

Chapter 8

Transcending Victimhood: Child Soldiers and Restorative Justice

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Abstract The international community strives to eradicate the scourge of child soldiering. Mostly, though, these efforts replay the same narratives and circulate the same assumptions. This chapter, which takes a second look at these efforts, aspires to refresh law and policy so as to improve preventative, restorative, and remedial initiatives while also vivifying the dignity of youth. As a starting point, this chapter proposes that the dominant language used to characterise child soldiers—that of passive victimhood—be revisited so as to better recognise the potentiality of child soldiers to participate in and lead post-conflict reconstructive efforts. This chapter suggests a variety of reforms to the content and trajectory of law and policy in light of the complex, variegated realities of child soldiering. International lawyers and policymakers are predisposed to disassemble these complexities. Although understandable, this penchant ultimately is counterproductive. Along the way, this chapter also questions central tenets of contemporary humanitarianism, rethinks elements of international criminal justice, and aspires to embolden the rights of the child.

Keywords Child soldiers • Straight 18 position • Victims and constructions of victimhood • Agency • Transitional justice • Reintegration

It is easy to see the child soldier superficially as a contradiction in terms or simply as an anachronism. Neither childhood nor youth, after all, should be about war or weapons. Nonetheless—and however jarring—militarization suffuses the lives of many children.

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At the very least, worldwide, tens of thousands of persons below the age of eighteen currently are associated with armed forces or armed groups. Adults who serve in such forces or groups, moreover, may have joined while younger than eighteen. In addition, the past decade has seen the demobilization of many tens of thousands more child soldiers. Although joyful, their return journey to civilian life also is bittersweet. They come back home to the communities where they initially had been recruited—at times, forcibly—and where, in some instances, they had committed terrible atrocities. While associated with armed forces or groups, many child recruits are subject to brutalities, beatings, and rape. Drug and alcohol abuse is common.

International law and policy cover considerable ground in their efforts to eradicate child soldiering and promote the well-being of current and former child soldiers. States adopt treaties and instruments, while also endorsing principles and declarations. Experts issue reports. Organizations draft best practices and ‘how to’ guidelines. Authorities prepare model interventions. Conscripting, enlisting, or using younger children—namely, under the age of fifteen—in hostilities is an international war crime for which adult commanders recently have been convicted. Additional verdicts are imminent, including against Charles Taylor, Liberia’s former dictator.

Although international interventions have helped reduce specific incidents, the practice of child soldiering still persists. It may shift locally, and abate here and there, but it endures globally. Preventative measures, therefore, remain inadequate. Former child soldiers experience challenges in adjusting to civilian life. Reintegration is complex and eventful. The homecoming is only the beginning. Reconciliation within communities afflicted by violence committed by and against child soldiers is incomplete. Shortfalls linger on the restorative front.

What, then, to do? The reflexive response among international lawyers and transnational policymakers is to hone familiar tools and work them even faster. In practice, this means that humanitarian efforts ramp up the chorus of outrage regarding the plight of child soldiers. These efforts typically highlight themes of vulnerability, frailty, victimization, and incapacity.

The reflexive response is full of good intentions. It is rhetorically compelling. But it is becoming palliative. I urge lawmakers and policymakers to transcend what passes as conventional wisdom and encourage them to peer beyond into a more demanding space. The time is right for something new.

Meaningful reform, however, first requires the international community to *reimagine* child soldiers and the sources of child soldiering. This reimaginative exercise, in turn, calls into question habits and expectations that pervade contemporary humanitarianism, the universality of human rights, strategies for juvenile civic engagement, and post-conflict justice. Lessons learned from recent experiences with child soldiering and the improvements that can be made on this front, therefore, weave into a much broader revisionist tapestry.

This conference dedicated to victims of international crimes, which include children and child soldiers, also offers an opportunity to assess the advantages and disadvantages—and the potential and limits—to victimhood discourses generally. It also permits an exploration of the utility of transitional justice mechanisms in the process of restoring individuals and collectivities afflicted by mass atrocity.

In this vein, this chapter raises a number of admittedly tough questions. Are child soldiers necessarily well-served by formulaic stereotypes that no child ever can volunteer to participate in armed forces or armed groups? That all child soldiers are used and none wish to engage in martial activities? That no person under the age of eighteen can commit human rights abuses for reasons other than being cruelly forced to do so? That all conflicts that implicate children are innately senseless? That children associated with armed forces or groups see themselves as victims? As misled? The way international activists conceptualize an issue may morph into a self-fulfilling prophecy that, in turn, fails to concretize optimal programmatic interventions for the intended beneficiaries.

Remedial efforts currently undertaken for former child soldiers accentuate medicalized trauma recovery and psychotherapy. Although taken as obvious, is this emphasis the best way forward? Perhaps, readers may be happily surprised to learn that the mental health of former child soldiers may be less precarious and more robust than commonly believed. Hence, programmatic interventions ought to include more in the way of economic, educational, justice, and occupational efforts. Readers also may be surprised to learn that many child soldiers exit fighting factions not by way of humanitarian rescue but, rather, entirely on their own by dint of personal initiative. They escape. Or they abandon the armed force or group once they grow weary of militarized life or begin to see the futility in the putative cause for which they are fighting. In short, rescue is less common than conventional wisdom may suppose, while escape is more common.

How to effectively sanction commanders who conscript, enlist, or use children in hostilities? For the moment, entities that finance, fund, or arm groups and forces that deploy children largely fall below the radar screen. How can this blind spot be addressed? Some child soldiers are implicated in grievous acts of atrocity. Should transitional justice mechanisms be considered for them? Criminal trials are most ill-fitting in this regard. But is there not room to be more creative about engineering justice such that it involves more than just courtrooms and jailhouses? In the case of child soldiers, it is not axiomatically wise to eschew accountability conversations. Accountability measures other than criminal trials—such as truth commissions and traditional ceremonies—may facilitate reintegration, rehabilitation, restoration, and reparation. In the long term, shielding juveniles from law's obligations while conferring upon them law's beneficent protectiveness might not durably anchor them as rights-bearers.

If some children join armed forces or groups for social, economic, or political reasons, does treating them as passive or incompetent address their grievances? Is it helpful to downplay how the child entered militarized life, whether by abduction, voluntary enlistment, or because he or she was born into the armed group? Are policies that eliminate distinctions among the roles that child soldiers perform during conflict necessarily wise? At present, girl soldiers are consistently underserved by post-conflict programming. So, too, are children who are born into armed groups. What about the many children—and adults—who did not associate with armed groups but were aggrieved by the conduct of children who did? What does justice mean for them?

However embedded, perceptions of the victim status of child soldiers remain somewhat contingent upon the nationality of those persons injured by their conduct. Child soldiers who commit violence—for example, terrorist attacks—against Western targets are seen less like deluded children and more like menacing adults. On a related note, how does the West treat child soldiers affiliated with armed factions who, following their decommissioning, may seek refugee status within its borders? What actions by Western states may abet child soldiering? Law and policy do not always apply consistently. Their forward trajectory may ebb and flow depending on state power and politics.

8.1 Defining the Terms

Who, exactly, is a child soldier? A standardized—and increasingly legalized—definition has emerged, in large part through two major international conferences. The first, which was held in Cape Town in 1997, focused on the demobilization and social reintegration of child soldiers in Africa. A follow-up conference was convened in Paris in 2007. Co-hosted by the United Nations Children’s Fund (UNICEF) and the French government, this event was of a larger scale and global orientation. It included representatives of fifty-eight states along with many key stakeholders.

The Cape Town and Paris conferences each led to the adoption of non-binding instruments that have since obtained widespread professional, operational, and political currency. The initial development and subsequent circulation of these influential instruments owes much to the involvement of non-governmental organizations (NGOs), United Nations (UN) agencies, donors, and activists. This constellation of actors also has sensitized a global public through media outreach, film, and literature.

These instruments include as child soldiers much more than only those persons younger than eighteen who carry weapons, engage in combat, or who take (or have taken) a direct part in hostilities. Also included are children used for auxiliary activities (for example, portering, spying, and cooking) and children forced into sexual servitude. The impetus among policymakers is to discourage distinctions from being drawn between children who serve as combatants and children who do not or who do so only incidentally. One motivation in this regard is to ensure inclusiveness toward both girl and boy soldiers. Accordingly, and responsively, official nomenclature has drifted away from *child soldier* as initially set out and defined in the Cape Town Principles.¹ The move is now toward the somewhat

¹ Cape Town Principles and Best Practices 2007 April 27–30, 1997, Definitions. Available at [www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf). A child soldier is ‘any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members’. The definition explicitly includes girls recruited for sexual purposes and forced marriage and affirms that it ‘does not, therefore, only refer to a child who is carrying or has carried arms’ (hereinafter Cape Town Principles).

tongue-tying *children associated with armed forces or armed groups*, defined in the Paris Principles to cover: ‘Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.’²

Whereas *armed forces* refer to official state militaries, *armed groups* refer to non-state entities distinct from those forces (notably, rebel or protest movements, dissident factions, and insurgents).

Notwithstanding some differences between the Cape Town and Paris definitions, both still share considerable textual overlap regarding the actual persons they protect. Experts often become ensnared in debates over terms and titles.³ Terminology matters, to be sure, but debates over it may devolve into distractions. For reasons of convenience and brevity, this chapter primarily uses the term *child soldiers*, but understands its definitional scope as based on the 2007 Paris Principles. This chapter, furthermore, understands the determination of who is considered a child soldier to arise not at the point of exit from militarized life, but at the point of entry. Hence, a *former child soldier* is a person who was initially associated with armed forces or armed groups while under the age of eighteen, even if he or she is eighteen or older at the time of release, demobilization, escape, or rescue.

At its very core, settled international law makes it unlawful to recruit or use anyone under the age of 15 in armed forces or armed groups. Actors and activists push to discard fifteen and replace it across-the-board with eighteen.⁴ This push actuates the ‘Straight 18’ advocacy position. International law has absorbed many of the aspirations of the Straight 18 position. Armed groups, for example, are barred from recruiting anyone younger than eighteen. International law treats state armed forces more ambiguously. This means that international law has not yet absorbed every aspiration of the Straight 18 position. However, international law’s trend-line arcs toward the Straight 18 horizon. Accordingly, much of settled law has become dated, if not stale, and is becoming increasingly so. The Straight 18 position has considerable momentum and portends what will be. Its advocacy efforts have exercised even

² The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups 2007, Prin. 2.1. Available at [http://www.icrc.org/eng/assets/files/others/parisprinciples-en\[1\].pdf](http://www.icrc.org/eng/assets/files/others/parisprinciples-en[1].pdf). Accessed 13 April 2013 (hereinafter Paris Principles). As of September 2010, ninety-five states have endorsed the Paris Commitments, which the Paris Principles accompany.

³ Yet another term of art circulated by experts is ‘children associated with fighting forces.’

⁴ For example, UNICEF ‘joins other organizations, child rights advocates and NGOs in advocating a “straight 18 ban” on all recruitment, compulsory or voluntary and participation of children under 18 in hostilities.’ UNICEF (2010) *Adult Wars, Child Soldiers: Voices of Children Involved in Armed Conflict in the East Asia and Pacific Region*, p. 12; see also Human Rights Watch (2007) *Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma*, p. 14, calling on the Burmese government to cease recruiting and to demobilize children younger than eighteen from armed forces, and also to ‘[d]evelop and impose effective and appropriate sanctions against individuals found to be recruiting children under 18 into the armed forces’.

greater influence in shaping transnational policy initiatives, best practices, and persuasive authority such as the commitments and principles emerging from the Cape Town and Paris processes.⁵

As recently as 2008, it was estimated that military recruitment of children and their use in hostilities ‘still takes place in one form or another in at least 86 countries and territories worldwide.’⁶ Accordingly, this chapter considers evidence from an array of jurisdictions. Although many child soldiers are found within the ranks of armed groups, state actors also incorporate children into armed forces. Burma (Myanmar) is presently the largest state recruiter of child soldiers. Subject to a variety of conditions, persons under the age of eighteen may voluntarily enlist in armed forces and reserves in a number of countries, albeit a minority overall, including Australia, Bangladesh, Canada, China, Germany, India, the Netherlands, the United Kingdom, and the United States. In addition, my project examines recent and ongoing evidence of child soldiering in both armed forces and armed groups in Afghanistan, Angola, Cambodia, Colombia, Democratic Republic of the Congo (DRC), Indonesia, Liberia, Libya, Mozambique, Nepal, Papua New Guinea, Philippines, Sierra Leone, Sri Lanka, Sudan, Rwanda, Timor-Leste, and Uganda.

The focus of this chapter, and the broader book project, tilts toward the involvement of child soldiers in atrocity-producing conflicts, particularly conflicts in which international courts and tribunals indict (and, in some instances, are able to prosecute and punish) alleged offenders. Several recent conflicts that have become internationally judicialized situate in Africa, to wit, the DRC, Uganda, Rwanda, Sudan, and Sierra Leone. A number of these jurisdictions, moreover, have undertaken ambitious programmatic initiatives to reintegrate former child soldiers. So, too, have some jurisdictions whose atrocity-producing conflicts have not formally become subject to international judicialization efforts. Liberia is a case-in-point. Consequently, this project is more about child soldiering in African states than it is about child soldiering elsewhere. In this regard, it entwines with my own experiences with international justice which also, starting with my legal work in Rwanda over a decade ago, center on Africa. Persons who were minors at the time of allegedly committing acts of genocide were among the suspects I assisted in the Kigali prison. My choice to focus on child soldiers in Africa is not intended to dilute the reality that child soldiering truly is a global phenomenon. To be clear, only a plurality—reportedly, about 40 %—of the global number of child soldiers is located on the African continent. When responding to Africa, transnational narratives often

⁵ The term ‘best practices’ (also, ‘good practices’) initially arose within corporate planning and has now entered the lexicon of domestic and international administrative law. Best practices are not formally binding rules. They refer to consensually agreed upon regulatory measures and processes, often informal in nature, that over time crystallize into preferential models. Because of their iterated use and replication, best practices acquire a quasi-legal character.

⁶ Coalition to Stop the Use of Child Soldiers (2008) *Child Soldiers Global Report 2008*, p. 12.

sensationalize and objectify through intemperate depictions, distorted lenses, and paternalistic hues.⁷ My aim is to transcend these pernicious impulses and the half-truths that emerge from them; and to resist tiresome tendencies that Africanise a global phenomenon and pathologize African conflicts.

More boys than girls are represented in the subgroup of child soldiers who commit acts of atrocity. One of my goals is to emphasize that these children can return to civilian life and can integrate within the community. Consequently, this project comes to talk more about boy soldiers than it does about girl soldiers. It does incorporate considerable data regarding girl soldiers, however, whose roles in communal violence are considerably more complex than may prosaically be assumed. Moreover, my recommended policy reforms would diversify post-conflict programming. They would accord greater centrality to initiatives specific to girl soldiers and implement a gender-sensitive approach.

8.2 Images of Child Soldiers

Transnational discourse typifies child soldiers in a variety of images. These portraits communicate easily with the public, but Myriam Denov is right to point out that they also inordinately simplify the complex lives and experiences of child soldiers.⁸ In this regard, I would add, these images may poorly serve their subjects.

One image is that of a very young child—a guileless naïf—hued as clueless and dependent. This image telescopes the child soldier as a helpless object manipulated locally by adult malevolence, yet at the same time to be rescued transnationally by adult humanitarianism. It portrays child soldiers as forced into service, forced to fight, and forced to kill. Its visuals are of deranged militias that steal children from their families and tear them from their communities. In the hands of such militias, these children become neutered mechanical means used to fulfill nefarious ends over which they have no input. They are no more than ‘instruments of war’ and ‘the weapon of choice.’⁹ In another influential account, that of distin-

⁷ Referencing the Lord’s Resistance Army (LRA), a notorious rebel group in Northern Uganda, Ben Mergelsberg notes: ‘The narrative of the LRA abducting young, innocent children, brainwashing them and forcing them to fight is common in the media. It evokes a generalized image of the child soldier as a vulnerable innocent without any agency, brutally abducted, drugged and turned into a monster.’ Mergelsberg 2010, p. 156. Mergelsberg, however, adds that: ‘[T]he view of helpless children without agency in what has happened to them often does not correspond to their actual experiences. Passive victims on first sight, they turned out during my fieldwork to be active survivors with a good sense of why they were fighting, how they survived and what they needed most after their return.’ Id. at 156–157.

⁸ Denov 2010, pp. 5–14, elegantly discusses portrayals and representations of the child soldier, which she chides for their extremism and exoticism.

⁹ Otunnu 2000, pp. 48, 49. Available at www2.lse.ac.uk/internationalDevelopment/pdf/WP05.pdf. Otunnu, an eminent public servant, served as the UN Special Representative for Children and Armed Conflict from 1997 to 2005.

guished human rights activist Roméo Dallaire, child soldiers are portrayed as an ‘end-to-end weapon system’ and as ‘tools;’ what is more, children ‘are vulnerable and easy to catch, just like minnows in a pond,’ with the involved adults depicted as ‘evil.’¹⁰ This image melds with and, in turn, disseminates a narrative—now transposed into law and policy—through which child soldiers are construed first and foremost as victims. In terms of on-the-ground practice, however, the conceptual understanding of child soldiers principally as victims tends toward operational interventions that essentialize their victimhood. This first image, therefore, typifies the child soldier as a *faultless passive victim*.

A second image, which harmonizes with the victim narrative, is that of child soldiers as *irreparable damaged goods*. Pursuant to this image, child soldiers are tormented and scarred. They form part of a ‘lost generation.’¹¹ This image captures the pain of militarized life and the concomitant physical and emotional injuries. Yet it does so at the cost of overlooking the resilience of former child soldiers and children in war zones generally. This depiction defines expectations and sets parameters. Constructions of the child soldier as psychologically devastated and pilfered by conflict, for example, have spurred the preeminence of trauma recovery models in post-conflict programming.

A third image—somewhat antiquated, yet still in circulation—posits the child soldier as a *hero*, whose valor flows from fighting for a just cause that resists oppression or from demonstrating patriotism.¹² In contradistinction to the faultless passive victim image, the hero image plays up the independence, conviction, nobility, and enterprise of the child soldier. This portrayal also may venerate military service, however, and feed into pernicious norms of masculinity and hyper-aggression. It can lead to a parlous situation for the unpopular side. In Timor-Leste, for example, ‘children who fought on the side of independence were considered heroes [while] [t]hose who fought on the opposing side were stigmatised, and some were later targeted.’¹³

A final image dramatically appears in journalistic accounts, political grandstanding, and national security circles. This image stylizes the child soldier as *demon and bandit*: irredeemable, baleful, and sinister. Pursuant to this depiction, the child soldier is a ticking time-bomb, bad seed, and warped soul incorrigibly

¹⁰ Dallaire 2010, pp. 3, 12, 15, 150, also referring to former child soldiers as ‘immature souls in small bodies’. Dallaire, now a Senator in Canada, is well-known for his outspoken role as commander of the UN Assistance Mission for Rwanda during the country’s 1994 genocide. He recently has oriented his efforts to eradicating child soldiering. To this end, he founded the Child Soldiers Initiative.

¹¹ Singer 2006, p. 38.

¹² Denov 2010, pp. 9–10, noting also the celebrity status of some high-profile child soldiers viewed as heroically transcending from violence to redemption.

¹³ UNICEF Innocenti Research Centre in cooperation with the International Center for Transitional Justice (2010) Children and Truth Commissions, p. 47 (citation omitted), hereinafter Children and Truth Commissions.

determined to kill with alacrity.¹⁴ This flawed image comports with two alarming policy outputs. The first is the pointlessness of investing in the rehabilitation of former child soldiers. The second is the neglect of girl soldiers. The demon and bandit image, after all, tends to present child soldiers as wild boys, which clouds the reality that '[a]s many as 40 % of child soldiers may be girls.'¹⁵ Girl soldiers already are poorly served by extant programming that under-appreciates the specific gender-based reintegrative challenges they face. The demon image piles onto these challenges, many of which involve recovery from abhorrent sexual violence and forced marriage. Many girls give birth while associated with armed forces or groups. Rates of HIV, AIDS, and sexually transmitted diseases are high. Upon cessation of hostilities, it is not uncommon for local communities to marginalize these young mothers and view their children with repugnance. Insofar as the fathers of these children (at times themselves teenagers) may have been abusive fighters and unit commanders, the 'bad seed' may be perceived by communities as passing down intergenerationally. Girl soldiers, assuredly, are not an indiscriminate group of interchangeable members. Girls who become 'wives' of commanders exert power over girls without 'husbands.' This latter group, in turn, comes to suffer even greater levels of sexual abuse. Some girls commit terrible acts of atrocity against other girls, boys, women, and men. The demon and bandit image also obscures the fact that boys, too, are sexually abused.

These four images are not equals. Hierarchy and ordinality can be theorized among them with regard to their operational influence in shaping official policies and sculpting conventional wisdom.

The faultless passive victim image has achieved widespread traction within—and is avidly disseminated by—influential intergovernmental organizations and UN agencies, along with NGOs and other actors that populate global civil society.¹⁶ It has consequently come to dominate international discourse. The faultless passive victim image binds communities of conscience. This image has ascended as a metaphor for the child soldier: continuously defining the child soldier at the point of entry into conflict, during conflict, at the point of exit from conflict, and also in the aftermath of conflict. Applied top-down in a wide-range of places, this image is

¹⁴ Denov 2010, p. 6; see also Blattman and Annan 2010, p. 882, reporting on and critiquing the use of this imagery; Wessells 2006, p. 45 (first paperback 2009) noting that 'this portrayal contradicts much evidence and does injustice to the rich interplay between personal and situational influences on decisions to become soldiers'.

¹⁵ Wessells 2006, p. 9, citing a 2005 Save the Children Report.

¹⁶ Cf. Utas 2003, pp. 7–8, noting that 'the perspective of humanitarian aid agencies (Save the Children/UNICEF, in particular) will often describe child soldiers, and deal with them, solely as victims'; Boyden and de Berry 2004, pp. xi, xv, '[C]hildren and adolescents are portrayed as the passive recipients of adult agency, the victims of wars waged by others and of brutality that is alien and imposed.... Personal volition is denied and emphasis given to their vulnerability and helplessness ...'; Ben-Ari 2009, pp. 1, 13: 'Even a cursory review of the websites devoted to young soldiers reveals the extent to which visual representations in photographs or drawings are designed to evoke images of blamelessness and helplessness.'

portable. It forms part of transnational rule of law discourse and technique. Although projections of it by communities of conscience have become more refined over time, its core attributes persist and, in fact, are hardening into law and policy. This portrait scripts official conversations about child soldiers. Accordingly, these conversations become conformist and stilted.

Global civil society, advocacy groups, donors, and activists lack the formal capacity to make international law. Although some international and intergovernmental organizations, including some UN agencies, may exercise law-making ability, most do not (including many whose mandates touch upon child soldiering). By virtue of their activities, however, all of these actors shape the content of binding international law as traditionally made by states and, what is more, often determine the legally oriented content of best practices, rule of law blueprints, and policy guidelines.¹⁷ I refer to this normative, aspirational, and operational mix of international law, policy, and practice—constituted as it is directly and indirectly by a broad constellation of actors—as the *international legal imagination*.¹⁸ On the topic of child soldiers, the faultless passive victim image fills the international legal imagination. This image thereby contributes to and influences the substance of international law and policy.

Attending to the scourge of child soldiering has become a portal for transnational rights discourse and its broader reformist ambitions to enter local constituencies. In this regard, the child soldier has become a site that serves broader political purposes. One purpose is the naturalization of certain characteristics of childhood. Another purpose is the universalization of a child as anyone below the age of eighteen. This chapter, and the book from which it is extracted, carefully considers the relationship between internationalized legal norms regarding coming of age, which are rooted in chronology, and diverse localized understandings, which are more malleably informed by experience, activity, relationship, and station in life.

One goal of the faultless passive victim image is to curb punitive policies and harsh measures that may flow from the demon caricature. At times, pressure may arise within post-conflict societies to pursue such policies against former child soldiers. Transnational actors may discursively respond to these pressures by even further underscoring the unwitting dependency and sacrificial nature of militarized youth. In so doing, transnational actors unhelpfully dichotomize conversational frames such that child soldiers become either ‘sinners’ or ‘saints.’¹⁹

¹⁷ These actors may participate in conferences in which states negotiate and adopt major multilateral treaties.

¹⁸ The term ‘international legal imagination’ is not coined herein as a neologism, but no other scholarship appears to meaningfully address, define, or deploy it as an analytic tool. Among a tiny handful of unrelated references thereto in the published literature is Landauer 2011, p. 557, mentioning this term in passing without definition or deployment.

¹⁹ For use of such language, see, e.g., Lonagan 2011, p. 71.

Because the depiction of the demon child soldier tends to hail from the global South (notably Africa), it reinforces racial stereotypes. Nor, however, are racial overtones absent from the faultless passive victim image. This portrait may inadvertently pathologize entire social structures by presenting the children as needing to be saved from their communities, from their cultures, and from their families.

Although not the doing of global civil society, the turn to victimhood narratives to thwart punitive policies and retributive measures can be selective. Owing to state behavior, the political suitability of these narratives correlates to whom, exactly, the conduct of the child soldiers aggrieves. A center/periphery divide emerges. Transnational conceptions of faultlessness do not fully reach children from the periphery who commit atrocious acts against Westerners. Whereas the child perpetrator targeting Africans tends to be held as a mindless captive of purposeless violence, the child perpetrator targeting Westerners tends to be held as an intentional author of purposeful violence.

In short, all extreme images of child soldiers run the risk, as Denov eloquently counsels, of ‘reflect[ing] and reproduc[ing] enduring hierarchies between the global North and South, cementing notions of race, perversity and barbarism, alongside the dehumanisation of child soldiers and their societies.’²⁰

Within post-conflict societies guided by international judicialization and administration efforts, policy initiatives generated by the faultless passive victim imagery presuppose and designate local child soldiers as programmed to commit terrible abuses over which they have neither appreciation nor control. Child soldiers are seen as forcibly coerced into military service and, in the case of atrocity-producing conflicts, compelled to commit horrific human rights abuses.²¹ As a group, and *ipso facto* as individuals, they are taken to lack any volition. Seen as ‘faceless,’ they ‘have not yet developed a concept of justice.’²²

Is the projected image fully explanatory? If not, do its deficiencies or omissions matter? Notwithstanding accuracy in many individual cases, the portrayal of the child soldier as a faultless passive victim is unduly reductive. It belies considerably more varied actual individual experiences. This image—as do all extreme images of the child soldier—occludes, flattens, and conceals details. And, yes,

²⁰ Denov 2010, p. 14.

²¹ For a typical presentation, see Spiga 2010, pp. 183, 192: ‘It is common knowledge that children are often forced to take up arms and have little choice on whether or not to enlist; after their recruitment, they are coerced to commit actions, of which—in most cases—they have little understanding.’ The international legal imagination, however, stiffly balks at generalizing this explanatory account in cases of perpetrators aged 18 or older. For this group ‘following orders’ is a paltry defense.

²² Dallaire 2010, pp. 3, 138, also describing some child soldiers as ‘zombies’. Noting that Dallaire’s book ‘[p]arallel[s] [his] own childhood, in which he spun fictional worlds in the forests beyond his family’s log cabin ... [and is] inspired by Antoine de Saint-Exupéry’s *Le Petit Prince*,’ one reviewer lauded it for ‘perfectly captur[ing] the innocence and experience of childhood that war so savagely steals from them.’ Nutt S (2005) *Arms and the child*, *The Globe and Mail* (November 5, 2010).

these details are salient. They matter. It is inadequate to generalize an overarching understanding of child soldiering based on the more extreme cases. Extrapolating from the extremes instead of the mean sensationalizes vulnerability and trauma.²³ A proportionate and inclusive process of inductive reasoning requires even-handed consideration of the full gamut of individual experiences, not only a subset of those cases most compatible with predetermined advocacy efforts. Child soldiers and child soldiering are not so simple.

In the end, I urge the international legal imagination to adopt a supple, empathetic, and dexterous approach to child soldiers that vivifies their dignity rather than the current *Zeitgeist* that encases their vulnerability. I hope for this chapter to contribute, however modestly, to that process.

8.3 Social Realities of Child Soldiering: Circumscribed Action

Accumulated knowledge about child soldiers arises from a diversity of disciplines. The richness that might flow from this diversity, unfortunately, lies fallow. These disciplines and their concomitant literatures often communicate poorly with each other. In terms of the development of law, best practices, and policy, the play of various literatures has been uneven. Child psychology and trauma studies have exerted considerable influence. So, too, have reports published by transnational pressure groups, NGOs, activists, and UN agencies. The recommendations of child rights advocates also have proven instrumental.

Other disciplines and their literatures have not resonated with the international legal imagination. In fact, the international legal imagination holds contributions from these fields at arm's length. Thus, these contributions remain untapped. This gate-keeping occasions a loss, insofar as the only way to eradicate child soldiering and promote genuine post-conflict reconciliation is to understand the phenomenon as multidimensionally as possible. Examples of undervalued contributions include ethnographic participant observation, anthropological studies, qualitative research, survey data, and feminist theory. Another is adolescent developmental neurobiology, which focuses on the social category of adolescents as distinct from young children. I hope to canvas these literatures so as to integrate them more robustly into conversations about child soldiering. In this regard, this work is both synthetic

²³ This impulse even arises in the work of Jeff McMahan, a leading moral philosopher, in his otherwise brilliantly nuanced discussion. McMahan 2007, pp. 9–10 (cited with permission) offering the following as an illustrative hypothetical case: an eight year-old boy, forced by a group of armed men to kill his best friend in view of his entire village, and then abducted to a camp; after several years of indoctrination, brutalisation, and training, he is administered drugs, given a light automatic weapon, and sent to fight for an unjust cause at the age of eleven or twelve.

and creative. It aims to revisit the epistemology of child soldiering. It intends to develop a less didactic and more grounded composite.

Although not monolithic, these literatures tend to perceive child soldiers neither as crushed nor as succumbing, but rather as traversing, surviving, coping, and making what they can out of bad circumstances not of their own doing. These literatures foreground individuality and adaptation, rather than aimless collective subservience. They voice a more dynamic account of child soldiers as *social navigators* interacting with, instead of overwhelmed by, their environments—even when those environments involve the most invidious of circumstances.²⁴ These literatures also tend to place children, adolescents, youth, and adults along a broader continuum that is less rigidly stratified by chronological age demarcations.

Presentation of this information is meant to holistically *understand* child soldiering so as to more meaningfully *prevent* its occurrence. Although the faultless passive victim image may serve as an anodyne to distressing and delicate conversations about militarized youth, the international legal imagination needs to do better. Rote deontological denunciation can only take us so far. Within transnational discourse, the seemingly inevitable obverse to the innocence of the children is the iniquity of the adult commanders of rogue armed groups. Although serving rhetorical purposes, presenting these commanders as crazed demented evildoers also obscures the reasons why they recruit children in fighting forces. Perhaps these reasons are more conventional and strategic, and less visceral, than the portrayal diffused by the international legal imagination. In any event, unraveling these reasons would help clarify the sources of child soldiering. Such clarification is necessary for the success of dissuasive efforts and the effective sanction of adult commanders.

Young children certainly are associated with armed forces or armed groups. In some instances, many young children may be forcibly recruited and, in fact, may fight. Most child soldiers, however, are not young children. Most are adolescents—often aged fifteen, sixteen, or seventeen. Overall, the young, pre-pubescent child is simply not indicative of the norm. The marketing and advertising work of charity organizations, however, still inclines toward underscoring the tender age of child soldiers. One visual, for example, involves the surrealistic juxtaposition of bullets in what looks like a Crayola crayon box.²⁵ Although certainly eye-catching and well-intended, this approach may neither resonate with nor strike at the heart of the problem of child soldiering.

In light of the centrality of *adolescents* (often older teenagers) to the phenomenon of *child* soldiering, is it not apposite to consider adolescent developmental psychology? This burgeoning field, which increasingly is turning to sophisticated neuroscientific and neurobiological methods, demonstrates that adolescents typically are more susceptible than adults to outside or peer influence. In comparison

²⁴ I draw the concept of social navigation from Mats Utas. See Utas 2005, pp. 403, 408, 426.

²⁵ See, e.g., www.warchild.org.uk/issues/child-soldiers (accessed on June 24, 2011).

to adults, adolescents are more represented in reckless behavior; they have a gauzier ability to foresee the future; are more impulsive, impetuous, and risk-taking; and have more transitory personalities. Adolescents trust more readily and their trust can be easily misplaced. But neither is the adolescent brain child-like nor pre-logical. On many key metrics, in fact, available research indicates that older adolescents are much more like adults than children. Instead of pursuing rigid child/adult binaries, then, perhaps it would make sense for law and policy to engage with interstitial developmental categories.

Persons under the age of eighteen associated with armed forces or armed groups largely get there in one of three ways: (1) they are abducted or conscripted through force or serious threats; (2) they present themselves, whether independently or through recruitment programs and become enlisted/enrolled; or (3) they are born into forces or groups. The first two paths, which are the most common, are not always capable of firm demarcation. However, they are distinguishable and, moreover, should be distinguished.

Readers may find it surprising, but most child soldiers are neither abducted nor forcibly recruited. The international legal imagination, nevertheless, heavily emphasizes this path to militarization. Doing so exposes this horrific aspect of the phenomenon of child soldiering. This emphasis, however, also leads to the undertheorization and underexploration of *youth volunteerism*. The international legal imagination cannot just wish away the fact that significant numbers of children join armed forces or armed groups in the absence of evident coercion and, in fact, exercise some—and at times considerable—initiative in this regard. Even within the most maleficent of conflicts, children come forward and present themselves for service.

In response, the international legal imagination predetermines that no child has the capacity to volunteer or to consent to serve—whether innately or because of nightmarish circumstances, or both. Volunteering is presented as an illusion.²⁶ The international legal imagination is particularly skeptical of armed groups and, in their case, flatly views juvenile volunteerism as an impossibility or absurdity. For all intents and purposes, then, enlistment of volunteers becomes no different than abduction.

The international legal imagination is remiss to neglect the prevalence and relevance of children who volunteer for military service. To be sure, cases arise where determinations of volunteerism would be specious. Children may be offered up—like chattel—by family members or local leaders. They may be tricked into joining. They may come forward to serve as a cook, only to be given an automatic weapon and placed on the front lines. Some children may rashly present themselves for service because of excessive impulsivity.²⁷ That said, many children,

²⁶ Hart 2006, pp. 5, 7: ‘The authors of global accounts of “child soldiers”... have little time for the idea that children may be capable of exercising any real measure of choice about recruitment... [T]he very notion of voluntary recruitment is largely an illusion.’

²⁷ Over time, as hardships weigh on them, these children may come to regret their decision. Some of them then exit, while others are compelled to stay; others persist and remain with the group; some advance within the ranks. Longitudinally, these latter cases become considerably more ambiguous.

notably older adolescents, come forward intentionally to join armed forces or groups. Environmental factors and situational constraints—which include poverty, insecurity, lack of education, socialization into violence, and broken families—certainly inform their decisions to enlist. Children’s engagement with these factors can be more usefully understood as interactive and negotiated processes of negative push and affirmative pull.

In joining armed forces or groups, children may simply be pursuing paths of economic advancement, inclusion in occupational networks, pursuit of political or ideological reform, and professional development. Children—particularly, older adolescents—are not invariably lost on these paths. They traverse and cross them as best they can. However disturbing to outsiders, this may mean joining armed forces or armed groups. Moreover, at times child recruits deceive their parents and other commanders. They conceal their age, travel great distances, and persevere tenaciously in their quest to associate with armed forces or groups. They may join despite community and family exhortations to the contrary. These children, too, count as child soldiers. Although armed groups may seek to undermine legitimate governments through macabre methods, they may also serve as engines of protest against illegitimate rulers, state authoritarianism, and kleptocratic dictatorship.

What child soldiers actually say about their experiences may contrast with how international observers broadcast those experiences. In interviews, for example, former child soldiers often describe themselves as having volunteered for service. Some interviewers respond by discounting all such statements. They thereby massage complex data to fit a simple pre-existing theory. P. W. Singer—whose work on child soldiers has received considerable attention—finds the notion of voluntary recruitment ‘misleading,’ in part because children are ‘of an age at which they are not capable of making mature decisions.’²⁸ Helping hands may prefer to believe that child soldiers are ignorant of the absence of choice in their lives and lack the cognitive capacity for discernment. This strategy, however well-intentioned, may demean by unduly accenting gullibility. This strategy, moreover, depletes the informational record and leads to misguided recommendations. It risks presenting youth inanimately as objects of study rather than vibrantly as sources of information. Although assertions of volunteer service made by child soldiers should not be immunized from contextual analysis, I believe it is wrong summarily to dismiss them. Young people may understand volunteerism within the context of their lives and apply it fairly to themselves.

Dismissing what adolescents have to say owing to their putative jejunity contrasts sharply with assumptions of juvenile capacity and autonomy that animate

²⁸ Singer 2006, p. 62. Singer’s book relies heavily on humanitarian and human rights reports, journalistic accounts, psychology scholarship, and military/security studies literature. It makes only marginal reference to ethnographic or anthropological work. See also *generally* Office of the Special Representative of the Secretary-General for Children and Armed Conflict (2011) *Children and Justice During and in the Aftermath of Armed Conflict* (Working Paper No. 3, September 2011), p. 10: ‘Children ... lack the mental maturity and judgment to express consent or to fully understand the implications of their actions.’ (hereinafter *Children and Justice*).

other areas of law and policy. For example, when it comes to bioethical debates regarding consent to medical treatment and access to reproductive rights and technologies, in many jurisdictions adolescents tend to be presumed competent. International human rights law highlights that adolescents can exercise rights of freedom of association and expression. So, too, does international family law. Protective policies predicated upon children being constructed as enfeebled *before and during* conflict may counterproductively result in children persistently being treated as enfeebled *after* conflict. I remain skeptical that atrophied delineations of capacity, and the notion that adolescents categorically require infantilising rules to protect them, actually promote the aspiration to engage them robustly as full members of society. Moreover, many persons initially recruited as children age into adulthood during conflict or before they feasibly can enroll in post-conflict programming. In these instances, infantilising aspects may become perceived both by them and the community as particularly ill-fitting.

Once associated with armed forces or groups, what do children actually do? How are they used? Children rotate among various roles, which include combat, auxiliary support, or accompanying forces as sex slaves or compelled conjugal partners.²⁹ These roles expose them to great danger. In contradistinction to often graphic media representations, significant numbers of children neither fight nor carry weapons.³⁰ Even fewer become implicated in the systematic perpetration of acts of atrocity that potentially might fall within the scope of extraordinary international crimes (such as war crimes, crimes against humanity, and genocide) proscribed by international criminal law.

The dominant explanatory account is that those child soldiers who commit extraordinary international crimes are forced by commanders and, hence, operate under extreme duress; they are incapacitated by compelled ingestion of narcotics and alcohol; they are brainwashed and resocialized by the endemic violence that envelops them; and they are plagued with fears of brutal punishment. Hence, moral responsibility should be excused, even for grievous acts of violence. Excuse begets forgiveness which, *arguendo*, establishes a firm footing for the child soldier's reintegration.

This dominant account explains many acts of atrocity perpetrated by persons under the age of eighteen. Despite their frequency, however, these cases cannot be universalized. The international legal imagination tends, once again, to wish away the fact that not all child soldiers materially implicated in acts of atrocity actually conform to this explanatory account. In this regard, the international legal imagination undertheorizes the challenge at hand, perhaps selfishly insofar as: '[T]he

²⁹ I very occasionally turn to the phrases 'child combatant' or 'child ex-combatant' specifically to refer to child soldiers who have materially (as opposed to incidentally) fulfilled combat roles.

³⁰ Wessells 2006, p. 71: 'Contrary to popular conceptions, many child soldiers never fight, and many neither carry their own weapon nor know how to use one.'; Ben-Ari 229, p. 1, reporting that children 'sometimes act as combatants who directly participate in hostilities [but] more often they are deployed as auxiliaries ... or in various support roles'.

fact that children are capable of violence clearly falls outside entrenched modernist formulations of childhood. Children who behave violently—who rape, murder and kill—pose a conundrum because they dismantle the idea of the romantic innocence and vulnerability of childhood.³¹

Considerable heterogeneity arises among child soldiers with regard to their relationship to violence that, in turn, underscores the ongoing salience of disposition, choice, and residual discretion to exceed or subvert command authority. Some child soldiers lie to and manipulate commanders to avoid killing. Others refuse to inflict gross human rights abuses upon third-party civilians or combatants. Other child soldiers, however, torture, rape, and kill to navigate volatile militarized hierarchies. Some do so gratuitously or to pursue lucre.

Accordingly, afflicted communities may perceive child soldiers in a considerably more individuated fashion. They may see them as actual persons known to them rather than as anonymously fungible ‘beasts of no nation.’³² These details matter. Furthermore, regardless of why they did it and the circumstances thereof, the fact remains that the acts of child soldiers do impose staggering consequences upon the lives of others, including children.³³

Given the distortions and omissions engendered by the faultless passive victim lens (as well as the occlusions triggered by other currently circulated images), is there another way to talk about child soldiers that reflects the complexities of their experiences?

I propose to approach individual child soldiers through a *model of circumscribed action*. A circumscribed actor has the ability to act, the ability not to act, and the ability to do otherwise than what he or she actually has done. The effective range of these abilities, however, is delimited, bounded, and confined. Yet, the abilities themselves are neither evanescent nor ephemeral. Circumscribed actors exercise some discretion in navigating and mediating the constraints around them. Circumscribed actors dispose of an enclosed space which is theirs—the acreage of which varies according to an oscillating admixture of disposition and situation—in which they exercise a margin of volition. Within this space, they make short-term decisions. Circumscribed actors scale social environments they did not create. Although acted upon, they also act upon others. Oppression, after all, does not axiomatically void the oppressed’s capacity for decision-making. Nor is

³¹ Honwana 2005, pp. 31, 37.

³² This is the title of a prominent novel which tracks the story of Agu, a fictional child soldier, Iweala 2005. On this note, many documentaries, movies, novels, memoirs, and autobiographies evoke the vicissitudes of the child soldier. For a handful of examples, see Kourouma 2000; Keitetsi 2002; McDonnell and Akallo 2007; Blood Diamond (2006, dir. Edward Zwick); Wit Licht (2008, recut as *The Silent Army*, dir. Jean van de Velde).

³³ Kamara with McClelland 2008, pp. 40–41, Sierra Leonean author Kamara describes how, as a child, she became a double amputee: ‘Two boys steadied me as my body began to sway. As the machete came down, things went silent. I closed my eyes tightly, but then they popped open and I saw everything. It took the boy two attempts to cut off my right hand. The first swipe didn’t get through the bones, which I saw sticking out in all different shapes and sizes.’

it normatively desirable as a matter of policymaking to adopt such an arthritic and atrophied view of the oppressed.

Circumscribed action is not a metaphor, nor a photograph, nor an ideal-type, nor an image whose reification is sought and to which all *prima facie* categorized individuals are to conform. Rather, circumscribed action is presented as a *spectrum* or *continuum* that embraces the inherent diversity among the individuals aligned along its axis.³⁴ Presenting circumscribed action as a spectrum, instead of a singular category, facilitates procedural inquiry regarding the specific histories and experiences of these individuals.

When law internalizes the chronological watershed of the age of eighteen, and turns to it to contrast the capable adult from the incapable child, law creates an exigent situation for young adults. After all, neuroscience teaches us that, as a matter of age, cognitive functions continue to develop well into the mid-twenties. When the law draws bright-lines, outsiders may become excessively exposed to the very vicissitudes from which law aims to insulate insiders. Abusive commanders may simply shift their focus from older children to young adults. In the end, law may simultaneously protect too much and too little. Accordingly, a turn to a model of circumscribed action would abandon the current predilection for two oppositional polarities—that is, child or adult—and thereby relieve younger adults from the weight of excessive hardship and older children from the straightjacket of excessive infantilization.

8.4 An Emergent Legal Fiction and Its Effects

Where does the faultless passive victim image intend to shift international law and policy?

For starters, toward eighteen as the threshold age of permissible military service. I argue that attainment of this goal would be facilitated were its pursuit to be paired with a less judgmental and more tempered portrayal of those persons intended for protective coverage. Another intended shift involves the vitiating of the legal relevance of distinctions among kinds of recruitment or use and, correspondingly, to annul the possibility that any child ever can volunteer to serve or to perform functions within armed forces or groups.

Considerable momentum also is afoot to exclude children (including child soldiers), whether *de jure* or *de facto*, from the jurisdiction of international or internationalized courts and tribunals that adjudge extraordinary atrocity crimes. Although prosecuting child soldiers for such crimes is certainly not unlawful, such prosecutions increasingly are seen as inappropriate and, even, illegitimate.

³⁴ Wessells 2006, p. 74: ‘The lives of child combatants exhibit significant diversity, cautioning against stereotypes of child combatants as bloodthirsty predators or innocents herded onto the killing fields.’

The push for international institutions to abjure criminal trials for child soldiers implicated in acts of atrocity conceptually seeps into the national and local court systems of post-conflict societies. As a result, national criminal prosecutions of former child soldiers become discouraged as well.

The faultless passive victim narrative also suffuses post-conflict justice modalities other than criminal trials. For example, in the case of truth-seeking and reconciliation mechanisms, ascendant best practices advise that children can only participate therein voluntarily as witnesses or victims.³⁵ These best practices also advocate that all child participants—including children formerly associated with armed forces or groups—be treated equally as victims or witnesses.³⁶ In other words, children are not to be distinguished *inter se* in terms of their individual conduct. Nor, apparently, are child soldiers to be distinguished from other children in conflict zones. Individual participation in acts of atrocity is, therefore, not approached through a *quid pro quo* dialogue of forgiveness. The elimination of distinctions among group members helps accord legal protection to as many children as possible. Nevertheless, I caution against this policy preference. Child soldiers can be treated as a generally protected class while distinctions among individual class members still remain respected.

The preferred push is to void victim-perpetrator ambiguity in the case of child soldiers. When the child inflicts horrors, responsibility passes entirely to the adult abductor, enlister, recruiter, or commander. Although abjured for child soldiers, international criminal tribunals are invoked to prosecute as war criminals those adults who conscript, enlist, or use children below the age of fifteen as active participants in hostilities. Straight 18 aspirations endeavor to expand this prohibition to cover all children, that is, all persons younger than eighteen.³⁷

The international community has invested considerable resources and energy to prosecute a handful of adult militia leaders for unlawful conscription, enlistment, or use of children younger than fifteen. The Special Court for Sierra Leone (SCSL), a hybrid court created cooperatively between the UN and the Sierra Leonean government, has issued several convictions on such charges. The inaugural trial at the International Criminal Court (ICC) in The Hague—involving Thomas Lubanga Dyilo, a DRC rebel leader—is proceeding exclusively on these charges. The Rome Statute, the multilateral international treaty establishing the

³⁵ Paris Principles (2007) Prin. 3.8 (also adding the stipulation that child participation must be by informed consent of both the child and parent or guardian where appropriate and possible) and 8.16.

³⁶ *Id.* Prin. 8.15.

³⁷ See, e.g., REDRESS Trust (2006) *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court*, p. 1: 'It is recommended that the ICC should follow suit and raise the legal age of child recruitment, enlisting or "use" from fifteen to eighteen.'; UNDDR (2006) *Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS)* Sect. 5.30, p. 23, available at www.unddr.org/iddrs/05/download/IDDRS_530.pdf: 'It is a serious breach of international humanitarian law, human rights law and international criminal law to use children as soldiers under the age of 15, and in most circumstances to use children under 18.'

ICC, also permits victims to participate in the criminal proceedings against an accused. On this note, ICC judges have determined the class of persons harmed by child soldiers not to be direct or indirect victims of Lubanga's alleged conduct and, thus, have denied applications brought by class members to participate in the criminal proceedings against him.

Although the faultless passive victim image reflects the experiences of many child soldiers, I argue—borrowing a term of art from legal philosopher Lon Fuller—that its transposition into law spins a *legal fiction*.³⁸ According to Fuller, a fiction 'is neither a truthful statement, nor a lie, nor an erroneous conclusion.'³⁹ Fuller identifies many kinds of legal fictions. What I call the legal fiction of faultless passive victimhood most closely approximates the category of neglective or abstractive fictions.⁴⁰ For Fuller, neglective fictions constitute the 'most obvious example of the process by which our minds simplify reality.'⁴¹

Legal fictions are neither intrinsically malignant nor intrinsically benign. They are constructs that serve both ill and good. In the case of child soldiering, the legal fiction of faultless passive victimhood fulfills a number of valuable purposes. Because it offers a disambiguated and pointed message, it helps marshal resources and co-ordinate condemnation. Many of the reforms the fiction has impressed upon the architecture of law, policy, and best practices are salutary.

Along with a variety of gains, however, indulging this legal fiction also produces operational shortcomings.

One example arises from the prosecution of adult recruiters and users of child soldiers. These prosecutions, to be clear, help condemn child soldiering. International lawyers and policymakers, however, exaggerate their deterrent value. Such bullshiness is unwise. It distracts from the need to search well beyond the architecture of the courtroom and jailhouse in order to meaningfully dissuade and, ultimately, end child soldiering. Much more than a handful of criminal prosecutions are required to promote the well-being of children in conflict zones. When international criminal law fixates on the adult recruiter or user, it flits past the multiple sources of child soldiering—institutional, power politics, commercial, and historical. State responsibility for unlawful recruitment of children, along with other forms of collective sanction, therefore remains undertheorized and underdeveloped. I hope to encourage deeper reflection and more action along these lines. As part of their goal to accentuate the moral culpability of adult recruiters or users, criminal prosecutions amplify how post-traumatic stress syndrome debilitates former child soldiers. If convicting perpetrators becomes entwined with tropes of

³⁸ Fuller 1967, p. 9, a fiction is 'either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility'.

³⁹ *Id.*, p. 5.

⁴⁰ *Id.*, p. 106, citing Vaihinger 1920, p. 28. For Vaihinger, these fictions constitute 'a series of methods in which the deviation from reality manifests itself specifically as a disregard of certain elements in the fact situation.' *Id.*, citing Vaihinger 1920, p. 28.

⁴¹ *Id.*

youth helplessness, however, the upshot may be incarcerating a handful of adults while simultaneously perpetuating gerontocracy by eroding tenets of juvenile autonomy and ability.

The faultless passive victim image is conducive to several other externalities. Of greatest concern is the sidelining of *transitional justice* from post-conflict initiatives to reintegrate former child soldiers and to reconstruct their communities.⁴² The phrase transitional justice designates the range of processes by which societies come to terms with histories of widespread violence, how they reckon with terrible human rights abuses, and how people within afflicted constituencies come to live together again. Transitional justice is concerned with redress, historical clarification, and reconciliation. Processes commonly associated with transitional justice include criminal trials, civil liability (for example, private tort actions, restitutionary claims, and public reparations), lustration, community service programs, truth and reconciliation commissions, endogenous mechanisms,⁴³ public inquiries, and restorative ceremonies. These processes vary considerably *inter se* regarding how, to whom, and to what degree they allocate responsibility for acts of atrocity. They nevertheless share the pursuit of social repair through a framework that recognizes the pain that these acts have wrought. These institutions also share the belief that there can be no durable stability if injustices and human rights abuses are left unaddressed. This does not necessarily mean that perpetrators have to confess or atone. Many endogenous ceremonies, for example, do not contemplate such methods, preferring instead to address past wrongs through future-oriented work and cultivation of relationships.

The international legal imagination's propensity is to generically ease a potential three-dimensional status of child soldiers as perpetrators, witnesses, and victims into a two-dimensional portrayal of child soldiers as victims and witnesses alone. This constriction, however, engenders some opportunity costs. In response, I advance the normative claim that transitional justice initiatives other than criminal trials—in particular, truth commissions, restorative modalities, and endogenous mechanisms—can help facilitate reintegration and reconciliation in cases of child soldiers implicated in acts of atrocity.

I do not call for former child soldiers to be criminally prosecuted for suspected violations of international criminal law before international institutions and, if

⁴² Together with their adult counterparts, many—but certainly not all, and in some jurisdictions only few—child soldiers may return to their communities of origin through disarmament, demobilization (release), and reintegration (DDR) programs. Disarmament involves the collection of weapons. Demobilization means the discharge of individuals from fighting forces. Reintegration is the step through which the former fighter transitions to a civilian role.

⁴³ I borrow political scientist Phil Clark's unorthodox use of the term 'endogenous' to describe ceremonies, rites, and rituals that arise, often informally, at the local level to promote social repair and purification following wrongful conduct. I also deploy the more conventional terms 'traditional' and 'customary' in this regard. I recognize the contested meaning and use of these terms, but turn to them only descriptively and purely out of convenience. I do not aim to theorise these terms.

found guilty, to be punished through incarceration. Nor do I recommend prosecutions or imprisonment at the national level. My reservations extend even more emphatically to proceedings before military commissions or tribunals, which are particularly susceptible to procedural irregularities and political vagaries. The outrageous situation faced at Guantánamo Bay by Omar Khadr, a Canadian child soldier who, as a minor, had associated with al-Qaeda, is painfully illustrative.⁴⁴

As a matter of outcome, then, I concur in the international legal imagination's push to discard criminal trials for child soldiers. I disagree, however, when it comes to why. My skepticism regarding criminal trials for child soldiers implicated in acts of atrocity flows from my broader circumspection regarding the ability of the atrocity trial to attain its principally avowed penological goals, especially in the case of lower-level cadres, regardless of the age of the accused.⁴⁵ These goals include retribution, deterrence, and expressivism. Penological goals of rehabilitation and reintegration, which should be particularly salient in the context of juveniles, do not centrally figure among international criminal law's aspirations. The fact that child soldiers do not serve as conflict entrepreneurs or political leaders dulls the benefits of incapacitating them. Former child soldiers and those persons harmed by their conduct require restoration, which sequestered incarceration does not provide.

To recap, this project does not turn to criminal law as a regulatory solution. Why, then, does it devote considerable space to review the interface of the international legal imagination with the question of the potential criminal culpability of child soldiers? Why be concerned with assessing how, and for which reasons, conventional wisdom has come to eschew criminal trials for child soldiers enmeshed in the commission of acts of atrocity? The answer lies in the fact that what the international legal imagination says, recommends, and exhorts ultimately bears heavily upon the reconstructive journeys of inter- and post-conflict societies. Transnational interventions matter. Although excluding child soldiers from international and national criminal trials may well be appropriate as a policy *result*, the

⁴⁴ In October 2010, a US Military Commission convicted Khadr through a plea bargain of charges that included violating the laws of war. Khadr pleaded guilty to five charges—including throwing a grenade in a 2002 firefight that killed a US combatant, Christopher Speer, in Afghanistan—as well as various other crimes in connection with terrorist activity. He was formally sentenced by a military jury to forty years' imprisonment. Because of a diplomatic agreement, however, Khadr will likely be repatriated to Canada to serve out seven years of his sentence (which the agreement capped at eight years in total) in accordance with Canadian law. Savage C (2010) *Guantánamo Detainee's Guilty Plea Averts Trial*, N.Y. Times (October 25, 2010), on file with author. Khadr was not credited for the eight years he had spent in detention prior to his conviction. Khadr was fifteen years old at the time of his capture by US forces. In addition to his age, his lengthy pre-trial detention by the US at Guantánamo Bay (he was twenty-four years old at the time he pleaded guilty), and the problematic conditions he faced while in custody, Khadr's situation is controversial owing to evidence that confessions he allegedly made had been secured following implicit threats of gang rape. Savage C (2010) *U.S. Wary of Example Set by Tribunal Case*, N.Y. Times (August 27, 2010).

⁴⁵ Drumbl 2007, pp. 149–180.

current *rationales* for so doing, and the forces that propel those rationales, have come to overshoot their mark. Fear that child soldiers may become subject to punitive criminal trials has induced a crudely fulsome protectionism that has come to insulate child soldiers from accountability processes generally, regardless of the goals or potentials of those processes. This protectionism needlessly cocoons child soldiers from the tough questions that societies must reckon with in order to come to terms with mass violence. The solution, then, is not for international criminal law to recognize the criminal culpability of children but, instead, for transnational discourse to develop a more fine-grained approach to post-conflict accountability. I have elsewhere urged the adoption of more careful approaches to victimization and perpetration as a general matter.⁴⁶ Hence, the proposals made in this chapter, and extensively discussed in the book from which it is extracted, dovetail with my overarching vision of what post-conflict justice ideally ought to look like.

Afflicted communities want their children back home. They welcome the return of former child soldiers. Transnationally motored discourses of forgiveness without reciprocal obligation may appear, at first blush, to mesh with local sentiments of forgiveness without reciprocal obligation. Impulses arise in afflicted communities to accept excuse—namely constraint enhanced by youth—in the case of the antecedent violent acts of child soldier returnees.

Transnational discourse, however, overestimates the uniformity and flexibility of community sentiment. A careful mining of the evidentiary record reveals that communities care about conduct during conflict, that is, why and how did the child join fighting forces and, once there, what did he or she do. Communities do not take all child soldier returnees to be fungible moral equals and to require identical approaches to reintegration. It is unclear whether community members unambivalently accept that the cognizability of their injuries should hew so tightly to the age of the perpetrator. The fact that community members demonstrate variable and volatile sentiments, ranging from joy to cordiality to antipathy, is understandable. In fact, it should be obvious. Regardless of who perpetrated it and why, mass atrocity invariably engenders a broad gamut of raw emotions among survivors and targeted populations. To pretend otherwise is foolhardy. To base policy on such pretension is quixotic.

Unsurprisingly, certain subgroups of former child soldiers face reintegration hurdles. Their home communities simply do not accept the suitability of the collectivized faultless passive victim narrative as applied to them as individuals. One such subgroup is child soldiers who have served for long periods of times with armed forces or groups. Another subgroup involves child soldiers suspected of having committed atrocities or believed to have been affiliated with units that inflicted atrocities. These subgroups are at risk for marginalization and a recrudescence of militarized life, crime, and violence.

The legal fiction, therefore, neither represents nor reaches a relevant number of child soldier returnees, for whom reinsertion is far from seamless or self-evident.

⁴⁶ Id.

For this subgroup, unconditional excuse does not resonate within afflicted communities. Instead, consideration might be given to exploring processes of forgiveness predicated upon mutual and reciprocal obligation among returnees and the community. Reintegration cannot always be assumed. The violence may be too much.

Collaterally, transitional justice measures also may relieve the child soldier's sense of injustice. The child soldier may justifiably harbor resentment toward the community that idled while forcible recruitment ensnared its youth. Transitional justice measures may enable the child soldier to tell what happened to him or her—and to identify or learn who in the community may have abetted unscrupulous warlords. Transitional justice processes create a venue to discuss much more than accountability and responsibility. They also may authenticate stories of resistance to atrocity and contestation to cruel orders.⁴⁷ In this regard, transitional justice processes may come to benefit not only subgroups of child soldiers implicated in atrocity, but all child soldiers as well. Through participation in transitional justice processes, former child soldiers even may help educate other children in the community about the perils of becoming associated with armed forces or groups.

In my work with adult atrocity perpetrators I have come to experience that many—perhaps self-servingly—view themselves as victims or tools who simply ended up on the losing side of circumstance. The international legal imagination gives short shrift to their representations of subservience and victimhood. Adults, after all, are not legally excused from choices, often exercised in times of chaos, to join armed forces or groups that commit atrocity. Their responsibility is not evacuated. Many adults are compulsorily conscripted, as well, yet this does not ab initio absolve them from the consequences of their conduct. Many adult soldiers are little older than eighteen and live in strikingly similar situations to child soldiers. They are thus contemporaries. Can so much differentiation realistically hinge upon a simple matter of chronological age? Jo Boyden and Joanna de Berry remain unconvinced: '[C]hildren and adolescents can be very active in defining their own allegiances during conflict, as well as their own strategies for coping and survival. This implies that the prevailing dichotomy between adult as active perpetrator and child as passive victim needs challenging.'⁴⁸

According to anthropologist Susan Shepler, writing within the context of Sierra Leone, '[c]oming to terms with the participation of child soldiers ... is key to post-war reconciliation and peace building.'⁴⁹ I believe that international law and policy, however, fails to demonstrate adroitness or finesse in negotiating this quandary. One way to redress this blind spot is to trim the emphasis on criminal law binaries of guilt or innocence, corruption or purity, victim or perpetrator, and adult or child.

⁴⁷ Regarding transitional justice and resistance to atrocity, see Leebaw 2011.

⁴⁸ Boyden and de Berry 2004, p. xv.

⁴⁹ Shepler 2005, pp. 197, 198.

Adopting a baseline of circumscribed action might open the space necessary to effect meaningful conceptual shifts and, thereby, synergistically liaise with the work of those observers who believe that transitional justice matters for child soldiers.⁵⁰ For example, international lawyer Cécile Aptel recognizes the value of non-penal proceedings in acknowledging children's wrongdoing and diminishing stigma. She suggests that 'more thinking is required concerning the liability of children who have participated in the commission of crimes.'⁵¹ I hope to respond to this need and inspire a framework for reform. Meaningful change cannot occur, however, until the presumptive imagery recedes from the tautness of passive victimhood and embraces something more dynamic, such as circumscribed action.⁵² Efforts to engage with transitional justice will remain superficial unless liberated from the strictures of victimhood discourse. This discourse, and its correlative imagery, is simply too tendentious.

In short, then, I advise that the legal fiction of faultless passive victimhood should be dismantled and, therewith, its controlling effects deflated.

Assuredly, as is the case with any reformative process, renewal may produce fresh concerns. In reimagining the child soldier, and recommending policy shifts keyed thereto, my project is anticipatorily mindful of three sets of concerns: *pragmatics* (are the suggested reforms affordable or realistic?), *fear* (am I opening the door to harsh punishment for child soldiers, thereby leaving them worse off?), and *overreach* (instead of circumscribed action, why not just a rebuttable presumption of victimhood?).

In the end, I remain persuaded that these proposals are worthwhile. They also convey broader pedagogic value. Connections arise between reimagining child soldiers, on the one hand, and three cognate challenges, on the other. These challenges are: reforming domestic justice systems in cases of ordinary common crime committed by juveniles, rehabilitating victims of transnational crimes that fall outside the aegis of international criminal law (e.g., sex- and drug-trafficking), and revisiting the place of international criminal law within the overall framework of post-conflict justice.

⁵⁰ Children and Truth Commissions, pp. x–xi, 65; Parmar et al. 2010 Annex (Key Operational Principles); Children and Justice, pp. 27, 39, encouraging restorative, rehabilitative, and traditional justice processes.

⁵¹ Aptel C (2010) International Criminal Justice and Child Protection. In Parmar et al., pp. 67, 107–111.

⁵² For example, Human Rights Watch's suggestion that former child soldiers 'participat[e] in restorative justice processes to help the child acknowledge their actions and gain reacceptance by the community' is hampered by the very foundational images Human Rights Watch disseminates about children as choicelessly coerced into fighting and unthinkingly committing violent acts. Human Rights Watch (2008) Coercion and Intimidation of Child Soldiers to Participate in Violence, p. 15. The IDDRS encourages more robust connections between transitional justice and DDR programming—including for child soldiers, for whom restorative mechanisms notably are discussed. Notwithstanding their innovative nature, the IDDRS recommendations also remain cabined by the IDDRS's depiction that '[f]ormer child soldiers are victims of criminal policies for which adults are responsible.' UNDDR (2006) Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS) Sect. 5.30, p. 9.

8.5 Conclusion

It is much easier to express outrage regarding the oxymoron of the child soldier than it is to interrogatively theorize the oxymoron so as to enhance preventative and remedial policies. It is considerably easier to pre-judge *ex ante* that children and adolescents bear no responsibility for the situations they find themselves in and what they interstitially do within those situations than to examine *ex post* why, exactly, they militarize and then why, exactly, some among them become involved in committing terrible crimes. The easier path that assuages transnational sensibilities, however, is not necessarily the best path to protect children or safeguard the public. Policy based on the convenient answer may simply be poor policy.

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