Special Counsel, to William Haynes II, General Counsel, Department of Defense, 9 January 2002 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 38

Memorandum from John Yoo, Deputy Assistant Attorney General, to The Honourable Alberto R Gonzales, Counsel to the President, 1 August 2002 in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 218

I Speeches and Statements


Cornall, Robert, ‘A Strategic Approach to National Security’ (Speech delivered at the Security in Government Conference, Canberra, 10 May 2005)


Press Releases and Press Conference Transcripts


Council on American-Islamic Relations Canada, ‘Canadian Muslims Condemn Recent Khadr Comments’ (Press Release, 5 March 2004) <http://www.caircan.ca/itn_more.php?id=A856_0_2_0_M>

Council on American-Islamic Relations Canada, ‘CAIR-CAN Calls on Prime Minister to Speak Out Against Guantánamo Bay’ (Press Release, 6 March 2006) <http://www.caircan.ca/itn_more.php?id=A2355_0_2_0_M>

Council on American-Islamic Relations Canada, ‘185 Organizations and Individuals Write PM to Repatriate Omar Khadr’ (Press Release, 3 February 2009) <http://www.caircan.ca/ann_more.php?id=3024_0_9_0_C>


Freedom from Torture, ‘Please Think Again on Detainee Inquiry Prime Minister’ (Press Release, 20 December 2013) <http://www.freedomfromtorture.org/news-blogs/7726>


Law Council of Australia, ‘Law Council Supports Changes to Bring Hicks and Habib Home’ (Media Release, 19 February 2004)

Law Council of Australia, ‘Hicks Court Challenge to be Heard in April’ (Media Release, 25 March 2004)

Law Council of Australia, ‘Hicks and Habib US Court Challenge’ (Media Release, 19 April 2004)


Law Council of Australia, ‘PM Jumps the Gun on Military Trials for Australian Detainees’ (Media Release, 28 May 2004)

Law Council of Australia, ‘Doubts Remain Over Fair Trial for Hicks’ (Media Release, 11 June 2004)

Law Council of Australia, ‘Hicks and Habib Win Landmark Case’ (Media Release, 29 June 2004)

Law Council of Australia, ‘Habib Phone Call – Too Little Too Late’ (Media Release, 12 August 2004)


303


K Media Articles and Programs


AAP, ‘Concerns Over Fairness’, The Sydney Morning Herald (Sydney), 22 July 2005, 5


ABC, ‘Worst of the Worst?’, Four Corners, 20 July 2004 (Sally Neighbour) <http://www.abc.net.au/4corners/content/2004/s1157599.htm>
ABC, ‘Habib Granted Right of Reply’, *PM*, 18 February 2005 (Kim Beazley) <http://www.abc.net.au/pm/content/2005/s1306229.htm>

ABC, ‘The Case against David Hicks’, *Four Corners*, 31 October 2005 (Debbie Whitmont) <http://www.abc.net.au/4corners/content/2005/s1494795.htm>


ABC, ‘Quick Trial for Hicks Essential: Ruddock’, *Insiders*, 1 October 2006 (Philip Ruddock) <http://www.abc.net.au/insiders/content/2006/s1752836.htm>

Ackland, Richard, ‘There’s No Justification for Throwing Hicks to the Wolves’, *The Sydney Morning Herald* (Sydney), 21 January 2005, 15

Ackland, Richard, ‘No Justice as Hicks Thrown to the Wolves’, *The Sydney Morning Herald* (Sydney), 5 August 2005, 13


Altmann, Carol, Robert Garran, Rebecca Digirolamo and Andrew McGarry ‘The Taliban the Army Rejected”, *The Australian* (Sydney), 14 December 2001, 1


Banham, Cynthia and Gay Alcorn, ‘US Detention Sparks Call to Protect Citizens’, *The Sydney Morning Herald* (Sydney), 12 January 2002, 7


Banham, Cynthia, Cosima Mariner and Penelope Debelle, ‘No Justice for Hicks in Flawed Trial: QC’, *The Sydney Morning Herald* (Sydney), 16 September 2004, 3


Banham, Cynthia, ‘Hicks has Rights, Rules US Judge’, *The Sydney Morning Herald* (Sydney), 2 February 2005, 7

Banham, Cynthia, ‘National Senator Raises Concerns with PM about Detention of Hicks’, *The Sydney Morning Herald* (Sydney), 4 November 2006, 5
Banham, Cynthia and Phillip Coorey, ‘Coalition Unrest Grows Over Hicks’, *The Sydney Morning Herald* (Sydney), 10 November 2006, 3


307


Butterly, Nick and Peter Veness, ‘Torture Ban Puts Limit; On Terror’, *Courier Mail* (Brisbane), 2 October 2006, 9

Campbell, Clark, ‘Red Cross Visits Captured Teenager Canada Still Denied Access to 15-year-old’, *The Globe and Mail* (Toronto), 16 September 2002, 8

Campbell, Duncan, ‘Third Guantánamo Staff Member Held’, *The Guardian* (London), 1 October 2003, 16

Carlton, Mike, ‘Fabricated Fear of Muslims is a Cancer Among Us’, *The Sydney Morning Herald* (Sydney), 4 November 2006, 28

Carrell, Severin, ‘Guantánamo Account: “I was Shackled, Beaten, Suffocated by a Plastic Bag and Deprived of Sleep. This is How they Forced my Confession”’, *The Independent* (London), 30 January 2005 <http://www.independent.co.uk/news/uk/this-britain/guantanamo-account-i-was-shackled-beaten-suffocated-by-a-plastic-bag-and-deprived-of-sleep-this-is-how-they-forced-my-confession-6153703.html#>


Chase, Steven and Drew Fagan, ‘Prime Minister Scorns Call for Probe; If There is a Canadian Link in Deportation of Arar, Powell Will Tell Us, Chretien Says’, The Globe and Mail (Toronto), 6 November 2003, 4

Chase, Steven, ‘Arar’s Wife Approached to Enter Politics’, The Globe and Mail (Toronto), 11 February 2004, 4


Chulov, Martin and John Kerin, ‘Terrorist Suspect “Tortured”’, The Australian (Sydney), 21 May 2004, 1


Cobain, Ian, ‘Series of Allegations that Finally Forced Brown to Act: Brown Asks ISC to Look at Interrogation Policy Again Detainees Claimed MI5 Collusion as Early as
<http://www.theguardian.com/politics/2009/mar/19/mi5-torture-allegations-gordon-brown>


Cobain, Ian, ‘David Cameron Under Pressure to Review Interrogation Guidelines: High Court Rules Policy May have been Unlawful Government Rewriting Guidance, Says Lawyer’, *The Guardian* (London), 29 June 2010


Cobain, Ian, ‘ICC to Examine Claims that British Troops Carried Out War Crimes in Iraq’, *The Guardian* (London), 14 May 2014
<http://www.theguardian.com/law/2014/may/13icc-to-investigate-alleged-british-war-crimes-iraq>

<http://www.theguardian.com/world/2014/jul/09/files-uk-role-cia-rendition-destroyed-diego-garcia-water-damage>


Dodson, Louise, Mark Metherell and Stephanie Peatling, ‘PM Fights Dissent from Back Bench on Three Fronts’, *The Sydney Morning Herald* (Sydney), 15 June 2006, 4


<http://www.theguardian.com/politics/2004/oct/04/uk.terrorism>

Eccleston, Roy, ‘Hicks Meets his Dad, then Faces Trial’, The Australian (Sydney) 26 August 2004, 1


<http://www.theguardian.com/world/2002/jun/12/usa.guardianleaders>


Editorial, ‘Bay Watch – The Myths About Guantánamo are Challenged’, The Times (London), 7 May 2003, 19


Editorial, ‘What Happened to Arar?’, National Post (Toronto), 11 October 2003, 19


Editorial, ‘Strike Camp; It Is Time to Set a Date For Guantánamo’s Closure’, The Times (London), 28 April 2006, 23

Editorial, ‘Time To Ask a Very Difficult Question’, The Australian (Sydney), 18 June 2007, 15


Editorial, ‘Zero Tolerance on Torture’, *National Post* (Toronto), 23 October 2008, 18


Editorial, ‘Years of Revelations and Incrimination’, *The Guardian* (London), 21 May 2010, 4

Editorial, ‘Emotional Intelligence; Allegations of Torture Have Damaged Britain’s Reputation. An Inquiry is to be Welcomed, as is an Examination of How Intelligence Should be Treated in Court’, *The Times* (London), 7 July 2010, 2

Editorial, ‘Leaks Reveal Terrorism Concern’, *The Australian* (Sydney), 28 April 2011, 13


Edwards, Verity, ‘Hicks Hearing “Set Up” for Conviction’, *The Australian* (Sydney), 2 August 2005, 4

Edwards, Verity ‘Democrats Urge Fair Trial for Hicks’, *The Australian* (Sydney), 5 September 2005, 7


El Akkad, Omar, ‘Cracks Appear in Murder Case Against Khadr; Canadian Wasn’t the Only One Who Could have Thrown Grenade that Killed Medic in Afghanistan, Agent’s Leaked Testimony Suggests’, *The Globe and Mail* (Toronto), 5 February 2008, 1

El Akkad, Omar, ‘Opposition Parties Call for Khadr’s Return; MPs Say They’ve Failed to Protect Controversial Guantánamo Detainee’s Rights’, *The Globe and Mail* (Toronto), 26 February 2008, 7

El Akkad, Omar, ‘US Army Altered Khadr Report; First Version said Attacker was Slain, Military Court Told’, *The Globe and Mail* (Toronto), 14 March 2008, 1


Fife, Robert, ‘Officials Link Arar to Al Qaeda Camp: Family Says Claim is Part of Smear Campaign by Anonymous Officials, Demand Inquiry’, *National Post* (Toronto), 30 December 2003, 1
Franklin, Matthew and Dennis Shanahan, ‘Rudd Follows Mentor’s Mantra’, *The Australian* (Sydney), 16 December 2006, 1

Freeman, Alan and Colin Freeze, ‘Canadian Charged in US Soldier’s Death’, *The Globe and Mail* (Toronto), 8 November 2005, 1


Freeze, Colin and Omar el Akkad, ‘Canada’s Secret Documents on Khadr’s Treatment Revealed; Prisoner at Gitmo was Moved Every Three Hours for 21 Days to “Make Him More Amenable and Willing to Talk”’, *The Globe and Mail* (Toronto), 10 July 2008, 1

Freeze, Colin, ‘Bring Back Khadr Now, Ex-PM Says he Should Have Worked to Repatriate Prisoner While in Office’, *The Globe and Mail* (Toronto), 21 July 2008, 4

Gawenda, Michael, ‘Tell it to the Marine’, *The Sydney Morning Herald* (Sydney), 19 November 2005, 30


Gibson, Joel, ‘Lawyer Tells Court Habib Case Outside its Jurisdiction’, *The Sydney Morning Herald* (Sydney), 15 September 2009, 2


Gimson, Andrew, ‘Miliband Squirms as his Reputation is on the Line; Prime Minister Insists it is not Political as he Details Inquiry into Torture Allegations’, *The Daily Telegraph* (London), 7 July 2010, 8

Greenbery, Lee, ‘Khadrs will get Medical, Social Benefits, McGuinty Says: Province’s “Responsibility”’, *National Post* (Toronto), 14 April 2004, 4
Hall, Sarah, ‘Now Publish Legal Case for War, says Campbell – Foreign Affairs Demand for America to Hand…’, *The Guardian* (London), 25 September 2003, 14

Harris, Trudy, ‘Habib “Owes Muslims an Explanation”’, *The Australian* (Sydney), 16 February 2005, 1


‘Hicks Furore’, *The Australian* (Sydney), 5 August 2005, 6


Horin, Adele, ‘Good, Bad or Ugly, A Fair Trial is a Right’, *The Sydney Morning Herald* (Sydney), 6 August 2005, 35

Horin, Adele, ‘Execution Stance Under Fire’, *The Sydney Morning Herald* (Sydney), 1 November 2007, 4


Ibbitson, John, ‘Harper has Only Days to Make Choice on Khadr’, *The Globe and Mail* (Toronto), 16 October 2010, 20


Kerbaj, Richard, ‘ Judges Seek Fair Trial for Hicks’, *The Australian* (Sydney), 3 June 2006, 2

‘Key Documents and What they Show’, *The Guardian* (London), 15 July 2010, 4

Koring, Paul, ‘US Terror Trials in Doubt as Khadr Case Crumbles’, *The Globe and Mail* (Toronto), 5 June 2007, 1


Kremmer, Christopher, ‘Second Man Linked to al-Qaeda’, *The Sydney Morning Herald* (Sydney), 19 January 2002, 6

Leblanc, Daniel, ‘Zaccardelli Takes the Fall; RCMP Commissioner Forced to Resign After Misleading Parliamentary Committee Probing in Arar Case’, *The Globe and Mail* (Toronto), 7 December 2006, 1

Leblanc, Daniel, ‘US Pushes Canada to Take Khadr; US Secretary Hilary Clinton Contacts Foreign Affairs Minister Lawrence Cannon Over Guantánamo Bay Prisoner’, *The Globe and Mail* (Toronto), 23 October 2010, 11


Lewis, Steve, Patricia Karvelas and Matt Price, ‘Defiant Greens Vow Further Disruptions’, *The Australian* (Sydney), 24 October 2003, 3


Macfarlane, Duncan, ‘Deane Attacks Howard “Untruths”’, *The Australian* (Sydney), 30 May 2003, 3

Marr, David, ‘Prisoner of Suspicion’, *The Sydney Morning Herald* (Sydney), 5 February 2005, 33

Marr, David, ‘Australia’s Most Wanted’, *The Sydney Morning Herald* (Sydney), 13 January 2007, 21
Marriner, Cosima, Nadia Jamal and Cynthia Banham, ‘Habib Set Free from Guantanamo Bay’, The Sydney Morning Herald (Sydney), 12 January 2005, 1


McGarry, Andrew, ‘US Court Ruling Buoys Hicks Supporters’, The Australian (Sydney), 2 February 2005, 6


‘Meet the Class of 2003; Almost 1000 Email Messages Later, Nominations have Closed and a Globe Panel has Decided that Our Second Nation Builder of the Year will be One of These 12 Finalists. George W Bush Isn’t One of Them’, The Globe and Mail (Toronto), 6 December 2003, 4


Metherell, Mark, ‘Pentagon Denies Abuse of Hicks and Habib PM to Discuss Trial With Bush’, The Sydney Morning Herald (Sydney), 18 July 2005, 4


Morris, Linda, ‘From Housewife to a Freedom Fighter’, The Sydney Morning Herald (Sydney), 13 January 2005, 13

318
Morris, Linda, ‘Jensen Plan to Attract Men to Church’, The Sydney Morning Herald (Sydney), 17 October 2006, 3


Murray, Douglas and Robin Simcox, ‘The Evidence Shows that Cage is a pro-terrorist Group’, The Telegraph (London), 21 July 2014

NBC, ‘Secretary Rumsfeld Interview with Matt Lauer NBC “Today”’, Today, 5 May 2004 (Donald Rumsfeld)


‘News Focus’, The Sydney Morning Herald (Sydney), 4 August 2005, 4

‘News Focus’, The Sydney Morning Herald (Sydney), 20 May 2006, 6

‘News in Focus”, The Sydney Morning Herald (Sydney), 13 August 2005, 19

<http://www.theguardian.com/uk/2005/dec/19/usa.guantanamo>

<http://www.theguardian.com/uk/2005/dec/24/politics.guantanamo>

<http://www.theguardian.com/uk/2006/mar/17/guantanamo.politics>

<http://www.theguardian.com/politics/2006/mar/23/uk.guantanamo>
O’Brien, Natalie, ‘Canberra Snubs Habib’, *The Australian* (Sydney), 21 November 2007, 2


O’Neill, Juliet, ‘Canada’s Dossier on Maher Arar: The Existence of a Group of Ottawa Men with Alleged Ties to al-Qaeda is at the Root of Why the Government Opposes an Inquiry into the Case’, *Ottawa Citizen* (Ottawa), 8 November 2003, 1


Pearlman, Jonathan, ‘Most Want Hicks to Return – Poll’, *The Sydney Morning Herald* (Sydney), 14 December 2006, 4

Peirce, Gareth, ‘Was it Like This for the Irish?’, *London Review of Books* (London), 10 April 2008, 3

Pelly, Michael, ‘When the Good People are Left in the Dark’, *The Sydney Morning Herald* (Sydney), 4 March 2006, 33


Price, Matt, ‘St Kevin Commits Sins of Babble’, *The Australian* (Sydney), 29 March 2007, 2


Sallot, Jeff, ““Mr Arar, I Wish to Take this Opportunity to Express Publicly to You, to Your Wife and to Your Children How Truly Sorry I am” RCMP Commissioner Giuliano Zaccardelli, Testifying Before the House National Security Committee Yesterday’, The Globe and Mail (Toronto), 29 September 2006, 1

Sallot, Jeff, “‘Come Clean’ on Arar, Harper Tells Bush’, The Globe and Mail (Toronto), 7 October 2006, 1

Sallot, Jeff, ‘Ottawa will Probe File of 3 More Detainees; The Arar Affair; Justice O’Connor Wants More Checks, Balances on Security Forces’, The Globe and Mail (Toronto), 13 December 2006, 1

Sallot, Jeff, ‘Arar Given $11.5 Million in Compensation; Canadian Engineer Tortured in Syria Laments Life he Lost Four Long Years Ago’, The Globe and Mail (Toronto), 27 January 2007, 4


Seccombe, Mike, ‘Abuse Alert Months Ago, Hill Concedes’, The Sydney Morning Herald (Sydney), 12 May 2004, 1

Selley, Chris, ‘Spinning Omar Khadr; No Matter What Ezra Levant Says, the Term “Child Soldier” Applies to Anyone Under 18’, National Post (Toronto), 16 July 2010, 13


Shephard, Michelle, ‘Canada is Khadr’s “Only Hope”; Accused War Criminal Wouldn’t be a Risk if Returned, His US Military Lawyer Tells Commons Committee’, Toronto Star (Toronto), 30 April 2008 <http://www.thestar.com/news/2008/04/30/canada_is_khadrs_only_hope.html>


Shephard, Michelle, ‘US Military Gives Ottawa Khadr Video; Gitmo Prisoner’s Lawyer Says Toews is Stalling on Repatriation Deal’, Toronto Star (Toronto), 6 September 2012, 26

Shephard, Michelle, ‘Omar Khadr Back in Canada’, Toronto Star (Toronto), 29 September 2012
Shephard, Michelle, ‘Khadr Faces 2 More Years in Prison; Status of Former Gitmo Detainee to be Reviewed in December 2014’, *Toronto Star* (Toronto), 21 December 2012, 4


Snow, Deborah and David Marr, ‘Sitting Alone on Our Hands’, *The Sydney Morning Herald* (Sydney), 16 May 2009, 6


Stewart, Cameron and Trudy Harris, ‘Habib Recruited for Jihad: Cleric’, *The Australian* (Sydney), 17 July 2004, 4

Taylor, Diane, ‘“In the US, Who You Kill is More Important Than Who You Are”: Clive Stafford Smith Quit Journalism For Law to Try and Save Americans on Death Row’, *The Guardian* (London), 15 June 2004, 16


Taylor, Diane, ‘Guantánamo Detainees: “I Haven’t Stopped Crying Since I Heard… I think They Want to Kill Him”: Mother Tells How Her Hopes for Her Son’s Release were Dashed by the Appeal Court’, *The Guardian* (London), 13 October 2006, 11

Taylor, Diane, ‘“In the US, Who You Kill is More Important Than Who You Are”: Clive Stafford Smith Quit Journalism For Law to Try and Save Americans on Death Row’, *The Guardian* (London), 15 June 2004, 16


Taylor, Diane, ‘Guantánamo Detainees: “I Haven’t Stopped Crying Since I Heard… I think They Want to Kill Him”: Mother Tells How Her Hopes for Her Son’s Release were Dashed by the Appeal Court’, *The Guardian* (London), 13 October 2006, 11

Thompson, Allan, ‘Toronto Teen Held for Terror Role’, *Toronto Star* (Toronto), 6 September 2002, 1

Townsend, Mark, ‘Last British Resident in Guantánamo “May Never be Allowed Home”’, *The Observer* (London), 20 April 2013

<http://www.theguardian.com/world/2013/apr/20/british-resident-guantanamo>
‘US Won’t Apologize Over Arar Case, CTV Reports’, The Globe and Mail (Toronto), 28 October 2006, 10


Waldie, Paul, ‘Canada Should Cease Combat as NATO Test, Liberals Say; Dion Says Troops Must Withdraw in 2009 Even if No Other Country Will Take Over’, The Globe and Mail (Toronto), 26 September 2007, 18

Wallace, Rick, Andrew McGarry and Verity Edwards, ‘Archbishop and Dick Smith Fight to Bring Hicks Home’, The Australian (Sydney), 8 February 2007, 4

Watt, Nicholas and Vikram Dodd, ‘MPs’ Fury at Secret US Trials of “Terror” Britons – Minister Passes Commons Protest to Americans’, The Guardian (London), 8 July 2003
<http://www.theguardian.com/politics/2003/jul/08/uk.afghanistan>


Wilkinson, Marian and Jonathan Pearlman, ‘Military Trial Only Option for Hicks, Says Ruddock’, The Sydney Morning Herald (Sydney), 23 January 2004, 6

Wilkinson, Marian, ‘Hicks Trial Starts With Challenges on Charges’, The Sydney Morning Herald (Sydney), 27 August 2004, 8

Wilkinson, Marian and Cynthia Banham, ‘Red Cross to Grill Us Over Torture Claims’, The Sydney Morning Herald (Sydney), 2 December 2004, 9


Wintour, Patrick, ‘Hague Orders Inquiry into Torture Claims: Judge will Investigate Allegations that UK was Complicit in Abuse of Detainees’, The Guardian (London), 21 May 2010, 1
Woolcott, Richard, ‘So Much Promise, Fading’, *The Sydney Morning Herald* (Sydney), 21 January 2006, 51

L Other


British Columbia Civil Liberties Association, Criminal Lawyers’ Association (Ontario) and University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch, ‘Factum of the Intervener British Columbia Civil Liberties Association’, Submission in *Minister of Justice v Khadr*, S.C.C. File No. 32147, 21 February 2008


Executive Order No. 13,491, 74 Fed. Reg. No. 16 (22 January 2009)


Hicks, David, ‘Hicks’s Pretrial Agreement (Full Transcript), 2 April 2007’, Pretrial Agreement in United States v Hicks, 26 March 2007 in Leigh Sales Detainee 002: The Case of David Hicks (Melbourne University Press, 2007) 270-276


Khadr, Omar, ‘Offer for Pre-Trial Agreement’, United States of America v Khadr, 13 October 2010


Rasul, Shafiq, Asif Iqbal, Ruhel Ahmed and Jamal al-Harith, ‘Complaint’, Submission in Rasul v Rumsfeld, Case 1: 04-cv-01864-RMU, 27 October 2004


United States Army, Intelligence Interrogation Field Manual 34-52, 28 September 1992


