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**SIXTEENTH ANNUAL GROTIUS LECTURE
RESPONSE***

**THE POST-POSTCOLONIAL WOMAN OR
CHILD**

DIANE MARIE AMANN¹

“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.”² So wrote the namesake of this lecture, Hugo Grotius, in his masterwork entitled *The Law of War and Peace*. With that quotation, “Let the child be excused by his age, the woman by her sex,” Grotius traced to the writings of an ancient Roman philosopher the injunction against harming women and children in time of war. Grotius’s reiteration of Seneca’s words tacitly admitted that as late as 1625, armies still were violating the injunction. Sadly, the same is true 389 years later. Today, neither women nor children are excused from

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¹ Associated Dean for International Programs & Strategic Initiatives and Emily & Ernest Woodruff Chair in International Law, University of Georgia School of Law; Special Adviser on Children in and affected by Armed Conflict, Office of the Prosecutor, International Criminal Court. Written solely in my personal capacity, this article is based on the talk I gave as the Distinguished Discussant for the 16th Annual Grotius Lecture. Delivering the principal lecture was Radhika Coomaraswamy and that lecture appears in this issue as Radhika Coomaraswamy, *Women and Children: The Cutting Edge of International Law*, 30 AM. U. INT’L L. REV. 1 (2015). My thanks to the American Society of International Law and to American University Washington College of Law for the honor of taking part in this event. Immense thanks to my dear colleagues, Professors Margaret deGuzman, Jaya Ramji-Nogales, and Beth Van Schaack, for their assistance in exploring the issues raised in this article.

2. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 734 (Francis W. Kelsey trans., 1925) (1625) (quoting the Roman philosopher).

wartime assaults, violence, and upheaval. In Syria alone, three years of conflict have left well over 100,000 persons dead³ and forced another 2.5 million persons to flee their country.⁴ Women and children are included in those statistics. Conflicts elsewhere generate similarly grim numbers, as Professor Radhika Coomaraswamy indicated by her references to the Central African Republic, to the Democratic Republic of the Congo, and to her own homeland of Sri Lanka.⁵ Indeed, outrage at the persistent violation of laws protecting women and children undergirds the Grotius Lecture that she has just delivered.

Commensurate with her distinguished career in international law academia, policy, and practice, Professor Coomaraswamy has presented a vast and intricate tapestry of global developments. It would be impossible for me to comment in full in the time allotted. Instead, I propose to pull five strands out of the fabric of her lecture and to weave them anew, as a means to invite the imagining of a possible future, that of the post-postcolonial woman or child.

My first strand addresses Professor Coomaraswamy's statements of concern about postcolonial theorists whom she has found to be prevalent in the global south. These scholars, she said, "reject the

3. See Kashmira Gander, *UN to Stop Updating Death Toll in Syria Conflict*, INDEPENDENT, Jan. 7, 2014, at ¶ 2, <http://www.independent.co.uk/news/world/middle-east/un-to-stop-updating-death-toll-in-syria-conflict-9045096.html> (reporting that the U.N. refugee agency, which had announced 100,000 deaths in July 2013, had decided to stop stating death tolls because of the lack of reliable data); Death Toll in Syria's Civil War above 150,000: Monitor, REUTERS, Apr. 1, 2014, at ¶ 1, <http://www.reuters.com/article/2014/04/01/us-syria-crisis-toll-idUSBREA300YX20140401> (estimating the death toll to be at least 150,000 as of Spring 2014).

4. See European-Mediterranean Human Rights Network, *Violence against Woman Bleeding Wound in the Syrian Conflict* (Nov. 2013), available at <http://www.euromedrights.org/eng/wp-content/uploads/2013/11/Doc-report-VAW-Syria.pdf> (detailing, in report prepared by consortium of eighty human rights organizations, harms including sexual violence, killings and executions, arbitrary detention, torture, and abductions); U.N. Children's Fund, *Under Siege: The Devastating Impact on Children of Three Years of Conflict in Syria* 18 (Mar. 10, 2014), available at http://weshare.unicef.org/C.aspx?VP3=SearchResult_VPage&ALID=2AMZIFDT4C (stating the overall number of refugees as of spring 2014, and specifying that of these 1.2 million were children and more than 10,000 of the persons killed were children); .

5. See Coomaraswamy, *supra* note 1, at 2, 4, 7-8, 21-22, 24, 30-31.

human rights framework as part of the ‘liberal’ ‘imperialist’ project especially when it comes to cultural practices.”⁶ She described the scholars as “rejecting the dominance of the European Enlightenment and the sacredness of the power of reason.”⁷ 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.⁸ Yet, as demonstrated by this week’s first-ever visit to England by an Irish President,⁹ 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.¹⁰ This self-

6. See *id.* at 23.

7. See *id.* at 25.

8. See IR. CONST., 1937; Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 2004 (2013) (explaining how “authors of India’s 1947 Constitution adopted a formulation used in Ireland’s Constitution to give constitutional status to social and economic rights”). Tom Arnold, *Message from the Chairman*, CONVENTION ON THE CONSTITUTION, <https://www.constitution.ie/> (last visited Dec. 21, 2014) (explaining that Ireland is in the process of considering amendments to the Constitution “to ensure that it is fully equipped for the 21st Century”).

9. See Henry Chu, *Irish President Welcomed by Queen Elizabeth II on Historic Visit*, LOS ANGELES TIMES, Apr. 8, 2014, at ¶ 3.

10. For a brief account of the United States’s “becoming a colonial power,” see Mary Ellen O’Connell, *Arbitration and Avoidance of War: The Nineteenth-Century American Vision*, in THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNAL 30, 38 (Cesare P.R. Romano ed., 2009). It is scarcely unheard of for a postcolonial state to engage in colonialist ventures, such as the expulsion of indigenous persons from lands subsequently occupied by supporters of the state. See, e.g., Rep. of the Int’l Comm. Inquiry on

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.¹¹

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 Kharkiv and Crimea,¹² 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, the topic that structures the second strand that I pull from Professor Coomaraswamy's rhetorical tapestry. International law is said to have forefathers – a few Spanish priests and our lecture's namesake, Grotius.¹³ 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.¹⁴ His position in the colonial era

Darfur to the U.N. Security-General, pursuant to S.C. resolution 1564 (2004), ¶ 219, U.N. Doc. S/2005/60 (Jan. 25, 2005) (stating that the Janjaweed militia aided the Sudanese government's attacks in Darfur because of "the promise of owning land, which also explained the massive forced displacement of the civilian population").

11. Cf. Diane Marie Amann, *Unipolar Disorder: A European Perspective on U.S. Security Strategy*, 27 HASTINGS INT'L & COMP. L. REV. 447, 440-54 (2004) (comparing U.S. views on foreign policy and global scrutiny to those in Europe); Diane Marie Amann, *Dialogue entre chercheurs différentes traditions juridiques: une perspective américaine*, in VARIATIONS AUTOUR D'UN DROIT COMMUN 363, 368-70 (Mireille Delmas-Marty et al. eds., 2002) [hereinafter Amann, *Dialogue*] (exploring American exceptionalism).

12. David M. Herszenhorn & Andrew Roth, *In East Ukraine, Protesters Seek Russian Troops*, NEW YORK TIMES, Apr. 7, 2014 (reporting on unrest in Kharkiv and other Ukrainian cities in the month after Russia declared its annexation of another portion of Ukraine, Crimea).

13. See James Brown Scott, *Introduction*, in GROTIUS, *supra* note 2, at xiv (describing contributions of Grotius and three Spaniards, Balthasar de Ayala, Francisco Suárez, and Francisco de Vitoria).

14. See *id.* at xiv.

is evident in his espousal of *jus praedae*, the law of prize.¹⁵ It also surfaces in his acceptance of slavery as a fact of the law of nations – albeit a fact “contrary to nature,”¹⁶ a practice that better nations would do well to avoid.¹⁷

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.¹⁸ 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 – what Professor Coomaraswamy and many others have called “double standards”¹⁹ – remain hallmarks of our postcolonial epoch.

We are, thus, in need of post-postcolonialism. To paraphrase Professor Gayatri Spivak, not only must the subaltern be permitted to speak,²⁰ but when she does, others must listen, must admit her as an

15. See GROTIUS, *supra* note 2, at 663-89 (discussing prize law in book III, chapter VI, entitled “On the right of acquiring things taken in war”); see also JOSHUA, BARKAN, *CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* 89-90 (2013) (linking colonialism and Grotius’s writings on prize law, undertaken in his role as advocate for the Dutch East India Company); Scott, *supra* note 13, at xiv-xx (discussing evolution of Grotius’s writings on prize law).

16. GROTIUS, *supra* note 2, at 690.

17. *E.g.*, *id.* at 657 (stating with reference to a rule he supported that “[t]he latter view is the law not of all nations, but of the better ones”); see *id.* at 696 (writing that the law of nations allowed slavery, yet adding that “[t]he law under consideration does not now exist among Christians”). Although Grotius may not have used the precise words “better nations,” variations on that term occur throughout his work.

18. See U.N. Charter art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”); see also *Growth in United Nations Membership, 1945- Present*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Dec. 21, 2014) (setting forth a timeline showing expansion of United Nations from organization with 51 charter members in 1945 to 193 members in 2014).

19. Coomaraswamy, *supra* note 1, at 23.

20. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Carey Nelson & Lawrence Grossman eds., 1988); see Coomaraswamy, *supra* note 1, at 25-26 (discussing this milestone article).

equal to their ongoing conversation, and must, eventually, adjust their behavior to accommodate her place in their world. Professor Adeno Addis aptly labeled this process “dialogic pluralism.”²¹ Efforts toward this end may be found in each of the treaties on which Professor Coomaraswamy’s lecture focused: each includes provisions aimed at increasing participation by and breaking down stereotypes about women or children.²² Nevertheless, the influence even of adult women remains circumscribed. As theorists like Professor Mireille Delmas-Marty have stressed,²³ moreover, the process of pluralistic dialogue must alter the structures of social and economic inequality within which the seeds of armed violence germinate.²⁴

With this claim, I shift to my third strand, a consideration of

21. Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 650 (1992); see Amann, *Dialogue*, *supra* note 11, at 364 (expressing support for Professor Addis’s concept, which he also called “critical pluralism”).

22. See Coomaraswamy, *supra* note 1, at 5-8, 19 (discussing Convention on the Rights of the Child art. 9(2), 23(1), 31, Nov. 20, 1989, 1577 U.N.T.S. 3 and Convention on the Elimination of All Forms of Discrimination against Women art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13). As of Spring 2014, the treaties had 194 and 188 parties, respectively, although the United States belonged to neither. See United Nations, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

23. See MIREILLE DELMAS-MARTY, *GLOBAL LAW: A TRIPLE CHALLENGE* vii (Naomi Norberg trans., 2003) (contending that “if we want to avoid hegemonic globalization, we must learn to pair the economic and human rights to invent a truly pluralist common law”); Amann, *Dialogue*, *supra* note 11, at 364 n.2 (citing additional Delmas-Marty writings on pluralism); see also Dianne Otto, *Power and Danger: Feminist Engagement with International Law through the UN Security Council*, 32 AUSTL. FEMINIST L.J. 97, 106 (2010) (criticizing Security Council resolution for “the absence of any reference to addressing the structural causes of women’s inequality, like women’s economic marginalisation, which must be addressed before the rhetoric of participation has any hope of translating into practice”).

24. In a similar vein is this quote from the principal lecture: “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.” Coomaraswamy, *supra* note 1, at 35; cf. Diane Marie Amann, *International Law and the Future of Peace*, 107 ASIL PROCEEDINGS 111, 113 (2013) (discussing concept of “positive peace” (quoting MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL 15-16 (Harper San Francisco 1994) (1963))).

women and children.

What did 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,” Grotius wrote, was a “right to inflict injury” that extended to “the slaughter even of infants and of women . . . with impunity.”²⁵ 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.²⁶ Among his most plaintive examples in support of this injunction are these words, written by another ancient Roman: “For what crime could little ones have deserved death?”²⁷

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.”²⁸ 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.²⁹

That conclusion was “the law not of all nations, but of the better ones,” Grotius wrote, 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.”³⁰

The quoted passages depict women and children as bystanders, beings not fully conscious of the world around them – not actors, but

25. GROTIUS, *supra* note 2, at 648.

26. *Id.* at 734 (stating, in subhead for book III, chapter IX: “Children should always be spared; women, unless they have been guilty of an extremely serious offence; and old men”) (emphasis omitted).

27. *Id.* at 735 (quoting Lucan).

28. *Id.* at 656 (adding, in the same sentence, that other writings maintained “that it is not permissible”).

29. *Id.* at 657.

30. *Id.*

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. Mark Drumbl, Fionnuala Ní Aoláin, and Dianne Otto 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.³¹ 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. This is the fourth strand that I draw from Professor Coomaraswamy's talk, not only because of her express mention of honor killings, but also because of her recognition that "womenandchildren" is not a single word, that discrete attention must be paid to the many different hues of human experience.³² Victimization may be an aspect of that experience, but it is not the only one. Consider this sentence from the boyhood memoir of one who survived World War II: "Children, even relatively young children, learn to be cunning or street-smart

31. See MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 100 (2012) (impugning "the metaphor of the child soldiers as faultless passive victim"), discussed in Diane Marie Amann, *Book Review: Reimagining Child Soldiers in International Law and Policy*, 107 AM. J. INT'L L. 724 (2013); Fionnuala Ní Aoláin, *Situating Women in Counterterrorism Discourses: Undulating Masculinities and Luminal Femininities*, 93 B.U. L. REV. 1085, 1086 (2013) (criticizing references to women, in policy discussions, "as the wives, daughters, sisters, and mothers of terrorist actors, or as the archetypal victims of senseless terrorist acts whose effects on the most vulnerable (women themselves) underscores the unacceptability of terrorist targeting"); Otto, *supra* note 23, at 103 (analyzing extent to which Council's Women, Peace and Security agenda moves beyond viewing "women as a 'vulnerable group' or as the 'victims' of armed conflict").

32. See Coomaraswamy, *supra* note 1, at 4 ("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.").

when circumstances demand, and they are fast learners when they have to be in order to live another day.”³³ The author is Professor Thomas Buergenthal, whose career has included service as judge on the International Court of Justice.³⁴

Another backward glance reveals glimpses of Buergenthal’s insight in Grotius’s time, and not only because Grotius himself began the practice of law at the ripe old age of seventeen.³⁵ Was there, in that time, any foremother of international law? An early President of this Society, James Brown Scott, once praised “that noble woman who preserved him” – that is, Grotius – “for us and for international law.”³⁶ That woman was his 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.³⁷ There he completed *The Law of War and Peace*.³⁸ As long ago as the seventeenth 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;³⁹ 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*

33. THOMAS BUERGENTHAL, *A LUCKY CHILD: A MEMOIR OF SURVIVING AUSCHWITZ AS A YOUNG BOY* 208 (2009).

34. See *Judge Thomas Buergenthal*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=11> (last visited Dec. 21, 2014).

35. See Scott, *supra* note 13, at xvii.

36. *Id.* at xxiv (providing that Scott did not identify the “noble woman” by name and did not mention at all the role of her maid, described below).

37. See Dirk Pfeifer, *Loyalty, Bravery and Female Cleverness: Grotius’s Maidservant and Remonstrant Identity*, 29 DE ZEVENTIENDE EEUW 176, 177-78, 180-84, 187-88 (2013) (recounting the story and emphasizing on the role of the maid, Elseлина van Houweningen).

38. See Scott, *supra* note 13, at xxiv-vi; Hugo Grotius, SLOT LOEVESTEIN, <http://www.slotloevestein.nl/documents/museum/geschiedenis/hugo-de-groot.xml?lang=en> (last visited Dec. 21, 2014) (stating that to avoid raising suspicion, Maria remained under house arrest in Loevestein Castle until Dutch authorities permitted her to join Grotius in France); Pfeifer, *supra* note 37, at 180.

39. See, e.g., Colleen A. Vasconcellos, *Ferdinand and Isabella (Spain)*, in COLONIALISM: AN INTERNATIONAL SOCIAL, CULTURAL, AND POLITICAL ENCYCLOPEDIA 207 (Melvin Eugene Page & Penny M. Sonnenburg eds., 2003).

liberum, freedom of the seas.⁴⁰ 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.”⁴¹

This and other Grotian references to punishment direct me to my final strand, accountability. On this, I fear that Professor Coomaraswamy is rather more sanguine than I. She cites with optimism developments at the national level as well as U.N. monitoring mechanisms, Security Council resolutions, and International Criminal Court prosecutions.⁴² A pessimist, however, would be pained to point out that the 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.⁴³ And although the ICC broke

40. On the Grotian tenet, see GROTIUS, *supra* note 2, at 603; HUGO GROTIUS, *THE FREE SEA* (Richard Hakluyt trans., 2004) (1609). On the actions of the British queen, see, e.g., Catherine E. Manathunga, *Ireland*, in *COLONIALISM: AN INTERNATIONAL SOCIAL, CULTURAL, AND POLITICAL ENCYCLOPEDIA* 280-81 (Melvin Eugene Page & Penny M. Sonnenburg eds., 2003); Margaret Sankey, *Elizabeth I*, in *COLONIALISM: AN INTERNATIONAL SOCIAL, CULTURAL, AND POLITICAL ENCYCLOPEDIA* 187 (Melvin Eugene Page & Penny M. Sonnenburg eds., 2003).

41. GROTIUS, *supra* note 2, at 735.

42. See Coomaraswamy, *supra* note 1, at 8-20.

43. See Jean-Marc de la Sablière, *Security Council Engagement on the Protection of Children in Armed Conflict: Progress Achieved and the Way Forward* 29 (June 15, 2012) (urging, in report by a former Permanent Representative of France to the United Nations, that “[t]he threat of sanctions, consistently reiterated by the Council, should be put into practice more often so that it is not ultimately perceived as an empty threat”); David S. Koller & Miriam Eckenfels-Garcia, *Using Targeted Sanctions to End Violations against Children in Armed Conflict 1-4* (Apr. 25, 2014) (unpublished manuscript) (on file with the author) (dating back to 2004, contemplation of these enforcement tools, yet finding only “limited” use of targeted measures since then); Security Council Report, *Cross-Cutting Report: Children and Armed Conflict 2-3* (Feb. 21, 2014), available at http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_1_children_and_armed_conflict

ground by convicting a militia leader of those very war crimes,⁴⁴ 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.⁴⁵ What is more, not one ICC verdict has resulted in conviction on charges of sexual violence.⁴⁶ Considered in light of developments at the Security Council, these facts compel us: first, to put to one side claims that legal technicalities explain the ICC verdicts; second, to inquire whether we have entered a new era of soft – some would say no – accountability; and third, if so, to ask what we are going to do about it. (Speaking parenthetically, our inquiry must explore the freedom from accountability that countries like the United States enjoy by dint of their P-5 status.)⁴⁷

_2014.pdf (stating, in periodic report by nongovernmental watchdog organization, that although Council debates in 2012 and 2013 had “focused on accountability and persistent perpetrators,” they did not give rise to significant “movement in this direction,” and attributing this to “general reluctance by some members of the Working Group to impose targeted sanctions”).

44. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 1358 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [hereinafter *Lubanga* Judgment], discussed in Diane Marie Amann, *International Decisions: Prosecutor v. Lubanga*, 106 AM. J. INT'L L. 809 (2012).

45. See *Procureur v. Katanga*, No. ICC-01/04-02/12, Judgment rendu en application de l'article 74 du Statut (Mar. 7, 2014), ¶¶ 1024-88, <http://www.icc-cpi.int/iccdocs/doc/doc1744366.pdf> [hereinafter *Katanga* Judgment]; *Procureur v. Ngudjolo*, No. ICC-01/04-02/12, Jugement rendu en application de l'article 74 du Statut (Dec. 18, 2012), ¶¶ 397, 504-16, <http://www.icc-cpi.int/iccdocs/doc/doc1529535.pdf> [hereinafter *Ngudjolo* Judgment].

46. See *Katanga* Judgment, *supra* note 45, ¶¶ 958-1023; *Ngudjolo* Judgment, *supra* note 45, § XI, at 215; see also Diane Marie Amann, *Children and the First Verdict of the International Criminal Court*, 12 WASH. U. GLOBAL STUD. L. REV. 411, 422, 424-28 (2013) (discussing treatment in *Lubanga* Judgment of sexual violence evidence as “irrelevant”); *Partial Conviction of Katanga by ICC Acquittals for Sexual Violence and Use of Child Soldiers: The Prosecutor vs. Germain Katanga*, WOMEN'S INITIATIVES FOR GENDER JUSTICE (Mar. 7, 2014), <http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf> (indicating in press release that in *Katanga*, judges wrongly applied “a higher standard of evidence” to charges of sexual violence).

47. Concern about this particular defect in the international accountability framework extends even to the issue of child soldiers. See Richard J. Wilson, *Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo*, 11 SANTA CLARA J. INT'L L. 29, 79 (2012) (concluding, in an article on a person detained from age fifteen onwards, that “the

So where does this leave us? If not victim, who is our post-postcolonial 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 members of the global community start to address sexual violence and other wartime harms done to boys and, yes, even to adult men.⁴⁸ Furthermore, there is much to be gleaned from the recent scholarship of Professor Martha Albertson Fineman.⁴⁹ That scholarship posits that what warrants protection is not sex, not age, but vulnerability. It, thus, refocuses analysis away from a singular identity as “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 she would direct the making and implementation of law. Fineman’s 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.

tribunals that could have held the United States to account for its non-compliance with international law utterly failed to do so”).

48. See generally, e.g., Solange Mouthaan, *Sexual Violence against Men and International Law: Criminalising the Unmentionable*, 13 INT’L CRIM. L. REV. 665 (2013); Otto, *supra* note 23, at 108-09 (discussing Sandesh Sivakumaran, *Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict*, 92 INT’L REV. RED CROSS 259 (2010)); *Promoting Accountability for Conflict-Related Sexual Violence Against Men: A Comparative Legal Analysis of International And Domestic Laws Relating To IDP and Refugee Men In Uganda* (Refugee Law Project, Working Paper No. 24, 2013), http://www.refugeelawproject.org/files/working_papers/RLP.WP24.pdf; U.N.

High Comm’r for Refugees, *Working with Men and Boy Survivors of Sexual and Gender-based Violence in Forced Displacement* (July 2012).

49. See Fionnuala Ní Aoláin, *Women, Vulnerability, and Humanitarian Emergencies*, 18 MICH. J. GENDER & L. 1, 4-5 (2011) (discussing Fineman’s work). See generally Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008-2009).

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