

In the “War on Terror,” What Did Rights Organizations Get Wrong?

Jameel Jaffer

[Jameel Jaffer \(@JameelJaffer\)](#) is the Inaugural Director of the Knight First Amendment Institute at Columbia University. He is the former Deputy Legal Director at the American Civil Liberties Union and Director of the ACLU’s Center for Democracy, author of [The Drone Memos](#), and member of the editorial board of *Just Security*.

With the 20th anniversary of the September 2001 attacks approaching, and images of the United States’ withdrawal from Afghanistan dominating the news, many Americans are reflecting on these past two decades – on the 9/11 attacks themselves and their thousands of victims; on the ways in which our government responded to the attacks, and on the many lives affected or cut short by those responses; and on the disfiguration of our communities, society, and world by years of terrorism, counterterrorism, and war. In conversations over the next days and weeks, U.S. human rights organizations will draw attention to the human and democratic costs of some of the U.S. government’s post-9/11 policies. They’ll ask once again whether these policies serve (or served) our interests, and whether these policies are (or were) consistent with our law and values. This is exactly what human rights organizations should do, of course.

But this moment also provides an opportunity to look inward – a chance for human rights organizations to reassess the decisions they made, and the work they did, over the past two decades. This kind of institutional introspection might be difficult for a number of reasons. But asking– individually, organizationally, and as a human rights community – what we might have done differently, and what we got wrong, might help us understand how we need to change, and how we can be more effective in the future. This kind of critical self-reflection makes sense even if one believes, as I do, that American human rights organizations were extraordinarily fortunate to have the leaders they did, and that these organizations did a lot of work over the past two decades that was principled, tactically savvy, and effective.

* * *

I've been doing some of this kind of reflection myself. One of the human rights issues I spent a lot of time working on when I was at the ACLU had to do with interrogation policy. We filed lawsuits that compelled the government to release hundreds of documents relating to the maltreatment of men held in U.S. custody, and later we represented some of those men in lawsuits against the officials who had authorized their abuse and torture. Like our counterparts at other human rights organizations, we were also active participants in public debate about this issue. I've been thinking about one of the arguments we adopted as a frame for our efforts – an argument I've always associated with Senator John McCain.

Senator McCain was a particularly committed opponent of the Bush administration's torture policies because of his experience as a prisoner of war in Vietnam. In the Senate and the press, he argued again and again that torturing prisoners was simply beneath the United States – that it was fundamentally inconsistent with American values. “Bob, could I just say – it's not about them; it's about us,” McCain said to Bob Schieffer on Face the Nation in 2014, after the Senate Intelligence Committee released the executive summary of its report on the CIA's torture program. “It's about us, what we were, what we are and what we – and what we should be.”

We adopted this frame at the ACLU, too. It seemed to resonate with people across the political spectrum. It had the effect of taking the focus off the prisoners who had been tortured, all of whom were dark-skinned foreigners with strange names and adherents of a religion unfamiliar to most Americans, and some of whom had been accused of terrible crimes, and it put the focus instead on American traditions and values – or on purported American traditions and values, some might say. It wasn't a human rights argument, strictly speaking. At bottom it was an argument that one didn't need to view the prisoners as entitled to human rights, or even as fully human, in order to conclude that the United States shouldn't torture them.

I think human rights organizations were right to adopt this argument, especially because other arguments rarely seemed to convince anyone who wasn't convinced already. Now I wonder, though, whether the emphasis we gave to this argument had costs we didn't recognize at the time.

The debate about torture unfolded differently in the United States than it did in some other democracies. In other democratic countries, the debate centered around the experiences of specific people. In Canada, for example, a government commission led by a former Justice of the Supreme Court investigated the case of Maher Arar, a Canadian citizen whom the United States “rendered” to Syria, where he was tortured

for a year and imprisoned in a cell he likened to a grave. At the conclusion of the commission’s inquiry, Arar received an apology from the Canadian prime minister as well as substantial compensation. Arar’s story became common knowledge in Canada, as did the story of Omar Khadr, a Canadian citizen who was 15 years old when he was detained by the United States in Afghanistan and then imprisoned and tortured at Guantanamo. The Supreme Court of Canada held that Canadian interrogators violated Khadr’s rights when they interrogated him in American custody.

In other democracies, too, men who suffered torture at the hands of American interrogators – or at the hands of their proxies – became something like household names. The “Tipton Three,” three British citizens who were held at Guantanamo, became a cause célèbre in the United Kingdom. The story of Binyam Mohamed, whom the United States rendered to Morocco for torture and then imprisoned without charge at Guantanamo for five years, also became well known in the United Kingdom, in part because the High Court of Justice considered an aspect of his case. Ahmed Agiza and Muhammad al-Zery, Egyptian nationals whom the United States rendered to Egypt, became a focus of public and press attention in Sweden, where the two had sought asylum before falling into the hands of the CIA. Khaled el-Masri, a German national whom the United States imprisoned and tortured in Afghanistan after mistaking him for someone else, received similar attention in Germany, in part because the European Court of Human Rights took up his case.

The debate in the United States, by contrast, seemed to be about everything except the experiences of specific victims. It was about statutory terms, constitutional provisions, farfetched hypotheticals, and competing accounts of our national character. The stories of specific people did sometimes seep in at the margins, but I doubt there are very many Americans, even today, who could name a person who was imprisoned in a CIA black site, or tortured at Guantanamo, or rendered by the United States to Syria or Morocco or Egypt – let alone tell his story.

It would be overstating things, I know, to attribute this entirely, or even principally, to human rights organizations’ adoption of McCain’s argument. The influence of human rights organizations is limited. Also, not every human rights organization gave a lot of emphasis to McCain’s argument, and even the organizations that adopted it wholeheartedly made other arguments as well. Even as we employed McCain’s argument, we tried very hard to tell the prisoners’ stories in court, in Congress, in the press.

If Americans are unfamiliar with the stories of men who were tortured, it's probably less because human rights organizations didn't *tell* these stories than because the government took great efforts to *suppress* them – denying visas to former prisoners who wanted to meet with audiences in the United States, censoring transcripts of judicial proceedings, and declaring the prisoners' memories of their torture to be classified, for example. Another contributing factor—perhaps the decisive one—was that courts and other accountability institutions in other democracies played their appointed roles, whereas their counterparts in the United States too often served as helpmeets to the “war on terror.”

Still, I can't help but wonder whether human rights organizations' insistence that the torture debate was “not about *them*,” – that is, not about the men whose human rights had been violated – might also have contributed to the distinctive way the torture debate unfolded in the United States. Every time we foregrounded McCain's argument, after all, we substituted a debate about abstractions for a debate about prisoners' specific experiences. Would we have felt comfortable doing this in any other context, if we were addressing any other human rights violation? Again, I don't actually think it was a mistake for us to adopt the argument, in the circumstances. But is it possible that our decision to adopt it did something more than just bracket prisoners' human rights – that it might have, even if only in a small way, contributed to their dehumanization as well?

* * *

The question of how some human rights organizations talked about torture is just one of many questions that could be asked about the decisions that human rights organizations made in the months and years after 9/11. Over the past two decades, these organizations made countless decisions about which issues to focus on, which cases to take on, how to allocate resources, whom to collaborate with, which arguments to deploy, whether and how to engage with government officials, and how to frame complex issues for the public. Some of those decisions involved questions of tactics – like the question of how to talk about torture – but others involved much larger questions of strategy, values, or purpose.

In his new book, Reign of Terror, Spencer Ackerman writes about the war on terror's “grotesque subtext” – the perception that nonwhites, and Muslims in particular, are “marauders from hostile foreign civilizations.” One question that might be asked of human rights advocates is whether we adequately addressed, or even fully appreciated, this subtext. I suppose another question that might be asked is what

it would have meant to appreciate or address it. Perhaps we would have spent less energy debating the finer points of the Foreign Intelligence Surveillance Act and Common Article 3, and more energy talking about the prejudices that connected the government’s national security policies to one another? Or perhaps we should have relied more heavily on political and moral arguments, and less heavily on legal ones?

Others have questioned the role that human rights organizations may have played in “sanitizing” the war on terror. In the *New York Review of Books*, Samuel Moyn writes that human rights organizations made the war on terror marginally less brutal, but that making it less brutal also helped legitimate it. Jack Goldsmith has said essentially the same thing, albeit with satisfaction rather than dismay. Chase Madar made a related argument when he reviewed my book about the drone program, criticizing human rights organizations for failing to recognize that “the real function of the laws of armed conflict is not to restrain lethal force but to optimize its application.” Were we wrong to focus on wartime abuses rather than on war itself? Were there ways in which our efforts to protect human rights served to entrench the war on terror, and even make it more possible for the U.S. government to extend it?

To acknowledge these (and other) critiques is not necessarily to agree with them. But it would be worthwhile for us to engage with them, and for us to ask, more broadly, whether, over the past 20 years, human rights advocates did what they came to do. For human rights organizations, effectiveness has many dimensions, including bearing witness, giving voice to victims, exposing abuses, preventing abuses, countering official narratives, creating a historical record, building coalitions, changing the law, and influencing government policy. Still, we wanted to be effective. Were we as effective as we could have been?