

THREE PERPLEXING PREDICAMENTS IN HUMAN RIGHTS LAW

Patricia M. Wald

Introduction

I am not a human rights scholar or indeed even a full-time human rights practitioner. Still, I have spent a good part of the last decade dealing with human rights in their many complex facets and relationships. Today I would share with you three human rights problems I have worked with, which defy easy solutions, however good our intentions, and some modest suggestions on moving them along. All three, I think, illustrate the frightening dependence of real-time human rights on culture, resources, the refusal of national sovereignty, like a many-headed hydra, to succumb to enlightenment or even consensus on individual rights and finally the mighty gap between words, will and deeds on the international scene. Withal I am not discouraged; a backward look through the last half-century inspires confidence to take the next steps forward, aware of the odds, but not supine before them.

I. The Egyptian Women Judges

A few months ago, I participated in a U.S.-based training course for the first group of 30 women appointed as judges in Egypt. The majority wore traditional head coverings but a few did not. All came from positions in the prosecutor's office. We gave them the standard instruction in gender discrimination laws and practices here in the U.S., the requirements of CEDAW (Convention on the

Elimination of All Forms of Discrimination Against Women), a treaty which Egypt interestingly has ratified but the U.S. has not. But their principal questions to us were in the realm of whether women here could inherit money and own property, get divorces and custody of children. As judges they would not have offices of their own, they would hear cases in the courthouse and return home to work on the judgments. But, nonetheless, their mere appointment was hailed as a monumental advance for women in Egypt. Ten years previously I had visited Egypt with a small delegation of U.S. federal judges, predominantly women, and when we queried why Egypt had no women judges despite large enrollments of women in law schools we were told it was not religion, simply that they had not yet found women qualified by experience or temperament to serve in the judiciary.

Now becoming a judge may not qualify as a human right, vital to an individual's existence, on a par with rights to life, liberty, property, health, education, food or shelter. But the Egyptian situation does point up one of the strongest reasons why women have such a hard time gaining access to fundamental human rights, however defined. Women, with some exceptions such as Eleanor Roosevelt's memorable contributions to the Universal Declaration on Human Rights, until recently have had too little appreciable role in the development or definition of human rights law. Ironically, it was the emergence of the war crimes tribunals and international humanitarian law jurisprudence, about which I will

speak later, that brought at least some women's human rights to center stage as enforceable mandates of international law.¹

In the main, however, despite widespread acceptance of treaties and declarations of human rights that bar discrimination based on gender (the U.N. Charter and Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights—and the subsequent one on economic, social and cultural rights—CEDAW, U.N. and regional human rights committees and commissions galore) women's most basic rights to work, own property, make choices on family status and reproduction, have been subordinated in too many parts of the world to cultural norms that dictate subservience to male husbands, fathers, brothers, even in-laws. While human rights law generally has focused on individual rights that in theory transcend the sovereign rights of states and governments, women's rights have fallen prey to the traditional and cultural supremacy of male power in the private domain of family relationships, enforced by religious or tribal courts. This carve-out of the domain of private relationships for nongovernmental regulation and enforcement has often been embraced in the national law itself.² It is enshrined in the Egyptian Constitution. We cringe at the occasional news reports that a gang rape victim in Saudi Arabia is herself subjected to lashes and prison for riding in a car with a male nonfamily member or that a woman is sentenced to stoning for adultery in Northern Nigeria. Less dramatic but

more common is the denial to women in many, mostly Islamic, countries in Africa, the Middle East and Asia of rights to be educated, to work in many or any occupations outside the home, to confer a national identity on their children, and on and on.³

Some say of course that the gender-blind rights encapsulated in the aspirational treaties and international declarations are themselves too antiseptic and ignore the binding realities of cultural and religious mores that dominate the lives of women outside the West; these critics criticize the definition and scope of the rights defined in these documents as not truly universal but rather derived from a norm oriented to the “white, Anglo-Western European, Judeo-Christian, educated, propertied, heterosexual, able-bodied male” (sort of like our Founding Fathers), that just doesn’t fit into the lifestyle of ordinary women in Afghanistan, Cambodia, or Central Africa.⁴ A series of Global Women’s and Human Rights Conferences held around the world in Cairo, Vienna, Beijing and elsewhere in the ‘90s sought to rent the veil of iron between the public pieties and the private realities of women in those countries and to elevate the interfamilial abuses of women to fullfledged human rights violations. In truth, however, the progress in that struggle is slow and erratic, more so, I think, than in other areas of human rights.

Women’s human rights advocates have identified a fatal flaw in any strategy that relies too heavily on diplomacy and verbal assurances of governments of

adherence to international norms against gender discrimination. The deficit in such approaches is their inability to deal with “structural inequality” within the society, that is an “essential power imbalance between women and men, in which men have held most of the power to make decisions that affect women,” i.e., HIV-AIDS, domestic violence, custody, divorce, property rights.⁵ Part of the dilemma as to these kinds of human rights violations is that out-of-country pressures can go only so far; no one contemplates an international humanitarian military intervention, even an economic boycott or sanctions or aid cutoffs, to prevent or punish these abuses against women. Reform, if it comes, will have to emanate from within the society itself, slowly and most likely issue by issue. Indeed I fully recognize it is open to question how much of a difference my 30 Egyptian women judges can make—we did have extended conversations with them about how the first wave of women in our own judiciaries (it is not so long ago—a few decades—since women appeared in any cognizable numbers on our own courts) managed to exercise power within a traditionally all-male bench and avoid becoming marginalized. The mere presence of women—with or without headdresses—cannot, for instance, fail to change the “face” of justice presented to Egyptian citizens with ordinary grievances, and the women judges can insure that the courts do not consciously or unconsciously exacerbate inequities in the laws themselves by interpreting them in light of untoward assumptions about gender differences or

aptitudes. While the women alone cannot change the laws, after a while they may feel confident enough to speak out against them and when there is a sound basis, interpret them in a way that affords women more leeway and choices, even on occasion—if their law allows—invalidate laws and practices that are blatantly discriminatory.⁶ An ambitious agenda I know, but the courts are a good place to begin. The structural inequality that characterizes a “government of men” will never be addressed effectively by treaties or declarations alone, interpreted and administered exclusively by men.

Let me go back to Egypt to illustrate. Its Constitution guarantees equality between men and women in some sections (Articles 8 and 40), but in others (Articles 9 and 11) looks to the Islamic law of Sharia to guide family matters; it ratified the CEDAW in 1991 but with reservations that excepted key provisions involving women’s rights in family matters such as divorce and nationality of children that could conflict with Sharia (this even though in international law theory no reservation is allowed if incompatible with the basic purpose and objectives of the Convention). The chief enforcement mechanism for CEDAW is a Committee that reviews and comments upon state compliance reports (and “alternative” reports from interested civic organizations in some instances). In Egypt’s case, recent comments in one of these alternative reports,⁷ have included reference to “disturbing reports documenting violations of the human rights of

women” including torture of women in detention to extract information against their male relatives, banning of shelters for domestic violence victims, Nationality Laws that conferred citizenship on children by way of the father but not the mother, recent divorce laws that allowed women to divorce for incompatibility but only if they returned their dowry and forswore any financial claims against their spouses (men can divorce by declaration alone); difficulties in women obtaining passports without their husband’s consent despite court rulings to the contrary. The alternative reports warned of “rising conservative trends” and media stereotyping calling for women to return to their homes and discounting pursuit of careers. Few women it reported have leadership roles or important jobs in either private or public commerce; female wages were less than male counterparts by one-third. A second alternative report by a Women’s Resource Center for Victims of Violence cites the frequency of marital rapes and beatings; “crimes of honour” (murder of an adulterous spouse) punished for men by 3-year sentences but by life sentences at hard labor for women; earlier marriages allowed for girls than boys with attendant consequences of higher school dropout rates and almost double illiteracy rates for young women; followed by early pregnancies and increased domestic violence; restrictive definitions of punishable rape, confined to vaginal penetration by a penis; limited access to reproductive health care or advice.⁸ The CEDAW Committee itself noted the States’ own admission of discrimination in

conferring nationality, “low representation of women in many areas of decisionmaking ... absence of women in the judiciary, high levels of illiteracy among women and girls and violence against women” and concluded that “persistence of patriarchal attitudes and stereotypical behavior with respect to the role of women and men in the family and society limit the full implementation of the Convention.”⁹ An understatement indeed.

Where does progress lie in reducing abuses affecting such a major component of the human race? Of course I have no ready formula but only a few pointers, hopefully in the right direction. First, international human rights groups can and should continue to press for governmental recognition of accepted universal rights for women. In this regard I believe it is essential that they do not accept the incorporation of religious law into the national legal system as automatically binding, the way Egypt apparently does, when such incorporation diminishes those basic rights.¹⁰ The Archbishop of Canterbury recently provoked a wave of debate and some outrage when he spoke of his amenability to “plural jurisdiction” in British law and called “the incorporation of Muslim religious law into the British system ‘commendable’” to accommodate minority cultural practices.¹¹ His supporters and his dissenters disagreed on the import of his remarks, but Adam Liptak, in the New York Times, pointed out that U.S. and British courts already recognize religious tribunals as legitimate fora for settling

disputes. The critical criteria, however, is whether there has been genuine consent to these tribunals by those participating in them and whether the tribunals' decisions are offensive to national legal conceptions of justice. For example, according to one expert, civilian courts "should refuse to enforce any ruling from a religious tribunal that leaves a woman worse off than she would have been in a conventional divorce."¹² But this kind of delineation promises to be a thicket for Western nations with substantial cultural minorities, as shown by the Middle East and Asian Islamic countries' experience. I personally believe national courts should go very cautiously in recognition or enforcement of noncivilian tribunal decisions. Even if governmental adherence to international human rights laws and treaties may not in itself be sufficient to guarantee enforcement of basic human rights, it would be disastrous to officially countenance their abandonment in favor of private fora in cases involving basic rights.

Second, international development and loan agencies should become more aggressive in conditioning their assistance to countries on women's equal access to employment, education and other essential opportunities. Private organizations and even commercial companies doing business in the countries can do their part as well. One nongovernmental organization (NGO) I work with is trying to help indigenous tribes in Africa set up carbon emissions trading rights from reforestation projects and in so doing help the women who do the majority of work

on the projects get a fairer share in the profits than current customary laws in those countries allow. In the longer run we are working to reform those discriminatory ownership laws themselves. The New York Times reports that the manufacturer of women's sanitary products sold abroad has contributed their products free to girls in rural Africa who were staying out of school during their menstrual periods. The company additionally provides hygiene education to teachers and bathrooms in the schools so that the girls can utilize the products comfortably. In turn the manufacturer gets loading and docking preferences in at least one country's ports.¹³ Goldman Sachs runs a 2-week business management program aimed to reach 10,000 women entrepreneurs from developing countries.¹⁴ Development statistics have shown over and over that increasing education to women means lower population rates and better health and economic environments for all children.¹⁵

Still old notions, backed up by culture and sometimes religion do not give way easily and, as some who have worked on the problem far longer and more intensely than I point out, women inside such cultures may not always want to separate themselves from their cultural roots because of the tradeoffs in security and social acceptance. Outsiders need to look for solutions that acknowledge the pull of cultural traditions and seek to accommodate them but in ways that do not deny women their most basic needs and rights.¹⁶ Even in the seemingly indefensible practice of female circumcision, one reformer cautions that most

mothers think they are doing something good for their daughters by allowing it—they must be educated to its health risks, not merely scorned for their lack of maternal compassion.¹⁷ But such solutions optimally should come from internal discourse within the societies itself. Those kinds of solutions require a “multi-dimensional perspective that considers not only gender, but also race, ethnicity, sexuality, religion, class, ability and culture.” Women’s rights defined as those they need to move about and thrive in their own society will not always be exact replicas of men’s (a debate still being fought here in our own country).¹⁸ To some, any cultural relativity may indeed seem in conflict with the universality of human rights doctrine but that aspiration must not itself become an impediment to legitimate progress. The goal is to produce more real freedoms for women inside their own societies, not to alienate them from those societies.

Let’s go back to Egypt. Egyptian women have been far from compliant to their subordinate status.¹⁹ But their most ardent advocates acknowledge their past strategies have not produced the success they seek; this they attribute to the willingness of men and even Islamic men to accept their help in coalitions for other goals like nationalism or development but to consign concerns for women’s rights as such to the bottom of the priority list. Egyptian women throughout the 20th century have conducted hunger strikes, marched on Parliament, and gone to jail just like our suffragettes, but unlike the suffragettes too often for causes other than

their own. As a result, their most personal needs—divorce, custody, reproductive rights have stayed within the domain governed by Islamic law, with the secular government willing to take only baby steps to offset the worst injustices of Sharia. They did win the right to vote in 1956 but in the 1990s fewer than 10 percent had registered to vote and women’s representation in Parliament had declined (though it has marginally increased since). In short, their formal rights of access to civil and political rights have not been paralleled by significant political participation (men’s voter registration is obligatory, women’s optimal) and gains in literacy for women have been slow (62 percent of women compared to 38 percent of men are illiterate). Of late there has even been a resurgence in conservative dress and appeals to traditional subservient roles.

There are, however, as two prominent Egyptian women scholars have pointed out,²⁰ a few promising pockets of internal resistance in the form of NGOs, mostly financed by foreign money, who are striving to (1) revisit Arabic history to discern alternative scenarios that highlight women’s contributions to Egypt over the ages and so in effect moderate the traditional cultural perceptions of their proper roles in society, (2) create publishing houses for Arab women to communicate and disseminate their views and issues; traditionally they have been consigned to Western publishing houses with uneven translation and little promotional effort to gain wider audiences;²¹ (3) illuminate the reality of life for

some women (1-5) who are the breadwinners and household heads and must cope with those unappreciated roles in contrast to the prototype Islamic version of the protected, cared for, exclusively family-oriented women, (4) provide credit and loans, also legal advice and assistance for women whose rights are violated. In all of this effort, sadly, the absence of men as supporters is noteworthy. And a recent crackdown by Egyptian authorities on civic activists generally is an added cause for concern. Still these activists, including the women's organizations, refuse to admit defeat—"the majority of Egyptians are, like us, under the age of 35," says one such activist—"our president is 85, and far away from Facebook." There are 60 Facebook groups whose members are dedicated to liberal causes including women's rights; they have achieved some successes in pushing back the most virulent attacks on their members.²²

In the end, then, much of Egyptian women's lack of rights can be traced to what one writer calls "the fact that women are perceived as the bearers and perpetrators of cultural values and social mores [which] increases the resistance to any change in their status and the laws that govern their lives."²³ Caught between religious conservatism and state ambiguity in promoting their rights against some Islamic opponents, their causes have languished. Making their lives better will not be an easy job. I can only be cautiously optimistic that my 30 judges will further the internal movement a little (I am aware many countries with more substantial

numbers of women judges continue to have abysmally bad human rights records). We on the outside can offer encouragement, a little money (not to the judges but to the NGOs), modest peer pressure from the international community but in the end little else. They will have to do it mostly by themselves, against formidable odds. We can only hope the 30 judges will help.

II. Terrorism and Human Rights

The fear of renewed terrorism as well as the terrorism itself has inspired some of the most troubling abuses of human rights in recent times. Two things bear noting about this newest genre of abuses. The first is that advanced countries like the United States have adopted these abusive techniques—sometimes under cover, other times justifying them by dubious manipulation of international doctrines. Some outraged human rights groups have objected, but others, even presidential contenders, have described them as a necessary accommodation to national security. The second thing is that the victims have been almost always noncitizens—we have created in effect a special class against whom abuses can freely be practiced without legal recourse.

Three prominent ways in which the United States (and some of our allies as well) have backtracked on human rights involve the use of torture and coercive techniques in interrogating prisoners to secure information, the prolonged indefinite detention, without charges or opportunity to show innocence, of

noncitizens labeled enemy combatants or suspected terrorists—whether captured on the battlefield or off and incarcerated in Guantanamo or in other secret prisons around the world and third our expanded use of extraordinary rendition—the transfer of an individual to a country where she/he is at risk of torture.²⁴

At various times since the infamous attack on the Twin Towers on 9/11/2001, our government has denied using torture, refused to concede its involvement in renditions and attempted to justify its indefinite detentions of uncharged prisoners in Guantanamo on iconoclastic interpretations of international humanitarian law. I think it is fair to say, however, we are past the denial stage now—six and a half years after 9/11. Testimonies of victims and of interrogators in court cases, confessional books, TV appearances and a series of newspaper leaks by enterprising reporters have discounted such denials and produced a consensus that we do—or at least have done—all those things and the critical questions now are do we really need to do them for national security and, even if they do diminish our risk of attack, should we do them? To our credit, we do debate these issues openly and spiritedly once government involvement has been revealed.

The Executive in these struggles has usually taken an initial position that the President's Commander in Chief Powers enable him to waive virtually all national and international restrictions on what can be done to protect the United States from attack. Under fire in the courts and in the mainstream press the government has

then retreated to a position that the President's wide discretion to decide how to protect our country militates against any but minimal congressional or judicial intervention. This prerogative—they say—goes to interrogation techniques (except for torture which the Executive accepts as barred but redefines in a very limited way that may not now include even waterboarding);²⁵ also to rendition, which it says is a “state secret” which cannot be explored in the judicial forum through cases brought by victims, no matter how damaged or innocent they may be,²⁶ and finally, it says as to indefinite detention that its own military based, CSRTs (combatant status review hearings) held at Guantanamo with prisoners handcuffed and in shackles, without benefit of counsel, access to evidence against the subject, or the right to produce critical witnesses or evidence in their own favor, and with the burden of proof in the government's favor and evidence elicited by torture allowed in, is an adequate substitute for the ancient writ of habeas corpus which would allow Guantanamo prisoners to challenge the basis for their confinement in federal court. They deny as well that foreign-born prisoners have any constitution-based rights to habeas corpus.²⁷

The Supreme Court has intruded three times in the past four years into the Executive's self-declared sphere of discretion but so far only to require (a) some form of due process hearing for U.S. citizens captured on the battlefield engaged in armed conflict against the U.S. or its allies;²⁸ (b) to say that a statutory right to

habeas corpus applies to Guantanamo prisoners,²⁹ but this ruling has now gone by the board since Congress has itself repealed that statutory right, and the issue of whether any constitutional right exists for the Gitmo inmates is now pending before the Court in a third case; (c) to rule that Common Article 3 of the Geneva Conventions to which the U.S. is a party, applies to ban torture or cruel, inhuman or degrading treatment of all U.S. captives in Guantanamo no matter what the nature of the conflict. The Court has also said that Congress must legislate to authorize military commissions to try such prisoners accused of war crimes.³⁰ Following these decisions, in 2006 Congress finally came to bat but with no homeruns for human rights—it approved military commissions with almost equally restrictive rights to the ones the Executive had set unilaterally, it specifically ruled against any private rights to challenge detention or treatment under the Geneva Conventions or other rights-based treaties and it took away habeas corpus as a right for any noncitizen detainees, substituting instead the CSRTs and limited review of their decisions in the D.C. Circuit. It also effectively immunized U.S. personnel from being prosecuted under U.S. law for certain war crimes committed before 2006.³¹ After a public disclosure that tapes showing waterboarding by U.S. interrogators before that time had been purposely destroyed, Congress recently passed legislation that would ban waterboarding, mock executions, sexual humiliation, use of attack dogs, electric shocks and withholding food, water and

medical treatment by the CIA as well as military personnel. It was already forbidden to the military in the Army Field Manual. That controversial legislation, however, was vetoed by the President and his veto was sustained by a comfortable margin of 225-188. (All three presidential contenders say waterboarding is illegal, though McCain voted against the bill as unnecessary and the Administration is now saying that the kind of waterboarding we do is different from the kind almost universally decried as torture and that we ourselves have prosecuted in the past.)³²

Critics of the Administration's take on torture and coercive interrogations which include many senior retired military officials and former Department of Justice and Department of Defense lawyers as well as civil libertarians argued that basic human rights such as bodily integrity should not be hostages to national security—even the “ticking bomb” scenario whereby a terrorist with crucial information on an imminent attack is subjected to torture has no roots in real life experiences or likely occurrences. They say torture doesn't work nearly as well as cooperative and softer supporting techniques do; the information it produces is untrustworthy. The debate still swirls as to whether Abu Zubaida, one of the suspects whose interrogation tapes were destroyed by the CIA, was an “unstable source who provided limited information under gentle questioning” or a “hardened terrorist who cracked under extremely harsh measures.” We know he gave some useful information before any torture or coercion, but whether he gave additional

good material afterwards is up for grabs. The suspect says he told his capturers whatever they wanted to hear.³³ I believe the anti-torture view is the most credible, though the government relentlessly sticks to its view that “enhanced coercive” techniques—it will not call them torture—are necessary with toughened zealots. Perhaps the most powerful argument against them is that it is a 2-way street and if we justify them, so will other countries into whose hands U.S. soldiers may fall.

So far as prolonged, indefinite, detention of so-called enemy combatants is concerned, the Supreme Court has said that it is authorized by international humanitarian law for the duration of a specific armed conflict in which the detainee was engaged in fighting the U.S. or our allies. As to persons captured outside the zone of combat, however—most experts agree—national law governs as to what is done with them. Civil rights groups, as well as the American Bar Association, want habeas corpus restored as a right available to all detainees, foreigners as well as native-born, to insure that an independent and impartial federal judge finds a reasonable basis for holding someone as a so-called enemy combatant (whatever that term finally comes to mean), rather than an innocent bystander caught in the wrong place at the wrong time or sold to the U.S. for bounty by Afghanistan rebel groups—as a substantial component of Gitmo inmates were.³⁴ Human rights advocates also want regular trials for every defendant charged with a war crime in a civilian court, or a military tribunal governed by the U.S. Code of Military

Justice.³⁵ Some others would set up a special national security court to try suspected terrorists where security screened personnel—judge, prosecutor and defense counsel—could rule on all the evidence (classified and unclassified), and ordinary judicial procedures would be adjusted to accommodate the needs of secret intelligence and combat personnel’s unavailability as witnesses.³⁶ Actually, there is a fair amount of agreement among military lawyers as well as human rights advocates that the evils of Guantanamo and “black hole” secret prisons abroad lie in (1) the lack of any fair process for weeding out the real terrorists from those who were truly innocent onlookers; (2) the failure to allow Red Cross access to prisoners wherever located or even to register their existence making them “ghost prisoners”; and (3) the “no end in sight” nature of their confinement in a never-ending war against terror. Few defend anymore the current CSRT hearings which have pronounced all but 38 of 584 inmates not eligible for release. Lt. Col. Stephen Abraham, liaison to the Guantanamo tribunals and to the intelligence agencies, has called the CSRTs “in essence both a hypocritical act as well as an act of moral cowardice” and related his personal experience with pressure brought on the military adjudicators to rule for the government complete with instructions to seek more evidence and revise findings when they fail initially to come to the desired conclusion.³⁷ One counsel wrote a book about these hearings, reviewed in the following way:

The rules said that evidence obtained from detainees who've undergone waterboarding could be admitted. They also provided that even if a prisoner was acquitted he might not be set free . . . [defense] counsel was provided with a "script" ... listing "virtually every word that either side was meant to say in the tribunals." Three of the prosecutors handpicked to try [the] case resigned ... declining to participate in ... a "rigged" process.... What [is] describe[d] should show anyone who believes that those we hold in shackles for five years should have a chance to test the evidence against them.³⁸

Yet getting even a Democratic Congress to restore habeas corpus in place of these hearings has proven politically impossible, and lower federal courts have ruled that foreigners held outside the Continental United States have no constitutional rights to the writ.

This draconian policy has even been extended to persons legally resident in the United States. The result has been cases like Al Marri—a Pakistani here with his five children and wife on a student visa, picked up and detained in solitary confinement in a military prison for four years without charges or trial.³⁹ There can be little doubt that our misadventure in Guantanamo and around the world (U.S. currently has in its custody 70,000 prisoners in the war on terror, if we include Iraqis) has taken a bitter toll on our credibility as leaders of human rights development and advocacy around the world. Even more discouraging has been the recalcitrance of not just the Administration but Congress and even the courts to come down strong on the side of banning abuses. Fear is a powerful motivator and while in past conflicts we have temporarily retreated from our fidelity to personal liberty and fair process, we have never done so on so large a scale as in these past

six years. How slowly and how far we will retrace our steps and whether the rest of the world will ever again regard us as the “friendly giant” remains to be seen.

The third rail of U.S. terrorist policy that raises serious rights challenges is the expanded use of “extraordinary rendition,”⁴⁰ the seizing without lawful process of a suspected terrorist in another country (or even in a U.S. airport), and transferring him to the custody of a third party country for interrogation and imprisonment, usually without the consent or any formal process for extradition. There is nothing illegal about our arranging with another country’s enforcement branch to have someone extradited through that country’s normal process to a third country—as long as we have no reason to believe the subject will be subjected to torture or abuse in that country. But that is not what is happening. The kind of extraordinary rendition that is at issue since 9/11—namely the transfer to a country where there is substantial reason to believe the suspect will undergo torture—is not consonant with international law; over the past several years we have outsourced terrorism suspects to Egypt, Saudi Arabia, Jordan, Syria, Morocco and Uzbekistan, countries where our own State Department alleges abuse of detainees is frequent. Leila Sadat quotes a CIA agent: “If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt.”⁴¹ The U.S. has used all three along with other “black sites” in Thailand, Afghanistan

and Eastern Europe. Article 3 of the Convention Against Torture (CAT), as well as domestic law (FARRA—the Foreign Affairs Reform and Restructuring Act) bar extradition or return of a captive to a country where there are substantial grounds for believing he will be subjected to torture.

The ICCPR gives all persons lawfully in a country the right to a judicial hearing before they can be removed forcibly. Kidnapping a resident of a foreign country without official approval is a recognized violation of sovereignty; we have nonetheless done it in several administrations, though previously claiming to limit its use to transporting a suspect to a country where he would be given a fair trial on alleged crimes.⁴² This Administration, however, has opined that precedent allows such removals for “investigation” as well as for trial. Thus, the U.S. arranged (with Canadian consent) the forcible transport of Maher Arar, a dual Canadian/Syrian citizen to Syria after he was seized on a plane at JFK airport; he was tortured and imprisoned for a year in Syria after which an official Canadian investigation concluded he was not a terrorist threat at all.⁴³ Similarly, El Masri, a German citizen, was seized by the CIA in Macedonia and transferred to Kabul where he was tortured, and then released when it was found he was not a terrorist. When he tried to sue the CIA, the Administration pleaded the “State secret” privilege and the case was dismissed.⁴⁴

The essence of extraordinary rendition is that it impugns national sovereignty as well as abuses human rights. Opponents call it “illegal, morally wrong, counterproductive, or a combination of the three.”⁴⁵ They condemn rendition that risks inhuman and degrading treatment as well as torture and rendition achieved by nonenforceable and nonmonitored “informal assurances” of third-party country officials that no abuse will take place. They say human rights law demands that an individual seized for transfer should have a right to appear and challenge the cause for his forcible arrest before some impartial body in the state he is being taken from, and to show that he is in fact vulnerable to abuse if transferred. They emphasize that even when the state where the suspect currently resides consents to the transfer, that does not abrogate the international human rights mandate he be given some adjudication process before removal.

All told, the U.S. incorporation into its antiterrorist policy of practices, like coercive interrogations of the type disclosed in CIA tapes and in Abu Ghraib, its continued justification of indefinite detention of persons captured or seized off the battlefield without any acceptable process for proving innocence, and its snatching and transfer of foreigners abroad to places where they are subject to abuse present an overwhelming and many think unnecessary abrogation of human rights in times of national crisis. Now almost seven years since the terrorist attack which precipitated our retreat from accepted principles of international humanitarian

law—the human rights counterattack has only begun and it is slow and halting. It is extremely difficult as the current habeas corpus fight in Congress and in the courts shows to gain back lost rights, even when the spectre that spawned the laws wanes. One can only hope that new presidential leadership will accelerate the process.

Are there lessons to be learned? I hope so. Now, while we are not in the immediate aftermath of an attack, we should formulate a legitimate process for dealing with large numbers of captures, beginning with the field sorting set out in the Geneva Convention Article 5 that stood us so well in prior wars—where the innocents are screened out in close proximity—time and place—to the battlefield. More than 1,000 were released under that system in the first Gulf War. As to those who are kept on as combatants after such a screening we need a later process that provides access to evidence, counsel, and ability to produce evidence for suspects (none of this need risk disclosure of national security information) and a meaningful appeal (as we know it, not the truncated procedure used for the CSRTs) to insure they truly are enemy allies. We need, too, an agreed upon definition of who is an “enemy combatant” subject to detention when he is apprehended far from any site of conflict. The Geneva Conventions are overdue another look at what rights nonprisoners of war detained for the “duration” should have apart from Convention Article 3. Terrorism captures seized away from the

battlefield should be dealt with in our ordinary criminal processes. Renditions should be legally authorized by the country in which the seizures take place and bona fide assurances required of non-torture from the countries to which they are sent with followup monitoring.⁴⁶ No torture or near torture techniques should be used in interrogations—the Army Field Manual, which covers armed service captures, should apply to all. Were such a system legislated and in place, if then, God forbid, another attack took place, we would not be at the mercy of young zealots and ad hoc paradigms like the “war on terror”; we would be prepared to draw a reasonable balance between national security and basic human rights that would take us back on the road to international credibility.

III. Trials of the Tribunals

One of the most serious problems in human rights law is enforceability—how to enforce human rights when the country in which the rights are being abused is either itself the abuser or unwilling or unable to protect its citizens from private marauders. It was almost half a century after Nuremberg’s groundbreaking trials of Nazi war criminals before another international criminal law tribunal was established in 1993, this time in the Hague under U.N. auspices to try alleged perpetrators of war crimes, crimes against humanity and genocide committed during the Balkan conflict in the early nineties. The International Criminal Tribunal for the former Yugoslavia (ICTY) on which I served as the American

Judge for two years, was followed in 1994 by the ICTR to try similar crimes committed during the Rwandan genocide. In 2002, the Special Court for Sierra Leone came into being following a brutal 11-year civil war in that impoverished country; this time a hybrid court of mixed international and local judges and prosecutors was mandated to prosecute those most responsible for atrocities committed in a war that prominently featured large-scale use of kidnapped child soldiers doped with narcotics and armed with instructions to maim innocent civilians in their home villages as well as the use of forced labor in the diamond mines. Across the globe, Cambodia is now embarked on its own journey into the past, the trial of the remaining handful of Khmer Rouge leaders who are allegedly responsible for some 1.7 million deaths (one-fourth of the then population of Cambodia) and millions of displaced persons in the late seventies. In 2002, the first permanent international criminal court was established by the Rome Treaty, its charter now subscribed by 105 nations, not including the United States. It too will prosecute war crimes, crimes against humanity and genocide (more elaborately defined than in the earlier court statutes) committed in or by residents of party states or consenting ones. But it will feature a complementarity design leaving to national courts the prosecution of such crimes if they are willing and able to do the job.⁴⁷

The advent of the international tribunals was generally hailed by diplomats, international experts and academics as a quantitative leap forward in enforcement—against individuals—of the international bans against these atrocity crimes. And their almost two-decade presence on the scene has produced some impressive results: a solid track record of prosecutions and convictions of high- and low-level perpetrators, including heads of state like Milosevic (who died mid-trial) and Charles Taylor, the former President of Liberia now on trial before the Special Court of Sierra Leone in a rented courtroom in the Hague, though some of the worst tyrants, like Karadzic and Mladic, remain at large after 15 years. The tribunals have produced as well a formidable body of jurisprudence spelling out the application to a myriad of on-the-ground situations of the previous, sometimes vague and often soft definitions of what are war crimes, what are defenses to those crimes, how far does the definition of command responsibility allow for the prosecution of high-level offenders who never set foot on the battlefield, and how far down the ladder does culpability reach for lower-level involvements by what some would regard as mere cogs in the war machine. Whether these prosecutions have actually deterred leaders from committing atrocities in new or ongoing wars remains an open question as well as to what degree they have assuaged the residual torment of survivors and grieving kin of victims or affected in any meaningful way the attitudes of ordinary people in the benighted lands toward their wartime

enemies. The first wave of these international criminal courts—the ICTY, ICTR, SCSL and ECCC—will go out of business within the next few years, leaving the permanent ICC in the Hague pretty much a loner.

The international criminal courts have not been without their critics; the U.N. courts for the Balkan and Rwanda conflicts have been dubbed too slow and too costly;⁴⁸ the problem of interfacing a hybrid court into a national court system with a history of pervasive politization and corruption is now being played out in Cambodia; the enduring search for adequate resources to pay salaries and build courtrooms has proved so time consuming that key players who should be in the courtrooms are required to spend up to one-third of their time going from country to country seeking money. Too high expectations have hurt the credibility of these courts as well; the international and hybrid courts so far have not been able to handle cumulatively more than a few hundred of the hundreds of thousands of human rights violators that the wars have spawned.⁴⁹ Other fora relying on local customs, reconciliation, communal punishment have emerged to supplement the international judicial tribunals; and in a few countries national courts like Bosnia's war crimes chamber have been established to help take up the slack. Despite much academic discussion about the comparative merits of criminal prosecutions versus noncourt alternatives, there is, I believe, a wide consensus that the international community needs to stay involved in prosecuting the worst crimes against

humanity and genocide that national and local fora will not or cannot cope with.

An example is the new Liberian President's request that Charles Taylor, the former President, not be tried in his homeland for fear of the political destabilization his trial might bring.⁵⁰

These early internationals and hybrids are usually evaluated on the basis of their contributions to ending the so-called culture of impunity for high-level offenders of human rights, their success in forging a new and robust jurisprudence for international humanitarian law and human rights and their capacity to provide fair and efficient trials and to impact the lives and attitudes of the people in the warring region.⁵¹

But the ICC has unique challenges as an enforcer of human rights. For one thing, unlike the older tribunals (except for the first few years of the ICTY when there were no trials), the ICC is and will often be dealing with ongoing conflicts in which crimes are still rampant. Not only does that fact alone suggest increased hostility to and lack of cooperation with the court in securing witnesses, documentary evidence, and, most critically in apprehending the perpetrators themselves. But it also means that many inside the region as well as international diplomats outside may view the court's intervention (even at the request of a state party or the Security Council) as an impediment to peace negotiations. Amnesties, which have always been an important bargaining chip in peace negotiations, are

not recognized as legitimate bars to prosecution by the Rome Statute; neither is there any traditional immunity for heads of state, and the law of war going back to Nuremberg restricts a defense of “just following orders” which had heretofore protected subordinates from punishment for wartime crimes.⁵²

This tension between peace and justice is declaimed as a false one by many (indeed, one NGO is called “No Peace Without Justice”) but it does exist and is acknowledged by the ICC prosecutor Luis Moreno Ocampo himself. More importantly it has emerged as a serious problem in 2 of the 3 African countries in which ICC indictments have already been issued (Uganda and Sudan). In all 3 of the countries, the considerable problem of apprehending indictees experienced by the earlier tribunals has been exacerbated by ongoing conflicts so that of the ICC’s eight current indictees, only three are in custody, all from the Democratic Republic of Congo. The rebel DRC militia leaders in custody are indicted among other things for conscripting child soldiers and widespread campaigns of sexual abuse. The internal conflict in the DRC goes back to 1998 with 5.4 million dead already in its wake and 400,000 uprooted in the past year alone. The largest U.N. peacekeeping force in the world, MONUC, consisting primarily of African troops (18,000) has been assigned there but seems largely ineffective so far although it did assist in the arrest of the ICC indictees. The country itself is plagued by widespread corruption and inefficiency, a parasitic army and no operating

judiciary. It is the site of some of the most heinous crimes against innocent civilian and humanitarian organizations in history, rape is endemic in many areas and the ICC must conduct its investigation and prosecution of atrocities simultaneously with a conciliation process among 25 warring militia groups. A recently arrived at agreement among some of the warring factions includes a general amnesty but of course cannot insulate leaders from international charges of crimes against humanity.⁵³ One of the indictees is scheduled for trial in June, 2008.

The situation in Northern Uganda may be even more critical—after a 20-year war with insurgents, five ICC indictments were issued in 2005 to members of the Lords Resistance Army, allegedly responsible for 100,000 deaths and displacement of nearly 2 million civilians. None of the arrest warrants have been executed, two of the subjects are now dead and there have been persistent clamors to lift the other three indictments in order to facilitate peace negotiations. Joseph Kony, the highly unstable rebel leader and his forces, are holed up in Garamba National Park in the DRC; according to some observers who have spoken with him, he dreads the spectre of any trial in the Hague but might consider exile to a third country which international purists vehemently object to. Kony rejects any peacekeeping force in part because he fears it may be used to arrest him, as apparently happened to indictees in the DRC.

Indeed, in just the last month a tentative peace agreement was reached between the Ugandan government and the LRA to set up trials inside Uganda's judicial system instead of the ICC (the Ugandan government asked for the initial ICC investigation) as a prelude to a ceasefire and peace negotiations. According to rebel leaders, "the fighters [had] said they would not leave their bush hideouts unless the [ICC] indictments were withdrawn." Although under the Rome Statute the ICC could cede jurisdiction to the Ugandan government if it were deemed "able and willing" to hold fair and effective trials, or the Security Council could order a suspension of ICC proceedings, the international NGOs were initially split on the right way to go. Human Rights Watch said maybe suspension is an option worth looking into. Amnesty International said No; it would set a "terrible precedent." Refugees International said "the enforcement challenges presented by the Ugandan case suggest that expectations as to what the ICC can achieve in its early years may be too high ... the international community should explore ways to strengthen the ICC's enforcement capacity in ways that minimize the risks to stability and to drawing out protracted humanitarian tragedy."

The ICC prosecutor was adamant. Ocampo said it was up to the ICC court to determine the admissibility of the case despite the new agreement. And the ICC court itself has requested the Ugandan government to provide them with information about the proposed new Ugandan tribunal for trying the rebels.

Meanwhile, the ICC prosecutor worries that humanitarian aid is being diverted to Kony's coffers and urges more vigorous monitoring by donor countries and organizations on where this aid ends up, as well as stronger efforts at isolation of Kony and his cronies from any international relationships. There is a wide consensus that even if the ICC indictments of rebel leaders were removed, any peace in Uganda would not be lasting unless substantial aid in the form of food, retraining of soldiers, education of war-trained children is afforded by the outside world.⁵⁴ Sudan is said to wield much influence over Uganda (and Kony) in this regard, but ironically it is Sudan itself which poses as much of, if not an even more, crucial test for the ICC.

Darfur, in northern Sudan in the opinion of much of the international community, poses, if anything, an even more daunting test of the ICC's credibility than Uganda. The referral to the ICC came from the Security Council and the U.S. decision to abstain on the referral resolution was a victory for ICC supporters in light of the U.S.' vigorous opposition in the past to the ICC. That referral came three years ago. Last year two indictments were issued—one against a janjaweed leader (the janjaweed are the government-sponsored militia which bomb and ravage the black African villages purportedly looking for rebels) and the other against the former Minister for the Interior, Ahmad Harun. So far, neither has been arrested. Harun was accused of recruiting and funding the janjaweed and his co-

indictee of executing the nefarious attacks against civilians, herding them into refugee camps and then attacking the camps, raping women and preventing their access to humanitarian aid. Because the perpetrators are Arab and the victims black Africans, the massacres have been viewed in some quarters as a clear case of genocide, but in others, including a U.N. Inquiry Group, they have been labeled as crimes against humanity. The ICC prosecutor has called on the League of Arab States, the U.N. and the EU to urge Sudan to give the indictees up, but to no avail. The government of Sudan has adamantly refused and says it will continue to conduct its own war crimes trials—with predictable results. The ICC prosecutor has gone back to the Security Council once already to ask its assistance in getting Sudan to comply with the arrests. The Sudan government's response so far, however, has been to put Harun in charge of humanitarian aid and deployment of the U.N. multinational force sent to prevent more violence in Darfur. More indictments we are told are in the offing against higher-ups who have “protected” the indictees and have spearheaded attacks against peacekeepers and humanitarian aid workers.⁵⁵

Since the Darfur conflict began five years ago, 200,000 civilians have been killed, 2 million displaced in refugee camps. For a period, 9,000 poorly trained and equipped African nation troops tried to stop the carnage but with little or no success. A larger multinational force of 26,000 was scheduled by the U.N. to

begin operating in January of this year, but so far member states apart from the U.S. who has been good on its word, have refused to provide adequate numbers of soldiers or equipment, helicopters, etc., necessary to make it an effective counter to the janjaweed. Moreover, Harun predictably has laid a thousand obstacles in the way of the new force, in part, it is reported, because he fears they will be used to arrest him, provoking an editorial column in the Washington Post that the ICC itself may be an obstacle in the way of peace and salvation for Darfur's innocent victims.⁵⁶ Sudan's government has vowed never to turn over the indictees. But at this point sympathizers of Darfur's suffering victims part company on what to do next. One group complains the few outstanding warrants are not high level or numerous enough. They urge the prosecutor to bring down higher-level indictments to build the political momentum among allies to make Sudan honor the ICC's processes; China's intervention is particularly sought because of the influence it wields with Sudan as its chief oil purchaser and military aid partner, and very recently it has begun to press for a change in Harun's policy.⁵⁷ Other groups, however, believe peace and protection of civilians are the first priorities and indictments of higher-ups may in fact discourage negotiations. They also think the key is African neighbors rallying against Darfur's actions and expecting more diplomatic pressure on it. But for now, in grim irony, Harun remains the state minister for humanitarian affairs in charge of caring for the very people he

displaced. Ocampo, the ICC prosecutor, seems not to despair; he says Harun's "destiny" is the court. Like Kony, Harun apparently dreads the prospect of a Hague trial, scurrying home from Jordan when named as a key suspect.⁵⁸ For the moment it looks as though the beleaguered U.N. peacekeeping force is the main hope for any stop to the carnage, while new peace efforts involving all the factious rebel groups are pursued. The role of the ICC in all this remains murky.

In its five years of operation, then, the ICC has indicted 10 defendants in 3 warring African countries and obtained custody of three. That record invites several questions. What is it reasonable to expect from the ICC as an enforcer of human rights in these most dreadful contexts? Is any peace no matter how fragile sometimes worth the price of amnesty for cruel and ruthless violators? And will a peace built upon the impunity of the worst violators last for long? Does fear of an international trial really hurt the prospects of peace or is it a kind of excuse for recalcitrant disputes? If the ICC keeps its own profile too low by indicting chiefly middle-level miscreants, does it risk irrelevance; if it goes after the top dogs and misses them, is that risk equally high? Remember the adage: "If you shoot at the King, don't miss." If countries do not come to the aid of the ICC in securing arrests, will the symbolism of its indictments along with an impressive jurisprudence built on the cases it does get to prosecute be enough to maintain its player status in the human rights field? Does its African concentration, which has

been criticized in some quarters, court a backlash from national leaders there in terms of not cooperating with the court? (For at least a period after his indictment by the Sierra Leone tribunal, Charles Taylor was afforded asylum in Nigeria.) In sum, the next several years will be critical ones for the ICC and I can only again caution modesty in our expectations but at the same time escalation of the efforts by ICC participating countries to use diplomatic and economic pressures to make Sudan comply. The ICC, like its predecessor courts, wobbles on a shaky fence between impartial justice and political reality—and it knows it. But its success is crucial to the notion of enforceable human rights around the globe and its perceived failure could be a monumental disappointment for international human rights.

Recently, in 2005, the U.N. took a further step and articulated what some referred to as a near-revolutionary doctrine called a “responsibility to protect” (acronym R2P), against atrocities on the part of a state toward its people and if the state can or will not protect them, the right of international forces to intervene and do it. Academics and commentators are busily engaged in conferences and symposia trying to define just what the scope and direction of R2P should be—one articulation defines it as three including Ps—international peacekeeping, prevention through diplomacy and economic pressure, intervention in extreme cases and punishment of perpetrators of atrocities.⁵⁹ Ocampo sees the ICC as a key

component in R2P working with state parties in preventing and punishing rights violators as well as bringing its own cases. The ICC would be a central fulcrum in a “truly global system of international justice,” sharing information with states, brokering international support for domestic justice systems and working cooperatively with States to apprehend suspects including multinational task forces under U.N. or ICC auspices to hunt down or negotiate the transfer of suspects within a recalcitrant State border.⁶⁰ Although skeptics point out R2P has not yet succeeded in stopping or even slowing down the carnage⁶¹ in Darfur, it is supported by 190 nations and does lay down criteria for military interventions in extreme cases. It could be a beginning.

Finally, when the other courts close down, the ICC will be a lonely flagship in international criminal enforcement of war crimes, genocide and crimes against humanity. (There are, however, a growing number of regional human rights courts in Africa, Europe and the Organization of American States.) The ICC’s judgments will be uniquely enforceable against individual perpetrators around the world; its interpretation of human rights, customary law and the law of war will stand alone in jurisprudential significance. Its support by nation states has to be a major factor in any global rule of law campaign. It can probably survive without us, but not as robustly as with us. Even if we don’t join up we should participate as an observer and a commentator in the 2010 Statute Review Conference and in the Special

Working Group on the Crime of Aggression. The critical issue is have we the will and the smarts to seek accommodation of any legitimate reservations we might have and some time in the near future become a part of what is probably the greatest experiment in human rights enforcement of our new century.

Now let me end on a hopeful note. The world is not a pretty place right now—which makes it all the more important to preserve and nurture those forces and great ideas that are trying to move us toward a better place. My three vignettes have perhaps described this trio of ambivalent situations too grimly—though I think not. The point in all of them is to illustrate the complexity and interdependence of human rights with the rest of the world’s consuming issues. None of that should—nor will it—deter the invaluable work of human rights activists; we can only hope it will sensitize our leaders to the human rights implications of their day-to-day decisions. A recent article in the New York Times by Kirk Johnson gave voice to the feelings of all who labor in the human rights vineyard; I close with an excerpt from it:

How far rhetoric and passion can take a man or a nation is another question and there’s plenty of reason to doubt that we’re anywhere near a transformative era in 2008. Look around today and it’s easy to see nothing but cynicism, apathy, polarization and political gridlock. . . . But if you listen closely, you might hear something—a faint but persistent tapping at the window that economists, criminologists and biologists say is the sound of change arising anyway. From capital punishment to global warming to homosexuality to abortion, many of the social issues that divide us now are shifting and evolving—perhaps even in some instances into a new consensus or at least, and no less profoundly, toward a reframing of the old debate . . .

Ideas can and do break the barriers between thought and action, between the academy and the shoe-leather reality of the barricades, and sometimes it happens suddenly.

“One day it’s the Roman Empire and everybody believes in the pagan gods—the next day it’s Christian—how does that happen...” “Or the ‘rights of man’ which became a rallying cry of the French Revolution. Nobody mentions it, and then a few years later, there’s a revolution over it.”⁶²

Human rights thinkers here and human rights workers out there might just be making that revolution right now.

Thank you.

Endnotes

¹ See Berta Esperanza Hernandez-Truyol, Human Rights Through a Gendered Lens in Kelly D. Askin & Dorean M. Koenig, *Women and International Human Rights Law*, Vol. 1, p. 3 (1999) (hereafter *Women's Rights*); Kelly D. Askin, *War Crimes Against Women* (1997).

² See Douglass Cassel and Jill Guzman, The Law and Reality of Discrimination Against Women in *Women's Rights*, supra note 1, at 295 et seq.

³ Id. at 313 et seq.

⁴ Truyol, supra note 1 at 31, 37.

⁵ Marsha A. Freeman & Arvonne S. Fraser, Women's Human Rights: Making the Theory a Reality in *Human Rights: An Agenda for the Next Century* (1994) at 105.

⁶ See Noah Feldman, Why Shariah?, N.Y. Times Magazine, Mar. 16, 2008 at 46, 49 (some Islamic politicians interpret Shariah as a “legal system in which God’s law sets the ground rules, authorizing and validating everyday laws passed by an elected legislature ... to function as something like a modern constitution.” Under such a system, “judicial review of legislative actions [would] guarantee that they do not violate Islamic law or values.” The role of judges as guarantors of the “rule of law” in such a system would be greatly increased).

⁷ Report of the OMCT (World Organization Against Torture), to the Committee on the Elimination of Discrimination Against Women, 24th Session (2001).

⁸ Alternative Report by Al-Nadin Center for the Rehabilitation of Victims of Violence, Implementation of the International Covenant on Economic, Social and Cultural Rights, April, 2000.

⁹ Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt (2001),

¹⁰ “Respect for culture does not require embracing traditions that marginalize or victimize women,” Truyol, *supra* note 1 at 37.

¹¹ Anne Appelbaum, A Craven Canterbury Tale, Wash. Post, Feb. 12, 2008 at A19.

¹² Adam Liptak, When God And the Law Don’t Square, N.Y. Times Week in Review, Feb. 17, 2008 at 3 (quote from Professor Robin Wilson).

¹³ Claudia H. Deutsch, A Not-So-Simple Plan to Keep African Girls in School, N.Y. Times, Nov. 12, 2007 at 6.

¹⁴ Tomoeh Murakami Tse, Teaching Women the Ways of the Marketplace, Wash. Post, Mar. 6, 2008 at D8.

¹⁵ See, e.g., Margaret E. Galey, Women and Education in *Women’s Rights*, *supra* note 1, at 403, 439.

¹⁶ See Christina M. Cema and Jennifer C. Wallace, Women and Culture in *Women’s Rights*, *supra* note 1, at 647 et seq. (“transformation will begin internally and find its support externally”).

¹⁷ Sarah Corbett, A Cutting Tradition, N.Y. Times Magazine, Jan. 20, 2008 at 44, 50.

¹⁸ Truyol, *supra* note 1, at 38.

¹⁹ Material in the text paragraphs following this note and dealing with the history of Egyptian women come from Nemat Guenena and Nadia Wassef, *Unfulfilled Promises: Women's Rights in Egypt* (1999).

²⁰ Guenena and Wassef, *supra* note 19 at 51 (“Strategies of Resistance”).

²¹ But see Lorraine Adams, *Beyond the Burka*, *N.Y. Times Book Review*, Jan. 6, 2008 at 12 (“The veiled, oppressed Muslim woman has become overexposed. American book clubs consume her memoirs.... Intellectuals argue over how she should be described and who can save her.” The author, however, also acknowledges American perception of Muslim literature “remain distorted” due to bad translations and that true Egyptian pioneers in women’s rights have their works “translated by small British publishers with little promotional muscle and modest sales.”)

²² Jackson Diehl, *Egypt’s YouTube Democrats*, *Wash. Post*, Dec 17, 2007 at A21.

²³ Guenena and Wassef, *supra* note 19 at 69.

²⁴ Margaret Satterwhite, *What’s Wrong With Rendition*, 29 *ABA National Security Law Report*, No. 4, Nov. 2007 at 1.

²⁵ See, e.g., Joby Warrick and Walter Pincus, *House Passes Bill to Ban CIA’s Use of Harsh Interrogation Techniques*, *Wash. Post*, Dec. 14, 2007 at A7 (bill comes in wake of disclosures CIA destroyed videotapes showing use of harsh interrogation tactics on terrorism suspects; White House vows to veto bill which “would prevent the United States from conducting lawful interrogations ... to obtain intelligence needed to protect Americans from attack”).

²⁶ *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

²⁷ *Boumediene v. Bush*, 476 F.3d 981, 1009 (D.C. Cir. 2007) (dissent of Judge Rogers); *Al Odeh v. United States* (same cite) (cases currently pending in U.S. Supreme Court #06-1195, 06-1196).

²⁸ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

²⁹ *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

³⁰ *Hamdan v. Rumsfeld*, 546 U.S. 1166 (2006).

³¹ Military Commissions Act of 2006, 10 U.S.C. § 950 et seq. (2006). For a comprehensive review of the Act and its origins, see Diane Marie Amman, *Punish or Surveil*, 16 *Transnational Law & Contemporary Problems* 873 (2007).

³² Dan Eggen and Michael Shear, *Vote Against Waterboarding Bill Called Consistent*, *Wash. Post*, Feb. 16, 2008 at A10; Dan Eggen, *Justice Official Defends Rough CIA Interrogations*, *Wash. Post*, Feb. 17, 2008 at A3.

³³ See Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect*, *Wash. Post*, Dec. 18, 2007 at A1, A21.

³⁴ See Brennan Center, *Ten Things You Should Know About Habeas Corpus* (2007) at 3 (“Until now, no American law left individuals detained by the Executive without any legal means to challenge their detention”; “disturbingly, there is much evidence that many, if not most, detained there are in fact innocent of any connection to terrorism—and that the government has long been aware of this”) (citing 2002 confidential CIA memo).

³⁵ See letter of Feb. 27, 2008 to President of the United States from ABA President William H. Neukom (“Since 2002, the ABA has urged that military tribunals be governed by the Uniform Code of Military Justice ... including the right to habeas corpus review....”)

³⁶ See discussion in *Due Process and Terrorism*, A Post-Workshop Report of the ABA Standing Committee on Law and National Security and the National Strategy Forum (Nov. 2007) at 16; Jack Goldsmith & Neal Katyal, Editorial, *The Terrorists’ Court*, N.Y. Times, July 11, 2007 at A19.

³⁷ Michael Melia, U.S. Reviews Gitmo Combatant Hearings, AP release Oct. 12, 2007 (recounting similar statements by Navy Capt. Theodore Fessel, Jr., lead officer at Guantanamo for Department of Defense overseer agency of CSRTs).

³⁸ Dahlia Lithwick, *Inside Gitmo* (reviewing *Eight O’Clock Ferry to the Windward Side* by Chris Stafford Smith) N.Y. Times Book Review, Dec. 16, 2007 at 11; see also Eugene Robinson, *Orwell at Guantanamo*, Wash. Post, April 3, 2007 at A23 (describing redacted transcript of CSRT hearing featuring undisclosed evidence and redacted allegations of torture); Mark Hansen and Stephanie Ward, *The 50-Lawyer Poll*, Sept. 2007, ABA Journal at 30 (50 defense attorneys who have tried terrorism cases vote judiciary has acquitted itself best (80%) and the executive worst (84%)).

³⁹ *Al-Marri v. Wright*, #06-7427 (4th Cir. 2007) (Petition for Rehearing and Rehearing En Banc).

⁴⁰ Margaret Satterwaite, *What’s Wrong With Rendition?*, 29 ABA National Security Law Report, No. 4, Nov. 2007 at 1.

⁴¹ Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 *Case Western Reserve J. of Int'l Law* 309 (2006) at 314.

⁴² Satterwaite, *supra* note 40; David Benjamin, *5 Myths About Rendition*, *Wash. Post, Outlook*, Oct. 21, 2007 at B3.

⁴³ Ian Austin, *Deported Canadian Was No Threat, Report Shows*, *N.Y. Times*, Aug. 10, 2007.

⁴⁴ See note 26, *supra*.

⁴⁵ Satterwaite, *supra* note 40.

⁴⁶ See, e.g., Philip Heymann and Juliette Kayyem, *Preserving Security and Democratic Freedoms in the War on Terrorism* (JFK School of Government, 2004) (non-U.S. prisoners cannot be seized from any state which has been certified as an ally; wherever seized the suspect is entitled to the same priorities as an alien facing detention proceedings in the U.S.).

⁴⁷ For an extended discussion of the origins and work of these tribunals, see Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—The Role of International War Crimes Tribunals*, 2 *J. of Nat'l Security Law & Policy* 111 (2006).

⁴⁸ See, e.g., Symposium, *The ICTY 10 Years On: The View from Inside*, 2 *J. Int'l Crim. Justice* 353 (2004).

⁴⁹ *Ibid.*; Seth Mydans, *Khmer Rouge Figure is First Charged in Atrocities of Killing Fields*, *N.Y. Times Int'l*, Aug. 1, 2007 at A6; Craig Timberg, *Sierra Leone Special*

Court's Narrow Focus, Wash. Post, Mar. 26, 2008 at A11 (5 convictions in 6 years at a cost of \$150 million criticized).

⁵⁰ See Marlise Simon, Trial of Liberian Ex-Leader Languishes Amid Delays, Bureaucracy and Costs, N.Y. Times Int'l, Aug. 27, 2007 at A6.

⁵¹ Ellis, *supra* note 47 at 154.

⁵² Rome Statute, Art. 27 (Irrelevance of Official Capacity); Art. 33 (superior orders not defense unless prisoner didn't know they were illegal or not "manifestly unlawful").

⁵³ The information in this section, except as otherwise noted, comes from the monthly bulletins of the Open Society Justice Initiative, International Justice Section (on file with author); see also Stephanie McCrummen, Groups Sign Deal to End Long Fight in E. Congo, Wash. Post, Jan. 24, 2008 at A13; Anna Husarska, Congo's Neglected Tragedy, Wash. Post, Jan. 12, 2008 at A17.

⁵⁴ Open Society Bulletins; Peter Eichstaedt, Uganda Ceasefire Brings Hope, Institute for War and Peace Reporting (<http://www.iwpr.net>) (Kony afraid indictees would be arrested and "whisked away to jail cells in the Hague"; Kony says "he won't sign a final peace deal until the ICC lifts the indictments"); U.N. Office for Coordination of Humanitarian Affairs, Uganda: Peace, Justice and the LRA, Feb. 21, 2008; Michael Gerson, The Price of Peace in Uganda, Wash. Post, July 25, 2007 at A15 ("victims seem to prefer peace to a grand reckoning"); Nora Boustany, Ugandan Rebel Reaches Out to International Court, Wash. Post, Mar. 19, 2008 at A12; Luis Moreno-Ocampo, Address to the Assembly of State Parties, 30 Nov. 2007 (These arrest warrants must be executed. There is no excuse.)

⁵⁵ Open Society Bulletins; Nora Boustany, State Dept. Rights Report Call Record of Sudan “Horrorific,” Wash. Post, Mar. 12, 2008 at A9 (Department of State accuses Sudanese government of obstructing UN peacekeeping force); Nicholas Kristof, Shameless in Sudan, N.Y. Times, July 9, 2007 at A21; Women’s Initiative for Gender Justice; Eye on the ICC 2008: 1 at 5 (Newsletter Mar. 27, 2008); Maggie Farley, War Crimes Suspect Strolls Darfur Region, Boston Globe, Aug. 19, 2007; Ocampo Address to the Assembly of State Parties, *supra* note 54; Statement by Louis Moreno-Ocampo to UN Security Council, Dec. 5, 2007.

⁵⁶ John Sullivan, UN Security Council Approves Joint Force of Up to 26,000 Peacekeepers for Darfur, New York Times Int’l, Aug. 1, 2007 at A10; Delay, Obstruction and Darfur, N.Y. Times editorial, Dec. 10, 2007 at A14; Help Wanted in Darfur, Wash. Post editorial, Feb. 3, 2008 at B6; Lydia Polgreen, Darfur Peacekeepers Face Daunting Obstacles, N.Y. Times, Mar. 24, 2008 at A1; Stephen Rademaker, Unwitting Party to Genocide, the International Criminal Court is Complicating Efforts to Save Darfur, Wash. Post, Jan. 11, 2007 at A25.

⁵⁷ Edward Cody, China Steps Up Its Argument Over Darfur, Wash. Post, Mar 8, 2008 at A11; Lydia Polgreen, China in New Role, Uses Ties to Press Sudan on Troubled Darfur, N.Y. Times Int’l, Feb. 23, 2008 at A7.

⁵⁸ Farley, *supra* note 55.

⁵⁹ See, e.g., Report of the December 2007 Conference on “The Responsibility to Protect and the International Criminal Court: America’s New Priorities,” Center for International Human Rights, Northwestern U. School of Law.

⁶⁰ Address of Luis Moreno-Ocampo to R2P Conference, *supra* note 59 on December 6, 2007.

⁶¹ For a skeptical view of R2P, see Diane Marie Amman, *The Course of True Human Rights Progress Never Did Run Smooth*, 21 *Harvard Human Rights J.* (forthcoming 2008).

⁶² Kirk Johnson, *We Agreed to Agree, and Forgot to Notice*, *N.Y. Times*, *Week in Review*, Jan. 6, 2008 at 1.