

Liberal Democracies and the Torture of Their Citizens

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Introduction

Overview

Torture is prohibited by international law. This includes under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which 158 states have accepted. The use of torture is inconsistent with fundamental values underpinning liberal democracies. Liberalism is a political tradition distinguished by the supreme value it places on the liberty of the individual, while torture disregards the sanctity of human dignity, autonomy and freedom.

Despite this, torture continues to be used by many states today—141 at last count, according to Amnesty International—including liberal democracies.¹ This was underscored by the public release in December 2014 of the United States Senate Select Committee on Intelligence’s *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*.² The Committee’s report presented detailed documentary evidence that detainees in the United States’ (US) ‘war on terror’ were subjected to torture and other cruel, inhuman or degrading treatment. As the Committee chairman, Dianne Feinstein, stated in her ‘Foreword’ to the report, ‘it is my personal conclusion that, under any common meaning of the term, CIA detainees were tortured’.³ The modern prevalence of state torture, including that sanctioned by liberal democracies after 11 September 2001, highlights the gap that exists between law and practice when it comes to human rights.

The war on terror was launched by the US in response to the devastating terrorist attacks of 11 September that killed nearly 3,000 people in New York City, Washington, DC and rural Pennsylvania.⁴ Much has been written about how

¹ Amnesty International, ‘Torture in 2014: 30 years of broken promises’, Stop Torture Media Briefing, 13 May 2014.

² United States Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, 2014.

³ Dianne Feinstein, ‘Foreword’ in United States Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, 2014, 4, fas.org/irp/congress/2014_rpt/ssci-rdi.pdf.

⁴ Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America’s New Global Detention System* (New York, NY: New York University Press, 2011) 11.

torture came to form part of the US Bush Administration's detainee interrogation policy in that broadly conceived war.⁵ This book is primarily concerned with a subject to which less attention has been directed: how the liberal allies of the US responded to the torture of their own citizens detained in the war on terror. These allies included the United Kingdom (UK), Canada and Australia. All three provided political and military support for the US invasion of Afghanistan in October 2001. They also had citizens (and, in the case of the UK, residents too) detained in the war on terror, who alleged mistreatment and/or torture. Surprisingly, despite sharing similar legal and political systems and common values, including a respect for human rights, these liberal democracies behaved differently when confronted with their citizens' claims of torture.

Australia, for example, was indifferent for many years to allegations of the torture of two citizens detained at Guantánamo Bay, the US Naval Base in Cuba where the Bush Administration held hundreds of individuals captured in the war on terror.⁶ When one of the citizens, Mamdouh Habib, gave a public account of his torture in Pakistan and Egypt after returning home in 2005, the Australian Government suggested that he should not be believed, and that anyone who did take his claims seriously was prejudiced in favour of Al-Qaeda and was anti-American.⁷ Canada, on the other hand, established a public judicial inquiry in 2004 into allegations that one of its citizens, Maher Arar, had been tortured in Syria, where he was sent by US officials for interrogation.⁸ The Canadian inquiry resulted in the first officially documented description of the US practice of extraordinary rendition—the same ordeal to which Habib was subjected.⁹ The UK was different again from Australia and Canada in its response to the detention of its citizens at Guantánamo Bay. Amid international concerns that detainees were being tortured, the UK began repatriating its nine citizens in early 2004; all were returned home by January 2005.¹⁰ In addition, the UK refused to allow its citizens to be

⁵ For example David Cole, 'The taint of torture: The roles of law and policy in our descent to the dark side', *Houston Law Review* 49(1) (2012), 53–69; Alfred McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York, NY: Holt Paperbacks, 2006); Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York, NY: Simon & Schuster Paperbacks, 2006); Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (New York, NY: New York University Press, 2011); Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York, NY: Palgrave Macmillan, 2008); Jamie Mayerfeld, 'Playing by our own rules: How US marginalization of International Human Rights Law led to torture', *Harvard Human Rights Journal* 20 (2007), 89–140.

⁶ Donald Rumsfeld, 'DoD news briefing—Secretary Rumsfeld and Gen. Myers', US Department of Defense, 27 December 2001.

⁷ 2UE, 'Interview—2UE IV with John Laws—Habib', 14 February 2005 (Alexander Downer).

⁸ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the events relating to Maher Arar: Analysis and recommendations*, 2006, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm.

⁹ Reg Whitaker, 'Arar: The affair, the inquiry, the aftermath', *IRPP Policy Matters* 9(1) (2008), 9.

¹⁰ Neil A Lewis, 'Red Cross finds detainee abuse in Guantánamo', *New York Times*, 30 November 2004, 1.

tried by the US military commission process, which permitted the use of evidence obtained by coercion.¹¹ The UK noted this was because the commissions failed to offer ‘sufficient guarantees of a fair trial in accordance with international standards.’¹² Despite this, Australia and Canada allowed their citizens to be tried under the Guantánamo Bay military commissions.

In this book, I examine why these three liberal allies responded differently to their citizens’ claims of torture in the war on terror. In other words, why did states sometimes live up to their international human rights commitments regarding the ban on torture and sometimes not? The question is complex, because so many different factors came to bear on the issue of detainee treatment in what was a time of heightened national security tension and heated political debate in the aftermath of the 9/11 terrorist attacks. My intention is not to rank liberal democracies in terms of their human rights records based on how they responded to the torture of citizens. Rather, I examine the factors that promoted the toleration of torture by liberal democracies, and those that restrained such impulses.

The argument presented in this book for why liberal democracies behaved differently when their citizens were tortured overseas is made on the foundation of detailed empirical analysis of what occurred inside the three countries during the first 10 years of the war on terror. Essentially, my contention is that liberal democracies, in responding to breaches of the international norm and laws prohibiting torture, were influenced by nuanced but important differences in their domestic political and legal contexts that enabled or constrained civil society activism on human rights.

Contemporary liberal international scholarship argues that domestic civil society is a crucial player in efforts to promote international human rights.¹³ Whether domestic actors are able to positively influence states, however, depends on the existence of appropriate agents with adequate political will and capability, factors heavily influenced by the domestic context and which vary across states.¹⁴ The liberal international model is often applied to examining human rights outcomes across different regime types, where freedoms and restrictions on political mobilisation can vary dramatically according to whether the political system is authoritarian or democratic.¹⁵ This study is, however, concerned with outcomes across different liberal democracies. Citizenries in liberal democracies also operate

¹¹ Johan Steyn, ‘Guantánamo Bay: The legal black hole’, *International and Comparative Law Quarterly* 53(1) (2004), 1–15.

¹² Lord Goldsmith, ‘Lord Goldsmith’s speech in full’, 25 June 2004, http://news.bbc.co.uk/2/hi/uk_news/politics/3839153.stm.

¹³ James Ron and David Crow, ‘Who trusts local human rights organizations? Evidence from three World regions’, *Human Rights Quarterly* 37 (2015), 188–89.

¹⁴ Eric Neumayer, ‘Do international human rights treaties improve respect for human rights?’, *Journal of Conflict Resolution* 49(6) (2005), 950.

¹⁵ Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York, NY: Cambridge University Press, 2009) 16.

in legal and political environments that can differ in significant ways that affect human rights activism.

Three domestic factors are isolated and examined as a part of a framework of enabling and constraining factors that can influence rights activism. In brief, the first is the country's political culture, and the way its history and prior experiences of human rights infractions condition the polity's particular awareness of rights. Second is the country's national institutional human rights framework, which includes constitutional and legislative rights protections and provides important levers for mobilisation around rights issues. The third is political opportunity, a more transient factor that offers incentives for or discouragement of activism in the form of a more open or closed political environment for mobilisation. These three political and legal structures are interrelated. Political culture can influence a polity's institutions, while institutions in turn can be established (or dismantled) deliberately in an attempt to forge a new rights culture. Opportunities can rely on activists framing claims according to dominant community understandings, or on accessing or constructing unifying mobilising structures.¹⁶ This enabling and constraining framework is discussed at length in Chapter 3. The different configurations of these factors across the three polities had important consequences for how executive governments in the UK, Australia and Canada responded to allegations that citizens and residents detained in the war on terror were tortured.

Civil societies are not, of course, homogeneous. It is not suggested that preferences of members of civil society are necessarily progressive or predetermined in favour of human rights. Furthermore, civil society agendas can change over time; they can be influenced by events and by the passage of time following traumatic events like terrorism. This study does not conceive of civil society as a monolithic entity, nor assign to it an inherently normative purpose. Rather, it assumes two basic points. First, most people value their own human rights: they generally care when they perceive their rights, and those of fellow citizens (as opposed to more distant foreigners), as threatened in serious ways. Secondly, in every liberal democracy different groups exist whose mandates include, specifically or broadly, defending human rights. This study is concerned with mapping the conditions under which such individuals and groups are more or less likely to become engaged when citizens' rights not to be tortured are violated. I explain what I mean by civil society and outline some critiques of its role in shaping rights agendas in Chapter 3.

The questions I pose in this book relate to the issue of political accountability, and whether states were ultimately held accountable by their domestic constituencies for their treaty obligations and human rights commitments regarding torture. Accountability involves the assurance that public officials are answerable for their behaviour, can be compelled to inform and justify their decisions, and may be

¹⁶ Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* (New York, NY: Cambridge University Press, 1998) 71–72.

subject to sanctions for those decisions.¹⁷ Whether states faced robust demands from citizens for accountability on international human rights breaches when a gap emerged between law and practice regarding torture, depended on particular configurations of various political and legal factors that encouraged or hindered that process and that differed across countries. Accountability of states that used torture in the war on terror—or that permitted it to be used, including against their own citizens—has been varied and inadequate. President Barack Obama, for example, refused to pursue prosecutions of US officials who ordered or carried out torture.¹⁸ Given this, the topic of torture and liberal democracies is a timely and important one.

The remainder of this chapter sets out the cases and methodology, and outlines the plan of the book.

The Cases

The selection of Australia, the UK and Canada as case studies is based on their similarities as countries that nonetheless had different responses to the torture issue in the war on terror. The three polities share a British heritage, are all members of the Commonwealth with common law legal systems and possess strong records of ratifying international human rights treaties. They have different domestic human rights frameworks, however. Australia has a federal constitution but no national bill of rights. The UK has no written constitution but is networked into an effective regional human rights system through its membership of the Council of Europe, a consequence of which is that in 1998 it enacted the Human Rights Act (which gave effect to rights under the European Convention on Human Rights as domestic statutory rights).¹⁹ Canada has a federal constitution and a constitutional bill of rights, namely the Canadian Charter of Rights and Freedoms.

It is also important to acknowledge foreign policy differences between Australia, the UK and Canada that may have impacted on their responses to the war on terror. While they are all US allies, their relationships with the superpower are influenced by different geostrategic factors. Canada, for example, shares a border with the US, a much more powerful neighbour, posing particular cultural, economic and foreign policy challenges.²⁰ Australia is the most geographically

¹⁷ Enrique Peruzzotti, 'The societalization of horizontal accountability: Rights advocacy and the Defensor del Pueblo de la Nación in Argentina' in *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, ed Ryan Goodman and Thomas Pegram (New York, NY: Cambridge University Press, 2012) 246.

¹⁸ Mark Mazzetti and Scott Shane, 'Interrogation memos details harsh tactics by the CIA', *New York Times*, 16 April 2009, 1.

¹⁹ Rayner Thwaites, *The Liberty of Non-Citizens* (Oxford: Hart Publishing, 2014) 137.

²⁰ Allan Kornberg and Harold D Clarke, *Citizens and Community: Political Support in a Representative Democracy* (Cambridge: Cambridge University Press, 1992) 18.

isolated of the allies and historically has carried a deep sense of insecurity that has shaped its heavy reliance on America's friendship.²¹ For the UK, retaining a close US alliance is sometimes seen as a way for the former imperial power to exercise influence over global affairs beyond its current position.²² Differences in the three states' alliances, discussed further in Chapters 5–7, meant the UK and Australia supported the US invasion of Iraq in 2003, while Canada did not.²³ Domestically, executive governments were under a range of pressures unique to their polity. For example, the UK had more citizens (and residents) detained in the war on terror than did Australia or Canada. The specific involvement of the states in their citizens' detention also varied. This involvement ranged from turning a blind eye to mistreatment and torture, to greater levels of complicity, such as knowingly supplying information that led to their own citizens' capture or assisted in their interrogations. In addition, the UK was involved in ongoing inquiries into allegations that its military personnel used torture against non-citizens in Iraq.²⁴

I mention these differentiating factors to highlight the complexities and multiple political layers involved in understanding the states' responses to the issue of torture in the war on terror. I do not claim to provide here a complete explanation for why liberal democracies responded as they did to torture—only greater understanding of some of the important influences that had a bearing on their behaviours. My particular interest is in better understanding the responses of states to the torture of citizens and residents by examining the role civil society activism played in shaping that response.

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 Habib, Australia's only citizens held at Guantánamo Bay. In the UK, I compare two groups of people rather than two particular individuals—the nine UK citizens and six residents detained at Guantánamo. In Canada I examine the case of 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, Canada's only citizen at Guantánamo who was captured at age 15 in Afghanistan. Extraordinary rendition was the US practice, used increasingly after 11 September 2001, of transferring individuals, who had no access to a legal proceeding in which to challenge that transfer, for interrogations to a country

²¹ Anthony Burke, *In Fear of Security: Australia's Invasion Anxiety* (Sydney: Pluto Press, 2001).

²² Tim Dunne, "When the shooting starts": Atlanticism in British security strategy, *International Affairs* 80(5) (2004), 898.

²³ Kim Richard Nossal, 'Defense policy and the atmospherics of Canada–US relations: The case of Harper conservatives', *American Review of Canadian Studies* 37(1) (2007), 24.

²⁴ International Criminal Court, 'Prosecutor of the International Criminal Court, Fatou Bensouda, reopens the preliminary examination of the situation in Iraq', statement, 13 May 2014, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>.

where they were at risk of torture.²⁵ Since my interest lies in the different ways in which liberal democracies responded to the torture of their citizens overseas, I treat arguments that could technically be regarded as being about detention (though still implicating torture) as issues about torture. For example, torture was at the heart of the practice of extraordinary rendition. 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).²⁶

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 such liberal claims 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 on ideas about citizenship as membership of a political community. Citizenship defines bounded populations with a specific set of rights and duties, excluding ‘others’ on the grounds of nationality.²⁷ Post-World War II ideas about the universality of human rights sometimes conflict, however, with liberal states’ attempts to discriminate between citizens and non-citizens in certain rights matters.²⁸ Some scholars argue that older notions of nation-based citizenship are being destabilised and a new, more cosmopolitan concept of citizenship is developing.²⁹ This blurring of the line between citizens and non-citizens is interesting for the way the UK treated its residents who were tortured, and I discuss it in Chapter 6.

I study the decade after 11 September 2001 in depth, but include relevant developments until the end of 2015. This time frame enables a study of changes of government in all three case study countries, and covers the return of all Australian, UK and Canadian citizens and residents from Guantánamo Bay. This period also encompasses the change in US administrations from President George W Bush, whose administration instigated the post-9/11 torture policies, to President Obama, who banned torture.³⁰ This is significant because, after Obama’s election, it presumably became easier for the allies to be critical of the Bush Administration’s torture policies and practices.

This book adopts a comparative case study approach. It is based on inductive research, where I seek to identify patterns from the evidence and select theoretical tools based on my early findings. It uses qualitative analysis, derived from media

²⁵ Margaret L Satterthwaite, ‘Rendered meaningless: Extraordinary rendition and the Rule of Law’, *The George Washington Law Review* 75 (2007), 1336.

²⁶ Lewis, ‘Red Cross finds detainee abuse in Guantánamo’, 1.

²⁷ Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago, IL: University of Chicago Press, 1994) 2.

²⁸ David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York, NY: The New Press, 2007) 39.

²⁹ Soysal, *Limits of Citizenship*, 1, 119; Saskia Sassen, *Territory Authority Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2008 [2006]) 307.

³⁰ Executive Order No 13,491, 74 Fed Reg No 16, 22 January 2009.

reports and other relevant publicly available texts, as well as a small number of semi-structured interviews, to draw out similarities and differences between cases. My approach is 'contextual'.³¹ To understand liberal democracies' legal and policy approaches to human rights and torture after 9/11, I argue that it is necessary to provide a detailed, nuanced, contextual examination that takes account of historical, political, legal and organisational factors that can affect how states respond.

For each case study country, I 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 that as wide a spectrum of dominant views on the torture issue in a polity was captured as possible. I identified all individual newspaper articles from each publication that dealt directly with torture in the war on terror, Guantánamo Bay and the torture of the particular country's individual citizens and residents who were detained by the US or subjected to extraordinary rendition.

Based on 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, in terms of the executive, judicial and legislative arms of government and 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; non-governmental organisation (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. I assessed a group or an 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 public 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 to clarify or confirm an issue or a hunch that arose from the narrative.³²

Plan of the Book

The book proceeds as follows. Chapter 2 addresses contradictions between liberal theory and torture policy. Chapter 3 discusses prevailing liberal international

³¹ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York, NY: Cambridge University Press, 2011) 5.

³² Many interviewees requested their names not be used, and accordingly I have chosen not to name any interviewees unless they expressly indicated a preference otherwise.

relations and international law theories for understanding state behaviour on international human rights. It shows how these compliance theories can provide a useful foundation for explaining differences between liberal democracies, by focusing on features of the domestic political and legal context that can affect mobilisation on human rights. It outlines in detail a framework of enabling and constraining factors for activism that helps explain why it is easier for domestic actors to mobilise under certain conditions and harder under others.

Chapter 4 examines the key developments in the US after 11 September 2001 that led to torture becoming a tool in the war on terror. I outline briefly what occurred in the different political spheres in the US (the executive, legislature, judiciary and civil society). I do not make the US an object of study beyond setting out in detail what occurred in that country with respect to torture, as the necessary background against which the behaviour of the three allies is to be analysed.

Chapters 5, 6 and 7 are the core case study chapters, where I provide detailed narratives of how Australia, the UK and Canada responded to the torture of citizens. I set out the actions of the executive, parliament, the courts and civil society. I then analyse the behaviour of domestic non-state actors through the framework of enabling and constraining factors influencing rights activism.

In Chapter 8, I bring together my findings and conduct more detailed comparative analysis of the cases. I draw conclusions about the potential for civil society to play a vital role in achieving state accountability on contentious international human rights matters, and how the effectiveness of civil society activism can be influenced in significant ways by the domestic political and legal context.