

Book Proposal

Always Innocent?

Child Soldiers, Justice, and the International Legal Imagination

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I propose a solo-authored book tentatively entitled *Always Innocent? Child Soldiers, Justice, and the International Legal Imagination*. The proposed book casts a critical eye on international law's approach to the tragic involvement of children (under 18 years) in the perpetration of mass atrocity. *Always Innocent?* draws from ethnographic research regarding how children end up in armed conflict and what they do during conflict, including committing systemic human rights abuses.

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I. THE BOOK'S RATIONALE AND ARGUMENT

Some child soldiers commit grievous crimes against combatants, civilians, the elderly, other children, and even infants. But, as best-selling author Ishmael Beah – himself a former child soldier in Sierra Leone – relates, they are told and come to believe that it ‘isn’t their fault.’¹ Beah candidly describes what he did:

We went to work, killing everyone in sight. We didn’t waste a single bullet. [...] We walked around the village and killed everyone who came out of the houses and huts. Afterward, we realized that there was no one to carry the loads. We had killed everyone.

[...]

So they were all lined up, six of them, with their hands tied. I shot them on their feet and watched them suffer for an entire day before finally shooting them in the head so that they would stop crying. Before I shot each man, I looked at him and saw how his eyes gave up hope and steadied before I pulled the trigger. I found their somber eyes irritating.²

And he sets out the response thereto:

In the morning I would feel one of the staff members wrap a blanket around me saying, ‘This isn’t your fault, you know. It really isn’t’. [...]

None of what happened was your fault, you were just a little boy [...]. [...] ‘None of these things are your fault,’ she would always say sternly at the end of every conversation. Even though I had always heard that phrase from every staff member – and frankly I had always hated it – I began that day to believe it.³

¹ Ishmael Beah, *A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER* (2007). Beah fled Sierra Leone for the United States when his uncle died and the RUF-AFRC entered Freetown because he feared once again becoming a child soldier. *Id.* at 209. In the U.S., he completes his education and becomes a successful advocate and celebrated author. *A LONG WAY GONE* has attracted extensive public acclaim, but in one instance (*The Australian*) was criticized for Beah’s alleged blurring of facts (specifically his age while a child soldier and the amount of time he spent as a child soldier). In my opinion, this controversy does not cloud the validity of Beah’s reporting of the violence he committed, nor the centrality of the ‘it’s not your fault’ theme to policy responses toward child soldiers (in fact, Beah’s work has disseminated much of that policy to general audiences). *See also* Samura, *Cry Freetown* (video interview with former boy soldier; ‘it’s not my fault, I know God will forgive me’); the portrayal of child soldiers in the Hollywood film *Blood Diamond*. Another popular book authored by a former child soldier, which won a prestigious literary award in France, is Ahmadou Kourouma’s *ALLAH N’EST PAS OBLIGÉ* (2000).

² Beah, *supra* note 1, at 143-144, 159.

³ Beah, *supra* note 1, at 151, 160, 165-166.

This belief does not arise by happenstance. Instead, it emerges by design. International human rights discourse and international humanitarian norms construct child soldiers as lacking in moral and legal authorship, capacity, or agency over their violence. Regardless of what they do – and who (and how) they may victimize – it is they, the child soldiers, who uniformly are the initial innocent victims. Initial innocence becomes the prism through which their subsequent conduct statically becomes refracted. Constructions of childhood innocence now migrate into and are in turn buoyed by other regulatory frameworks, including international criminal law.

International criminal law protects children in two primary ways. First, it effectively eliminates children under the age of eighteen as its subjects. Second, it punishes adults who conscript, enlist, or use children under the age of fifteen in armed conflict.

The Rome Statute of the International Criminal Court (ICC) excludes any person under the age of eighteen at the time of the alleged offense from the ICC's jurisdiction.⁴ As a result, the ICC cannot investigate, prosecute, or punish children. On the one hand, the ICC's jurisdictional exclusion arose at the Rome Conference as a matter of political compromise and disinterest among states regarding the issue of children as atrocity perpetrators. On the other hand, however, this jurisdictional exclusion also reflects and certainly contributes to the notion that children who commit atrocity lack agency over their actions and are *doli incapax* (incapable of forming criminal intent).⁵ Insofar as the jurisdictional exclusion does not require that the child actually be a child soldier, international criminal law's conceptualization of the child soldier has expanded to cover all children regardless of the context in which they commit the crimes in question.

As a matter of formal law, the Rome Statute's approach to children under the age of eighteen differs from the enabling instruments of other international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). Whereas the ICTY and ICTR Statutes make no mention of an age of criminal responsibility, the SCSL formally fixes fifteen as the age at which its jurisdiction begins. However, the formal *de jure* approach of the Rome Statute reflects the actual *de facto* practice of all of these, and other, international criminal tribunals insofar as international criminal prosecutors flatly refuse to pursue the criminal acts of perpetrators under the age of eighteen.⁶ In this regard, international

⁴ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 37 ILM 1002 (1998), 2187 UNTS 90, art. 26 ("The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.")

⁵ International human rights law has influenced the establishment of the age of majority in international criminal law. See, e.g. Roger S. Clark and Otto Triffterer, *Article 26: Exclusion of jurisdiction over persons under eighteen*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 493, 495-496 (Triffterer, ed., Nomos, 1999) (mentioning the discussion in the ICC Preparatory Committee of the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights, and the Convention on the Rights of the Child).

⁶ In November 2002, the first SCSL Chief Prosecutor, David Crane, announced that his office would not prosecute anyone under the age of eighteen. Special Court for Sierra Leone, Press and Public Affairs Office, *Special Court*

institutions prosecuting extraordinary international crimes materially depart from ordinary criminal law in nearly all national jurisdictions where persons under the age of eighteen are prosecuted, in some cases even as adults, when alleged to have committed ordinary common crimes, especially very serious crimes.⁷

International criminal law also protects children by deeming them incapable of consensually enlisting in fighting forces when under the age of fifteen. The adult who conscripts, uses, or enlists a child under the age of fifteen has committed a war crime. This structure leaves children between the ages of fifteen and eighteen stuck in the interstices of the law, where they face an odd set of incentives: it remains legal for them to fight, but they are not criminally responsible for their conduct, including when they recruit, or even forcibly conscript, younger children. These incentives are not academic insofar as some children come to hold, as children, positions of influence and power in fighting forces.

The ICC is currently investigating and prosecuting defendants for the conscription, enlistment, or use of children under the age of fifteen in fighting forces. The ICC's first trial – that of Congolese rebel leader Thomas Lubanga – is proceeding solely on this count. The narrative emerging from the *Lubanga* trial, which is essential to the Prosecutor's goal of securing a conviction, consolidates the image of all child soldiers as helpless automatons. After all, if the children were shown to volunteer or exercise some agency or free will in joining, then the accused would be handed a defense that, at a minimum, could serve rhetorical purposes. We are consequently left with the following: child soldiers have the capacity to actively serve in ICC proceedings as credible witnesses, and as rights-bearing claimants for reparations, but they are deemed incapable of assuming the burden of complying with international criminal law. Ironically, in this sense they become privileged litigants and privileged combatants.

Always Innocent? contrasts this legal regime with the social reality of child soldiering, in particular as revealed by ethnographic research from diverse jurisdictions including Sierra

Prosecutor Says He Will Not Prosecute Children, Press Release (November 2, 2002). See also generally Mark Osiel, *THE END OF RECIPROCITY: TERROR, TORTURE AND THE LAW OF WAR* (2009) (at chapter 2, p. 34 of my draft) (“Children have committed some of the very worst barbarities in conventional war, especially in Africa – precisely because they are too young to appreciate the moral significance of their actions. [...] [N]o international criminal tribunal would give a moment's thought to prosecuting [minors], even if it had jurisdiction over them, which the International Criminal Court does not.”); Alette Smeulers and Roelof Haveman, *International Crimes and Criminology: An Agenda for Future Research*, in *SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES* 508 (Smeulers & Haveman, eds. 2008) (noting that there “seems to be an emerging consensus that child soldiers should be free of punishment for what they have done [...]”).

⁷ Smeulers and Haveman, *supra* note 6, at 508 (“Age limits for immunity all over the world range from 7 to 15 years old, with exceptions for ‘grave crimes’ in which cases the child offenders can be tried and sentenced as adults.”). Furthermore, at present national jurisdictions permit minors to be prosecuted and punished for the same extraordinary international crimes for which international institutions will not prosecute or punish although, as Chapter 5 examines, international approaches increasingly remodel the content of national law in these areas of jurisdictional overlap.

Leone, Liberia, the Democratic Republic of Congo (DRC), Angola, Mozambique, and northern Uganda regarding how children end up in armed conflict and what they do during conflict.⁸

Many child soldiers are abducted in the most horrific manner – they are abused, brainwashed, and tortured by their commanders; they become addicted on drugs, at times coming to believe that violence is a game. In some instances, commanders inculcate children into violence by killing their families; or, more poignantly still, by forcing them to rape and murder their own family members and to destroy their villages – leaving them with no option but to join marauding groups of killers.⁹ Girl soldiers, some of whom also kill, often become subject to brutal sexual slavery and forced marriage. Participation in crimes against humanity by children in the DRC, Sierra Leone, Uganda, and Liberia is unequivocally more coerced than adult participation in atrocity in Rwanda and Nazi Germany. The youth, malleability, and differential cognitive function of child soldiers render them much more susceptible to manipulation.¹⁰

All that said, the ethnographic research also suggests that children exercise greater agency¹¹ in enlisting in armies, fighting forces, and militias than international criminal lawyers and human rights workers assume. What is more, despite the existence of staggeringly coercive pressures, some children exercise greater agency (in particular, tactical or situational agency) over the violence they commit and often personally lord great power over their victims. The

⁸ In particular, I consider the published research and writing of the following ethnographers, anthropologists, and social workers: Susan Shepler, Alcinda Honwana, David Rosen, David Francis, Jo Boyden, Jason Hart, Brandon Kohrt, Miriam Denov, Mats Utas, Krijn Peters, Paul Richards, and Michael Wessells. I also engage in a critical teleological reading of a number of international humanitarian publications.

⁹ Scott Johnson, *Hard Target: The Hunt for Africa's Last Warlord*, NEWSWEEK (May 25, 2009) p. 60 (“Kony has forced new male recruits to rape their mothers and kill their parents.”).

¹⁰ Commanders find children are easier to control. *See, e.g.* Prosecutor v. Katanga and Chui, confirmation of charges, Case No. ICC-01/04-01/07 (September 30, 2008), para. 262 (evidence showing Katanga used child soldiers because they never opposed his orders). The small physical stature of children also may provide strategic advantage in fighting. *See, e.g.*, Beah, *supra* note 1, at 143 (“We had all gotten better at shooting, and our size gave us an advantage, because we could hide under the tiniest bushes and kill men who wondered where the bullets were coming from.”)

¹¹ The meaning of “agency” is subject to considerable debate. I adopt anthropologist Alcinda Honwana’s term “tactical agency” or “agency of the weak” in the context of child soldiers. Alcinda Honwana, *CHILD SOLDIERS IN AFRICA* (2006). Honwana, who has written extensively on child soldiers in Angola and Mozambique, defines tactical agency as conduct “devised to cope with and maximize the concrete, immediate circumstances of the military environment in which they [n.b. children] have to operate [...] they are fully conscious of the immediate returns and they act, within certain constraints, to seize opportunities that are available to them.” *Id.* at 51. “Tactics are complex actions that involve calculation of advantage but arise from vulnerability.” *Id.* at 73. “Despite the fact that the majority of these boys had been forced to enter the military, they were not empty vessels into whom violence was poured or from whom violent behavior was coerced.” *Id.* at 73. Although I disagree with Honwana that an actor with tactical agency never can bear legal responsibility, I support her recommendation that the deployment of tactical agency by child soldiers ought to be assessed through traditional ceremonial rituals. *Id.* at 162 (noting in one sentence, without any further discussion, that child soldiers do not “exercise the autonomy that legal responsibility for their own actions would require”). Unlike Honwana’s work, I examine how international criminal law’s full-scale rejection of tactical agency discourages any transitional justice mechanism, including those Honwana herself propounds. Accordingly, Honwana’s diffidence to assign any legal responsibility to acts of tactical agency threatens the development of the very institutions she rightfully insists ought to play a part of the reintegration and rehabilitation of child soldiers.

ideal-type popular image of the child soldier is far from representative of the experience of all child soldiers.¹² Although there may be truth to this image, and in some instances considerable truth, I present it as unduly parsimonious, clumsily essentialist, and as belying a much more complex reality.

A disconnect therefore arises between the social reality of child soldiering and the legal construction of child soldiering, in particular regarding the narrow subset of child soldiers who systematically commit atrocity. Dueling narratives arise: on the one hand, the human rights narrative – with its proscriptive, normative, universalizing bent – and, on the other, the ethnographic narrative – with its descriptive, relativistic, and localized bent. I argue these narratives are not incommensurable and that both offer value in constructing a socio-legal regime. Multiple narratives should be welcomed instead of being shuttered out. However, this only can occur if legal institutions avoid the tantalizing drive towards parsimony that inheres in uniformly categorizing all child soldiers only as victims.¹³ I argue that the dominant legal characterization of child soldiers, deeply influenced by humanitarian discourse, inadequately grasps the actual reality of child soldiering and therefore serves us poorly in combating the phenomenon and its effects.

In my 2007 book *Atrocity, Punishment, and International Law*, I argued that liberal criminal law is ill-suited to adjudge mass atrocity and punish perpetrators.¹⁴ In salient part, this is because most atrocity perpetrators are not really deviant. Rather, they demonstrate conformist tendencies. They have some agency over their actions, and as a normative matter *should* be held accountable, but criminal law premised on individual autonomy is an awkward accountability tool in situations of collective and organizational massacre.¹⁵ In fact, international criminal law exaggerates the levels of individual agency, autonomy, and control that adults have amid the contextual cauldron where extraordinary international crimes are perpetrated. International criminal law exaggerates these characteristics in order to square collective violence with the predicate of individual culpability that underpins liberal legalist criminal trials. In my current work on children, I note the obverse phenomenon – namely, that international criminal law unduly minimizes the autonomy and agency of children and youth in contexts of atrocity to next-to-nothing.¹⁶ I do not believe that collective pressures ought to exculpate adults; in fact, I explicitly call for accountability measures that transcend the atrocity trial and welcome the

¹² Moreover, insofar as the majority of child soldiers are adolescents over the age of fourteen, the humanitarian narrative's deployment of the term child soldiers, instead of the more accurate term adolescent or youth soldiers, is an important semantic move that massages the overall conversation.

¹³ Alcinda Honwana, *Innocents et coupables: les enfants-soldats comme acteurs tactiques*, 80 POLITIQUE AFRICAINE 73 (2000).

¹⁴ Mark A. Drumbl, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007).

¹⁵ This is especially the case in genocidal contexts, where the violence is coordinated along religious, racial, ethnic, or nationalistic lines, but also arises in situations where groups are created, and group divisions plotted, along characteristics that are not permanent, stable, or eliminationist in orientation.

¹⁶ International criminal law – which applies individualized criminal process and punishment to alleged perpetrators of atrocity crimes – seemingly accepts its own ill-fit when it comes to all children, not just child soldiers, even when evidence might be available that implicates them in genocide, crimes against humanity, or widespread war crimes.

collective. On the other hand, the mere fact a perpetrator of atrocity is a minor does not justify suddenly lurching to the distant other end of the spectrum of responsibility.

In a similar vein, Smeulers and Holá critique international criminal law generally for its “fundamental attribution error” – namely, that it overestimates dispositional factors, such as blaming or crediting individuals, and it underestimates situational factors, such as blaming or crediting the environments in which these individuals operate.¹⁷ I agree with this observation. Paradoxically, however, in the specific case of child perpetrators, I contend that international criminal law opens itself up to the obverse criticism, namely that it underestimates dispositional factors – in fact, it completely discounts them – while overestimating situational factors by viewing them as fully explicative of the problem.

Always Innocent? challenges international law’s approach to child soldiers. The book factually argues that there is no empirical or experiential basis to generalize that all children, including all child soldiers, who commit atrocity entirely lack capacity, agency, or authorship over the international crimes they inflict. There is no empirical or experiential basis to generalize that every child soldier is unable to understand the consequences of his or her acts, or lacks mental and moral awareness of his or her conduct. The book then delivers a normative challenge. It posits that disarming, demobilizing, and reintegrating children who systematically commit atrocity without their participation in transitional processes of *accountability, attribution of wrongdoing, acknowledgement, and atonement* simply fails to serve their best interests or the collective best interests of the afflicted societies. Under the well-intentioned but ultimately paternalistic guise of protecting children, international criminal law actually dismisses them in a way that hampers their long-term welfare and undermines the participatory roles they may play in post-conflict transition.

In *Atrocity, Punishment, and International Law*, I expressed skepticism about the transformative, retributive and deterrent value of atrocity trials. I certainly do not think that they are appropriate or beneficial for child soldiers. However, *Always Innocent?* argues that international law’s prevailing approach to children who engage in systematic human rights abuses jeopardizes other forms of accountability, such as truth commissions, traditional reintegrative ceremonies, and community service, that ought to inform the transitional justice narrative for child soldiers and which constitute an important ingredient in eventual reconciliation. Involvement in any form of accountability is premised on an individual’s having done something wrong in the first place and, to some degree at least, that individual’s capacity of assuming blame, responsibility, or acknowledgement regarding the impugned conduct. Some form of truth-telling, collective service, or designation of responsibility – when conjoined with rehabilitation – may be a more effective reintegrative methodology than simply reintegration

¹⁷ Alette Smeulers and Barbora Holá, *Attributing guilt to and sentencing of various types of perpetrators*, 2009 manuscript on file with the author, at p. 3 (citing Gerrig and Zimbardo 519 (2008)).

without accountability owing to an often extrinsically generated belief that murder, rape, amputation, and torture is “not your fault.”

International criminal law should encourage, instead of gloss over, the hard work and discomfiting questions that must be addressed in order to reintegrate children who perpetrate grievous atrocity in a salutary, viable manner that dissuades their recidivism, ostracism, and marginalization. Atrocity trials for children are not a solution. Neither, however, is an absence of any meaningful accountability mechanism. I believe a more forthright conversation needs to be had about why some child soldiers systematically commit widespread atrocity while others resist, escape, or simply avoid so doing. The simplistic binary reductionism of the criminal law into guilty or innocent obfuscates complex realities that the same individual can be both a victimizer and a victim at the same time. As international criminal law grows and matures, it would do well to re-consider its own assumptions and constructions while drawing more from research conducted in cognate fields, in this case ethnography, anthropology, and social work.

Assessing the agency of children who torture, rape, and kill in contexts of extraordinary international criminality is a difficult task that requires great sensitivity, care, and nuance. It is considerably easier to pre-judge *ex ante* that they bear no responsibility than to examine *ex post* why, exactly, they join militias and then why, exactly, some among them commit terrible crimes. International law, however, ought to be informed by objective study and dispassionate inquiry. The easier path that assuages our sensibilities is not necessarily the best path to protect children from endemic conflict, to safeguard and heal societies from the pain that children may inflict, or to promote the best interests of the children who commit international crimes.

The conferral of incapacity upon all child soldiers has particularly pernicious effects on girl soldiers – whose involvement in committing crimes is generally much less than that of boys. The present approach resists undertaking fine-grained assessments of which child did what during the conflict. As a result, those children who resist the most are unrewarded and those who inflict the least harm are unrecognized. Instead, everyone is lumped in together under the rubric of apparent innocence despite their vastly different experiences. Taking child agency seriously is precisely the kind of approach that could most help girl soldiers, who nearly everyone recognizes undeservedly face some of the greatest hurdles in terms of their subsequent reintegration.

Externalities arise when children are collectively denied status as possible subjects of international criminal law. The deliberate non-application of criminal law is just as awkward in addressing the behavior of atrocity perpetrators as is the deliberate application of the criminal law. Hannah Arendt’s warning that extraordinary international crimes explode the limits of the criminal law applies both in terms of who is covered by the criminal law as well as who we choose to exempt from its reach.¹⁸ This further reveals the poor fit of criminal law as a dominant

¹⁸ Hannah Arendt, *EICHMANN IN JERUSALEM* (1963).

accountability mechanism to contexts of atrocity and underscores the need to look beyond trials and imprisonment to broader, yet more nuanced and careful, modalities of accountability. Accordingly, the answer is not to have trials for children and to incarcerate children who may be found guilty. Far from it. However, a danger arises that, when the criminal law is the dominant language of accountability and when that dominant language says one can do no wrong, a process becomes set in motion that dissuades all other forms of accountability and, one step further, of justice generally.

Chapter 1 introduces the topic.

Chapter 2 then sets out how contemporary international human rights law and international humanitarian law treat child soldiers. International advocacy networks strategically frame all child soldiers as victims in a manner that appeals to donor moral proclivities so as to attract funding, resources, and popular attention. International relations specialists have noted the deployment of such strategies by transnational advocacy networks, but only recently is scholarship emerging that examines externalities that arise from these essentialized approaches to framing, as well as their effect upon inter-subjective understandings of complex social phenomena.¹⁹ Chapter 2 modestly contributes to this emergent scholarship.

Chapter 3 examines international criminal law's approach to the involvement of children in fighting forces and the penal responsibility of persons under the age of eighteen. This chapter delves deeply into the work of international criminal tribunals and, in the case of the war crime of using children in armed conflict, the SCSL jurisprudence and the ongoing *Lubanga* trial at the ICC. International criminal law is shown to be influenced by human rights and humanitarian norms, a socializing effect that I argue to be far from self-evident given the different responsibilities and enforcement mechanisms of the respective legal regimes.²⁰ In earlier work, I critiqued the dependency of international criminal law upon the modalities of ordinary criminal law. In those subsets of its operation, such as child soldiers, where international criminal law turns to the extension of norms, in particular *lex ferenda*, from international human rights law and international humanitarian law, it, too, demonstrates a dependency that gives short shrift to the *sui generis* nature of the conduct that it sanctions. I argue that transitional justice initiatives that reach beyond the adult enlistment threaten the '100% victim status' that is central to influential humanitarian narratives regarding child soldiers. Consequently, the content and operation of international criminal law cannot be disentangled from the promotion of a broader children's

¹⁹ See e.g., Charli Carpenter, *Women, Children and Other Vulnerable Groups: Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue*, 49 INTERNATIONAL STUDIES QUARTERLY 295, 297, 303 (2005) (focusing on gender essentialisms that "situate[] women alongside children as innocent, dependent, and vulnerable").

²⁰ Darryl Robinson is wise to point out: "[...] while ICL [n.b. international criminal law] is a criminal law discipline, its norms and its practitioners draw a deep intellectual inheritance from human rights and humanitarian law. Interpretive, substantive, structural, and ideological assumptions of human rights and humanitarian law have been absorbed into ICL discourse, distorting methods of reasoning [...]." Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21(4) LEIDEN JOURNAL OF INTERNATIONAL LAW 925-963, 961 (2008).

rights agenda. I argue that international criminal law has become co-opted by this agenda and, with regard to the prosecution of adults who enlist minors into fighting forces, serves to disseminate the official narrative.

Turning away from essentialisms, Chapter 4 unpacks the complex realities documented by some anthropologists, criminologists, researchers, and ethnographers based on their experiences with child soldiers in conflict societies.

In Part (a), Chapter 4 examines the interplay between the age of eighteen as a watershed point of legal passage with on-the-ground perceptions of childhood and adulthood in a number of African conflict societies. No discussion of childhood innocence can be shorn from the debate over when childhood actually begins and the mediation of the universal and the particular in this regard. The humanitarian mythology of childhood meshes awkwardly with local understandings of coming of age.

Part (b) of Chapter 4 explores how children end up in fighting forces. It is indisputable that many children are kidnapped by members of rebel groups or their governmental rivals. The kidnappers themselves may be no older than the children they target.²¹ With regard to participation in fighting forces, research suggests, however, a somewhat more complex picture of why some child soldiers actually serve as combatants, thereby casting some doubt upon the robustness of the presumption central to the *Lubanga* prosecution that children never can choose to join. Moreover, it is difficult to generalize among conflicts *inter se* on the question of how children become implicated in fighting forces.

Part (c) of Chapter 4 considers why, among those children who are enmeshed in fighting forces, some systematically commit extraordinary international crimes while others do not, or do so only occasionally. There is limited evidence on this question.²² However, my review of available evidence, including ethnographic, neuro-biological, psychological, and anthropological, belies a much more complex reality than the parsimony presented by international criminal law. One important fact, which emerges from northern Uganda, is that only a small minority of child soldiers (even among those forcibly kidnapped by the Lord's Resistance Army) commit extraordinary international crimes, with an even smaller subset doing so serially. Children under eighteen certainly do not always act with full legal agency, but they also are not bereft of any agency whatsoever, certainly not tactical agency to make daily decisions that materially affect the lives of others. These children are not like ordinary common

²¹ Faith J. H. McDonnell and Grace Akallo, *GIRL SOLDIER: A STORY OF HOPE FOR NORTHERN UGANDA'S CHILDREN* 21 (2007). *See also* id. at 117-119, 131 for discussion of the terrible and depraved manner in which commanders treat some child soldiers.

²² Part of the reason why there are limited data on children who commit atrocity is because the extant framing of the tragedy of child soldiers, to which international criminal law itself is a contributor, dissuades this kind of research. In fact, international criminal law provides no incentives to undertake this kind of research or analysis – none at all – because the underlying questions are simply denuded of legal relevance insofar as children cannot be the subjects of international criminal process.

criminals, but they are also not completely hapless automatons either. While some children torture and kill sadistically, others run away in a manner that reflects tremendous enterprise, courage, and determined action; others succeed in making themselves useful to militia leaders in ways that do not entail inflicting gross human rights abuses upon third-party civilians or combatants; others lie to and situationally manipulate commanders to avoid killing; while others who begin as victims of brutal kidnapping strategically develop proficiency in atrocity in order to survive, revenge their losses, obtain lucre, or promote themselves within ragtag hierarchies. In the end, individual child soldiers act differently under comparable extrinsic circumstances. They are not just artifacts of situations — they have disposition.

Chapter 5 explores the spill-over effect of narratives of childhood innocence from the conflict phase into the post-conflict phase. Protective assumptions regarding children’s lack of agency before and during conflict become deeply embedded in post-conflict transitional justice paradigms.

In Part (a), Chapter 5 introduces the influence of humanitarian funding and discourse in structuring local policies with regard to child soldiers. This Part inquires whether the effects of these assumptions on reconciliation, justice, reintegration, and the rehabilitation of former child soldiers necessarily are salutary. Activist campaigns that highlight tragedies, such as child soldiering, may do so in a manner that flattens “complexity and fact”²³ and, in the case of the construction of childhood innocence, that serves an ulterior ideological or bureaucratic agenda.

In the spirit of further examining the effect of international norms on lives lived locally, Part (b) of Chapter 5 discusses how international criminal law also reorders local life. Despite the Rome Statute’s rhetoric of complementarity, national jurisdictions, particularly in vulnerable post-conflict societies, are incentivized to mimic its approaches in order to retain some control over the accountability process and to appear welcoming to donors.²⁴ The Rome Statute is an influential trendsetter that, when coupled with the influence of nongovernmental organizations and the global norm cascade,²⁵ foreseeably will have a substantive effect on all forms of accountability at the national and local levels. I predict that, increasingly, national jurisdictions whose atrocities are judicialized internationally may exclude minors from penal responsibility

²³ Julie Flint and Alex de Waal, *DARFUR: A NEW HISTORY OF A LONG WAR* xi-xii (2008) (referring to the Darfur crisis and noting that “[n]o objective account of Darfur’s crisis can avoid critical scrutiny of the role of the activist movement.”).

²⁴ See e.g. Héctor Olásolo, *Complementarity Analysis of National Sentencing*, in *SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW* 46 (Haveman & Olusanya, eds. 2006) (“[i]t is of the utmost importance to be aware of the fact that by using the power to declare the inadmissibility of a situation of a case on the basis of the inappropriateness of the penalties provided for crimes against humanity, war crimes and genocide in the relevant national criminal law, the ICC may indirectly cause the State concerned to revise the conception of penal norms, the principles of criminal law and the functions of punishment embraced by its national criminal justice system.”).

²⁵ Susan Shepler, *The Rites of the Child: Global Discourses of Youth and Reintegrating Child Soldiers in Sierra Leone*, 4 *JOURNAL OF HUMAN RIGHTS* 197, 207 (2005) (providing a fascinating ethnography of aid work and noting that “[i]n West Africa and in other so-called weak states, NGOs are clearly better funded and more present than the state in many cases.”)

for extraordinary international crimes. I take up the Sudan and Uganda as examples.²⁶ Drawing from experiences in Uganda and Sierra Leone, I then argue that the Rome Statute's collectivization of innocence even risks inhibiting accountability mechanisms from *outside* the criminal law, such as truth commissions, reintegrative ceremonies, or community service requirements, for children who commit atrocity. The choice to exempt children from the status of possible subjects of international criminal law encourages their exemption from the status of possible subjects of accountability *generally* for mass atrocity. Failure to address the conduct of child soldiers in the language of accountability is problematic from a transitional justice perspective, insofar as “[c]oming to terms with the participation of child soldiers, simultaneously perpetrators and innocents, is key to postwar reconstruction and peace building.”²⁷ Instead, I call for international criminal law to actively incentivize national jurisdictions to pursue accountability for children who are implicated in extraordinary international crimes, but to do so outside of atrocity trials. My recommendation contrasts to the current situation where the framework of international criminal law encourages national jurisdictions to do *nothing* when it comes to children who commit such crimes.

Chapter 5 Part (c) argues that, although at first blush it may seem that international law’s protective stance towards all child soldiers may facilitate their reintegration into society, considerable evidence exists that the accountability gap impedes the effective rehabilitation, reintegration, and reconciliation of those children most at risk, namely those who committed or are suspected to have committed systematic acts of atrocity. In addition, undifferentiated protective stances risk a paternalism that inhibits the active role of children post-conflict and breeds political passivity. Ascribing protected status to the group as a whole leads to considerable inequities regarding the situation of individual children. By lumping the girl soldier sexual slave together with the porter and both equally with the front-line child combatant who mutilates civilians, international criminal law levels the vastly different experiences among these child soldiers. The most brutal become able to obscure their violence by dint of the mingled presence of the most brutalized among them. The health of post-conflict transitions benefits when children’s experiences are sorted, vetted, and weighed instead of reductively essentialized. Given my skepticism regarding the transformative potential of liberal criminal law, Part (c) argues in favor of accountability mechanisms outside the confines of atrocity trials for former child soldiers suspected of committing terrible acts of atrocity. In particular, I support Honwana’s focus on traditional ceremonial rituals, to which international criminal and human

²⁶ Sudan has proposed to raise the age of penal responsibility domestically to eighteen and has referenced the Rome Statute in this regard, despite national intransigence in the face of ICC indictments and unwillingness genuinely to prosecute domestically; in Uganda the Juba Agreement’s approach to Ugandan child soldiers and the criminal justice system parallels ICC approaches. Obversely, in cases where mimicry is impossible (either because national judiciaries are unable genuinely to prosecute, or because a state has self-referred), then ICC trials become the only venue for criminal accountability. In these cases, insofar as children are exempted from trials they once again avoid criminal accountability.

²⁷ Shepler, *supra* note 25, at 198.

rights law generally exhibit discomfort. Whereas international law constructs itself as modern and effective, it holds traditional rituals to be nativist and problematic.

Presently, the response to former child soldiers, which is deeply influenced by humanitarian discourse, takes the form of disarmament, demobilization, and reintegration (DDR) programs. DDR programs, generally for adults and in particular in the case of child soldiers, largely are shorn from transitional justice initiatives, which they in fact suborn. Transitional justice, as Teitel notes, is the process by which societies come to terms with the past, how they reckon with terrible human rights abuses, and how people within those societies come to live together again.²⁸ Angela Veale is wise to note that “ignoring atrocities committed by minors could undermine the wider administration of justice, and the scope for justice systems to maintain credibility.”²⁹ Part III(c) argues that something is lost when DDR and transitional justice are decoupled. Although DDR programs convey considerable value in terms of disarmament and demobilization, Part III(c) posits that their reintegrative value would be enhanced were they to be genuinely harmonized with meaningful transitional justice efforts. DDR programs often provide funds and support to former child soldiers as a group, including as part of amnesty packages. These disbursements anger the persons and communities victimized by former child soldiers, for whom assistance is often not forthcoming, thereby subordinating their victimhood to that of the child soldiers who maimed them or killed their family members. Largely scrubbed from the discussion about child perpetrators are their victims’ rights to a remedy. Should the cognizability of an injury depend upon the age of the perpetrator?

Endeavoring to move the conversation from diagnosis to remedy, Chapter 6 proposes reforms that would align the operation of international criminal justice closer to the complex agency of children who commit terrible atrocity while respecting their particularly vulnerable situation as captives of powerful overseers and destructive social norms.

International criminal law presents two world-views that contradict each other. One underscores the necessity of trials and punishment for adults, the other their irrelevance for children. The primacy of the trial model for adults (as articulated through complementarity or, in the cases of other tribunals, primacy) makes it difficult for competing methods that focus on responsibility instead of culpability to acquire traction on the ground. A starker situation applies in cases of children, where the primacy of innocence makes it difficult for any method of accountability to become operational.

²⁸ Ruti Teitel, *Transitional Justice Genealogy*, 16 HARVARD HUMAN RIGHTS JOURNAL 69 (2003).

²⁹ Angela Veale, *The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology*, in INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN 103 (Arts and Popovski eds., 2006).