

**SARAH E. MENDELSON**

# Beyond Guantánamo

*Obama has to reclaim America's human rights mantle—and not some day, but this year, when the world is watching.*

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**ASSESSING DAMAGE, URGING ACTION—REPORT OF THE EMINENT JURISTS  
PANEL ON TERRORISM, COUNTERTERRORISM AND HUMAN RIGHTS**  
BY THE INTERNATIONAL COMMISSION OF JURISTS • 2009 • 199 PAGES • FREE

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n his third day in office, President Barack Obama signed executive orders banning the use of torture, giving senior officials one year to close Guantánamo, and ordering a review of detention policy. About a week later, in Washington, New York, and undoubtedly in other cities, many who worked to change Bush Administration counterterrorism policies, myself included, came together in living rooms and in bars—some shyly, others giddy, all slightly incredulous—and toasted. “What a difference an election makes!” many said.

“Not so fast,” others warned. “There is a lot on the President’s plate, and no one knows how the changes will play out or how prominent human rights will be.” Just a few months into the Administration, it looks like we were all right.

During her first trip abroad as secretary of state, Hillary Clinton assured

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the Chinese leadership that human rights would, in fact, not “interfere” with U.S. foreign policy. That message was jarring, particularly given Clinton’s own emphasis during her Senate confirmation on the need for more “smart power” and a better image of the United States abroad—not to mention her own history of activism on women’s and children’s rights (made manifest in Beijing itself in her famous 1995 speech). Was this what the naysayers meant by “not so fast”? What and where was the Administration’s human rights agenda?

But just when some sighed with relief that human rights could be neatly tucked away, it popped onto the agenda. Hours before Obama and Russian President Dmitri Medvedev met in London in April, a prominent human rights activist was badly beaten in Moscow. This sort of thing is not an entirely rare occurrence in Russia today. This victim, though, Lev Ponamarev, happens to be an old friend of Obama’s

key Russia adviser, Michael McFaul. In their meeting, Obama reportedly talked to Medvedev about the attack on Ponamarev at the behest of his adviser—and to the collective relief of the human rights community. In these early days, the China comment coupled with the Russia meeting reflect an Administration still finding its way, where hopes

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and aspirations live side by side with disappointment.

True, such human-rights muddiness is no different from any previous administration. Except that the immediate predecessor, the Bush Administration, talked about liberty while institutionalizing indefinite detention, and Obama promised to right those wrongs and restore America’s image—an implicit, if not literal, promise to put human rights at the center of his agenda. And it’s more than a matter of improving America’s reputation. The stakes are extremely high for the human rights community worldwide, and how the bureaucratic battle plays out means more than just a turf war between Administration officials.

It’s a point driven home by two major human rights reports, *World Report 2009* by Human Rights Watch (HRW) and *Assessing Damage, Urging Action* from the Geneva-based International Commission of Jurists (ICJ). The *World Report* is a weighty compilation of short, substantive bursts of information covering a vast array of issues such as children’s rights, impunity, arbitrary detention, and responses by key international actors in a specific region. The information is arranged according to how HRW maps the world: One finds Russia, for example, in the “Europe and Central Asia” section, a placement I am familiar with, as I serve on its advisory committee. The more compact *Assessing Damage, Urging*

*Action* is likely too dense for the casual reader (who might instead enjoy Jane Mayer's *The Dark Side*), but for experts or those who want to know the global impact of recent policies, this book is essential reading.

I doubt, but hope nevertheless, that Administration officials will take the time to peruse both, since these reports come with something of a time-sensitive warning: If U.S. leadership does not play a decisive role in restoring human rights, including, but by no means restricted to, getting the American house in order regarding torture and detention, then 2009 and 2010 will not look all that different from 2008—which is to say, terrible.

**T**he *World Report*, the latest 500-page annual review produced by HRW, is a stark, if not numbing, reminder that on the sixtieth anniversary of the Universal Declaration of Human Rights, relentless cruelty and impunity have not been vanquished. Detention, torture, disappearance, enslavement of children, rape, repeated rape—the list of horrors in the report is long. These annual reviews, painstakingly prepared by staff around the world, often at great personal cost to those reporting, boil down the year's crises so that even the most casual observer can quickly grasp the extent of abuses worldwide.

The annual review's opening essay, by HRW executive director Kenneth Roth, provides context and policy exhortation. In the 2008 *World Report*, the call was for the European Union to step up to the plate, since the role of the United States was so impaired by its counterterrorism policies. The call in 2009, however, is to the new U.S. administration to immediately “undo the enormous damage” caused by Bush-era policies on counterterrorism, because the knock-on effect of the policies has fostered an apathetic attitude toward human rights around the world. In the past, even the worst offenders, as scholars have long noted, spoke in human rights-friendly terms. But as long as the United States is detaining without charge or torturing, oppressors the world over have been emboldened.

As America's influence and reputation declined under George W. Bush, the power of what Roth calls “spoilers”—Algeria, China, Egypt, Russia, South Africa—evolved so that they are today able to stymie a growing number of human rights initiatives. While not the worst offenders by any means—Burma, North Korea, and Sudan surely belong to that list—these countries often advance a hyper-sovereign approach and are at worst trying to reset the table on human rights, blocking international responses to even the worst abuses. “The success of any effort to retake the initiative from the spoilers will depend to a large degree on Washington,” Roth argues.

The ICJ report generally concurs. The spoilers were particularly enabled by the way in which many states, the United States in particular, have responded

to recent terrorist attacks—“introducing an array of measures which are undermining cherished values as well as the international legal framework carefully evolved over at least the last half-century,” it concludes. Terrorist threats remain very serious for many countries, but the way in which states handled these threats and attacks spawned the willingness to torture, to detain indefinitely, and, in the language of the recently leaked 2007 report from the International Committee of the Red Cross (ICRC) concerning CIA interrogations, to engage in “undisclosed detention” or secret prisons. What makes the ICJ’s finding especially weighty is the methodology by which it was reached: A group of “eminent jurists” from the United States, Argentina, Pakistan, South Africa, Egypt, Thailand, Ireland, and Switzerland over two years held 16 hearings that covered more than 40 countries. This is not the work of a marginal NGO or a solitary academic; it is a reflection of expert global opinion.

The day the Eminent Jurists’ Panel convened in the United States—September 6, 2006—happened to be the day that Bush announced the transfer of 14 “high value detainees” from secret prisons around the world to Guantánamo. The panel’s visit was, of course, overshadowed by the news of that day. And that goes to a point made frequently in the report and echoing the statement made by Obama in his inaugural address: Bush’s false dichotomy between security and rights must end. Like Obama, these jurists argue that existing laws are nimble and can protect citizens. After all, these laws emerged from the ashes of World War II.

Will defense professionals be convinced (or even know) about the findings in the ICJ study? Will counterterrorism officials who say that the laws are not nimble be persuaded that, in fact, they are? I fear not, and I come away from these volumes with several preoccupations that intensify each day, particularly since the April 16 release of the Bush Administration’s Department of Justice memos providing the legal justification for the CIA’s interrogation program—and the spirited efforts of Dick Cheney to prove, as it were, that torture kept us safe. How great, precisely, is the sense of urgency to reform counterterrorism policies? Will we address the crimes of the past? And what happens if or when another attack occurs? What sort of resilience has been built into the system? The answers to these questions will tell us a lot about where the Administration—and, by extension, the world is headed on human rights.

**T**he first of these preoccupations—how the United States reforms its counterterrorism policies—is receiving the most attention. The reviews of the detainees’ files are finally underway, as is the work of those puzzling through detention policy going forward. I’ve heard it said that the President

asks weekly for an update on the status of the Guantánamo closure. But policy landmines lurk. If Obama continues the Bush Administration policy of detaining terrorist suspects picked up not on the battlefield but in random cities, holding them without access to legal counsel for years on end, as has been the case for some at Bagram, according to an April 2009 ruling of a U.S. district judge, then the reform will be incomplete.

The role of the intelligence services is another landmine, and surely an area that everyone, abuser and abused alike, will use as a metric of change. To date, the Obama Administration has not embarked on the sort of house-cleaning or shift in organizational culture that it needs to grow a new cohort of intelligence officers. Some retired intelligence officers tell me they worry privately about the lasting effect of the post-9/11 culture on the agency they devoted their professional lives to.

The continued presence of senior intelligence officials held over from the Bush Administration, including some who allegedly played important roles in adapting torture techniques from North Korean, Chinese, and Soviet security services, is a source of anger and disappointment.

**Elections do make a difference, and that's why many in the human rights community remain hopeful.**

The American political elite is now deep in the throes of a debate about whether and how to address recent crimes associated with torture, disappearance, and indefinite detention. Obama has stated he is “more interested in looking forward than...in looking backwards,” while Senate Judiciary Chairman Patrick Leahy has promoted the idea of convening an independent “truth commission.” Meanwhile, the Senate Select Committee on Intelligence has embarked on an investigation of one important piece in the story, the CIA detention and interrogation program. Little of this will likely become public.

The theme of accountability for past crimes is receiving, shall we say, uneven support in the Administration and elsewhere in Washington. Yet both looking back and accounting for the past cuts a wide swath around the world in both the HRW and the ICJ reports, with sections on the status of various commissions for truth and reconciliation in the *World Report* and an entire second chapter in *Assessing Damage, Urging Action* devoted to lessons from history. Strikingly, HRW reports that 400 people in Argentina and 482 in Chile face charges today for crimes committed during the military dictatorships of the 1970s through the 1990s.

When it comes to the United States, legal experts argue that because a Bush Administration official, Susan Crawford, the convening authority of

the military commissions at Guantánamo, admitted that the United States engaged in torture (coupled with the now added weight of the ICRC report and the OLC memos), the United States government, as a signatory to the Convention Against Torture, is legally obligated to open a criminal investigation. If that admission stands absent an investigation from the executive branch, some experts argue, perhaps dramatically but perhaps presciently, then the prohibition against torture is dead. Indeed, in response to the release of the OLC memos, Wilder Tayler, the acting secretary general of the ICJ, said in a statement: “If a nation committed to law is not willing or capable to hold those responsible who authorized some of the worst crimes under international law it sends a terrible message to the rest of the world. It does great harm to the universal prohibition of torture.” Those inside the Administration arguing for

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zero accountability need to consider the consequences, which, at a minimum, might include increased harm to those who serve in uniform overseas, as well as the further enabling of regimes that torture.

If the Administration won't step up to the plate, where will pressure come from? True, there are calls for justice

emanating from outside the United States: A Spanish court, for instance, has authorized a criminal investigation of former Bush Administration officials in relation to the torture of detainees. But that may have the unintended consequence of making domestic accountability less likely, as Washington insiders close ranks. Some scholars argue that, on average, accountability typically emerges 10 years after a regime changes. A full accounting, then, may be more likely in 2020 than in 2009 or 2010. Leaks may occur, and whistles may be blown. But this will come in dribs and drabs, such as the leaked February 2007 ICRC report, and through pressure generated from reports like these from HRW and ICJ.

And there lies the bright side. What we sometimes miss in Washington is how, over time, there has been enormous movement on many of these issues, once the lonely purview of a few human rights NGOs. Today there is much broader bipartisan agreement on the damage done by the Bush Administration counterterrorism policies: By 2008, five former secretaries of state were calling for the closure of Guantánamo, including Henry Kissinger. What neither the HRW or the ICJ reports capture, but is worth remembering, is that the cumulative effect of these (and other) such reports is palpable politically. The

role played by civil society in the United States and elsewhere in developing innovative strategies to move the public and policy makers on these issues ought to be heralded, explored, and understood. Groups such as HRW and ICJ, but also Amnesty International USA, the American Civil Liberties Union (ACLU), and the Center for Constitutional Rights have played important roles in this as yet unfolding story. Some strategies, such as those used by Human Rights First, which amplified the voices of retired military officers (those gentlemen standing behind the President as he signed the Executive Orders on January 22, 2009) to protest detention without charge and torture, were truly innovative and effective. The ACLU's use of strategic litigation to get the OLC memos declassified is a tribute to the strength of independent institutions in the United States. Cumulatively, these and other efforts generated the pressure to change government policies. And yes, elections do make a difference. That is indeed what we were toasting back in January 2009, and why many in the human rights community remain hopeful.

**W**hile the HRW and ICJ reports detail the grim, broken world the Obama Administration inherited, let's suppose, a year from now, all is going reasonably well. We get our house in order. The detention facility at Guantánamo is closed. The United States no longer tortures and no longer engages in detention without charge. All in all, not a bad year's work.

Nagging questions will remain, though. If there is another large-scale terrorist attack, will Obama Administration officials have learned the lessons and absorbed the points made in the HRW and ICJ reports? Are human rights groups planning contingencies if those officials haven't? In March 2008, in an effort meant to develop such resilience, I had a meeting with British counterterrorism officials and police in London to discuss the possibility of engaging in (admittedly the most wonkish of activities) a "table top." The purpose was to simulate how first responders act after an attack to build greater awareness of human rights into their responses. Such a table top would have involved London counterterrorism officials and human rights activists, with a smattering of Americans, governmental and nongovernmental experts, looking on. Everyone thought it a grand idea. "Let's expand and do a Europol-wide exercise," one London police official eagerly suggested, with the idea of then running it in the United States. Nothing of the kind ever took place stateside, nor is it likely to: Governments are overwhelmed by other issues, the financial crisis has everyone squeezed, and NGOs are either focused on accountability questions or just trying to stay open.

Reading these reports, I couldn't help imagining that the Administration,

together with partners in the European Union, could pull off something remarkable, should they pool political capital. What if the sort of political energy and focus that is allocated to climate change or arms control went into restoring the human rights agenda? As Elisa Massimino, chief executive of Human Rights First, suggested to me the day before the election, what if the next administration made clear how human rights is a critical part of every bilateral relationship because “it will help build the world we want to live in?” What if a serious diplomatic initiative on human rights was one of the capstones on the President’s agenda? A year from now, we will have a little less room to imagine. We will either be disappointed or on the path to building a new human rights era. The abused and their abusers will be watching. ▀