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## Women and Children: The Cutting Edge of International Law

Radhika Coomaraswamy

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## SIXTEENTH ANNUAL GROTIUS LECTURE

### WOMEN AND CHILDREN: THE CUTTING EDGE OF INTERNATIONAL LAW\*

RADHIKA COOMARASWAMY\*\*

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\*\* Former Under Secretary General of the United Nations and Special Representative of the Secretary General for Children and Armed Conflict and currently the lead author of the United Nations Secretary General's Global Study- a 15 year review of Security Council Resolution 1325. She has also been appointed by the Secretary General to serve on the High Level Review Panel on UN Peacekeeping. Ms Coomaraswamy remains a Global Professor at New York University School of Law and an Emeritus Fellow of the International Centre for Ethnic Studies, Colombo. I want to thank Suriya Wickremesinghe, Kumari Jayawardena, Tony Anghie, Vasuki Nesiah, Neloufer de Mel, Vijay K. Nagaraj, Sonali Deraniyagala, Ambika Satkunanathan, Asanga Welikala, Malathi de Alwis, Sabrina Aesufelly, José Alvarez, Philip Alston, Gráinne de Búrca, Nikki Lacey, David Garland, Sally Merry, Ahilan Kadirgamar, Sandesh Sivakumaran, and Madhuri Sharma for their advice, comments, and criticisms. However, the point of view expressed in this speech is strictly my own. I also want to thank Anji Manivannan for her assistance as well as her copy editing of the original manuscript.

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## I. PREFACE

Sometime at the end of 2011, while I was still the U.N. Special Representative of the Secretary General for Children and Armed Conflict, I met an ambassador from an Asian country just before a U.N. Security Council meeting on children and armed conflict. He told me that I was leaving the United Nations at the right time. “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.”<sup>1</sup>

A few months earlier, I was in the Central African Republic (CAR) with three generations of women from a 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.<sup>2</sup> 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 was not convicted, they found consolation in the fact that someone recognized the crimes

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1. Interview with Ambassador (July 12, 2011).

2. Jean-Pierre Bemba Gombo (Bemba) was the head of the Movement for the Liberation of Congo (MLC). The MLC went into the Democratic Republic of the Congo in 2002 and has since been accused of committing war crimes and crimes against humanity. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 97-106 (Nov. 11, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (indicting Mr. Bemba in 2008).

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committed against them.

This 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 root 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 begin mobilizing and using the discourse and strategy of the human rights movement to fight for equality and social justice.

## II. INTRODUCTION

In the traditional world of international law, issues of war, peace, and security have always taken precedence over other developments.<sup>3</sup> The Westphalian origins led to focusing on dispute resolution and establishing an international order that will enable peace. Even today, 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:

1. First, I will try identifying five ways in which women's rights and children's rights have impacted the substance and procedure of international law, especially in the last few decades.
2. Second, I will try describing the backlash against some of these developments, leading to a certain paralysis in their contemporary evolution.
3. Third, I will attempt to identify a way forward for the future, always keeping the interest of women and children

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3. See generally OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1995).

in mind.

Before I proceed, I would just like to bracket my remarks with three short caveats. First, international human rights law is often seen as a sub-regime of international law.<sup>4</sup> In the same way, women 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.

Second, though 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. Though 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. I have brought them together because the structures of the two international conventions outlining their rights are similar and they are also issues that receive similar attention from the respective organs of the United Nations. I do not intend in any way to infantilize women by making this comparison.

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 the U.N. 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 actually compromise one's ideals.

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4. Scott Sheeran, *The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint, or Pushing the Boundaries?*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS LAW 80 (Scott Sheeran & Nigel Rodley eds., 2014).

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### III. PART ONE: FIVE WAYS INTERNATIONAL LAW IS IMPACTED

Let me now go into the first part of my lecture: the five ways in which I think women's rights and children's rights have impacted the substance and procedure of traditional international law. Let me list these five ways at the beginning:

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 other issues, the question of women and children's rights pierces the veil of state sovereignty, the foundation of traditional international law;
3. Women's and children's issues have led to a rethinking on how to deal with non-state actors within the framework of international law;
4. Since the 1990's, international criminal jurisprudence has developed new and innovative doctrine with regard to crimes against women and children with pioneering efforts by the ad hoc Tribunals and the International Criminal Court; and
5. The role of NGOs involved in women and children's issues has been unprecedented at the international level, forcing recognition of civil society and its role in international deliberations.

#### A. THE PROCESS OF CREATING INTERNATIONAL LAW

The first area of impact, I believe, 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.<sup>5</sup> This may be supplemented by treaties, which generally tended to be bilateral and concerned issues of peace and security or trade

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5. See Scott Sheeran & Nigel Rodley, *The Broad Review of International Human Rights Law*, in *ROUTLEDGE HANDBOOK OF HUMAN RIGHTS LAW* 3-6 (Scott Sheeran & Nigel Rodley eds., 2014).

and commercial activity.

José Alvarez has documented the revolution that has taken place since the 1970's 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.<sup>6</sup> The Convention on the Elimination of All Forms 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 uniqueness was not in their multilateral nature but that instead of codifying practice that was in existence, they tried to actually transform the practice of states at the national and international level. They imposed positive duties on states and even, at times, tried to transform the behavior of individuals within nation states.<sup>7</sup> CEDAW Article 5(a) 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.<sup>8</sup>

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 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 accepts a gradualist approach, stating that "appropriate measures be taken without delay."<sup>9</sup>

This transformative impetus was a product of the intellectual climate of the 1960's and the 1970's and continued with vigor at the

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6. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006).

7. Convention on the Elimination of All Forms of Discrimination Against Women art. 4, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

8. *Id.* at art. 5.

9. *Id.* at art. 2.

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international level well into the 1990's.<sup>10</sup> 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 20th 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.<sup>11</sup> 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.<sup>12</sup> On the advice of the U.N.'s legal counsel, they abandoned this effort.<sup>13</sup> 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.<sup>14</sup> In the area of women's rights, we do have a serious question on how the desire for universality of

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10. During the 1990's—especially after the wars in Bosnia and Rwanda—there was a great deal of activism around issues related to women and armed conflict and children and armed conflict. Many women were crucial for this activism, though their perspectives greatly differed: Catherine MacKinnon, who helped develop the legal concepts in this area, and Charlotte Bunch, Jessica Neuwirth, Sunila Abeysekere, Sylvia Pimental, Heisoo Shin, and Florence Butegwa, who were all leading international advocates. Charlotte Bunch was the individual responsible for coining the phrase “women's rights is human rights.”

11. As of January 5, 2014, there have been 188 ratifications of CEDAW and 194 ratifications of the Convention on the Rights of the Child (CRC). CEDAW, *supra* note 7; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

12. See Jennifer Riddle, Note, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 623-24 (2002).

13. *Id.* at 630.

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

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 U.N. Declaration on the Elimination of Violence Against Women, I wrote to countries and found that only a handful of countries 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 passed either legislation or formulated national programs to deal with this issue.<sup>15</sup> Given the lack of capacity in 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 U.N. agency. However, after that, nothing may happen because the criminal justice system may lack capacity and the government may not have the adequate political will.<sup>16</sup> 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.

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 has made transformative projects unfashionable.<sup>17</sup>

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15. Special Rapporteur on Violence against Women, its Causes and Consequences, *International, Regional and National Developments in the Area of Violence against Women 1994-2003*, U.N. Doc. E/CN.4/2003/75/Add.1 (Feb. 27, 2003).

16. In a visit to one country, I was informed upon arrival that a comprehensive trafficking legislation had been adopted and a high-powered taskforce had been set up two years earlier. When I met with that committee, they informed me rather meekly that this was the first time they had met.

17. See FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND

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.

#### B. 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.<sup>18</sup> The process of decolonization around the world only accentuated this initial structure. The initial efforts by the U.N. system with regard to human rights were relegated to the setting of standards and a refusal to deal with developments within countries.<sup>19</sup> Soon, however, the movement against apartheid in South Africa,<sup>20</sup> the movement against disappearances in Latin America,<sup>21</sup> 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 over time has developed two elements: state sovereignty, that 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 U.N. 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

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SOCIETY (Martha Albertson Fineman & Terence Dougherty eds., 2005).

18. See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL* 132 (2007).

19. The two major International Covenants—the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights—were the main focus of work at the U.N. Human Rights Commission.

20. In 1967, the Economic and Social Council called on the U.N. Commission on Human Rights to become "interventionist" with regard to apartheid in E.S.C. Res. 1235/42, U.N. Doc. E/4393 (1967).

21. In 1980, in response to what was taking place in Chile, the U.N. Human Rights Commission set up the Working Group on Enforced or Involuntary Disappearances. Its initial mandate was for one year.

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.<sup>22</sup>

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 U.N. system, these two issues have the most extensive network of monitoring and reporting. All three pillars of the U.N. system—The Security Council, The Economic and Social Council, and The Human Rights Council—have monitoring mechanisms with regard to women and children.

If one looks at the special procedures of the U.N. Human Rights Council, there are five related to women and children. The Economic and Social Council oversees the two treaties, CEDAW and CRC, which next to the Geneva Conventions have the largest amount of state signatories and their own 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 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 U.N. agencies and some NGOs, and the Task Force that finalizes these reports is chaired by the Head of the U.N. system in the country.<sup>23</sup> 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

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22. In *Vertido v. Philippines*, the CEDAW Committee goes into a detailed analysis of the attitudes and prejudices of the Filipino judges. Committee on the Elimination of Discrimination against Women, 46th Sess., July 12-30, 2010, U.N. Doc. CEDAW/46/D/18/2008 (Sept. 1, 2010)

23. See JEAN-MARC DE LA SABLIERE, SECURITY COUNCIL ENGAGEMENT ON THE PROTECTION OF CHILDREN IN ARMED CONFLICT: PROGRESS ACHIEVED AND THE WAY FORWARD (forthcoming) (providing a comprehensive description of these systems).

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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<sup>24</sup> 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 in 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 organs of the United Nations, there are also two full-time U.N. agencies that are involved in the issues of women and children. UNICEF, the largest U.N. agency and perhaps its most successful, is wholly dedicated to the concerns of children and U.N. women, which was created recently to amalgamate all U.N. agencies working on women and 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—devoted wholly to issues related to women and children and who report to all the U.N. bodies and agencies and 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 level does not really exist

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24. *See id.*

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 U.N. Development Programme adopting a “rights up front” policy this year, this system of monitoring will be strengthened and tightened.<sup>25</sup>

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.<sup>26</sup> 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*<sup>27</sup> case before the ICTR and the *Foča* case<sup>28</sup> before the ICTY were renowned 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.<sup>29</sup> To reiterate what I said earlier, the systems of monitoring, reporting, and punishing 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

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25. U.N. Development Programme Rights Up Front Action Plan (2013); *see Right Up Front*, UNITED NATIONS (Dec. 17, 2003), <http://www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.htm>.

26. In the DRC, Eric BADEGE, Baudoin Ngaruye, Sultani Makenga, Jerome Kakwavu, Innocent Zimurinda, and Sheka Ntabo Ntaberi have had sanctions imposed against them for recruiting child soldiers or for committing sexual violence against women. In Cote D'Ivoire, Folie Martin Kouakou, le Goude, and Eugene Djue have had sanctions imposed against them for the same reasons.

27. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <http://www.unictr.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>.

28. *See* Prosecutor v. Kunarac et al., Case No. IT-96-23/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

29. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [hereinafter *Lubanga* Judgment].

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 *Vishaka* case in India where the Indian Supreme Court, drawing on General Recommendation 19 of CEDAW, basically legislated on sexual harassment. This included a requirement that states, companies, and corporations that hire over fifty people must have a sexual harassment policy and a committee to listen to complaints. This committee should be composed of a majority of women, including an outsider.<sup>30</sup>

Other judiciaries that have drawn directly on international law with regard to women's issues are Botswana in *Unity Dow*,<sup>31</sup> the Nigerian Supreme Court in a case involving a cultural practice that permitted incest,<sup>32</sup> the Mauritius Supreme Court looking at religious law,<sup>33</sup> and the Malaysian Supreme Court on the issue of discrimination due to pregnancy.<sup>34</sup> 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 U.S. Supreme Court Justice Ruth Bader Ginsburg and Indian Supreme Court Justice Bhagwati on 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.<sup>35</sup>

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.<sup>36</sup> In the area of judicial incorporation,

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30. See *Vishaka v. Rajasthan*, (1997) A.I.R. 3011 S.C. 384 (India).

31. See *Unity Dow v. Attorney General of Botswana*, [1992] 30 L. Rep. Commonwealth 623 (1992).

32. See *Mojekwu v. Ejikeme*, [1999] 5 NWLR 402 (Nigeria).

33. See *Bhewa v. Mauritius*, [1991] LRC (Const) 298 (Mauritius).

34. See *Noorfadilla bt Ahmad Saikin v. Chayed bin Basirun & Ors*, [2012] 1 MLJ 832 (Malay.).

35. See P.N. Bhagwati, , 14 COMMONWEALTH L. BULL. 1996 (1988).

36. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 517-34 (1995).

though 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.

The veil of state sovereignty is also penetrated by U.N. templates and best practices devised and supported by the technical teams of the United Nations. This is available in a great deal of areas, especially those influenced by the U.N. 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—not only for this type of issue but for all important concerns in international relations—hides the politics involved and prevents innovation, creativity, and ownership at the national level.<sup>37</sup> Nevertheless, today, U.N. 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 thirty percent of the seats of national parliaments should be reserved for women, which is seen as the critical mass needed for women to actually influence the political process.<sup>38</sup> As a result, in many of the countries emerging out of conflict with U.N. 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 U.N. Women but national ownership and the political will to implement lag far behind.

Finally, at the community level of nation states, international human rights norms with regard to women and children have pierced state sovereignty claims in some countries. Sally Merry has

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37. See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 26-32 (2005).

38. See Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 23, 16th Sess. (1997).

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chronicled this with regard to the whole movement to combat domestic violence.<sup>39</sup> 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 many developing countries' domestic violence cases, the batterer is also often a victim of social injustice and poverty. Therefore, in those societies, groups have attempted to focus 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 U.N. treaty bodies have 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.<sup>40</sup> 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 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 1980's, donors 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 level. Donors, too, must rethink their recent strategies that are

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39. See generally Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343 (2003).

40. See David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RTS. J. 101, 117, 119 (2002).

counterproductive and conceived in capitals far away from the real world in which women and children actually live.

### C. NON-STATE 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 non-state actors who also violate the rights of others. The 1980's and 1990's saw a vigorous campaign against impunity of non-state 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.<sup>41</sup>

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 *Velásquez* 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.<sup>42</sup>

The women's movement seized on this language in its effort to make violence against women a human rights issue. All U.N. 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.<sup>43</sup> There has been a great deal of discussion about what this due diligence entails.<sup>44</sup> 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

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41. Both the violence against women movement and the discussion around war crimes and crimes against humanity highlighted the issue of the responsibility of non-state actors in discussions at the international level, especially in the 1990's.

42. See *Velásquez-Rodríguez v. Honduras*, Case 7920, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4, (1988).

43. See *generally* Declaration on the Elimination of Violence against Women, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

44. See DUE DILIGENCE PROJECT, [duediligenceproject.org](http://duediligenceproject.org) (last visited Dec. 28 2014) (launching the project after the 58th Session of the Commission on the Status of Women).

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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 non-state 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.<sup>45</sup> 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. In considering targeted measures against individuals, the Security Council has also strengthened this policy.

Though international individual criminal responsibility for war crimes and crimes against humanity is much 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 1990's 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 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 at 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-

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45. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994).

friendly demands.<sup>46</sup>

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.<sup>47</sup> 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 is instead within the confines of human rights and the rule of law. Excessive criminalization also takes away from other possible approaches such as restorative justice that, combined with punishment, may be more appropriate in certain contexts.

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46. See, e.g., NewsX, *Delhi gangrape: People demands castration for accused- NewsX* YOUTUBE (Dec. 19, 2012), <https://www.youtube.com/watch?v=9Z1P61O-C5s>.

47. See David Garland, *Penalty and the Penal State*, 51 CRIMINOLOGY 475 (2013).

#### D. 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 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 1990's, with the creation of the Special Tribunals for the Former Yugoslavia and Rwanda 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 in the area of issues related to women and children.

For the first time, there is now an international definition of rape, following a great deal of discussion.<sup>48</sup> 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 type of evidence may be produced during rape trials.<sup>49</sup> Procedures for the protection of victims and witnesses were also new, innovative, and

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48. See Akayesu, Case No. ICTR-96-4; Prosecutor v. Delalic et al., Case No. IT-96-21, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>; Kunarac et al., Case No. IT-96-23/1-T; Rome Statute of the International Criminal Court art. 7(g), July 17, 1998, 2187 U.N.T.S. 90 (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 of Sierra Leone art. 2(g), Jan. 16, 2002, U.N. Doc. S/RES/1315.

49. Int'l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 96, U.N. Doc. IT/32/Rev. 49 (May 22, 2013), [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev49\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf).

comprehensive—at least in the planning stage.<sup>50</sup> All these developments may in turn actually influence rape proceedings at the national level.

The ICC also, for the first time, defined what it was 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 had been exposed as potential targets with consequential risk.<sup>51</sup>

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 demonstrative effects and influence national law when national courts have to determine similar questions with regard to the protection of women and children from violence.

#### E. INTERNATIONAL CIVIL SOCIETY

Until the 1990's, 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

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50. See Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L CRIM. L. REV. 345, 353-62 (2003).

51. See *Lubanga Judgment*, *supra* note 29.

United Nations.<sup>52</sup> Until the 1990's, 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, does not mention violence against women and it was only introduced as General Recommendation 19 in the early 1990's. 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 the World Conference on Human Rights held in 1993. They were so convincing that by the end of the year, the U.N. General Assembly had passed the Declaration on the Elimination of Violence Against Women and within the year, the U.N. Human Rights Commission created the post of Special Rapporteur on Violence Against Women. This same network expanded and worked tirelessly on issues relating sexual violence during times of armed conflict in the 1990's, 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, it was humanitarian NGOs working in conflict areas that pushed hard on this issue, forcing the U.N. General Assembly to request Graça Machel to convene a study in the 1990's. 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 concluding the above five 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 U.N. officials and NGO

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52. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 165-98 (1998); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 908-09 (2005).

activists to push the agenda forward in a sustained and deliberative manner.

#### IV. PART TWO: THE BACKLASH

I would like to now 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, and 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. Third, I will say a few words about the backlash on international mechanisms of accountability as many of these mechanisms are dealing with women's and children's issues.

##### A. HUMANITARIAN INTERVENTION

The tremendous growth of human rights in the 1990's—and the emphasis on women's rights and children's rights in particular—was unprecedented and was possible because of the end of the Cold War and the removal of dictatorships in Latin America. With a large number of countries from Latin America and Eastern Europe coming into the United Nations 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,<sup>53</sup> brought in the prospect of humanitarian intervention through the military use of force to protect civilians—chief among them were 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

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53. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-40, 60th Sess., U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

a new form of imperialism. The protection of women and children that in the 1990's received universal support is now facing a measure of resistance even in the Security Council.

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 unattractive human rights records and led by nationalist elites that still remembered 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 was adopted without most Third World countries participating.<sup>54</sup> They also assail the selectivity and double standards when it comes to human rights, which, when combined with arrogant posturing, usually have colonial overtones.<sup>55</sup>

Whatever the original philosophical roots of human rights, most countries consent to the framework when they sign the U.N. Charter and when they enter into treaties. With regard to women and children, the overwhelming ratifications despite reservations signal 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.<sup>56</sup> 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 acted in a human rights situation was in response to the call of people from the South: in the cases of apartheid in South Africa

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54. See Anthony Anghie, *International Human Rights Law and a Developing World Perspective*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 109-26 (Scott Sheeran & Nigel Rodley eds., 2014).

55. See MAHMOOD MAMDANI, *SAVIORS AND SURVIVORS: DARFUR, POLITICS, AND THE WAR ON TERROR* (2010).

56. See generally RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

and disappearances in Latin America.<sup>57</sup> American legal scholars focus on Helsinki Watch (which developed into Human Rights Watch) as originating international human rights,<sup>58</sup> 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 the passive stance of 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 even exist in national systems—especially in those countries fighting double standards at the international level—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 in which 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 and need for remedy far outweigh purely intellectual claims searching for an elusive global balance of power.

The prospect of humanitarian intervention has also rekindled the suspicions of post-colonial legal scholars who are critical voices in the academy in the Global South. This challenge is particularly important because it is fought out 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

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57. See *supra* notes 20-21 and accompanying text.

58. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 172 (2012).

framework from the developmental state viewpoint.

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 claim 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.<sup>59</sup>

The community is a very important site for individuals, especially in Asia. If true transformation is to result, it has to be at the community level, thus further emphasizing the need and importance of community activism. However, the strategies used have to 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.<sup>60</sup> 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 “community” concept still have to be worked out by local level activists. In this context, some of the gains made by scholars and women’s rights activists seeking to reinterpret Muslim law to align with human rights standards are encouraging developments.<sup>61</sup>

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

60. See NICOLE POPE, *HONOR KILLINGS IN THE TWENTY-FIRST CENTURY* 17-29 (2011).

61. For more information, see the scholarly works of Abdullahi Ahmed An-Na’im and the reports of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed.

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 their veil as an act of resistance even though in their daily life, they may lead contemporary lives.<sup>62</sup> I have seen people in the Global South turn off the television when a Hollywood celebrity appears on CNN talking about rape in Africa in a shrill voice.

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 in particular cultural contexts. Supported by anthropological literature, they argue that Western demonizing of these cultural practices is without a true understanding of their symbolism or role in a particular culture. For an example, see Sylvia Wynter's comprehensive article on female circumcision and the worldview that gave rise to it.<sup>63</sup>

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.<sup>64</sup> 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

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62. See Sirma Bilge, *Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women*, 31 J. INTERCULTURAL STUD. 9, 14-21 (2010).

63. See 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).

64. See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER 66-111 (Patrick Williams & Laura Chrisman, eds., 1994), available at [http://www.mcgill.ca/files/crclaw-discourse/Can\\_the\\_subaltern\\_speak.pdf](http://www.mcgill.ca/files/crclaw-discourse/Can_the_subaltern_speak.pdf) [hereinafter Spivak, *Can the Subaltern Speak?*].

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.<sup>65</sup> She argues that that the British acting without involving the local population was a classic case of “white men saving brown women from brown men”<sup>66</sup> by portraying Indian women as abject victims without agency awaiting rescue from their imperial masters.

The last recorded case of sati took place in the late 1980’s. 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 many believed that there was an element of coercion and deep vulnerability. The Indian State reacted firmly, passing strong legislation, initiating prosecution, and even including a provision that watching a sati was a crime. There has been no recorded case of sati since.<sup>67</sup>

Having studied this case in detail as Special Rapporteur on Violence Against Women, I find Spivak’s arguments rich and intellectually challenging, but I am also concerned that in the contemporary world and the way power is wielded within the family in South Asia today will ensure that any attempt to justify or exempt certain forms of sati will result in the deaths of many women. While I have 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

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65. See Gayatri Chakravorty Spivak, *The Rani of Sirmur: An Essay in Reading the Archives*, 24 HISTORY & THEORY 247 (1985).

66. See Spivak, *Can the Subaltern Speak?*, *supra* note 64, at 93.

67. See The Commission of Sati (Prevention) Act, No. 3 of 1988, INDIA CODE (1987).

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 called the end of history,<sup>68</sup> where parliamentary democracy and a capitalist economy are accepted as a given, the frontline issues become those of culture and religion. These precise issues affect women and girl children the most. The battle for and against imperialism is often waged today on the bodies of women.

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 Frantz Fanon. That is a given. As long as hegemonic policies and practices of exploitation and oppression exist, it is essential that we continue to raise our critical voice. Yet, there is also growing recognition that today, not all expansionist hegemonic intentions come from Western countries and it is increasingly a multi-polar world, especially in Asia.<sup>69</sup> 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, educationists, and 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 country as educationists, health workers, and religious

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68. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2006).

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

personages to set up schools and educate women.<sup>70</sup> Today, practically all the leading girls' schools in the country were 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.<sup>71</sup> 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.<sup>72</sup> Accepting the contributions of these individuals will be the first sign to show that we have truly thrown off the psychological shackles of colonialism.

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, 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 U.N. 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, women's rights organizations, child rights groups, or those working on issues of human rights and social justice. These networks are

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70. See KUMARI JAYAWARDENA, *THE WHITE WOMAN'S OTHER BURDEN: WESTERN WOMEN AND SOUTH ASIA DURING BRITISH RULE* 21-32, 75-90 (1995).

71. See generally BETHIA N. BELL & HEATHER M. BELL, *H.C.P. BELL: ARCHAEOLOGIST OF CEYLON AND THE MALDIVES* (1993).

72. See generally HELENA PETROVNA BLAVATSKY ET AL., *FIVE PART SERIES ON THE THEOSOPHISTS* (2004).

powerful, reinforcing, and based on partnership across cultures and societies.<sup>73</sup> This is not limited to liberal causes—these networks even sustain anti-globalization movements demanding economic justice.

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 11<sup>th</sup> 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 where we learnt so much from one another and acted individually and collectively to fight for the rights of women and children. To reject 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.

#### B. SEXUALITY

In addition to the general backlash against human rights that has affected women's rights and children's rights since 2001, particular developments within the respective fields 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 1980's and violence against women in the 1990's. However, in the early 1990's, path-breaking writers, such as Judith Butler, began to question the category of what constitutes "woman" from the perspective of gender identity.<sup>74</sup> Arguing that gender categories are more fluid than biological, many Western NGOs and academics began placing the issue of sexuality on the international agenda. Even most feminists today believe that sexuality is at the root of many issues relating to women, ranging

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73. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2009).

74. See Judith Butler, *Subjects of Sex/Gender/Desire*, in *FEMINISM AND POLITICS* 273 (Anne Phillips ed., 1998); Judith Butler, *Imitation and Gender Insubordination*, in *WOMEN, KNOWLEDGE, AND REALITY: EXPLORATIONS IN FEMINIST PHILOSOPHY* 371 (Ann Garry & Marilyn Pearsall eds., 1996).

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from discriminatory cultural practices to violence against women. In addition, there is the internationally sensitive issue of sexual orientation.

The issue of sexuality first came up at the International Population Conference in the 1990's 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 Islamic 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 U.N. agencies were afraid to call for another world conference in 2005, afraid 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, ranging from violence against women to Millennium Development Goals, are now long and arduous, 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 standalone goal for the next millennium.

### C. ACCOUNTABILITY

The area where the backlash since 2001 is clearly articulated by member states is in the field of 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 horror of Rwanda and the former Yugoslavia has receded into the background and arguments for state sovereignty are on the ascendant. Where moral outrage about what was happening to children in Liberia, Sierra Leone, and the Congo united the world, after Iraq, Afghanistan, and Libya, the fear that accountability will be selectively used has led to expressions of discomfort. Certain African leaders indicted by the ICC have also run campaigns throughout Africa against the Court. Many African states have signed the ICC and often use it as a way of dealing with their brutal rebel forces.<sup>75</sup> A recent opinion piece in *The New York Times* by Mahmood Mamdani and the 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.<sup>76</sup>

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 negatively impact the actual victims of war.

During my last years as the Special Representative on Children and Armed Conflict, I witnessed this unfold at the Security Council in the aftermath of the intervention in Libya. Open debates and resolutions on the thematic mandates on women and children, that the Council once fully endorsed, were now 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 speech, despite these developments between intellectuals, heads of state, and the institutions of the United Nations, there is a groundswell of interest and support for international accountability, especially among

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75. President Museveni of Uganda 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.

76. See Thabo Mbeki & Mahmood Mamdani, Op-ed., *Courts can't End Civil Wars*, N.Y. TIMES, Feb. 5, 2014, <http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html>.

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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?”<sup>77</sup> The desire for justice runs deep and cannot be dismissed so easily in favor of only dialogue, otherwise new conflicts fuelled by revenge will emerge in the future. Closure to conflict will only come when we recognize the suffering and injustice and collectively decide not to repeat past mistakes.

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77. Interview with woman victim in Kigali, Rwanda (1995).

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

### A. FINDING THE BALANCE BETWEEN MORAL OUTRAGE AND LOCAL NUANCE

The most important necessity today is to win back the full support of the Global South for issues relating to human rights in general and women and children in particular. The first step is in the area of advocacy to find the correct balance between moral outrage and the understanding of nuance and context. Nothing upsets Third World people more than the 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 to change course. Moral outrage also 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, for moral outrage to be effective, it cannot be selective or have double standards, and so it must involve issues of both the North and the South.<sup>78</sup> 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

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78. The non-regulation of U.S. drones over Yemen and Pakistan and the existence of detention facilities like Guantanamo remain open symbols of double standards despite the administration change in the United States.

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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 led by U.S. and Swedish activists with the active involvement of the U.S. State Department is punishment-based.<sup>79</sup> 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. Though this sounds noble, no one stops to ask why one of the girls rescued by Nicholas Kristof actually went back to her brothel.<sup>80</sup>

My experience with trafficking in Poland, Nepal, and India is that there *are* really horrendous cases of abduction and sexual slavery that have to be stopped at any cost. Punitive regulation of some sort must deal with the worst manifestations. However, it was very clear that the vast majority of women that I interviewed wanted to migrate because of certain conditions at home—whether it was poverty, domestic abuse, or community oppression. The desire to migrate is 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 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 the root of the problem lies in the woman or girl’s desire to migrate. Therefore, migration and trafficking are closely connected. Draconian laws set up without

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79. The U.S. Department of State Trafficking in Persons Report focuses on laws and punishment as a way of assessing the compliance of states with trafficking norms.

80. Nicholas D. Kristof, Op-ed., *Back to the Brothel*, N.Y. TIMES, Jan. 22, 2005, <http://www.nytimes.com/2005/01/22/opinion/22kristof.html>.

understanding this fundamental fact may only further victimize the individual concerned. The repatriation of women who have saved all their lives to migrate may devastate them unless their concerns are met. This part of the equation is rarely confronted. 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 and 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 a situation where we take away all these strategies without adequate policies and programs in place to give them alternative 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 carefully deliberating and fine-tuning, augmented by effective social programmes, their impact on actual women could be devastating.

#### B. 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 I said earlier, it is important to make a difference at the community level.

The research by Sally Merry pointing to how international standards and practice with regard to violence against women were internalized and transformed to meet the actual needs of the community is perhaps a starting point.<sup>81</sup> This again involves working with local-level community groups and responsive state actors at the national, regional, and local levels. For these standards to make any impact on the actual lives of women, we must now move the activism from the international to the national level and from the

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81. See generally Merry, *supra* note 39.

national to the local level.

When we speak about 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 emerges 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.

### C. 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 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 role of women.”<sup>82</sup>

As globalization results in greater inequality within countries, many people are left behind, especially poor women, single women, and 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 ranging from call centers to work in the beauty industry and factory work in free trade zones. Women are also migrating in larger numbers to find work outside their home, 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 though some regulation is necessary, it should not be prohibitive, since women get an opportunity to work, to leave feudal structures,

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82. See Gayatri Chakravorty Spivak, *Diasporas Old and New: Women in the Transnational World*, 10 *TEXTUAL PRAC.* 245, 250 (1996).

and to 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—regulation that prevents and protects them from abuse but which also allows them to choose their own work and lifestyle. 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.

#### D. AN APPEAL

Finally, as a way forward, I would like to make an appeal to the progressive intellectuals of the Global South. After September 11, and the excursions into Iraq, Libya, and Afghanistan, many States 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, and dictatorships in Eastern Europe and East Asia to the West as the exclusive possession of Western liberalism. Yet, it must be remembered that the same tools can be used against western hegemony. The only comprehensive report on drone attacks in Pakistan is by the Stanford University and New York University Law Schools' human rights clinics.

Having been in the field, I know that human rights discourse is powerful—not only as a tool of mobilization but also as a means of raising self-respect among vulnerable and oppressed people. Given the universal ratification of the U.N. 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 “resentment”: morality talk that challenges the “noble” and the “select” by the weak and the oppressed.<sup>83</sup> 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.

## VI. MALALA

In conclusion, let me say 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 Nations is reviewing the Millennium Development Goals that were set as we emerged into the 21st century. The most spectacular development has been in the area of girls’ education.<sup>84</sup> 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.<sup>85</sup> 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 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 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 all-girls school the Taliban had attacked. She was undeterred. She was going back to school and she told me with steely determinations that

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83. See FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* (Douglas Smith trans., 1999) (1887); Bernard Reginster, *Nietzsche on Ressentiment and Valuation*, 57 *PHIL. & PHENOMENOLOGICAL RES.* 281 (1997).

84. See generally U.N. WOMEN, <http://www.unwomen.org/> (Dec. 28, 2014) (outlining Millennium Development Goals).

85. In the U.S., see THOMAS A. DIPRETE & CLAUDIA BUCHMANN, *THE RISE OF WOMEN: THE GROWING GENDER GAP IN EDUCATION AND WHAT IT MEANS FOR AMERICAN SCHOOLS* (2013).

she was going to be a teacher. I found the same steel in a girls' school outside Jalalabhad under threat from the extremist forces. They were celebrating since one of their own had got into medical school. Another told me 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 begin 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.

## VII. 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 freethinking academics. Sithie was a leading corporate lawyer and a human rights activist who was also a deeply moral and caring person, 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 times at the national, regional, and international level. Neelan gave 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

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provided by him and his colleagues. Interns and scholars from around the world—some giants in their field, some just beginning their 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 brokenhearted seeing the Sri Lanka they loved being torn apart, not only by brute physical force but also 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.

Thank you.