SIXTEENTH ANNUAL GROTIUS LECTURE

The lecture began at 5:00 pm, Wednesday, April 9, and was given by Radhika Coomaraswamy, former UN Special Representative of the Secretary-General on Children and Armed Conflict; the discussant was Diane Marie Amann, Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law; Special Adviser on Children in and affected by Armed Conflict, International Criminal Court, Office of the Prosecutor.[*]

Women and Children: The Cutting Edge of International Law

By Radhika Coomaraswamy[†]

Preface

Sometime at the end of 2011, while I was still the United Nations Special Representative of the Secretary-General for Children and Armed Conflict, I met an ambassador from an Asian country just before a United Nations Security Council meeting on children and armed conflict. He told me that I was leaving the United Nations at the right time, because ''the era of human rights is over, it has been shown up for what it is, a product of western liberalism and now a modern day foreign policy weapon of western imperialism.''[1]

A few months earlier I was in the Central African Republic (CAR) with three generations of women from the same family, who had been brutally raped by the forces of Jean Pierre Bemba when he entered CAR from the Democratic Republic of Congo in 2002.[2] They were getting ready to go to The Hague to testify against him. They described the events in detail, and I could feel their sense of vindication and hope. Even if Bemba were not convicted, they found consolation in the fact that someone had recognized the crimes committed against them.

This, then, is the complexity of human rights in the modern world. Increasingly, member states, along with individuals and groups in the Global South, challenge both the epistemology and practice of human rights. But despite their efforts, at the grass-roots level there is a groundswell of support for the idea of human rights, including women's and children's rights, as more and more groups have begun to use the discourse and strategy of the human rights movement to fight for equality and social justice.

Introduction

In the traditional world of international law, issues of war, peace, and security have always taken precedence over other developments.[3] The Westphalian origins led to a focus on dispute resolution and the establishment of an international order that will enable peace. Even today

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[1] Personal communication, July 12, 2012.

[2] Jean-Pierre Bemba Gombo (Bemba) was the head of the Movement for the Liberation of Congo (MLC). The MLC went into Congo in 2002 and has been accused of committing war crimes and crimes against humanity. Bemba has been indicted by the ICC. Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08.

[3] For a full description, see Oscar Schachter, International Law in Theory and Practice (1995).

the media attention of the world remains on the Security Council, whose proceedings dominate the discussion of international law and international relations.

However, hidden from view away from the drama of the use of force and international peace and security, there has been a quiet, creeping revolution in the area of women's and children's rights at the international level, which may have far-reaching consequences on how we think about international law and its place in the modern world.

I have divided this lecture into three parts: (I) I will identify five ways in which women's rights and children's rights have impacted the substance and procedure of international law, especially during the last few decades; (II) I will describe the backlash against some of these developments that has led to a certain paralysis in their contemporary evolution; and (III) I will identify a way forward—always keeping the interests of women and children in mind.

Before I proceed, I would like to outline three short caveats.

First, international human rights law is often seen as a sub-regime of international law.[4] In the same way, women's and children's rights are a sub-regime of international human rights law, with a level of autonomy and integrity relevant to their specialization. Nevertheless, as we will see later, what happens in the international arena to the regime of human rights also affects issues relating to women and children and vice versa. Some traditional international lawyers may dismiss all this as issues within the periphery of the periphery, but in some ways they have already begun to play a significant role in international relations.

Second, although I have brought the issues of women and children together for the purpose of the lecture, we must recognize that there are strong differences between these mandates. Women are adults, and their main quest is for empowerment and equality with men. While there are similarities between women and children when it comes to matters of protection during war, there are major differences in the quality and nature of their agency and right to participation.

Third, I spent a great deal of my life as a researcher and an academic working for a think tank in Sri Lanka. I was also fortunate to have the experience of being United Nations Special Rapporteur on Violence Against Women and the Special Representative of the Secretary-General on Children and Armed Conflict. The tension between the world of ideas and the world of the practitioner is particularly interesting to me, as over time I have found that what is ideal is not doable, and what is doable may compromise one's ideals.

I. Five Ways in Which International Law Is Impacted

There are five ways in which I think women's rights and children's rights have impacted the substance and procedure of traditional international law. They are as follows:

1. Women's rights and children's rights have had a unique impact on the process of creating international law and its relationship to state practice.
2. More than any other issues, the question of women's and children's rights pierces the veil of state sovereignty—the foundation of traditional international law.

[4] Scott Sheeran, *The Relationship of International Human Rights and General International Law: Hermeneutic Constraint, or Pushing the Boundaries?, in* Handbook of International Human Rights Law 80 (Scott Sheeran & Nigel Rodley eds., 2013).

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3. Women's and children's issues have led to rethinking how to deal with nonstate actors within the framework of international law.
4. Since the 1990s, international criminal jurisprudence has developed new and innovative doctrines with regard to crimes against women and children with pioneering efforts by the ad hoc tribunals and the International Criminal Court.
5. The role of NGOs involved in women's and children's issues has been unprecedented at the international level, forcing a recognition of civil society and its role in international deliberations.

The Process of Creating International Law

The first area of impact is in the process of creating international law and standards. Those of us who are old enough to remember the old masters of international law must recall how it was drilled into us that only decades of state practice without objection creates the sense of legal obligation that is the basis of international law.[5] This may be supplemented by treaties, which generally tended to be bilateral and concerned issues of peace and security or trade and commercial activity.

José Alvarez has documented the revolution that has taken place since the 1970s in the realm of treaty-making and the proliferation of international multilateral treaties creating obligations and standards on a whole host of matters—treaties usually negotiated under the auspices of the United Nations.[6] The Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child were also drafted during this period.

However, the Women's Convention and the Children's Convention were unique. This was not because they were multilateral in nature, but because, instead of codifying existing practice, they tried to transform state practice at the national and international levels. These conventions imposed positive duties on states,[7] and even at times tried to transform the behavior of individuals within nation-states. Article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is one such example:

> State Parties shall take all appropriate measures:
>
> > a. to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[8]

As is well known about CEDAW, for example, it truly pushes the frontiers of international law, imposing obligations on issues of equality, protection, and transformation at the same time. It includes both political and civil rights as well as economic and social rights. It deals with both the public and the private sphere. Though it is revolutionary, it takes a gradualist approach, stating that ''appropriate measures be taken without delay.''[9]

[5] *See* SCHACHTER, *supra* note 3, chapter 1.
[6] José E. Alvarez, *International Organizations as Lawmakers* (2005), http://legal.un.org/avl/ls/Alvarez_IO.html.
[7] CEDAW art. 4 (1979).
[8] *Id.* art. 5.
[9] *Id*. art. 2.

This transformative impetus was a product of the intellectual climate of the 1960s and the 1970s and continued with vigor at the international level well into the 1990s.[10] The fact that we had come a full circle from hundreds of years of state practice leading to the creation of international law, to an era where multilateral treaties attempted to change state practice and the behavior of their citizens, is one of the unique developments of the latter half of the twentieth century.

The problem with transformative projects, especially those originating at the international level, is the gap between aspiration and implementation. Both the Women's Convention and the Children's Convention are the most ratified conventions in the world.[11] However, the Women's Convention has so many reservations by a diverse number of states that its value as a normative standard raises some doubts. The CEDAW Committee taking the lead from the Human Rights Committee attempted to reign in these reservations by attempting to claim the right to decide whether a reservation was against the object and purpose of the treaty.[12] On the advice of the UN's legal counsel they abandoned this effort.[13] The ICJ in its determination on the Genocide Convention argued that universality is an important goal of human rights and humanitarian treaties, and that some measure of state flexibility should be allowed as long as reservations do not violate the object and purpose of the treaty.[14] In the area of women's rights, we do have a serious question on how the desire for universality of membership can often trump the integrity and coherence of multilateral treaties.

Nevertheless, there is no doubt that concerted international action can change national policy and practice. When I began my tenure as Special Rapporteur on Violence Against Women a year after the UN Declaration on the Elimination of Violence Against Women (DEVAW), I wrote to countries and found that only a handful had addressed the issue of domestic violence in any form. When I left nine years later, for my final report I wrote to countries again, this time after a decade of international activism, including at the Beijing Conference. This time, every country except Bhutan had either passed legislation or formulated national programs to deal with this issue.[15] Given the lack of capacity of many states to implement their programs, there may not have been an immediate effect on the ground. In fact, during my state visits I noticed that governments presented grand plans to combat domestic violence or trafficking usually drafted with the help of a UN agency. However, after that sometimes nothing happened, often because the criminal justice system lacked capacity and the government lacked political will.[16] Nevertheless, international activism on violence against women resulted in a sea change in attitudes and a growing awareness about the importance of dealing with this once invisible issue.

[10] During the 1990s, especially after the wars in Bosnia and Rwanda, there was a great deal of activism around issues related to women and armed conflict, and to children and armed conflict. Many women were crucial for this activism, although their perspectives greatly differed. Catherine McKinnon (who helped develop the legal concepts in this area), Charlotte Bunch, Jessica Newirth, Sunila Abeyesekere, Sylvia Pimental, Heisoo Shin, and Florence Butegwa were the leading international advocates.

[11] There are 187 ratifications of CEDAW and 193 ratifications of the Convention on the Rights of the Child (CRC).

[12] *See* Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. INT'L L. REV. 605 (2002–2003).

[13] *Id*.

[14] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

[15] Report of the Special Rapporteur on Violence Against Women to the United Nations Human Rights Commission, Annex I, 2003.

[16] On a visit to an unnamed country, I was informed upon arrival that comprehensive trafficking legislation had been adopted and a high-powered task force had been set up two years earlier. When I met with the Committee, however, they informed me rather meekly that this was the first time they had met.

It has to be said that the political and intellectual climate is different now. Transformative ideas and imaginative projects for the law at the international level are in retreat. Post-modernists and conservative scholars alike believe that practices should evolve from the community and not be imposed from above. The utilitarian framework of the now-dominant law and economics movement in western universities emphasizing efficiency and gradualism[17] has made transformative projects unfashionable.

And yet it could be argued that this return to a conservative, evolutionary framework was made possible because of the dramatic push given by feminists and documents like CEDAW and DEVAW. Once the lines were marked in the sand and awareness raised, one could then afford the luxury of focusing on nuance, context, and efficiency.

Piercing the Veil of State Sovereignty

At the time the United Nations was created, there was general consensus that state sovereignty would be the foundation upon which the international order would rest.[18] The process of decolonization around the world only accentuated this initial structure. The initial efforts by the UN system with regard to human rights were relegated to the setting of standards[19] and a refusal to deal with developments within countries. Soon, however, the movement against apartheid in South Africa,[20] the movement against disappearances in Latin America,[21] and the struggle for democracy in Eastern Europe, Latin America, and East Asia resulted in a gradual piercing of the veil of state sovereignty. Given these movements, one could argue that national sovereignty has two elements—state sovereignty, which is the foundation of traditional international law, and people's sovereignty, which, one could argue, is the main element in the regime of human rights. It must not be forgotten that the United Nations Charter begins with ''We the people.''

Of all the concerns before the international community, no other issues pierce the veil of state sovereignty as much as the issues concerning women and children. As they attempt to change state practice and even individual behavior, they not only impose positive duties on states but also pass judgment on national attitudes and stereotypes.[22]

In the area of accountability for international crimes and rights violations, again it is the issues concerning women and children that go the furthest. Within the UN system these two issues have the most extensive network of monitoring and reporting. All three pillars of the UN system have monitoring mechanisms with regard to women and children.

If one looks at the special procedures of the United Nations Human Rights Council, there are five related to women and children. The Economic and Social Council oversees two treaties—CEDAW and CRC—with the largest number of state signatories and their own

[17] For an interesting discussion of feminist viewpoints on the Law and Economics Movement, see FEMINISM CONFRONTS HOMO ECONOMICUS (M.A. Fineman et al. eds., 2005).

[18] SCHACHTER, *supra* note 3.

[19] The two major international covenants—the Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights—were the main focus of work at the UN Human Rights Commission.

[20] In 1967 the Economic and Social Council called on the UN Human Rights Commission to become ''interventionist'' with regard to apartheid. Res. 1235 (XL11), 42 UN ESCOR Supp. (No. 1) at 17, UN Doc. E/4393 (1967), http://www1.umn.edu/humanrts/procedures/1235.html.

[21] In 1980, in response to what was taking place in Chile, the UN Human Rights Commission set up the Working Group on Disappearances. The initial mandate was for one year.

[22] In *Vertido v. Philippines*, the CEDAW Committee went into a detailed analysis of the attitudes and prejudices of the Philippine judges. Committee on the Elimination of Discrimination Against Women, Communication No. 18/20081, UN Doc. CEDAW/46/D/18/2008, July 12–30, 2008.

very activist treaty bodies. A session before either of these Committees, who have been fully briefed by shadow reports of NGOs, can be a grueling process.

The Security Council that was once averse to any human rights issue being brought before it has, since 1999, accepted three important thematic mandates. The first was Children and Armed Conflict, the second was Sexual Violence during Armed Conflict, and the third relates to Protection of Civilians. All three are related to issues concerning women and children. The first two have elaborate monitoring and reporting mechanisms on the ground at the field level within countries involving all UN agencies, and some NGOs and the Task Force that finalizes these reports is chaired by the Head of the UN system in the country.[23] These reports that go directly to the Secretary-General via the Special Representative on Children and Armed Conflict or the Special Representative on Sexual Violence also contain name and shame lists of states and armed groups that commit systematic violations against children and women. It is envisioned that persistent perpetrators will eventually face targeted sanctions. With regard to the Democratic Republic of the Congo and Somalia, the sanctions committees[24] have included crimes against children and women as grounds for the imposition of sanctions. Individuals in the Democratic Republic of Congo and Côte d'Ivoire have had sanctions imposed against them because of their violence toward women and children.

The involvement of the Security Council on these issues has raised some concerns, especially after the emergence of the doctrine of the responsibility to protect. The power of the women and children's movement to leverage the Security Council is a new and welcome development, forcing the Council to deal with the consequences of their actions on civilians. However, this new power should be used judiciously. It has already proved useful on the ground, but, as mentioned later, partnership with national women and children's groups working at the community level is essential for this to be a true success.

Besides the concern of the three main UN organs, there are also two full-time UN agencies that are fully involved in the issues of women and children. UNICEF, the largest UN agency and perhaps its most successful, is wholly dedicated to the concerns of children, and UN Women, which was recently created to amalgamate all the UN agencies working on women, is fully engaged with the large ambit of women's concerns.

At the Secretariat there are also two full-time Under Secretary-Generals, the Special Representative on Children and Armed Conflict, and the Special Representative on Sexual Violence During Armed Conflict, who are devoted wholly to issues related to women and children, who report to all the UN bodies and agencies, and who also conduct field visits to ensure compliance in the area of their mandates.

This extensive and extraordinary network for monitoring and reporting at the international and national levels does not really exist for other human rights issues. Today systematic information is now gathered on a regular basis on violations against women and children without the participation of the member state. With the United Nations Development Programme adopting a ''rights up front'' policy this year, this system of monitoring will be strengthened and tightened.[25]

[23] A comprehensive description of these systems may be found in Jean-Marc de la Sablière, *Security Council Engagement on the Protection of Children in Armed Conflict: Progress Achieved and the Way Forward* (July 2012), https://childrenandarmedconflict.un.org/publications/Delasabliererepport_en.pdf.

[24] *Id.*

[25] United Nations ''Human Rights Up Front'' Action Plan (2013), http://www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.htm.

In the area of women and children, the international system also goes beyond monitoring to the question of punishment. As outlined above, sanctions committees have imposed sanctions against persons committing grave violations against women and children. In addition, if we look at the cases before international tribunals, some of the most important path-breaking cases relate to war crimes and crimes against humanity in regard to women and children. The Akayesu[26] case before the ICTR and the Foca case[27] before the ICTY were notable because of their jurisprudence on sexual violence. The ICC decided to make its very first case about the issue of child soldiers, an issue that it felt had universal resonance.[28] The systems of monitoring, reporting, and punishment described above with regard to violations against women and children are the most extensive you will find on any issue within the international human rights system.

Piercing the veil of state sovereignty has also taken other unique forms besides monitoring and accountability by international institutions. Since the treaties with regard to women and children are seen as aspirational, many states with a dualist tradition do not translate the provisions into legislation. Increasingly, though, especially in countries with a commonwealth tradition of law, judiciaries are stepping into the breach, appealing directly to international law where national legislation does not exist. The most comprehensive of these interventions was the Visakha case in India where the Indian Supreme Court, drawing on Recommendation 19 of CEDAW, basically legislated on sexual harassment. This included a requirement that state companies and corporations hiring over 50 people must have a sexual harassment policy as well as a committee to listen to complaints. This committee should have a majority of women in its composition, including an outsider.[29]

Other judiciaries that have drawn directly on international law with regard to women's issues are Botswana in *Unity Dow,*[30] the Nigerian Supreme Court in a case involving a cultural practice that permitted incest,[31] the Mauritius Supreme Court looking at religious law,[32] and the Malaysian Supreme Court on the issue of discrimination due to pregnancy.[33] In fact, there is now an ongoing transnational judicial dialogue on many of these issues and the adoption of the Bangalore Principles by a judicial colloquium that included Ruth Bader Ginsberg and Justice Bhagwati discussing guidelines on how to incorporate human rights norms in judgments in the absence of national action or where national legislation or practice conflict with these standards.[34]

Recent scholars have pointed to the fact that international relations increasingly rely on networks of groups, whether from civil society, the state, or the professions.[35] In the area of judicial incorporation, while many conservative judges still believe in judicial sovereignty, transnational judicial dialogue is increasing awareness and changing the way judges think, especially in the area of human rights.

[26] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment (Sept. 2, 1998).
[27] *See* Prosecutor v. Kunarac, Case No. IT-96-23, IT-96-23/1-A, Judgment (June 12, 2002).
[28] *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment (Mar. 14, 2012).
[29] *See* Vishakha v. State of Rajasthan, AIR 1997 SC 3011.
[30] *See* Unity Dow v. Att'y Gen. of Botswana [1992] L. Rep. Commonwealth, 623.
[31] *See* Muojekwu v. Ejikeme [2000] 5 N.W.L.R. 402.
[32] *See* Bhewa v. Gov't of Mauritius [1991] LRC (Const.).
[33] *See* Noorfadilla Binit Ahmad Saikin v. Chayed Bin Basirun [2012] 1 MLJ 832.
[34] *See* P.N. Bhagwati, *Bangalore Principles*, 14 COMMONWEALTH L. BULL. 1196 (1988).
[35] *See* Anne-Marie Slaughter, *International Law in World of Liberal States,* 6 EJIL 503 (1995).

The veil of state sovereignty is also pierced by UN templates and best practices devised and supported by the technical teams of the United Nations. This is available in a great many areas, especially those influenced by the United Nations Development Programme and the World Bank, and a similar process exists with regard to issues relating to women and children.

This kind of international law is sometimes criticized by international scholars who argue that this type of ''technocratic,'' ''bureaucratic'' intervention hides the politics involved and stifles innovation, creativity, and ownership at the national level—not only for this type of issue but for all important dilemmas in international relations.[36] Nevertheless, today UN templates and best practices are in place in a vast number of countries, especially those coming out of conflict situations. With regard to women, there is the CEDAW Committee recommendation that 30% quotas of the seats of national parliaments should be reserved for women, as this is seen as the critical mass needed whereby women can actually influence the political process.[37] As a result, in many of the countries emerging out of conflict with UN assistance, such as East Timor and Rwanda, quotas for women in parliament are now in place under national constitutions.

In addition to constitutions, model legislation is also promoted by the United Nations and other agencies in the area of domestic violence, trafficking, child labor, and child soldiers. This is not always implemented. Governments accept formal obligations often drafted by the best minds in UNICEF or UN Women, but national ownership and the political will to implement lag far behind.

Finally at the community level, international human rights norms with regard to women and children have in some countries pierced state sovereignty claims. Sally Merry has chronicled this with regard to the whole movement to combat domestic violence.[38] She shows how laws and models developed in one part of the world are taken, modified, and transformed to suit local conditions. For example, in domestic violence cases in many developing countries, the batterer is also often a victim of social injustice and poverty. Therefore, in those societies groups have attempted to focus attention on the treatment for batterers.

As Sally Merry's research points out, international standards often do respond to an important need in the community. The articulation of this need in human rights language gives it legitimacy, particularly because countries have accepted these obligations. The standards and the conclusions of UN treaty bodies become rallying tools for activists and individuals fighting for equality and social justice. This dynamic between international standards and local activists is perhaps the most exciting part of this chapter on recent developments in international law.

David Kennedy has often criticized human rights groups who attempt to work with international standards.[39] He argues that over time they have developed an entrepreneurship/professional model of work, relying on donor funding and distancing themselves from the subjects of their concern.

This is, for the most part, unfair since professionalization does not necessarily mean less activism or less genuine concern. However, there is also a modicum of truth in his comment on professionalization and the nexus between donors and some NGOs. In the 1980s, donors

[36] *See* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

[37] *See* General Recommendation No. 23 (16th sess., 1997).

[38] Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence,* 25 HUM. RTS. Q. 343–81 (2003).

[39] David Kennedy, *The International Human Rights Movement: Part of the Problem,* 15 HARV. HUM. RTS. J. 101 (2002).

were far more responsive to the actual needs of countries and the actual project demands of NGOs and research groups. Today they come with set agendas that are sometimes unhelpful in fighting for issues of human rights and social justice in a given context. It is important that human rights organizations listen to this criticism if they are to maintain legitimacy both at the national and international levels. Donors, too, must rethink their recent strategies that are counterproductive and conceived in capitals far away from the real world in which women and children actually live.

Nonstate Actors

Traditional international law is built on the foundation of state responsibility. However, over time there has been a growing concern about the impunity enjoyed by nonstate actors who also violate the rights of others. The 1980s and 1990s saw a vigorous campaign against impunity of nonstate actors both through recourse to individual criminal responsibility under international humanitarian law and by seeking to address these issues within the framework of human rights.[40]

The impetus began with the issue of disappearances where state actors donning civilian attire were responsible for extrajudicial killings in Latin America. The state would avoid liability by claiming that private actors committed these acts. The celebrated *Velasquez* decision of the Inter-American Court finally responded to this terrible state of affairs by arguing that states have a due diligence duty to prevent, prosecute, and punish private perpetrators who violate the rights of others.[41]

The women's movement seized on this language in its effort to make violence against women a human rights issue. All UN documents dealing with violence against women articulate state responsibility for private actors with the requirement that states have a due diligence duty to prevent, prosecute, and punish those who commit crimes against women.[42] There has been a great deal of discussion about what this due diligence entails.[43] The main thrust of all the arguments has been aimed at ensuring that the criminal justice system responds to the issues with adequate training, resources, and commitment. In addition, there have been arguments that there should be an adequate support system for the victim.

There have also been efforts by feminist jurists to make nonstate actors who commit violence against women directly responsible for these crimes under international law, much like the individual criminal responsibility doctrine under humanitarian law. Professor Rhonda Copelon wrote a much-quoted article equating domestic violence to torture, an international crime for which there is individual criminal responsibility.[44] International cases before the ad hoc tribunals and the ICC have also underscored the importance of recognizing individual criminal responsibility for crimes against women and children. The Security Council, in considering targeted measures against individuals, has also strengthened this policy. Although

[40] The violence against women movement and the discussion around war crimes and crimes against humanity highlighted the issue of the responsibility of nonstate actors in discussions at the international level, especially in the 1990s.

[41] *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988).

[42] *See generally* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, UN Doc. A/Res/48/104 (Dec. 20, 1993).

[43] *See* DUE DILIGENCE PROJECT, *58th Session of the Commission on the Status of Women Side Event: ''Beyond 2015: Due Diligence Framework to End Violence Against Women* (Mar. 7, 2013), http://www.duediligenceproject.-org/Events/Events.html.

[44] Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture,* 25 COLUM. HUM. RTS. L. REV. 291 (1993–1994).

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international individual criminal responsibility for war crimes and crimes against humanity is very needed, excessive criminalization of crimes within nation-states may cause problems. One of the foremost theorists of human rights, Sir Nigel Rodley, warned the women's movement in the 1990s about the pitfalls of this trajectory. Human rights is a doctrine that has been primarily a watchdog of the state. He argued that the new approaches to fight violence against women will lead to an unhealthy partnership between women's rights groups and the criminal justice system. He warned that the fight against impunity might end up as something else.

Twenty years after the initial movement, one must confess that there is some truth in that warning given to us by Sir Nigel. Certain areas of violence against women such as trafficking and sexual violence have become movements that are more about the punishment of individuals rather than the rights of victims. Celebrity after celebrity, politician after politician are now becoming shrill and demanding immediate action translated as punishing the perpetrator. The prosecutor is now in the forefront of these issues, not the human rights activist. In India during the aftermath of the horrific gang rape of a paramedical student, certain women's groups called for public castration and the death penalty—not very human rights-friendly demands.[45]

There is concern that what began as a women's human rights movement may turn into a law and order punitive movement. David Garland has written extensively on the American penal state of recent years and the emergence of an ideology based on punishment and victims' rights.[46] Victims' rights should not be dismissed. It is very important that the violations be acknowledged and victims' claims taken care of, but it is also important to ensure that the response is not within a framework of personal retribution and revenge and within the confines of human rights and the rule of law. Excessive criminalization also detracts from other possible approaches, such as restorative justice that, combined with punishment, may be more appropriate in certain contexts.

International Criminal Law

The creation of the International Criminal Court saw for the first time the clear articulation of sexual violence in all its forms as a war crime and a crime against humanity. Until then the grave breaches provisions of the Geneva Conventions had led to a great deal of ambiguity, debate, and prosecutorial creativity since they did not specifically mention sexual violence. This dramatic development in international criminal law was made possible as a result of the constant lobbying of a broad group of women's rights activists drawn from the North and the South.

Since the creation in 1990 of the Special Tribunals for Rwanda and the former Yugoslavia and the International Criminal Court, international criminal case law has developed at a rapid pace. Interestingly, much of the jurisprudence that is being produced has been on issues relating to women and children.

[45] *See, e.g.,* Newsxlive, *Delhi Gang Rape: People Demand Castration for Accused,* YouTube (Dec. 19, 2012), https://www.youtube.com/watch?v=9Z1P61O-C5s.

[46] David Garland, *Penalty and the Penal State,* 51 Criminology 475 (Aug. 2013).

For the first time, following a great deal of discussion, there is now an international definition of rape.[47] The definition attempts to signal the importance of recognizing the gravity of the crime and the powerlessness of women in the context of armed conflict, while also protecting the rights of the defendant. Rules of evidence, in particular Rule 96 of the ICTY, have also been developed that are state-of-the-art in setting clear guidelines for what types of evidence may be produced during rape trials.[48] Procedures for the protection of victims and witnesses are also new, innovative, and comprehensive, at least in the planning stage.[49] All these developments may in turn actually influence rape proceedings at the national level.

Also for the first time, the ICC has defined what it is to be a child soldier—what it means to conscript, enlist, or use children to participate actively in hostilities. Using a broad case-by-case approach, the Court focused not so much on the functional role of the child but on whether he or she has been exposed as a potential target with consequential risk.[50]

For international lawyers concerned with women's rights and children's rights, these are interesting and exciting developments in the field of jurisprudence. The formulation of international definitions and standards may have demonstrable effects, and may influence national law when national courts must determine similar questions with regard to the protection of women and children from violence.

International Civil Society

Until the 1990s, NGO participation at multilateral institutions was a very limited affair pertaining primarily to the lobbying of states with a few select NGOs being given the right to participate in proceedings. The Commission on the Status of Women, the Women's Convention, and the world conferences that took place on women's issues, along with the work of the Children's Committee, changed all that. These two areas became pioneers in envisioning a more active role for NGOs. For example, both the CEDAW Committee and the CRC Committee entertain ''shadow reports'' prepared by NGOs on compliance by particular member states. These reports are taken very seriously and are often the basis for questioning member states and in formulating conclusions and recommendations.

Kathryn Sikkink describes the network of women's NGOs drawn from northern and southern countries that pushed for violence against women to be included in the human rights agenda of the United Nations.[51] Until the 1990s, violence against women was a taboo subject, and only issues involving discrimination primarily in the workplace and in the family were discussed at the international level. CEDAW, for example, has no mention of violence against women, and it was only introduced as Recommendation 19 in the early 1990s. An extraordinary movement of women across regions and cultures fighting against domestic violence, trafficking, and systematic rape brought the issue of violence against women to

[47] *See Akayesu,* Case No. ICTR-96-4-T; *Delalić*, Case No. IT-96-21-T; *Furundžija,* Case No. IT-95-17/1-T; *Kunarac,* Case Nos. IT-96-23 & IT-96-23/1; ICC Statute art. 7(g) (specifically prohibiting rape and including ''sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity'' as crimes against humanity). *See also* Statute of the Special Court Sierra Leone art. 2(g).

[48] ICTY Statute Rules of Procedure and Evidence, Rule 96, UN Doc. T/32 (Mar. 14, 1994).

[49] *See* S. Garkawe, *Victims and the International Criminal Court: Three Major Issues,* 3 Int'l Crim. L. Rev. 345 (2003).

[50] *See* Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment (Mar. 14, 2012).

[51] *See* Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (1998); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change,* 52 Int'l Org. 887 (1998).

the World Conference on Human Rights held in 1993. They were so convincing that by the end of the year the United Nations General Assembly had passed the Declaration on the Elimination of Violence Against Women, and within the year the UN Human Rights Commission had created the post of Special Rapporteur on Violence Against Women. This same network expanded and worked tirelessly on issues relating to sexual violence during times of armed conflict in the 1990s, resulting in the Statute of the International Criminal Court having one of the most comprehensive definitions of sexual violence contained in any international legal document.

In the case of children and armed conflict, again it was humanitarian NGOs working in conflict areas that pushed hard on this issue and forced the UN General Assembly to request Graca Machel to convene a study in the 1990s. Immediately after that report, the General Assembly created a full-time Under Secretary-General post for a Special Representative on Children and Armed Conflict. They also kept a close watch on the developments that followed.

In discussing the above six areas where the issues concerning women and children have impacted international law and procedure, one has to reflect on why multilateral fora are more responsive to these issues and not others. Children's issues, especially, draw a broad consensus at the United Nations. Perhaps these issues play to ''nobility'' in the self-image of nation-states and their citizens as the protectors and rescuers of vulnerable women and children. No state wants to go on record as being against them. It is this discomfort that is often exploited by the more experienced UN officials and NGO activists in order to push the agenda forward in a sustained and deliberative manner.

II. The Backlash

I would like now to move onto to the second part of the lecture, which will attempt to understand some backlash against the human rights movement in general, and women's rights and children's rights in particular that began at the turn of the century. I will discuss three aspects: first, the impact of Kosovo, Iraq, Afghanistan, and the doctrine of humanitarian intervention on Third World perceptions of human rights, including women's and children's rights; second, I will discuss the attempt to place the issue of sexuality on the international agenda and the repercussions for women's rights; and finally, I will say a few words about the backlash to international mechanisms of accountability as many of these mechanisms are dealing with women's and children's issues.

Humanitarian Intervention

The tremendous growth of human rights in the 1990s, and the emphasis on women's rights and children's rights in particular, were unprecedented and were possible because of the end of the Cold War and the end of various dictatorships in Latin America. With a large number of countries from Latin America and Eastern Europe coming into the United Nations and supporting the human rights agenda, there was a proliferation of human rights mandates and state acquiescence in the growth and expansion of human rights.

Kosovo, September 11, and the War on Terror dramatically changed this atmosphere. These developments, coupled with the new doctrine of the Responsibility to Protect,[52] brought in the prospect of humanitarian intervention through the military use of force to protect

[52] G.A. Res. 60/1, paras. 138–40, UN Doc. A/RES/60/1 (Oct. 24, 2005) (describing the responsibility of the individual state to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity).

civilians, chief among them women and children. In Afghanistan the protection of women was often articulated as one of the main reasons for military action. These developments deeply worried countries of the Global South where it was felt that human rights issues and the protection of civilians might become a cover for a new form of imperialism. The protection of women and children—which in the 1990s received universal support even in the Security Council—is now facing a measure of resistance.

This prospect of humanitarian intervention has also rekindled the strident discourse of state sovereignty that had been in abeyance in the years following the end of the Cold War. Many countries of the Global South, especially those with an unattractive human rights record and led by nationalist elites that still remember colonialism, have begun to reassert the doctrine of state sovereignty which they claim is the pillar of international law. They again point out that the concept of human rights in its present form is the product of the European Enlightenment, and were adopted without the participation of most Third World countries.[53] They also assail the selectivity and double standards when it comes to human rights, which, when combined with arrogant posturing, usually have colonial overtones.[54]

Whatever the original philosophical roots of human rights, most countries consent to the framework when they sign the United Nations Charter and when they enter into treaties. With regard to women and children, the overwhelming number of ratifications, despite reservations, signals the fact that states consent and aspire to reach the goals set out in these Conventions. We are not talking about self-evident Kantian principles, but a regime based on consent in line with the thinking of philosophers such as Richard Rorty.[55] Whatever the philosophical misgivings and intellectual challenges, states do consent to things so that they can do practical business in the public sphere. Therefore, consent surely is a valid basis from which to expect compliance regardless of the specific history of a nation-state.

In addition, it must be remembered that the first time the United Nations addressed a human right situation was in response to the call of people from the South—with regard to apartheid in South Africa and disappearances in Latin America. American legal scholars focus on Helsinki Watch and Human Rights Watch as the originators of international human rights,[56] but the truth is that within the United Nations it was apartheid and disappearances that first forced the Human Rights Commission at that time to move beyond standard-setting to monitoring, reporting, and action. To ignore this history is to belittle the struggle of so many people and groups around the world.

As for double standards at the international level, there are very few honest intellectuals who would contest this claim, and there is no doubt that double standards do exist. A great deal needs to be done to face this issue squarely. However, the response to this dilemma cannot be to paralyze the entire international system. Double standards exist even in national systems, but the answer cannot be to set criminals free and encourage widespread impunity. The humanitarian approach appears to be the most pragmatic one—a case-by-case approach where it is believed that justice for one person is better than justice for none. Though at the macro level the argument of double standards appears forceful, it is never an answer for the individual demands of victims, many of whom I have met in person and whose suffering

[53] Antony Anghie, *International Human Rights Law and a Developing World Perspective, in* Routledge Handbook of International Human Rights Law (Scott Sheeran & Nigel Rodley eds., 2013).

[54] Mahmood Mamdani, Saviors and Survivors: Darfur, Politics and the War on Terror (2010).

[55] Richard Rorty, Contingency, Iron and Solidarity (1989).

[56] Samuel Moyn, The Last Utopia: Human Rights in History (2012).

and need for remedy far outweigh purely intellectual claims searching for a global balance of power.

The prospect of humanitarian intervention has also rekindled the suspicions of post- colonial legal scholars who now dominate the academy in the Global South. This challenge is particularly important because it is fought in the realm of culture that has so much implication for the rights of women and children in particular. As more progressive young people in the Global South—who once joined human rights movements in large numbers—are now drawn to this post-colonial framework, the momentum to fight cultural practices that are violent toward women and children has begun to fade or is left to people who deal with these issues outside a rights framework from the viewpoint of the developmental state.

Though many postcolonial scholars accept human rights as strategic in some contexts, they generally reject the human rights framework as part of the ''liberal'' ''imperialist'' project, especially when it comes to cultural practices. Rejecting universalism, they look for solutions at the local community level. Dismissing grand meta-narratives that essentialize the human condition, they argue that these narratives prevent local initiatives and creativity that are more community-oriented. They argue that human rights discourse especially attempts to monopolize the discourse of dissent and resistance—a discourse that places the individual over the community.[57]

The community is a very important site for individuals, especially in Asia. If true transformation is to result, it must be at the level of the community and thus further emphasize the need and importance of community activism. However, the strategies used must be mindful of the particular history. The reification of the community can be a cause of concern for anyone who works on women's and girls' issues. Communities may be the most oppressive structure that women and girls face in their lives. Communities may have an ideology of subordination with regard to women and girls, may effectively control their emotional and sexual expression, and in some instances may also sanction violence against them.[58] Romanticizing the community, even if it is for fighting the good battle against imperialism, is always problematic. The best strategies for the dilemmas posed by the word ''community'' still have to be worked out by local activists. In this context, some of the gains made by scholars and women's rights activists seeking to reinterpret Muslim law to be in line with human rights standards are an encouraging development.[59]

There are two strands to the post-colonial legal scholars' anti-imperialist, anti-liberal stance, both of which have enormous implications for women and children. The first emphasizes the matter of tone—the arrogance of former colonial masters, their ''othering'' of non-white people, and the lack of respect for non-Western cultures and traditions. They see the tone as emanating from the political hegemony that these powers enjoy at the international level. Many Muslim women aggravated by this tone and attitude will don the veil as an act of resistance even though in their daily life they may lead modern lives.[60] I have seen people in the Global South turn off the television when some Hollywood celebrity appears on CNN in a shrill voice talking about rape in Africa.

[57] See, in particular, the writings of the subaltern movement—works by Gayatri Spivak, Partha Chatterjee, and Ranajit Guha, who also draw on the works of Foucault, Derrida, and other post-modern and post-structural scholars in the West.

[58] *See* NICOLE POPE, HONOR KILLINGS IN THE 21st CENTURY (2011).

[59] See the scholarly work of A. An'Aim and the reports of Special Rapporteur on the Right to Culture Farida Shaheed.

[60] *See* Sirma Bilge, *Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women,* 31 J. INTERCULTURAL STUD. 9 (2010).

The second strand is more complicated and is a question of ontology. This strand rejects the dominance of the European Enlightenment and the sacredness of the power of reason. These scholars wish to highlight the nuances and the epistemology involved in violations against women and children within particular cultural contexts. Supported by anthropological literature, they argue that Western demonizing of these cultural practices lacks a true understanding of their symbolism or role in a particular culture. For example, Sylvia Wynter has written a comprehensive article on female circumcision and the worldview that gave rise to it.[61]

Perhaps one of the more interesting interventions was by Gayatri Spivak, the icon of the post-colonial subaltern movement, who has written interesting articles on the practice of Sati or widow burning in India.[62] The British banned Sati in the late nineteenth century without consulting the local population. Spivak, along with leading Indian intellectuals such as Lata Mani, Ashis Nandy, and Veena Das, who do not condone Sati as it is practiced today, argued that the British banned it through racist eyes and without understanding the ontological foundations of Sati that are rooted in Hindu concepts, of truth and self-sacrifice. The glorification and worship of a Sati was often cited as the value the society placed on this act of self-sacrifice. As an example, Spivak puts together a story from the archives of a princess from Rajasthan making a case as to why she should be permitted to commit Sati, a voice that appears to have a great deal of agency and clarity of purpose.[63] She argues that that the action of the British without involvement of the local population was a classic case of ''white men saving brown women from brown men,''[64] with portrayal of Indian women as abject victims without agency awaiting rescue from their imperial masters.

The last recorded case of Sati took place in the late 1980s. The Roop Kanwar case brought all these arguments to the fore. However, there was little doubt that Roop did not really enjoy the agency of the Rajasthani princess, that she was always surrounded by her brothers-in-law, and that there appeared to many to have been elements of coercion and deep vulnerability. The Indian state reacted decisively, passing strong legislation, initiating prosecutions, and even including a provision that watching Sati was a crime. There has been no recorded case of Sati since.[65]

Having studied this case in detail as Special Rapporteur on Violence Against Women, I find Spivak's arguments rich and intellectually challenging, but am also concerned that in the contemporary world and the way power is wielded within the family in South Asia today, any attempt to justify or exempt certain forms of Sati will result in the deaths of many women. While I have a great deal of respect for the critique provided by these subaltern scholars and authors, I am disturbed as a practitioner by the consequences in the real world of what their words seem to suggest.

With the revival of state sovereignty arguments and the dominance of post-colonial thinking in the academies of the South, along with a great deal of effort placed on fighting imperialist hegemony, it may now be an appropriate time, after nearly seventy years of independence, to unpack what we mean by imperialism. It is important to revisit this, because in an era

[61] Sylvia Wynter, *''Genital Mutilation'' or ''Symbolic Birth?'' Female Circumcision, Lost Origins, and the Aculturalism of Feminist/Western Thought,* 47 Case W. Res. L. Rev. 501 (1997).

[62] *See* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?, in* Colonial Discourse and Post-Colonial Theory: A Reader (Patrick Williams & Laura Chrisman eds., 1994).

[63] Gayatri Chakravorty Spivak, *The Rani of Sirmur: An Essay in Reading the Archives,* 24 Hist. & Theory 247 (Oct. 1985).

[64] Spivak, *supra* note 62, at 93.

[65] *See* The Commission of Sati (Prevention) Act, 1987, *available at* http://www.wcd.nic.in/commissionofsatiprevention.htm.

called the end of history,[66] where parliamentary democracy and a capitalist economy are accepted as given, the frontline issues become those of culture and religion. These are precisely the issues that affect women and girls the most. The battle for and against imperialism is often waged today on female bodies.

There is no one in the Global South today who wants to strengthen colonial systems of political subjugation, economic exploitation, and psychological oppression as articulated by Fanon. That is a given. There is also growing recognition that today not all expansionist intentions come from Western countries, and it is increasingly a multipolar world, especially in Asia.[67] It must also be recognized that colonialism and imperialism are also terms of bluster—a way in which nations and societies attempt to obfuscate grave injustices of their own making by forging superficial solidarity with those who oppose imperialism just for the sake of it.

Slogans such as ''white men saving brown women from brown men'' may have been important rallying calls at independence, but they hide a much more complicated story. A great deal of colonialism was rapacious and brutal, but even during the height of colonialism there were many white men and women—archaeologists, educators, philosophers—who did yeoman's service to resurrect and rebuild Third World societies. In my own country, Kumari Jayawardena has chronicled how brave white women left their home countries as educators, health workers, and religious workers to set up schools and educate women.[68] Today, practically all the leading girls' schools in the country are those set up by these women. H.C.P. Bell, a British archeologist, gave his whole life and passion to restoring the ancient cities of Sri Lanka, clearing out the jungle, and meticulously recording each item.[69] These are now our pride and joy. The theosophists led by James Olcott and Anna Blavatsky helped spark a major revival in Hinduism and Buddhism in South Asia, and their work is sometimes seen as contributing to the foundation of modern-day religion in these societies and in rekindling self-respect among South Asians.[70]

The efforts by Samuel Huntington on the political right and Third World scholars on the political left to erect unbridgeable cultural and civilizational barriers among traditions and cultures while throwing a fist at universalism does not really do justice to the ruptures, the syntheses, and distortions that are actually taking place in the real world. As we know today, societies at every level are becoming more cosmopolitan. Culture and cultural practice are always being contested and are constantly changing. Erecting these barriers also trumps genuine attempts at finding commonalities and creating equal partnerships across cultures and societies. In fact, if the work of modern-day international scholars is anything to go by, their ideas run counter to what is actually happening at the local, national, and international levels. For example, Anne-Marie Slaughter has a thesis that the new international order is not the UN Security Council but networks of people following common goals and interests across nations and cultures whether it be judges, professionals, crime enforcement personnel, climate change activists, anti-racism groups, or those working on issues of human rights and social justice. These networks are powerful, self-reinforcing, and based on partnerships

[66] Francis Fukuyama, The End of History and the Last Man (2006).

[67] The role of China today and its search for natural resources, its monopoly and commissions with regard to infrastructure projects, and its interactions with authoritarian developing-country states and politicians have yet to be analyzed in detail.

[68] Kumari Jayawardena, The White Woman's Other Burden: Western Women and South Asia During British Rule (1995).

[69] Bethia N. Bell & Heather M. Bell, H.C.P Bell: Archaeologist of Ceylon and the Maldives (1993).

[70] Helene Petrovina Blavatsky et al., Five Part Series on the Theosophists (2004).

across cultures and societies.[71] This phenomenon is not limited to liberal causes—even anti-globalization movements demanding economic justice are sustained by these networks.

The early movements for women's rights and children's rights were successful and achieved so much because they were able to build these coalitions and partnerships between northern and southern countries. September 11th has had a chilling effect on many of these collaborative efforts in the area of human rights. It is important to recover certain aspects of that early phase of solidarity when we learned so much from one another and acted individually and collectively to fight for the rights of women and children. Rejecting universality in an era of globalization is to become the proverbial ostrich with one's head stuck in the sand. One accepts that universalism must be based on equal respect and equal partnership, but those partnerships are essential, and, as Slaughter claims, the lifeblood of the present international system.

Sexuality

In addition to the general backlash against human rights that has affected women's rights and children's rights since 2001, there have also been particular developments within the respective fields that have led to a slowing of momentum with regard to the activism on these issues at the international level.

For the most part, the international women's movement was united around the issue of discrimination in the 1980s and violence against women in the 1990s. However, in the early 1990s, path-breaking writers such as Judith Butler began to question the category of what constitutes ''woman'' from the perspective of gender identity.[72] Arguing that gender categories are more fluid than biological, many western NGOs and academics began placing the issue of sexuality on the international agenda. Most feminists even today believe that sexuality is at the root of many issues relating to women, from discriminatory cultural practices to violence against women. In addition there is the internationally sensitive issue of sexual orientation.

The issue of sexuality first arose at the International Population Conference in the 1990s and then at the World Conference of Women held in Beijing in 1995, where member states recognized some measure of sexuality within the sphere of reproductive rights and accepted the notion of ''reproductive autonomy.'' However, there was a desire to go further, to recognize sexual rights independent of reproduction and to allow for the protection of sexual minorities.

This emphasis on sexual rights by Western feminists was not well-received by most countries of the Global South, many of them strong believers in the Catholic and Muslim traditions. Their conservative positions were supported by the change of administration in the United States, which was deeply suspicious of reproductive rights. This combination resulted in pushback, not only on sexual rights but also on some aspects of reproductive rights—so much so that European member states and UN agencies were afraid to call for a world conference in 2005 as expected, fearful there would be a rollback of hard-earned gains.

This polarization continues, and because of suspicion on both sides, the women's agenda is not moving forward rapidly. All negotiations at the Commission on the Status of Women from violence against women to millennial development goals are now long and arduous,

[71] *See* Anne-Marie Slaughter, A New World Order (2009).

[72] *See* Judith Butler, *Subjects of Sex/Gender/Desire, in* Feminism and Politics 273 (Anne Phillips ed., 1998); *see also* Judith Butler, *Imitation and Gender Insubordination, in* Women, Knowledge, and Reality: Explorations in Feminist Philosophy 371 (Ann Garry & Marilyn Pearsall eds., 1996).

when unanimity was once easy and simple to achieve. There was a glimmer of hope this year when in the wee hours of the last night of negotiations in March 2014, member states agreed to make gender equality a stand-alone goal for the next millennium.

Accountability

The area where the backlash since 2001 is clearly articulated by member states is in the accountability of nation states and individuals for human rights violations, war crimes, and crimes against humanity. This includes questioning the work of the International Criminal Court, the Human Rights Council, and the recent thematic work of the Security Council on women and children.

The horrors of Rwanda and the former Yugoslavia have receded into the background, and arguments for state sovereignty are on the ascendant. Where once moral outrage about what was happening to children in Liberia, Sierra Leone, and the Congo united the world, events in Iraq, Afghanistan, and Libya have led to the fear that accountability will be selectively used. Certain African leaders indicted by the ICC have also run campaigns throughout Africa against the Court. Many African states have signed the Rome Statute of the ICC and often use it as a way of dealing with their brutal rebel forces.[73] A recent opinion piece in the *New York Times* by Mahmood Momdani and former President of South Africa Thabo Mbeki argued that accountability is not necessary and is in fact counterproductive in African civil wars. All solutions should be through negotiations and dialogue.[74]

Since most of the mechanisms of accountability at the international level deal with and are crucial to the vindication of the rights of women and children, this particular type of backlash will have a negative impact on the actual victims of war.

My last years as the Special Representative on Children and Armed Conflict witnessed this unfolding at the Security Council in the aftermath of the intervention in Libya. Open debates and resolutions on the thematic mandates on women and children, which once had received the full endorsement of the Council, had become subject to a great deal of scrutiny. The negotiations again became long, arduous, and watered down. Suspicion had replaced comity even in the area of women and children.

However, as I said at the beginning of my presentation, despite these developments among intellectuals, heads of state, and the institutions of the United Nations, there is a groundswell of interest and support for international accountability, especially among victims of crimes. For example, women victims who spoke to me about reconciliation without justice in Rwanda would ask, ''Do they expect me to live next door to the man who gang-raped me and killed my husband and sons?''[75] The desire for justice runs deep and cannot be dismissed so easily in favor of only dialogue; otherwise new conflicts fueled by revenge will emerge in the future. Closure to conflict will only come when there is recognition of suffering and injustice, and a collective decision not to repeat past mistakes.

III. Reflections on the Way Forward

Given the impasse that currently holds sway on many of these issues at the international level, how do we move forward? I am going to suggest three areas: first, finding the correct

[73] President Museveni signed the Rome Statute primarily to deal with the Lord's Resistance Army. President Bashir of Sudan and President Kenyatta of Kenya have often urged the African Union to boycott the ICC.

[74] Thabo Mbeki & Mahmood Mamdani, *Courts Can't End Civil Wars,* N.Y. Times, Feb. 5, 2014.

[75] Personal Communication, Kigali 1995.

balance between moral outrage and local nuance in our advocacy; second, focusing for the next few years on efforts at the national level and working toward ownership of these issues and strategies by diverse communities; and finally, beginning to work in a more sustained manner on economic and social rights.

Finding the Balance Between Moral Outrage and Local Nuance

The greatest priority today is to win back the full support of the Global South for issues relating to human rights in general, and to women and children in particular. The first step is in the area of advocacy. We must find the correct balance between moral outrage and the understanding of nuance and context. Nothing upsets Third World people more than an arrogant tone: to see a galaxy of Western celebrities, politicians, and their wives, assisted by the sensational sound bites of the 24-hour news cycle, pass quick judgment on countries and cultures of the South.

And yet, one must be honest. As I have experienced in over two decades of advocacy, it is moral outrage that moves the system. It is moral outrage that shames governments and individuals, and they do change course. It is also moral outrage that compels donors to give money to causes. All of us in the field of advocacy have deployed moral outrage to raise awareness on important issues.

However, if moral outrage is to be effective, it cannot be selective: it must involve issues not only of the South but also of the North.[76] It must also be channeled through important national partnerships. Moral outrage on its own and the rescue of particular individuals will not change matters in the long term, unless one simultaneously works for national and community ownership of the policies and programs that combat terrible practices.

In addition, moral outrage, unless tempered by reality, can lead to very complicated situations. Many laws have been passed on the upswing of moral outrage; for example, the laws against trafficking in many countries and the recent Indian law on rape. What are the actual consequences of these laws prompted by outrage but passed without careful deliberation? Very little empirical research on their impact actually exists.

Let us take the area of trafficking, where many strong laws exist today. The framework proposed and spearheaded by U.S. and Swedish activists with the active involvement of the U.S. State Department is punishment-based.[77] The assumption is that you criminalize the trafficker, penalize the client, and ''rescue'' the victim or sex worker. Punish and rescue is the effective slogan. While this sounds noble, no one stops to ask why one of the girls rescued by Nicholas Kristoff actually went back to her brothel.[78]

My experience with trafficking in Poland, Nepal, and India is that there are the really horrendous cases of abduction and sexual slavery that must be stopped at all costs. There has to be punitive regulation of some sort to deal with the worst manifestations. However, it was very clear that the vast majority of women whom I interviewed wanted to migrate because of certain conditions at home—whether it was poverty, domestic abuse, or community oppression. The desire to migrate was then exploited by unscrupulous elements. It is true that some women migrate to do domestic work and then end up as sex slaves. It is also true

[76] The lack of regulation of U.S. drones over Yemen and Pakistan, and the continued existence of the Guantánamo Bay detention camp, remain open symbols of double standards, despite the change of administration in the United States.

[77] The U.S. State Department's *Trafficking in Persons Report* focuses on laws and punishment as a way of assessing states' compliance with trafficking norms. The report is available at http://www.state.gov/j/tip/rls/tiprpt/.

[78] Nicholas Kristoff, Op-Ed., *Back to the Brothel,* N.Y. Times, Jan. 22, 2005.

that other women migrate and work factory shifts during the day and do sex work at night to supplement their income in the urban underground.

The important aspect to recognize is that it is the woman's or girl's desire to migrate that is the root of the problem. Therefore, there is a close connection between migration and trafficking. Draconian laws set up without understanding this fundamental fact may only further victimize the individuals concerned. It is important today to conduct empirical research into the application of these laws so that we may find the right formula that stops the terrible abuse of women, but also protects women's freedom of movement and the right to migrate to other countries in search of a better life.

When we discuss issues relating to trafficking, migration of domestic workers, sex entertainment work, mail-order brides, or female factory workers, we are dealing with the survival strategies of women. We do not want to put them into situations where we take away all these strategies without adequate policies and programs in place to give them other opportunities to pursue livelihoods and make a better life. Punishment of the perpetrator alone will not suffice. Laws and regulations in pursuit of honest and idealistic visions may be done in good faith, but without careful deliberation and fine-tuning, their impact on actual women could be devastating.

Consolidation of Rights Gained—Moving to the National Level

As the international system is in a holding position with regard to the rights of women and children, the most important imperative today is to work toward national ownership of international standards. Legislation and judicial construction as described above are important, but as said earlier, it is at the community level where it is important to make a difference.

The research by Sally Merry[79] pointing to how international standards and practice with regard to violence against women have been internalized and transformed to meet the actual needs of the community is perhaps a starting point. Again, this involves working with local community groups and responsive state actors at the national, regional, and local levels. We must now move the activism from the international level to the national, and from the national to the local if these standards are to make any impact on the actual lives of women.

When we speak of national ownership, one does not mean ideas and strategies conceived in the West and imposed without reflection on the South. Ownership implies a dialectic: international norms intrude into the domestic sphere, leading to discussion, dialogue, and contestation, out of which will emerge practices and programs most relevant to the local community. This dialectic is crucial to avoid the charge that these are norms that have no resonance or acceptability at the local level. Such a dialectical process of ownership will also ensure effective implementation by parties who were privy to its elaboration.

Economic and Social Rights

To win back the Global South, we must also begin to focus on issues that are most relevant to them—the economic and social rights of women. This is particularly important in the light of the rapid globalization that is taking place. Gayatri Spivak in one of her more telling comments states that ''the significant difference (in this era of globalization) is the use, abuse, participation, and the role of women.'' As globalization results in greater inequality within countries, many people are left behind, especially poor women, single women, and

[79] Merry, *supra* note 38.

minority women and their children. Recent discussions about rising inequality must factor in the problems faced by women and children and the rights they enjoy under international conventions.

In addition, globalization has produced all kinds of new forms of employment for women from call centers and work in the beauty industry, to factory work in free-trade zones. Women are also migrating in larger numbers to find work outside their homes, usually as domestic aides or nurses. Again, responses to these developments differ. There are those who wish to prohibit or extensively regulate these exploitative practices. Others argue that although some regulation is necessary, it should not be prohibitive, since women do get an opportunity to work, leave feudal structures, and receive a measure of economic independence.

What is needed is the empirical evidence on which regulation should be based. It is important to research what is actually happening on the ground to women to see if any regulation is needed—one that prevents and protects them from abuse, but that also allows them to choose their own work and lifestyles. The era of norm creation must now lead to an era of empiricism to see the impact of all these laws and standards on actual women.

An Appeal

Finally, as a way forward, I would like to make an appeal to the progressive intellectuals of the Global South. After 9/11 and the excursions into Iraq, Libya, and Afghanistan, many of these individuals have become very defensive, and their justifiable outcry at the behavior of Western powers in those wars has led to a distrust of the international system and to cynicism and paralysis in the real world. In this frame of mind they are willing to cede the powerful discourse and practice of human rights that helped fight apartheid in South Africa, disappearances in Latin America, dictatorship in Eastern Europe and East Asia, to the West as the exclusive possession of Western liberalism.

Having been in the field, I know how powerful human rights discourse is, not only as a tool of mobilization, but also as a means of raising self-respect among vulnerable and oppressed people. Given universal ratification of the United Nations Charter and so many ratifications of international human rights treaties, it is also a common language across states and cultures. It is today the language through which you are able to speak to the world and help create the networks, alliances, and partnerships outlined by Anne-Marie Slaughter. This is not to rule out other discourses, but to accept the fact that human rights is a powerful tool in the arsenal for social justice.

When we consider ceding human rights discourse as the sole possession of the West, perhaps we should remember Nietzsche, another disgruntled member of the anti-liberal club of the masters of suspicion. Nietzsche dismissed all talks of ''rights'' as *ressentiment,* morality talk which is a challenge to the ''noble'' and the ''select'' by the weak and the oppressed.[80] It is the latter heritage—human rights as the voice of the weak and the oppressed—dismissed by Nietzsche, that we must recapture and if necessary reform.

Malala

In conclusion, let me say that there is a silver lining for all of us who have worked on issues relating to women and children at the international level. At the moment, the United

[80] Nietzsche deals with this at length in *On the Genealogy of Morals.* An excellent article on the subject is Bernard Reginster, *Nietzsche on Ressentiment and Valuation,* 57 PHIL. & PHENOMENOLOGICAL RES. 281 (1997).

Nations is reviewing the Millennial Development Goals that were set as we emerged into the twenty-first century. The most spectacular development has been in the area of girls' education.[81] Girls are not only entering schools in large numbers, but in a few countries in Latin America, the Caribbean, and some parts of Asia, they dominate all the major faculties of the university, except perhaps engineering. Whether these gains will translate into employment gains, given the glass ceiling and the dual burden of motherhood and employment, has yet to be seen.

It is therefore not surprising that Malala, the feisty young lady from Pakistan, has become the icon of this development. Some within Pakistan have argued that she is being manipulated by Western powers and that she must guard against becoming solely a media figure and a superficial celebrity. But in my fieldwork in the Somalian refugee camps in Kenya or among girls in Afghanistan, I found that Malala is not alone and that girls all over the world are clamoring for education. In Afghanistan I met a girl called Aisha whose house had been bombed by U.S. warplanes, and whose girls' school had been attacked by the Taliban. She was undeterred. She was going back to school, and she told me with steely determination that she was going to be a teacher. I found the same steel in a girls' school outside Jalalabhad under threat from extremist forces. The girls were celebrating because one of their own had been accepted to medical school. Another told me that she was going to go into politics and run for governor.

As the generation of women around the world who first raised issues of discrimination and violence against women begins to grow weary and retire, it is this next generation of feisty, articulate, self-confident young women, especially from the Global South, who will finally take these issues forward. We can only wish them well.

Epilogue

I would like to conclude today by dedicating this lecture to my mentor, Neelan Tiruchelvam, and his wife, Sithie Tiruchelvam. Neelan was a prominent lawyer, an academic who often visited at Harvard Law School, and a politician. He was also a builder of institutions for civil society activists and free-thinking academics. Sithie was a leading corporate lawyer and a human rights activist who was also a deeply moral and caring person who was fully and actively involved in the issues of our time. She became the center of gravity for many individuals deeply concerned with social issues and critical artistic expression.

As you know, Sri Lanka lived through many decades of civil war. While fighting raged in the battlefield, the intellectual atmosphere in Colombo was often vicious and vituperative. Extremists on both sides, as well as enabling elements within the Sri Lankan government, attempted to silence all other voices, especially those who stood for pluralism, human rights, social justice, and peace.

In this toxic atmosphere, Neelan and Sithie provided a space for a whole generation of scholars from all ethnic groups, both in Sri Lanka and South Asia, to exchange ideas and debate some of the most crucial issues of our time at the national, regional, and international level. Neelan provided leadership at the workplace, and the conversations continued in Sithie's nurturing living room. Those were exciting times, and pioneering research was conducted as lawyers, anthropologists, social scientists, and artists gathered at the institutions that Neelan founded to exploit the creative space provided by him and his colleagues. Interns and scholars from around the world—some giants in their field, some just beginning their

[81] See the website of UN women (http://www.unwomen.org/en) with regard to Millennial Development goals.

scholarship—flocked to enjoy the atmosphere, the debate, and the repartee that often took place at the Thatched Patio of the International Centre for Ethnic Studies.

In the end Neelan paid with his life for his humanity and moderation when the Liberation Tigers of Tamil Eelam assassinated him in 1999. Sithie bravely continued his work, but just a few weeks ago she too passed away.

Both Neelan and Sithie died broken-hearted after seeing the Sri Lanka they loved being torn apart, not only by brute physical force, but by ideologies of violence and hate that have deeply damaged our minds and our hearts. In a hundred years' time, when the history of Sri Lanka is finally written by objective, dispassionate observers, Neelan and Sithie will have a central role in that narrative as some of the few passionate individuals who kept alive the traditions of humanity and dignity in a war-torn Sri Lanka—traditions that we now seem to have lost along the way.

Commentary on the 2014 Grotius Lecture

By Diane Marie Amann[*]

The Post-Postcolonial Woman or Child

'''Let the child be excused by his age, the woman by her sex,' says Seneca in the treatise in which he vents his anger upon anger.''[1] So wrote the namesake of this lecture, Hugo Grotius, in his masterwork entitled *The Law of War and Peace*. With that quotation, ''Let the child be excused by his age, the woman by her sex,'' Grotius traced to the writings of an ancient Roman philosopher the injunction against harming women and children in time of war. Grotius's reiteration of Seneca's words tacitly admitted that as late as 1625, armies were still violating the injunction. Sadly, the same is true 389 years later. Today neither women nor children are excused from wartime assaults, violence, and upheaval. In Syria alone, three years of conflict have left well over 100,000 persons dead[2] and forced another 2.5 million persons to flee their country.[3] Women and children are included in those statistics. Conflicts elsewhere generate similarly grim numbers, as Professor Radhika Coomaraswamy indicated by her references to the Central African Republic, to the Democratic Republic of the Congo, and to her own homeland of Sri Lanka.[4] Indeed, outrage at the persistent violation of laws protecting women and children undergirds the Grotius Lecture that she has just delivered.

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[1] Hugo Grotius, The Law of War and Peace 734 (Francis W. Kelsey trans. 1925) (originally published 1625).

[2] *See* Kashmira Gander, *UN to Stop Updating Death Toll in Syria Conflict*, Independent (London), Jan. 7, 2014 (reporting that the UN refugee agency, which had announced 100,000 deaths in July 2013, had decided to stop stating death tolls because of the lack of reliable data). A Britain-based activist group estimated the death toll to be at least 150,000 as of spring 2014. *Death Toll in Syria's Civil War Above 150,000: Monitor*, Reuters, Apr. 1, 2014.

[3] *See* UN Children's Fund, Under Siege: The Devastating Impact on Children of Three Years of Conflict in Syria 18 (Mar. 10, 2014) (stating the overall number of refugees as of spring 2014, and specifying that of these 1.2 million were children). More than 10,000 of the persons killed were children. *Id. See also* Euro-Mediterranean Human Rights Network, Violence Against Women, Bleeding Wound in the Syrian Conflict (Nov. 2013) (detailing, in report prepared by consortium of eighty human rights organizations, harms including sexual violence, killings and executions, arbitrary detention, torture, and abductions).

[4] *See* Radhika Coomaraswamy, *Women and Children: The Cutting Edge of International Law, in* ASIL Proc. 43, 48, 60, 64–65 (2014).