

THE POST-POSTCOLONIAL WOMAN OR CHILD



By Diane Marie Amann, the associate dean for international programs and strategic initiatives and the holder of the Woodruff Chair in International Law at the law school. She is also the special adviser to the International Criminal Court prosecutor on children in and affected by armed conflict. This essay is written in her personal capacity.

“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.” So wrote Hugo Grotius in his 1625 masterwork titled *The Law of War and Peace*. With that quotation, Grotius traced to the writings of an ancient Roman philosopher the injunction against harming women and children in time of war.

Grotius’ reiteration of Seneca’s words tacitly admitted that as late as 1625, armies still were violating the injunction. Sadly, the same is true 390 years later. Today, neither women nor children are excused from wartime assaults, violence and upheaval.

In Syria alone, four years of conflict have left well over 220,000 persons dead, and many more in dire need. Women and children are included in those statistics; indeed, of the 12.5 million Syrians now requiring humanitarian assistance, 5.6 million are children.

Conflicts elsewhere generate similarly grim numbers.

Author’s Note: This essay is based on the text of the talk I gave as the Distinguished Discussant for the 16th Annual Grotius Lecture delivered on April 9, 2014, in Washington, D.C., at the joint meeting of the American Society of International Law and the International Law Association. Delivering the principal lecture was Radhika Coomaraswamy, then a Global Professor of Law at the New York University School of Law and formerly the special representative of the U.N. secretary-general on children & armed conflict and the U.N. special rapporteur on violence against women. Her lecture and my response are reprinted in volume 30 of the American University International Law Review (2015), pp. 1–52, and also will appear in a forthcoming volume of ASIL Proceedings.

Legal discussions of such crises frequently turn on the discourse of human rights, according to which every person enjoys upon birth certain fundamental rights, and the violation of those rights demands a remedy. The discourse is deservedly a cornerstone of post-World War II legal thinking.

But the current human rights regime incurs criticism, as Radhika Coomaraswamy pointed out in the talk that gave rise to this essay. I will examine some reasons for that criticism with the aim of imagining a possible future – that of the post-postcolonial child.

Coomaraswamy, a Sri Lankan lawyer who has served as a U.N. under-secretary-general, referred in particular to certain postcolonial scholars from the global south. These scholars, she said, “reject the human rights framework as part of the ‘liberal’ ‘imperialist’ project especially when it comes to cultural practices,” and they further “reject the dominance of the European Enlightenment and the sacredness of the power of reason.”

My own response to such rejections might raise hackles among some of those scholars, for it begins with this claim: We are all postcolonials now.

By way of example, both of my own countries of citizenship are postcolonial states.

One is Ireland. This is the eighth decade since the adoption of the Irish Constitution, a postcolonial charter from which India later borrowed. Yet as demonstrated by the first-ever visit to England by an Irish President – in 2014 – remnants of eight centuries of colonization still litter both islands.

My other country is, of course, the United States. Here, the structure of government rests upon the postcolonial intuitions of the men who wrote its Constitution. Having won a revolution, these framers professed to borrow the best and to reject the worst from their colonial past. The choices they made two hundred years ago – admirable choices like the checking of power and shameful ones like slavery – influence U.S. policy to this day.

To this day, moreover, Americans see themselves as having repulsed foreign tyranny and invented a superior form of sovereignty. The American identity thus remains postcolonial – also, perhaps, preimperial. This self-perception contributes to seemingly contradictory impulses that have coexisted for much of American history; to be specific, the U.S. affinity for intervention overseas and the U.S. aversion to scrutiny from abroad.

Such interrelations of subjugation and independence, of isolation and cooperation, of the internal and the international, pervade our world. Relationships of this sort may be found to some degree in and among all member states of the United Nations. They pertain as well to nonmember entities, such as Taiwan, Kosovo and Palestine.

It is in our efforts to restitch the remnants of colonization – and maybe, in places like Crimea, to confront a new colonial patchwork – that we, the members of the global community, are revealed as postcolonials.

This is especially the case with regard to international law. International law is said to have forefathers: a few Spanish priests and the luminary quoted at the outset of this essay, Grotius. The periods of colonization in which these men lived shaped their writings; in turn, their writings shaped, even justified, the colonial project.

Grotius was, among many other things, a lawyer for the Dutch East India Company. His position in the colonial era is evident in his espousal of *jus praedae*, the law of prize. It also surfaces in his acceptance of slavery as a fact of the law of nations – albeit a fact “contrary to nature,” a practice that better nations would do well to avoid.

Our own international legal system operates in reaction to that colonial era. In the last half-century the norm of sovereign equality empowered new states as they emerged out of eroded empires. This dispersion of authority is apparent in one member-one vote bodies like the U.N. General Assembly.

Yet significant power still resides exclusively in certain states; most notably, the U.N. Security Council’s five permanent members. Each of those so-called P-5 members has, at various times, shown an imperialist streak. Vestiges of colonialism remain hallmarks of our postcolonial epoch.

We are thus in need of post-postcolonialism. To paraphrase *Can the Subaltern Speak?*, an oft-quoted 1988 writing by Columbia Literature Professor Gayatri Spivak: Not only must the subaltern be permitted to speak, but when she does, others must listen, must admit her as an equal to their ongoing conversation, and must, eventually, adjust their behavior to accommodate her place in their world.

Tulane Law Professor Adeno Addis aptly has labeled this process “dialogic pluralism.”¹

Legal discussions
... frequently turn
on the discourse of
human rights ...

1 Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 Notre Dame L. Rev. 615 (1992).

“Menwomenandchildren” is not a single word; discrete attention must be paid to the many different hues of human experience. Victimization may be an aspect of that experience, but it is not the only one.

Efforts toward this end may be found in the 1989 Convention on the Rights of the Child and the 1979 Convention on the Elimination of All Forms of Discrimination against Women. Each of these treaties enjoys wide membership among the countries of the world (the United States, however, belongs to neither). Each includes provisions aimed at increasing participation by, and breaking down stereotypes about, women or children.

Nevertheless, the influence even of adult women remains circumscribed. As theorists like Collège de France Professor Mireille Delmas-Marty have stressed, moreover, the process of pluralistic dialogue must alter the structures of social and economic inequality within which the seeds of armed violence germinate.²

What did Grotius, our putative forefather of international law, have to say about women and children? His historical account afforded little relief for either. “[I]ncluded in the law of war,” he stated, was a “right to inflict injury” that extended to “the slaughter even of infants and of women ... with impunity.”

Yet his very mention of women and children hinted at a preferred rule, one that he soon made explicit. “Children should always be spared,” Grotius wrote, and so too most women. Among his most plaintive examples in support of this injunction is this quotation of another ancient Roman, Lucan: “For what crime could little ones have deserved death?”

Grotius typically portrayed women, no less than children, as “innocents” who should be exempted from the ravages of war. Notably, he included within this exemption a ban on sexual assault. Grotius acknowledged that “many” writers had maintained “that the raping of women in time of war is permissible.” He disagreed:

A better conclusion has been reached by others, who have taken into consideration not only the injury but the unrestrained lust of the act; also, the fact that such acts do not contribute to safety

or to punishment, and should consequently not go unpunished in war any more than in peace.

That conclusion was “the law not of all nations, but of the better ones,” Grotius wrote. He then insisted that among “Christians” this view “shall be enforced, not only as a part of military discipline, but also as a part of the law of nations; that is, whoever forcibly violates chastity, even in war, should everywhere be subject to punishment.”

The quoted passages depict women and children as bystanders, beings not fully conscious of the world around them – not actors, but rather objects, in the tableau of the battlefield. They are to be protected, rescued even, in service of the actors’ notions of honor. A social scientist would say they have no agency. They are, first and last, victims.

The depiction rings familiar almost four centuries later. Law professors like Mark Drumbl of Washington and Lee University, Fionnuala Ní Aoláin of the universities of Minnesota and of Ulster, and Dianne Otto of the University of Melbourne are just a few of the many scholars demonstrating that the discourse of victimhood continues both to motivate and to justify global action on behalf of persons perceived as victims.³

Here too, then, remnants of a colonialist power dynamic persist in what is supposed to be a postcolonial era.

What is to be done? Makers of post-postcolonial international law should aspire to deploy the tools of motivation and action in a way that avoids reviving outdated notions of societal honor, and instead honors the actual humans who endure violence amid war.

“Menwomenandchildren” is not a single word; discrete attention must be paid to the many different hues of human experience. Victimization may be an aspect of that experience, but it is not the only one.

Consider this sentence from the story of someone who survived World War II: “Children, even relatively young children, learn to be cunning or street-smart when

2 Mireille Delmas-Marty, *Global Law: A Triple Challenge* (Naomi Norberg trans. 2003).

3 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (2012); Fionnuala Ní Aoláin, *Situating Women in Counterterrorism Discourses: Undulating Masculinities and Luminal Femininities*, 93 B.U. L. REV. 1085 (2013); Dianne Otto, *Power and Danger: Feminist Engagement with International Law through the UN Security Council*, Australian Feminist L.J. 97 (2010).

So where does this leave us? If not victim, who is our post-colonial child or woman, and how should international law both protect and empower her?

circumstances demand, and they are fast learners when they have to be in order to live another day.” The author of this passage, occurring in a 2009 book titled *A Lucky Child: A Memoir of Surviving Auschwitz as a Young Boy*, is George Washington University Law Professor Thomas Buergenthal, whose career has included service as a judge on the International Court of Justice.

Another backward glance reveals glimpses of Buergenthal’s insight in Grotius’ time, and not only because Grotius himself began the practice of law at the ripe old age of 17. Was there, in that time, any foremother of international law?

In his introduction to a 1925 reissue of Grotius’ work, an early president of the American Society of International Law, James Brown Scott, praised “that noble woman who preserved him” – that is, Grotius – “for us and for international law.” That woman was Grotius’ wife, Maria de Groot.

When Dutch authorities detained the couple as political dissidents, she and a maidservant stuffed Grotius in a trunk and smuggled him to France. There he completed *The Law of War and Peace*. As long ago as the 17th century, Maria and her maid flouted the stereotype of passive womanhood.

The same is surely true of two other women of that era. One is the Spanish queen who commissioned the voyage of Columbus; the other, the queen who waged war in England’s first colony and built a global navy whose power encroached upon the Grotian tenet of *mare liberum*, freedom of the seas. These two monarchs contributed mightily to colonialism, the practice that Grotius and the Spanish priests theorized.

If Grotius is a forefather, therefore, Isabella and Elizabeth are foremothers of international law. Perhaps it is in recognition of their ruthless reigns that Grotius stopped short of advocating a blanket exemption for women. To the contrary, he maintained that wartime violence could be wreaked against women who “have committed a crime which ought to be punished in a special manner” – women who “take the place of men.”

This and other Grotian references to punishment direct me to a final consideration, accountability.

On this, Coomaraswamy’s talk was rather more sanguine than am I. She cited with optimism developments aimed at improving

the lot of women and of children – initiatives by nation-states and by the United Nations, as well as Security Council resolutions and International Criminal Court prosecutions.

A pessimist, however, would be pained to point out that the Security Council’s Working Group on Children and Armed Conflict seldom has acted on a years-old proposal to sanction persistent perpetrators of grave violations like recruiting or using child soldiers.

And although the ICC broke ground by convicting a militia leader of those very war crimes, it also must be noted that two subsequent verdicts acquitted other leaders of similar charges, despite judges’ findings that child soldiers were everywhere during the conflict under review. What is more, not one ICC verdict yet has resulted in conviction on charges of sexual violence.

Considered in light of developments at the Security Council, legal technicalities that explain the ICC verdicts ought to be put to one side in order to examine the possibility that the international community may have entered a new era of soft (some would say no) accountability.

So where does this leave us? If not victim, who is our post-colonial child or woman, and how should international law both protect and empower her?

Initially, we must accept that she may not be a she. This is an insight gaining currency in the last couple years, as global actors start to address sexual violence and other wartime harms done to boys and, yes, even to adult men.

Furthermore, there is much to be gleaned from the recent scholarship of Emory Law Professor Martha Albertson Fineman.⁴ That scholarship posits that what warrants protection is not sex, not age, but vulnerability. It thus refocuses analysis away from a singular identity as “man” or “woman” or “child” and toward the varied ways that all persons, on account of some traits but not others, at some periods in their lives but not others, may be vulnerable.

It is to those moments of vulnerability that Fineman would direct the making and implementation of law. Her focus brings into view an image that transcends both colonial and postcolonial assumptions of societal strata and personal predilections. It thus bears promise for the envisaging of a post-postcolonial future.

Who knows? Maybe a global culture cognizant that everyone at times is weak will prove less eager to initiate armed violence, less apt to tolerate the violence done by structural inequalities and more willing to construct a just and enduring peace.

⁴ E.g., Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010–2011).