

DOES DEFECTIVE MORAL DEVELOPMENT EVER EXCUSE?

ADULT SOLDIERS RECRUITED AS CHILDREN

By

Renée Nicole Souris

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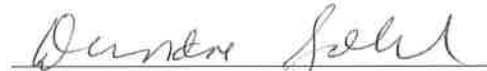
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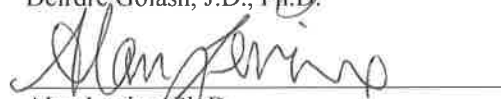
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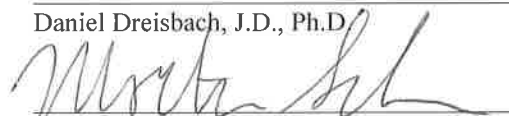
Justice, Law and Society

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For my brother

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ABSTRACT

This dissertation argues for a new excuse from criminal responsibility to be introduced into international criminal law to apply persons who carry out acts of genocide and crimes against humanity but who, through no fault of their own, lack the ability to exercise normal moral perception, an ability that enables ordinary persons to perceive the wrongfulness of this sphere of conduct under internationally accepted standards of right and wrong. I argue that this new excuse is needed on the basis that the Rome Statute assumes that all sane adults are able to perceive the manifest illegality of acts of genocide and crimes against humanity, but that it is reasonable to expect that some persons who may be prosecuted for these crimes lack this ability through no fault of their own.

Drawing on empirical facts about typical experiences of child soldiers in armed groups in Africa and recent psychological literature on how these kinds of experiences create the risk of harm to adult development, I systematically examine the case for applying the new excuse to adult soldiers who were recruited as children (“ARC soldiers”) into armed groups in Africa. I show that there is empirical support for the view that some ARC soldiers will lack normal moral perception in accordance with internationally accepted standards of right and wrong as a result of their experiences as child soldiers. I provide a moral argument that the subset among them who developed this inability through no fault of their own should be excused under international criminal law. I identify this subset as “traumatized ARC soldiers,” who I describe as ARC

soldiers whom it is reasonable to expect would lack normal perception and have impaired practical reason as a result of being subject, throughout their adolescent formative years, to coercion, isolation, and socialization in accordance with standards that are radically at odds with internationally accepted standards of right and wrong, and who do, in fact, have these defects or had them at the time they engaged in acts of genocide or crimes against humanity.

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CHAPTER 1

INTRODUCTION

The twentieth century has been called the “Century of Genocide” in response to the estimated 187 million human beings that were killed as a result of political violence during the century.¹ As observed halfway through the century, by international jurist Raphael Lemkin, who coined the term “genocide,” what distinguishes the twentieth century from previous centuries is not the violent harm that human beings inflicted on other human beings through massacre, but the ability and willingness of the international community to respond to these events through law.² One of the most well known examples of the ability and willingness of the international community to respond to mass atrocity through law was the creation of the International Military Tribunal at Nuremberg established to prosecute selected perpetrators of the Nazi atrocities against the Jewish people during World War II. In responding to Nazi perpetrators through law, the Nuremberg Court aimed to contribute to a basic goal summarized in the slogan, “Never again.”³ As mass atrocities continue to be carried out throughout the world after Nuremberg, the international community also continues to make efforts to respond to perpetrators through law. Some notable examples of such efforts include the International Criminal Tribunal of the Former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR). The ICTY and ICTR were ad hoc courts established by the United Nations in response to the ethnic cleansing campaign in the Balkans and the Rwandan genocide, respectively.⁴

¹ Mark Levene, “Why Is the Twentieth Century the Century of Genocide?” *Journal of World History* 11, no. 2 (Fall

² Raphael Lemkin, “Genocide,” *The American Scholar* 15, no. 2 (Spring 1946): 227-230.

³ Kelly Dawn Askin, “Symposium: The Nuremberg Trials: A Reappraisal and Their Legacy: ‘Never Again Promise Broken Again. Again. And Again,’” *Cardozo Law Review* 27, no. 4 (February 2006): 1723-1730.

⁴ “United Nations Research Guides,” Courts and Tribunals – UN Documentation: International Law, last modified July 27, 2012, accessed April 5, 2014. <http://research.un.org/en/docs/law/courts>.

In light of continuing mass atrocities carried out throughout the world, the international community determined that rather than create ad hoc tribunals to respond to individual conflicts, a permanent international criminal court was needed to establish a standing body of international criminal law under which perpetrators of mass atrocity could be prosecuted. In July 1998, representatives from the international community gathered in Rome to draft a statute that would establish a permanent international criminal court designed to respond to mass atrocity through law. The result was the Rome Statute, which established the International Criminal Court (ICC).⁵

The ICC aims to secure global justice by ending impunity for human rights violations and deterring perpetrators of mass atrocity.⁶ The ICC has jurisdiction over four crimes: crimes against humanity, genocide, war crimes, and the crime of aggression.⁷ Since its jurisdiction became active in 2001, the ICC has issued twenty-seven arrest warrants for persons accused of committing these crimes. One of these warrants is for Dominic Ongwen, a leader of the armed group the Lord's Resistance Army (LRA), who was abducted by the group when he was ten years old,⁸ and who now stands indicted for three counts of crimes against humanity and four counts of war crimes. The former include: murder, enslavement, and inhumane acts of inflicting serious bodily injury and suffering. The latter include: cruel treatment of civilians, intentionally

⁵ Rome Statute of the International Criminal Court, July 1, 2002. 2187 U.N.T.S. 90, accessed March 12, 2014, <http://www.un.org/law/icc/index.html>.

⁶ Since the ICC's jurisdiction became active in 2001, the only full trial processed through the Court is the trial of Congolese warlord, Thomas Lubanga Dyilo, who was convicted for war crimes of conscripting and enlisting children under the age of fifteen to actively participate in hostilities. "Situations and Cases," International Criminal Court: The Democratic Republic of the Congo, accessed March 12, 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx.

⁷ Rome Statute, Part 2, Article 5, Section 2 provides that the Court's jurisdiction over crimes of aggression will only become active after the crime has been defined according to other articles of the Statute. As of April 2014, the Court has yet to define crimes of aggression.

⁸ "Field Note," Justice and Reconciliation Project Field Note by Erin Baines July 2008, accessed March 12, 2014, http://theresolve.gopagoda.com/wp-content/uploads/2013/07/JRP_FN7_Dominic-Ongwen-1.pdf.

directing an attack against a civilian population, and pillaging.⁹ It is important to note that, because the Rome Statute excludes persons under eighteen from the jurisdiction of the ICC, Ongwen would not have been prosecuted for anything he did before the age of eighteen.¹⁰ He is now estimated to be in his early thirties and has apparently spent his life since abduction in the LRA, thus having been raised and socialized by the group.¹¹ He is the lowest ranking member of the LRA to be indicted by the ICC, the youngest person that the ICC has charged with crimes against humanity, and the only person that the ICC has charged with war crimes of which he is also a victim.¹²

The LRA is notorious for abducting children to fight in its ranks. A report issued by the United Nations estimates that roughly 90% of LRA members are under the age of eighteen, with some 30,000 children having been abducted by the group since the 1980s.¹³ Some of these abductees serve as cooks, spies, porters, or sex slaves, but many are used as child soldiers. Empirical work conducted with former child soldiers (hereinafter “FCS”) from the LRA shows that the average age range of child recruitment is around thirteen or fourteen, although the LRA has been known to target particularly young children as well, some as young as ten or under. After recruitment into the LRA, new child recruits are subject to strict regime of coercion, isolation, and socialization into the values of the group.¹⁴

⁹“Situations and Cases,” International Criminal Court: Uganda, accessed March 12, 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx.

¹⁰ Rome Statute, Part 3, Article 26.

¹¹ Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York, NY: Oxford University Press, 2012), 90-1.

¹² Erin K. Baines, “Complex Political Perpetrators: reflections on Dominic Ongwen,” *The Journal of Modern African Studies* 47, no. 2 (May 2009): 163-4.

¹³ “Uganda: Child soldiers at centre of mounting humanitarian crisis,” U.N. Series: 10 Stories the world should hear more about, accessed March 30, 2014, <http://www.un.org/events/tenstories/06/story.asp?storyID=100>.

¹⁴ The next chapter offers a more detailed account of these facts and identifies sources for these accounts.

The LRA purports to be a revolutionary group seeking to undermine the existing Ugandan government and re-establish it under the biblical then commandments.¹⁵ However the group's activities are nearly impossible to understand as pursuing an intelligible political strategy toward reform and the group's values cannot reasonably be taken to support the biblical commandments. For example, the group is notorious for its brutal attacks against the northern Ugandan civilian population, the Acholis, whom the group purports to be waging a revolution to liberate from the Ugandan government, and its leader, Joseph Kony – an Acholi himself – targets Acholi children for abduction to become child soldiers.¹⁶

Moreover, the values manifested in typical LRA activities show a stark lack of concern for the value of human life and the biblical commandments. For example, Kony regularly violates the commandments against idolatry and dishonesty, as he presents himself as a God-like figure and relies on force and deception to make child soldiers worship him.¹⁷ Moreover, the group's values violate the commandments against murder and theft, as child soldiers are regularly encouraged to murder and steal and taught that these actions are not wrong.¹⁸ These and other efforts by the group are designed to prevent child soldiers from trying to escape by making them fear sanctions if they do, separating them from their previous lives, binding them to the group, and engendering their loyalty to Kony by appealing to their religiosity.¹⁹ These efforts, combined with the long-lasting nature of the conflict, make it reasonable to expect that

¹⁵ "Joseph Kony: Profile of the LRA leader," *BBC Africa*, last updated March 8, 2012, accessed April 5, 2014, <http://www.bbc.com/news/world-africa-17299084>. Elizabeth Flock, "Joseph Kony and the Lord's Resistance Army: a primer," *Washington Post*, October 14, 2011, accessed April 5, 2014, http://www.washingtonpost.com/blogs/blogpost/post/obama-deploys-combat-forces-to-fight-lords-resistance-army-in-central-africa/2011/10/14/gIQAYB8KkL_blog.html.

¹⁶ Will Storr, "Tragedy in Uganda: Joseph Kony massacre survivors tell their stories," *The Guardian*, January 11, 2014, accessed April 5, 2014, <http://www.theguardian.com/world/2014/jan/12/joseph-kony-uganda-massacres-survivors-stories>.

¹⁷ Michael Wessells, *Child Soldiers: From Violence to Protection* (Cambridge, Massachusetts: Harvard University Press, 2006). 63, 77-8.

¹⁸ *Ibid*, 58, 141.

¹⁹ *Ibid*, 57, 77-8.

child soldiers who are not killed by violence, disease, or starvation remain soldiers into adulthood. Hence, Ongwen may be a single case out of a wider set of adult soldiers recruited as children (hereinafter “ARC soldiers”) in the LRA.

The experiences to which child soldiers are subject inside armed groups like the LRA are notorious for combining coercion, isolation, and socialization into the group’s values, which are radically at odds with internationally accepted standards of right and wrong. This raises the concern that child soldiers who grow up inside extreme armed groups may lack the opportunities that ordinary children have to acquire the abilities and skills associated with practical reasoning and to acquire the basic moral competences that ordinary children develop. Insofar as practical reasoning ability and basic moral competence are necessary for ordinary adults to know what their obligations are and to choose to fulfill them, the lack of these opportunities for child soldiers is relevant to evaluating whether ARC soldiers have been provided with a fair opportunity to choose to obey the law.

I. The existing excuses as applied to ARC soldiers

Like U.S. criminal law, international criminal law recognizes grounds for excusing perpetrators from criminal responsibility. None of the existing excuses under international criminal law, however, fully applies to ARC soldiers even if, through no fault of their own, they lack basic moral competence, such as normal moral perception in accordance with accepted international standards of right and wrong.

Article 31 of the Rome Statute identifies “grounds for excluding criminal responsibility,” which provides legal bases for some familiar excuses. Article 31 states the following:²⁰

²⁰ Rome Statute, Part 3, Articles 31.

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - (b) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
 - (c) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32 on “mistake of fact or law” also provides a legal basis for excuse, stating:²¹

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

²¹ Rome Statute, Part 3, Article 32.

Finally, Article 33 on “superior orders and prescription of law” also provides a legal basis for excuse, stating:²²

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and
 - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

In what follows, I will apply each of the above provisions to the case of ARC soldiers. In the course of my analysis, I identify the grounds under which some ARC soldiers would be excused under the Rome Statute. Because there has been only one trial to go through the ICC to date, there is limited case law to which to refer in interpreting the language of the various provisions. To support my interpretations of how each of the excuses may apply, I refer to how other international tribunals have interpreted similar provisions and to the U.S. Model Penal Code. While the Model Penal Code is not law, it represents the recommendations of a group of legal scholars and has been influential in shaping reforms to criminal codes in various U.S. states.²³

Mental disease or defect

The first excuse to consider is the excuse for mental disease or defect. ARC soldiers who suffer from mental diseases or defects that destroy their capacity to appreciate the unlawfulness of their conduct or capacity to control their conduct to conform to the law will be excused under

²² Rome Statute, Part 3, Article 33.

²³ The Model Penal Code (MPC) is a statutory text that was originally drafted in 1962 by the American Law Institute (ALI). The ALI is a group of legal scholars, judges, and lawyers that was formed in 1923 and aims to update and standardize the criminal law in the United States. The MPC is regarded as the reflections of reasoned judgment on the law. “Publications Catalog,” American Law Institute, accessed on April 5, 2014, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=92.

this provision. It is important that these capacities must be destroyed and not simply impaired. By holding that practical reason must be *destroyed* for the excuse for mental disease or defect to apply (and as shown in the next subsection, for the involuntary intoxication excuse to apply), the standard suggests that the damage to persons' capacities to appreciate the unlawfulness of their conduct or control their conduct to conform to the law must be total and permanent. This is because capacities deal with potentialities; to say that someone lacks the capacity to do *x* means that he or she lacks the potential to do so. Interpreted in this way, this standard sets a very high bar for when it may be applied. This interpretation implies that the excuse only applies to persons with incorrigible and irremediable damage to practical reason.

In addition to the fact that practical reasoning must be destroyed for this excuse to apply, the destruction must also be the result of a mental disease or defect. That the damage to practical reason must be the result of mental disease or defect makes the Rome Statute's standard similar to the Model Penal Code, which holds that a person is not responsible for criminal act, if at the moment of action, and as a result of mental disease or defect, did not possess "substantial capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law."²⁴ Here, mental disease or defect is taken as primarily consisting in cognitive defect (e.g., as is schizophrenia or mental retardation), which is a defect pertaining to thought. If there are emotional defects that paralyze the exercise of practical reason or volitional defects that preempt the exercise of practical reasoning, they, too, would be mental diseases or defects that destroy persons' abilities to appreciate the unlawfulness of their conduct or their ability to control their conduct to conform to the law, so long as these were incorrigible.

²⁴ "Insanity," Legal Information Institute Cornell University Law School, accessed April 7, 2014, <http://www.law.cornell.edu/background/insane/insanity.html>.

If we apply this understanding to ARC soldiers, only those who have destroyed capacities for practical reasoning that results from incorrigible cognitive, volitional or emotional defects are excused under it. In other words, they must lack the capacities to appreciate the unlawfulness of their conduct or to control their conduct to conform to the law not only at the moment of action, but also permanently. Hence, ARC soldiers with cognitive, emotional, or volitional defects that *impair* their abilities to appreciate the unlawfulness of their conduct or to control their conduct to conform to the law at the moment of action, but that do not permanently destroy these capacities, are not excused under the Rome Statute.

Involuntary intoxication

The Rome Statute recognizes an excuse for actions performed by persons who, at the time of their action, are in a state of involuntary intoxication that destroys their capacity to appreciate the unlawfulness of their conduct or capacity to control their conduct to conform to the law. As explained above, for these capacities to be destroyed, the damage to them must be complete and permanent. ARC soldiers whose addiction to drugs is so severe that it permanently destroys these capacities will be excused under the excuse for mental disease or defect considered above, but those in whom these capacities are not destroyed, but are impaired, will not be excused if they are voluntarily intoxicated as a result of involuntary addiction, or an addiction that developed as a result of being involuntarily intoxicated as child soldiers.

Self-defense or defense of another

The Rome Statute also excuses a person who acts reasonably and proportionately to defend him- or herself or another person against an imminent and unlawful use of force. This

excuse does not apply to self-defense against lawful uses of force. There are two implications of this. First, the excuse is available to ARC soldiers who use reasonable and proportionate force in self-defense against the imminent and unlawful uses of force by government armies. Secondly, the excuse is available to ARC soldiers who fight *for* governmental armies and who use reasonable and proportionate force in self-defense against imminent and unlawful uses of force of rebel groups.

For the excuse to apply in the first case, ARC soldiers must be able to identify what counts as unlawful uses of force by governmental armies so that they can restrict their uses of force in self-defense only to unlawful uses of force by governmental armies. This requires a considerable familiarity with the laws of war, a subject on which ARC soldiers who have been isolated from the general population for most of their lives are unlikely to be well informed. Moreover, the application of the excuse only extends to reasonable and proportionate uses of force in response to threats facing them, which again requires familiarity with the laws of war, or international custom, which typically sets these standards. Finally, the excuse only applies to force used in self-defense against an *imminent* threat. Thus, this excuse only applies to actions carried out in response to imminent force that respond with reasonable and proportionate force in accordance with the laws of war.

Those ARC soldiers who are unfamiliar with the laws of war or who lack the relatively sophisticated cognitive skills of ordinary adults and who, as a result, are unable to accurately determine what counts as reasonable and proportionate uses of force in response to unlawful uses of force against them are unlikely to act in ways that warrant excuse under self-defense. Those ARC soldiers who may be able to determine what counts as unlawful uses of force or reasonable and proportionate responses to force may lack the ability to call forth this information and

exercise these skills in the hostile situation of armed conflict. If some ARC soldiers are so traumatized by their experiences as child soldiers that they lack the firmness of ordinary adults, it will undermine their ability to respond reasonably and proportionately to their hostile situation, but unless they are under an imminent threat, they will not be excused under self-defense.

Duress

The Rome Statute also provides legal basis for excuse on account of duress. According to the Rome Statute, this excuse applies to persons whose conduct that is alleged to constitute a crime under the jurisdiction of the Court is caused by duress resulting from threats of imminent death or of continuing or imminent bodily harm, which are made by other persons or constituted by circumstances beyond that person's control, and who act reasonably and necessarily to avoid the threat, and who do not intend to cause more harm than they seek to avoid. For this excuse to apply, persons need to be able to exercise a similar set of abilities when acting as they need for the self-defense excuse apply, as described above. In particular, only persons who act reasonably and necessarily in response to threats may be excused under duress, which requires roughly the same set of abilities as it takes for persons to act reasonably and proportionately in self-defense. Rather than repeating that discussion, here I focus on what is unique about the duress excuse.

Let us start with the fact that, under the Rome Statute, duress may be caused by threats of imminent death, imminent bodily harm, or continuing bodily harm. The fact that ARC soldiers are in the forcibly limited and hostile environment of armed conflict makes it plausible that they are subject to continuing bodily harm. Even if the threats they face not caused by other persons, they may be constituted by their circumstances, which include being inside groups engaged in armed conflict. For the excuse to fully apply, however, it must not only be true that their actions

are caused by duress that results from being subject to continuing bodily threats, but if those threats arise from their circumstances, it must also be true that these circumstances are beyond their control and that in responding to the threat they do not intend to cause more harm than they seek to avoid.

The Rome Statute does not identify what counts as circumstances that are beyond a person's control in order for this part of the duress excuse to apply, but we may refer to the judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) that dealt with a similar issue to see how it may be interpreted. The ICTY was an *ad hoc* international criminal tribunal that was established by the United Nations to prosecute perpetrators of the ethnic cleaning in the Balkans. The Yugoslav Appellate Tribunal held that the "sheer scope and hostility of the ethnic cleansing campaign" is not "something that itself acted to coerce various Serbs by duress into harming Muslims and Croats in Bosnia and Kosovo."²⁵ While this might suggest that, according to precedent set by the ICTY, the circumstances of armed conflict do not function as circumstances of duress outside of a person's control, much of the ICTY's judgment, however, is grounded on the specific point that duress does not excuse the murder of innocent civilians, rather than on the view that being engulfed in hostile circumstances, like those of an ethnic cleansing campaign, are not circumstances that are within persons' control that can ground the excuse of duress.²⁶ This makes it plausible that the ICC could find the forcibly limited and hostile circumstances of armed conflict as beyond the control of individual members of armed groups engaged in the conflict. What is more, not only are ARC soldiers inside armed conflict,

²⁵ Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge, UK: Cambridge University Press, 2005), 199.

²⁶ Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-A, Judgment in the Appeals Chamber, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

their continued identification as members of rebel groups may place more constraints on them, making it unreasonable to expect that they leave the group and change their circumstances.

Even if the ICC interpreted the duress excuse so that ARC soldiers in the forcibly limited and hostile circumstances of armed conflict are in circumstances that are beyond their control, it would still need to be true that their conduct within those circumstances does not reflect the intent to cause more harm than they seek to avoid. If they do not meet this condition, then they are not excused. The excuse would not apply to either ARC soldiers who fail to consider the proportionality of their conduct and thus inflict harm disproportionate to any immediate threats they face, or to those who carry out a program of attack on civilians, not because they face threats from them, but because they have been socialized into this course of conduct.

Based on the Rome Statute's standard for duress, the excuse will apply to ARC soldiers whose actions are caused by duress resulting from imminent or continuing threats to their lives or bodily security, and who despite experiencing this duress, are able to determine what is reasonable and necessary to do in response to these threats and to act on their determinations in such a way that shows they are not intending to cause more harm than they are seeking to avoid. Acts of harm that do not meet this standard are unlikely to be excused, regardless of whether they are performed by ARC soldiers who are so traumatized by their experiences that they lack the conception of harm and the normal moral perceptions of ordinary adults that let them see that acts causing harm are wrong.

Mistake of fact or law

The Rome Statute also recognizes an excuse for persons who, at the moment of action, perform conduct alleged to constitute a crime under the jurisdiction of the Court, but who acted

on a mistake of fact that negates the mental element that is required by the crime. The most plausible case for mistake of fact is for ARC soldiers who were isolated and routinely lied to by group leaders during their adolescence. The longer child soldiers are kept in isolation and indoctrinated with false information, the more likely they will believe it as adults. This is especially true of child soldiers who are not only socialized in accordance with standards of right and wrong that radically challenge international standards, but who are also induced to believe various factual accounts that are meant to explain their situation. If these factual accounts consist in information about who poses a threat to them and why, child soldiers may be brought up to believe that persons who pose no actual threat to them do pose such a threat. What is more, the factual accounts they are told may reaffirm the group's values, among which may be the value of not questioning the authority of the group's leaders or their accounts of the group's purpose and its place in the conflict. When this is combined with coercion and other forms of socialization, child soldiers are not likely to seek out information to challenge what they are told. Thus, ARC soldiers from groups that lie to them, isolate them, and indoctrinate them with values of the group, including values related to not questioning the group's authority, may act on the basis of wide notion of factual mistake.

This is relevant to determining whether crimes of genocide and crimes against humanity have been committed, according to the Rome Statute. The Rome Statute states that the act of murder counts as a genocidal act if it is committed with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."²⁷ ARC soldiers who mistakenly believe that members of a particular national, ethnical, racial, or religious group pose a threat to them, and, who therefore, intend to kill members of the group in order to destroy it, act on a mistake of fact

²⁷ Rome Statute, Part 2, Article 6.

regarding the actual threat posed to them by the group. This mistake of fact, however, does not excuse them because it does not negate the mental element of the crime (here, the intent to destroy the group). Only mistakes of fact that show that ARC soldiers do not intend to destroy a group would excuse their conduct, such as a mistake of fact regarding the shared group identity of their victims.

Suppose ARC soldiers simply kill whomever they perceive as posing a threat to them, and because of their geographical location, these perceived threatening persons are all members of a particular group. Suppose, further, that they are mistaken and these individuals do not actually pose a threat to them. Here, these ARC soldiers act both on a mistake of fact regarding the actual threat posed by the group and do not target their victims on the basis of their group membership, thereby negating the mental element of the crime. While these acts may not count as acts of genocide because of their mistake of fact, ARC soldiers who perform them are not necessarily excused from responsibility, as their acts may still count as crimes against humanity because the Rome Statute counts the acts of murder, if carried out as a part of a “widespread and systematic attack” against a “civilian population,” with “knowledge of the attack” as crimes against humanity.²⁸ By associating with others in a violent enterprise, the acts of ARC soldiers will be taken as part of a widespread and systematic attack. The mental element of knowledge of the attack is also relatively easy to satisfy and difficult to negate by showing a mistake of fact. If an act of murder against civilians is carried out by an soldier who was recruited by an armed group as a child and who remains associated with the group, he will be found to be participating in a widespread and systematic attack against a civilian population with knowledge of the attack.

²⁸ Ibid, Article 7.

If an act of murder carried out by an ARC soldier is part of a widespread and systematic attack directed toward a governmental army, on the other hand, then the act would not count as a crime against humanity. The conduct would then be evaluated under the war crimes provisions of the Rome Statute, and the excuse of mistake of law would be available. The Rome Statute, however, offers an incomplete account of the conduct that can most plausibly be regarded as acts of war, as it has not yet defined the crime of aggression, which identifies the conditions under which war may be lawfully waged. Existing international criminal law under the Rome Statute deals exclusively with the conduct of war (*jus in bello*), rather than with the grounds for waging lawful war in the first place (*jus ad bellum*).²⁹ Accordingly, it does not offer a legal basis for the conditions under which persons may pursue lawful political revolution. Without offering a definition of the crime of aggression, the Rome Statute does not offer a full legal basis for evaluating the conduct of ARC soldiers who believe they are part of a political revolution, especially for evaluating whether it is plausible that they act on a mistake of law about when revolution may lawfully be waged. While an important project for the ICC to pursue in coming years, this is not directly relevant to evaluating the conduct of ARC soldiers who intentionally attack civilians, as their conduct is typically disqualified as conduct associated with war. On the other hand, it is relevant to evaluating the conduct of ARC soldiers who joined armed groups as adolescents on the (perhaps mistaken) belief that they were joining a just political revolution (some of whom may have been traumatized as a result of their experiences inside armed groups).

ARC soldiers whose conduct can be regarded as genuine acts of war and who act on the basis of a mistake of law can be excused under the Rome Statute if they act on reasonable

²⁹ For a historical analysis on the origin of this distinction, see “Resource Centre,” International Centre of the Red Cross, accessed April 7, 2014 <http://www.icrc.org/eng/resources/documents/misc/57jnuu.htm>. See also Michael Walzer’s analysis of this distinction in *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, fourth edition (New York, NY: Basic Books, 2006).

mistake of fact that undermines the requisite mental element associated with the conduct alleged to be a war crime under the Rome Statute. The Rome Statute adopts the Geneva Conventions of August 1949 for its standard for what counts as a war crime. Under these Conventions, the act of willful murder against protected persons counts as a war crime. Because civilians are considered protected persons under the Geneva Conventions, willful (i.e., not forced) acts of murder against civilians will not be excused under the Rome Statute. What is more, even forced acts of murder against civilians are not excused because such orders are considered manifestly unlawful under the superior orders excuse, which is considered next. This means that the only conduct carried out by ARC soldiers that may plausibly be excused under a mistake of law are those acts that count as the activities of a political revolution, which do not include willful attacks on civilians.

Superior orders

Under the Rome Statute, persons may be excused from criminal responsibility for acts of murder that were committed pursuant to an order of a government or of a superior, whether military or civilians, whose orders they were under a legal obligation to obey, provided that they did not know the order was unlawful, and the order was not manifestly unlawful. The Rome Statute further stipulates that orders to commit acts of genocide or crimes against humanity are manifestly unlawful. This means that there is no questioning the unlawfulness of orders to commit acts of genocide or crimes against humanity. They are held to be obviously unlawful. Persons have no legal relief under international criminal law to be excused from criminal responsibility for acts of genocide or crimes against humanity either by claiming they were just

following orders of a lawful superior, or that they acted on a mistake of law regarding the legality of the conduct associated with these crimes.³⁰

The excuse for superior orders would only plausibly apply to ARC soldiers who fight for governmental armies who are given orders by their leaders and whose conduct that is alleged to constitute a crime under the jurisdiction of the court was carried out pursuant to their orders. ARC soldiers who act pursuant to orders of their leaders may be excused under the Rome Statute so long as they did not know that the orders were illegal and they did not follow orders to carry out acts of genocide or crimes against humanity, which are manifestly unlawful. In light of the fact that the Rome Statute considers orders to commit acts of genocide or crimes against humanity to be manifestly unlawful, ARC soldiers may only be excused under superior orders for carrying out war crimes. Hence, the excuse for superior orders becomes most plausibly applied to ARC soldiers who are members of groups that can be regarded as engaging in genuine warfare and whose conduct inside those groups can be regarded as genuine acts of war.

II. The concern raised by prosecuting traumatized ARC soldiers

Although the manifest illegality provision directly applies to superior orders, it requires moral perception for conformity to other parts of the Statute. The manifest illegality provision creates the obligation to disobey the orders of a lawful superior when those orders are to commit acts of genocide or crimes against humanity. This means that *regardless of* the fact that a lawful superior has issued the order, the action contained in the order is itself so wrong that not only can no one can be obligated to obey it, but also there is actually an obligation to disobey it. If persons

³⁰ There is a provision after the mistake of fact or law excuse that states that mistakes of law must be consistent with other provisions of the Statute, especially Article 33, under which the law states orders to commit acts of genocide or crimes against humanity are manifestly unlawful. Hence, mistakes regarding the legality of the conduct that is associated with these crimes do not offer grounds for excluding criminal responsibility under the Rome Statute.

are obligated not to perform particular actions contained in the orders of lawful superiors, then it follows, *a fortiori*, that persons who are not even ordered by lawful superiors to perform these actions are under obligations not to perform them. Hence, while the manifest illegality provision applies directly to superior orders and requires that persons acting under lawful superiors have the requisite moral perception to see whether obeying their orders is violating their obligations, the manifest illegality provision also requires moral perception for conformity to other parts of the Statute for persons who do not typically act in furtherance of the orders of lawful superiors.

Interpreted in this way, the manifest illegality provision assumes that all adults whose capacities to appreciate the unlawfulness of their conduct or to control their conduct to conform to the law have not been destroyed are capable of the kind of moral perception needed to perceive the wrongfulness of a large sphere of the conduct proscribed under international criminal law. In light of this, this dissertation raises the following questions. First, does the manifest illegality provision of the Rome Statute rely on a mistaken assumption that all adults in whom practical reasoning is not destroyed are able to appreciate the unlawfulness of their conduct and control their conduct to conform to the law? Secondly, if so, what else is required for the ability for persons to see the manifest illegality of their crimes and how does this ability develop in ordinary human beings? Thirdly, based on the relevant empirical evidence on the experiences of child soldiers in armed groups, are there any psychological grounds upon which to doubt that ARC soldiers develop this ability inside armed groups? These are the questions that this dissertation sets out to systematically examine.

III. Outline of the chapters

The next two chapters lay the empirical groundwork for my moral and legal argument. Chapter 2 presents empirical descriptions of typical experiences of child soldiers in four African conflicts and concludes by reviewing studies that show the experiences associated with child soldiers in armed groups contributes to the development of emotional disturbances in FCS. Chapter 3 then examines the recent psychological literature on the role of emotions in ordinary adult development, and shows that emotional disturbances can seriously disrupt the process of moral development, especially the development of normal moral judgment, which is understood as applying general knowledge to particular cases without reasoning and can be described as a form of intuition or perception. There, I also identify the set of experiences that create a risk of harm to the adult development of ARC soldiers.

Chapters 4 and 5 are the core chapter of the dissertation. Together, they present a moral and legal argument for excusing traumatized ARC soldiers who lack normal moral perception in accordance with internationally accepted standards and who further have impaired practical reasoning, both which developed through no fault of their own. In Chapter 4, I discuss the relation between law and morality, as it functions in the domestic and international contexts, as the background for my argument. There, I also consider three versions of an influential theory of criminal responsibility and excuse that I build on to propose a new excuse. Based on the empirical work of Chapter 2 and Chapter 3, and the philosophical background provided in Chapter 4, Chapter 5 then presents a moral and legal argument for excusing a subset of ARC soldiers from criminal responsibility under international criminal law. There, I identify traumatized ARC soldiers, recruited at a young age into extreme armed groups that subjected them, throughout their formative adolescent years, to coercion, isolation, and socialization in

accordance with standards that are radically at odds with standards accepted by the international community as persons to whom the new excuse might apply. This is based on the view that their experiences as child soldiers have deprived them of the fair opportunity to develop normal moral perception in accordance with accepted international standards and their continued presence in the forcibly limited and hostile circumstances of war deprives them of the fair opportunity to develop it as adults.

Chapter 6 concludes by examining some of the implications of my argument. First, I examine the policy implications of excusing ARC soldiers from criminal responsibility. Then, I situate my project within a broader philosophical debate about the moral relevance of the vulnerability of human beings and how this is relevant to thinking about the moral and criminal responsibility of persons who grew up under hostile environments known to harm moral development and propose directions for further research.

CHAPTER 2

THE LIFE OF A CHILD SOLDIER FROM RECRUITMENT TO REINTEGRATION

Introduction

In this chapter, I consider empirical work on the experiences of child soldiers in conflicts primarily carried out in four African countries: Liberia, Mozambique, Sierra Leone, and Uganda. I present information on the age of recruitment, mode of recruitment, and method of retention for typical child soldiers in these groups. My survey of the literature shows that while there is within- and between-group variation on these variables, the following rough characterizations can be made. In Liberia, social, economic and political pressures push mid-adolescents into armed groups, but they are not coerced to join; coercion, however, accounts for what keeps many inside armed groups. The Mozambican National Resistance (RENAMO) uses a combination of non-coercive and coercive methods of recruitment, after which children aged six to sixteen are transformed into soldiers through coercion and socialization, but at most, remain with the group for only a few years. Sierra Leone's Revolutionary United Front (RUF) and Uganda's Lord's Resistance Army (LRA) primarily use coercive methods of recruitment, especially abduction directed toward young and mid-adolescents. Methods of retention used by these groups combine coercion and socialization into the group's values with isolation of child soldiers from the wider society, with many child soldiers staying in the groups throughout their adolescence. The combination of isolation, coercion, and socialization of child soldiers is shown to be particularly effective at binding them to the armed group, as it creates loyalty to the leaders, transfers the group's values, or instills the belief that staying with the group is their best route to security.

Section I discusses the recruitment of child soldiers into armed groups in Liberia, Mozambique, Sierra Leone, and Uganda. Here, I introduce information on the age and mode of

recruitment across groups. The relevant literature shows that the RUF and LRA target the youngest children and regularly use the most coercive forms of recruitment. Section II discusses the methods of retention used to keep child soldiers inside armed groups. Here, the RUF and LRA are known to use a clever combination of isolation, coercion, and socialization strategies during indoctrination in order to transform children into soldiers, make them loyal to the group, and prevent them from escaping. Section III then introduces empirical findings from reintegration efforts geared toward reintegrating demobilized or escaped FCS into society. This information on the post-war condition of FCS is used to gain some understanding of how the experiences associated with child soldiering have an impact on overall adult development.

My account in this chapter is not meant to be definitive, but rather to provide a general picture of the war experiences of child soldiers in four African conflicts. In subsequent chapters, I am most concerned with child soldiers and ARC soldiers from extreme groups like the RUF or LRA. Again, these groups are held to be the most extreme because their indoctrination strategies combine isolation, coercion, and socialization. The war experiences of child soldiers described in this chapter are presented in detail in order to appreciate the uniqueness of their situation relative to other similar groups, including: ordinary adult soldiers, adult victims of child abuse, and adult gang members who were recruited as children. Later chapters draw on this chapter to distinguish the case of ARC soldiers inside extreme armed groups from these similar cases.

I. Recruitment of Child Soldiers

This section examines the recruitment of child soldiers into armed groups in Liberia, Mozambique, Sierra Leone, and Uganda. I discuss each of these cases in turn, starting with a brief history of the conflict. As we will see, there is variation in the number of child soldiers used

by armed groups in these countries, the typical age at which children are recruitment, the mode of recruitment of children, and how long child soldiers typically remain inside armed groups. Moreover, the mode of recruitment used by these armed groups is either coercive or non-coercive, with the RUF and LRA being notorious for their near-exclusive use of coercive methods of recruitment, including abduction. Furthermore, the RUF and LRA are also known to target the youngest children for recruitment, with typical ages reportedly under ten years old.

Liberia

The conflict in Liberia consisted of two civil wars. The first civil war was fought among eight factions from 1989-1995. Charles Taylor, who later became notorious for using child soldiers, began as leader of the National Patriotic Front of Liberia (NPFL) in the first civil war. Charles Taylor is known for his “small-boys units” that consisted of combatants aged 6-20.³¹ Out of a total of 40,000 to 70,000 soldiers who fought in the first civil war, it is estimated that 10-40% were children, although the United Nations Department of Humanitarian Affairs (UNDHA) reports that child soldiers accounted for 24% of total demobilized soldiers in 1996-1997. The Liberia Peace Council (LPC) had the largest share of child soldiers, with 37%. From interviews with demobilized soldiers from the first civil war, Sukanya Podder finds that the presence of friends or family members already in an armed group was the most cited reason why children volunteered.³² Elisabeth Schauer and Thomas Elbert note that children volunteer to

³¹ “Children as soldiers,” The State of the World’s Children 1996, accessed March 9, 2014, <http://www.unicef.org/sowc96/2csoldrs.htm>.

³² Sukanya Podder, “Child Soldier Recruitment in the Liberian Civil Wars: Individual Motivations and Rebel Group Tactics,” in *Child Soldiers: From Recruitment to Reintegration*, eds. Alpaslan Özerdem and Sukanya Podder (New York, NY: Palgrave MacMillan, 2011), 62-63.

avoid “being left alone in their struggle to survive social, emotional, and economic hardship.”³³ Similarly, Podder notes that, “My observations from these responses is that in Liberia if one could not escape the fighting or leave the country, there were few choices but to join an armed group, partly on account of threats to physical security and food shortages.”³⁴

The second Liberian civil war was the result of severe economic downturn, inadequate implementation of the peace agreement from the first civil war, and a “hasty and incomplete Disarmament, Demobilization, and Reintegration (DDR) process.”³⁵ This conflict was fought primarily between the Government of Liberia under Charles Taylor, who was elected in 1997, and two factions, the Movement for Democracy in Liberia (MODEL) and Liberians United for Reconciliation and Democracy (LURD), which were financed by Sierra Leone and Guinea respectively. The GoL regularly recruited children by offering them money.³⁶ It is estimated that some child soldiers who served for the various factions during the second Liberian civil war were as young as seven years old.³⁷ Roughly 25% of LURD soldiers were children who were sent to fight after being either forcibly recruited or captured.³⁸ MODEL, which had the fewest child soldiers with around 20%, offered children protection for their participation and did not use coercive methods of recruitment.

³³ Elisabeth Schauer and Thomas Elbert, “The Psychological Impact of Child Soldiering,” in *Trauma Rehabilitation After War and Conflict: Community and Individual Perspectives*, ed. Erin Martz (New York, NY: Springer, 2010), 319.

³⁴ Podder, 62.

³⁵ Ibid, 53.

³⁶ Scott Gates, “Why Do Children Fight? Motivations and the Mode of Recruitment,” in *Child Soldiers: From Recruitment to Reintegration*, eds. Alpaslan Ozerdem and Sukanya Podder (New York, NY: Palgrave MacMillan, 2011): 37.

³⁷ “Children as soldiers,” *The State of the World’s Children*.

³⁸ Podder, 66.

Mozambique

In Mozambique, governmental forces fought an armed group called RENAMO (and various smaller militias) from 1965-1991. In a well-known study conducted by Neil Boothby, it is reported that, “often coercion was employed [by the government to induce children to join the forces] and if they refused they could be accused of being a RENAMO supporter and imprisoned or killed.”³⁹ Child soldiers of Mozambique’s government were under eighteen, but reportedly they were older adolescents. The average age of soldiers in the various militias who fought against the government ranged from fourteen to seventeen; those who joined were adolescents who had no possibility of continuing their education. The age range of recruitment for RENAMO was wider, ranging from six to sixteen, with reports of many children under ten years old.⁴⁰

Some children volunteered for RENAMO and others were kidnapped and forced to fight. Those who volunteered were children who had to drop out of school and who were promised scholarships and employment for their participation.⁴¹ These promises were often left unfulfilled. Other children were kidnapped and forced to join the armed group. Indeed, the “majority of RENAMO forces were kidnapped and forcibly trained, including children 8-14 years old.”⁴² Demobilized children reported serving as soldiers, spies, cooks, cleaners, and porters for RENAMO. Boothby found that the range of time within the armed group for RENAMO child soldiers was six months to three years. Given his finding that the average age of recruitment was

³⁹ Neil Boothby, “Mozambique Life Outcome Study: How Did Child Soldiers Turn Out as Adults?” in *Child Soldiers: From Recruitment to Reintegration*, eds. Alpaslan Ozerdem and Sukanya Podder (New York, NY: Palgrave MacMillan, 2011): 232.

⁴⁰ Ibid.

⁴¹ Ibid, 232.

⁴² Ibid, 232 (citing Morgan, 1990, and Vines, 1991).

six to sixteen years old, we can infer that all but the oldest RENAMO soldiers recruited as children were still legally juveniles even after being demobilized.

Sierra Leone

According to a study by Krijn Peters, “The Revolutionary United Front (RUF) of Sierra Leone – an infamous rebel movement widely known for its terror-tactic of amputating the limbs of its victims – did exist mainly out of young and sometimes ultra-young fighters.”⁴³ The conflict between the Civil Defense Forces (CDF), which is the government’s army, and the RUF lasted from 1991-2002. It began in 1991 with the RUF consisting primarily of young, uneducated, unemployed volunteers.⁴⁴ In his study of demobilized child soldiers from Sierra Leone, Scott Gates found that individuals who were offered money or diamonds were six times more likely to be willing to participate in RUF activities than those who were not. This measure includes children.⁴⁵ By the end of 1993, the RUF was almost defeated by the government’s army. It retreated into the rainforest, reemerging in 1994 when it entered what has since come to be known as the “bush phase,” during which the group was “isolated in the deep forest.”⁴⁶ Peters reports that during the bush phase more than 70% of RUF soldiers were under twenty-five years old and 30-50% were under eighteen.⁴⁷ Among them, 87% were recruited through abduction.⁴⁸ Like Charles Taylor, in Liberia, the RUF used small boy units, often with children under

⁴³ Krijn Peters, “Group Cohesion and Coercive Recruitment: Young Combatants and the Revolutionary United Front of Sierra Leone,” in *Child Soldiers: From Recruitment to Reintegration*, eds. Alpaslan Ozerdem and Sukanya Podder (New York, NY: Palgrave MacMillan, 2011): 77 (citing Richards, 1996, Gberie, 2005; Keen, 2006).

⁴⁴ Ibid, 78.

⁴⁵ Ibid.

⁴⁶ Ibid, 79.

⁴⁷ Ibid, 80-1.

⁴⁸ Gates, “Why Do Children Fight? Motivations and the Mode of Recruitment,” 37 (citing Humphreys and Weinstein, 2008).

twelve.⁴⁹ The RUF is documented as having the second youngest recorded combatant in the world, at age six; the youngest documented child soldier fought for the LRA at age five.⁵⁰

There is an empirical case to be made that RUF child soldiers, more so than child soldiers either in Liberia or Mozambique, may be forcibly recruited as children and remain soldiers into adulthood. In Liberia, recruited children may have remained soldiers into adulthood, but most were not coercively recruited. In Mozambique, children were coercively recruited, but most are likely to have exited the armed group before they were adults. What is more, not only is it empirically plausible that Sierra Leone's ranks include a considerable number of ARC soldiers, these ARC soldiers may have developed a strong allegiance to the group. Peters finds that, "Many, including some of its most loyal fighters and those who did rise to senior ranks during the conflict, were conscripted by force at a young age."⁵¹

Uganda

Uganda has been engulfed in war for more than twenty years. In the mid-1980s, Yoweri Museveni (who is now the President of Uganda) led a military coup and took over the government. In response, a civilian resistance movement led by Alice Lakwena mobilized against Museveni's leadership. Lakwena's group aimed to protect the Acholis, the northern Ugandan ethnic group. After Lakwena abandoned the movement, Joseph Kony formed the Lord's Resistance Army (LRA), which launched regular attacks on the Acholis throughout the 1990s and 2000s, in spite of Kony's claims that his group continues Lakwena's mission and aims to protect them. Kony presents himself as a savior to the people of Uganda. He is known for

⁴⁹ Wessells, 7.

⁵⁰ Ibid.

⁵¹ Ibid, 77.

convincing child soldiers in his ranks that he contains the spirits of Jesus Christ and Lakwena.⁵² Singer reports that Kony allegedly aims to build government based on the Ten Commandments, but under Kony's interpretation, "this includes the abduction, torture, rape, and killing of children, the use of sex slaves, and prohibition of living near roads or riding bicycles."⁵³

Like the RUF, the LRA kidnaps children and uses other coercive methods of recruitment. The LRA carries out its abductions through a process known as "press-ganging."⁵⁴ Press-ganging is a "form of group abduction wherein soldiers sweep through marketplaces or streets rounding up youths like fish in nets, or raid institutions such as orphanages or schools."⁵⁵ Indeed, several of the LRA attacks on the Acholis have been raids on villages to kidnap children and force them to fight for the LRA. One "notorious case was the LRA capture of 139 girls from the Aboke school in 1996."⁵⁶ Many children in Uganda (and sometimes entire families) are displaced into camps in search of protection from LRA raids, but displaced children are actually put at a greater risk of abduction and forced recruitment because the camps are not well protected.⁵⁷

Gates reports that the LRA has been using forced recruitment for two decades, with the average age of recruitment around fourteen years old.⁵⁸ Wessells presents a similar finding, reporting that the average age of child soldiers in the LRA is thirteen.⁵⁹ As noted above, however, "The LRA also holds the ignoble record for having the world's youngest reported armed combatant, age 5."⁶⁰ While Wessells finds that "Few children spend all their formative

⁵² Peter W. Singer, *Children at War* (Berkeley, CA: University of California Press, 2006), 100.

⁵³ Ibid.

⁵⁴ Wessells, 41.

⁵⁵ Ibid.

⁵⁶ Ibid, (citing De Temmerman 2001)

⁵⁷ Ibid.

⁵⁸ Gates, 36.

⁵⁹ Wessells, 7 (citing Derluyn et al. 2004).

⁶⁰ Peter W. Singer, "Child Soldiers: The New Faces of War," *American Educator*, accessed March 12, 2014 <http://www.brookings.edu/~media/research/files/articles/2005/1/winter%20islamicworld%20singer/singer2005121>.

years inside an armed group,”⁶¹ another source reports that the average time spent inside the LRA is roughly seven years. This means that if the average age of LRA child recruitment is thirteen or fourteen years old, and recruits spend an average of seven years inside the group, then the typical child soldier remains inside the armed group until young adulthood.

In conclusion, this section showed that while there is between and within group variation in the number of child soldiers used by armed groups in these countries, the typical age at which children are recruitment, the mode of recruitment of children, and how long child soldiers typically remain inside armed groups, some recruitment patterns emerge. The most noteworthy is that the RUF in Sierra Leone and the LRA in Uganda are most known for the near-exclusive use of coercive methods of recruitment, targeting of the youngest children for recruitment, and having child soldiers remain inside the group the longest.

II. Methods of Retention

This section examines the methods of retention used by armed groups in Liberia, Sierra Leone, Mozambique, and Uganda to keep child soldiers inside armed groups. Where the previous section explored the mode of recruitment and discussed how armed groups recruit children into their ranks initially, this section explores the mechanisms or processes by which armed groups transform children into soldiers and how they keep child soldiers in their ranks. As we will see, a pattern emerges with respect to the RUF and LRA. The last section saw that these two groups target younger child for recruitment and are more coercive in their recruitment methods. The overview of the literature on methods of retention presented in this chapter shows that the RUF and LRA are also known to use the most coercive methods of transforming children

⁶¹ Wessells, 142.

into soldiers and the most extreme measures, like isolating new recruits from society, to prevent them from escaping and to make their indoctrination more effective. While armed groups in Liberia and Mozambique also employ coercive methods of retention, unlike the RUF and the LRA, they do not typically isolate children from society during the process of indoctrination.

Liberia

Janet Fleischman and Lois Whitman report that child soldiers in the Liberian civil wars often had little or no education.⁶² Their military training was not regimented: at times it lasted months, but other times, it would last only one week. As explained in the last section, many child soldiers in Liberia volunteered under conditions of deprivation and limited choice. Many were offered promises of education or money. Others joined an armed group for political reasons or to avenge the death of a family member. As noted above, these promises were often not fulfilled and so leaders often encouraged child soldiers to loot houses and cars, which “in turn, encouraged children to abuse civilians in order to take their belongings.”⁶³

Among those who volunteered to pursue political motivations or avenge the death of a family member, many did not anticipate the brutal treatment they would receive within the group and the coercive methods that would be employed against them to secure their continued participation. According to an interview conducted by Human Rights Watch, which is cited by Fleischman and Whitman,

Child soldiers in Liberia report being treated cruelly by the factions to which they belonged; they have been beaten, flogged, and subjected to a form of torture called *tabay*—in which a person’s elbows are tied together behind his back, causing severe pain and often leading to nerve damage in the arms. Many children report being drugged with a mixture of cane juice and gunpowder, or with “bubbles,” an amphetamine, to make them “strong and brave” for fighting at the front. Many child soldiers also report having been subjected to a cruel initiation rite on joining a warring faction in which a child is forced to kill

⁶² Janet Fleischman and Lois Whitman, *Easy Prey: Child Soldiers in Liberia* (New York, NY: Human Rights Watch, 1994), 4.

⁶³ *Ibid*, 28.

or commit some other atrocity to demonstrate that he would be a reliable fighter—and to make a turning point from which there would be no going back.⁶⁴

Other descriptions of life inside Liberian armed groups corroborate this picture of violence and cruelty. Fleischman and Whitman recall the report of one social worker: “Kids have told us that they were actually forced to witness the execution of members of their family or their friends. If they screamed or cried, they were killed. Boys have told us of being lined up to watch executions and being forced to applaud. If you didn’t applaud, you could be next.”⁶⁵ Children are often encouraged to commit serious atrocities. Some of these are against strangers, but others are against people they know. Some of this violence is forced and some encouraged, but some violent deeds seem to be carried out for no reason at all.⁶⁶ These reports show that even those Liberian child soldiers who were not coercively recruited still typically faced coercive methods of retention to keep them obedient and inside the armed groups, which over time transformed them into soldiers who carried out violent acts against others without order or provocation.

Mozambique

Child soldiers in Boothby’s study reported that RENAMO forces used physical abuse and humiliation of forced recruits as the main forms of indoctrination. Boothby recounts:

In the first phase of indoctrination, RENAMO members attempted to harden the boys emotionally by punishing anyone who offered help or displayed feelings for others, thus conditioning them not to conspire to question the group’s authority. Boys were then encouraged to become abusers themselves. A progressive series of tasks, tasking the gun apart and putting it back together, shooting rifles next to their ears to get them used to the sound, killing cows, culminated in requests to kill unarmed human beings.⁶⁷

⁶⁴ Fleischman and Whitman, 4.

⁶⁵ Ibid, 36.

⁶⁶ Ibid, 18.

⁶⁷ Boothby, 234.

These tasks were instituted in order to induce the children aged six to sixteen to obey orders. Other practices included killing those who resisted and rewarding those who obeyed. Rewards typically included food and housing. Although not strictly coercive, these methods of retention can exert significant pressures on child soldiers who have no other way to fulfill these basic needs.

RENAMO did not rely solely on methods that appealed to the basic needs for survival in order to keep forced child recruits in the armed group. Gates examines the puzzle of why forced recruits remain in armed groups that do not exert direct force over their retention and finds that socialization is a crucial factor not only in retention but also in securing allegiance to the group. The process of socialization includes rewards and punishment to induce initial compliance, but other practices appeal to child soldier's psychological need for identity, acceptance, and community. RENAMO, for instance, used ceremonies as rites of passage for child soldiers who obeyed initial RENAMO orders. These ceremonies were meant to culminate the transformation from child to soldier and bind the child to the group.

On socialization of child soldiers generally, Gates finds that, "To the degree to which socialization processes lead to an internalization of these rules and norms will depend on how the group succeeded in transforming the preferences of inductees."⁶⁸ Gates adds that, "As a result of the re-framing and altering of preferences incumbent in socialization processes, children may 'forget' relatively more quickly that they were recruited by force."⁶⁹ Wood finds that the modus operandi of almost all armed groups is to habituate soldiers to social norms of the group

⁶⁸ Gates, 30.

⁶⁹ Ibid, 37.

in order to engender their allegiance.⁷⁰ He adds that some armed groups do this by restructuring or desensitizing soldier's emotions.⁷¹

Sierra Leone

While Gates emphasizes the importance of socialization in the retention of new forced recruits in armed groups, he also finds that "When force is applied in recruitment, force is likely to be used to keep a person in the organization."⁷² Various studies suggest that this is likely to be true of the RUF in Sierra Leone. As noted in the above section, roughly 87% of RUF soldiers were abducted children. Peters reports that RUF members abducted children wearing a "wooden mask and an impressive raffia costume."⁷³ This creature is known as the "Bush Devil." After abduction, the Bush Devil would take children into the bush, keep them isolated from the wider society, and encourage them to build bonds with fellow abductees. As Gates reports, however, other practices undermined these bonds. He reports of the RUF's "buddy system" whereby child soldiers are paired up during missions and each is ordered to sound an alarm if his buddy tries to escape, with a penalty of death for children who do not comply.⁷⁴ The RUF also used special "ideology officers" to make sure child soldiers were loyal, in addition to vicarious and public punishment for those found or believed to be disloyal to the RUF's particular missions and overall platform of advancing the cause of the rural underclass in Sierra Leone.⁷⁵

⁷⁰ E.J. Wood, "The Social Processes of Civil War: The Wartime Transformation of Social Networks," *Annual Review of Political Science* 11 (2008): 539-561.

⁷¹ E.J. Wood, *Insurgent Collective Action and Civil War in El Salvador* (New York, NY: Cambridge University Press, 2003).

⁷² Gates, 37.

⁷³ Peters, 81.

⁷⁴ Gates, 39 (citing *The Economist*, "Children under Arms," July 10, 1999, 21-23).

⁷⁵ Peters, 85-6.

It is also widely reported that the RUF forced new child recruits to take drugs in order to desensitize them to violence. The RUF is known to use a concoction called “brown-brown,” which is cocaine or heroin mixed with gunpowder. From his research on the RUF, Peter Singer finds that, “Where needles were not available, group leaders make incisions around the child’s temple and arm veins, pack the drugs in, and then cover the wound with plaster or a bandage.”⁷⁶ Moreover, child soldiers who try to refuse being drugged face severe punishments, and even death. On this point, Singer adds that, “RUF child soldiers report that if they refused (called ‘technical sabotage’ by rebel commanders), they would be killed.”⁷⁷ Moreover, he finds that, over time, RUF child soldiers become addicted to the drugs, and would no longer need to be coerced to take them. Singer cites a report from social workers in Sierra Leone, which estimates that more than 80% of RUF soldiers had used either heroin or cocaine.⁷⁸

In addition to using coercive methods of retention, the RUF also employed clever modes of socialization. After recruitment, child soldiers were initiated into the group through rituals and ceremonies that marked their transformation from child to soldier. Ozerdem and Podder explain that these rites of passage are powerful parts of the socialization process because they mimic rites of passage that ordinary children take outside the armed group in society: “The socialization processes within armed groups replace initiation rituals commonly practised to mark the transition to adulthood in most African societies.”⁷⁹ Peters also finds that many child soldiers were assigned to older RUF members and placed in a surrogate parental relation with them in order to solidify their identities as members of the group and bond them to particular individuals

⁷⁶ Singer, *Children at War*, 81.

⁷⁷ Ibid.

⁷⁸ Ibid, 82.

⁷⁹ Alpaslan Ozerdem and Sukanya Podder, “Mapping Child Soldier Reintegration Outcomes: Exploring the Linkages,” in *Child Soldiers: From Recruitment to Reintegration*, eds. Alpaslan Ozerdem and Sukanya Podder (New York, NY: Palgrave MacMillan, 2011): 311.

within the group.⁸⁰ Gates explains that “Children may more easily adapt to personalized form of management”⁸¹ and that “personal ties to commanders fostered intense loyalty and devotion both in the recruiting and management of children in Sierra Leone.”⁸²

The RUF also used the usual socialization strategies of most armed groups, giving child soldiers uniforms and nicknames as part of their transformation from children to soldiers. Such strategies “dissociate children from their intensely violent actions with little remorse.”⁸³ While recognizing the power of these means of socialization in securing allegiance of child soldiers in Sierra Leone, Peters nonetheless concludes that the two features that made RUF socialization so effective were the group’s isolation in jungle camps and the use of a meritocratic system that rewarded better fighting.⁸⁴ The coercive methods used by the RUF combined with the group’s clever socialization strategies help explain why forced recruits might choose to remain soldiers.

Uganda

To secure retention of kidnapped or forcibly recruited child soldiers in Uganda, the LRA used, and continues to use, both coercive and non-coercive methods. Gates finds that many child soldiers become loyal LRA as they grow up, despite initial unwillingness to participate: “In Uganda, where the Lord’s Resistance Army (LRA) has abducted tens of thousands of adolescents with an average age of 14 years, a large number of these children grow up and remain loyal to the organization well into adulthood.”⁸⁵ According to one LRA commander, the group targets children because they are more malleable than adults:

⁸⁰ Peters, 82.

⁸¹ Gates, 42.

⁸² Ibid, (citing Shepler, 2004).

⁸³ Ibid, 43.

⁸⁴ Peters, 77.

⁸⁵ Gates, 30 (citing Vermeij, 2009 and Beber and Blattman, 2010).

It was easy to make the newly abducted children participate with us. We taught them to become loyal and do what we said. They listened. This was difficult with grown-ups; we could not change their minds easily. They were always thinking about going home to their families. It was much easier to make the children become good, integrated rebels.⁸⁶

Many kidnapped or forcibly recruited children grow to be loyal to the LRA because of the group's use of coercion to compel obedience and its effective socialization and indoctrination.

Like the RUF's use of the Bush Devil, the LRA also has notorious practices of abduction and isolation. Wessells reports: "To fight the government's Operation Iron Fist, the LRA has abducted more than twelve thousand children since June 2002, and it attacks villages for the purpose of abducting people. The abductions are notorious for their brutality."⁸⁷ For example, the LRA is known to force new child recruits to publicly kill a friend or family members in order to separate them from the community before taking them away and isolating them. Wessells finds that "In 2003 the LRA used increasingly brutal tactics, including torturing parents to give up their children and forcing children to hack their own relatives to death."⁸⁸ LRA leaders have children kill a friend or family member so they feel unable to return to their communities if they manage to escape and to bind them to the group through their guilt. To further bind them, children may be compelled to drink the blood of their victims. The LRA may also leave its mark on new child recruits through markings or mutilations on their bodies. This is done to further separate children from their communities and previous lives and to let outsiders know that the children are associated with the LRA.

What is more, child recruits may be subject to a system similar to the RUF's buddy system in which they are hooked up by their ankles to a chain gang made out of barbed wire.⁸⁹

Child soldiers who try to run away have to amputate their own limbs in order to free themselves.

⁸⁶ Gates, 45 (citing Vermeij, 2009, 27).

⁸⁷ Wessells, 39.

⁸⁸ Wessells, 14.

⁸⁹ *The Reckoning: The Battle for the International Criminal Court*, DVD, directed by Pamela Yates (Brooklyn, NY: Skylight Pictures, 2009).

There are some reports that, like RUF child soldiers, LRA child soldiers are also forcibly given drugs to desensitize them to violence and make them hardened killers, but other reports state that Kony implements an anti-drug and alcohol policy in order to make new recruits transform into soldiers who take seriously their identities and roles as soldiers.⁹⁰

Reports document that child soldiers who refuse to carry out orders are immediately killed, which makes the future compliance of the others more likely. The LRA not only uses severe public punishments for disobedient child recruits, but also is known to indiscriminately kill some of its own child soldiers for apparently no reason. Indeed, other child soldiers are often made to carry out these killings.

As Wessells notes, one extreme strategy that is instituted to increase compliance is that, “Within the LRA, for example, talking with other new recruits is a punishable offense.”⁹¹ Wessells explains that this is part of breaking the will of child recruits: “Typically the training agenda is not to develop military or survival skills but to break children’s will and to achieve high levels of dominance and control.”⁹² Like ordinary soldiers, LRA child recruits are put in uniforms and given war names, but unlike ordinary soldiers, their training does not consist in their empowerment, but in their submission. Moreover, forcing child soldiers to kill their fellow soldiers may force them to betray themselves at a very deep level. The separation and isolation from their prior existence and the lack of trust within the armed group creates an environment where children see one another as competition for survival.

The LRA is very successful at getting children to remain in the armed group, and even grow loyal to it, after the initial coercion compelling their participation is gone. Wessells

⁹⁰ Luke Falkenburg, “Youth Lost: Ugandan Child Soldiers in the Lord’s Resistance Army,” *Small Wars Journal* 15 (March 2013), accessed March 20, 2014, <http://smallwarsjournal.com/jrnl/art/youth-lost-ugandan-child-soldiers-in-the-lord’s-resistance-army>.

⁹¹ Wessells, 63.

⁹² *Ibid*, 58.

explains that, “Children who grow up having learned fighting as their only means of livelihood and survival are likely to continue fighting for more years than adults.”⁹³ He adds:

Children are pliable in that they are flexible and easily manipulated and controlled. Young children are controllable through terror and brutality, a point not lost on older, stronger, and more cunning commanders. Through violence or threat of violence, young children can be trained to obey commands that many adults would contest or find ways around. Entering an armed group and a new world suffused with danger, and recognizing their ignorance of the group rules and lack of survival skills, young children use obedience as a survival strategy... Children’s pliability derives in part from their early level of psychological development and limited life experience... Children’s cognitive and moral development also underlies their pliability and increases their openness to new ideas. Unlike adults, young children are just beginning to think about complex moral issues and to develop the self-regulation and restraint evident in later stages of moral development.⁹⁴

In these passages, Wessells highlights something important that has so far been underemphasized in the discussion of modes of retention of child soldiers in armed groups like the LRA. This is that child soldiers are children. In spite of the brutal tactics used by the LRA against them, child soldiers might believe that the group is their only source of protection or that what is done to them and what they are forced to do is largely beyond their control. Wessells observes that LRA leaders often lie to new child recruits in order to further their isolation, heightened their disempowerment, and to induce them to carry out tasks. He writes,

To increase child soldiers’ isolation, groups such as the LRA regularly lie, saying the Ugandan army will capture escapees and mistreat or execute them. This message persuades many children that their greatest chances of survival lie in staying with the LRA. Lacking contact with the outside world, the children have no way of testing the veracity of the LRA messages. Isolation increases both the child’s dependency on the armed group and its control over them.⁹⁵

The engineered ignorance of child soldiers functions to keep them inside the group because it does not give them the opportunity to challenge what they learn from LRA leaders.

What is more, the isolation and deliberate undermining of trust, combined with the brutal tactics and psychologically invasive forms of socialization and indoctrination, can explain why so many children who enter groups unwillingly later become willing participants in the groups’

⁹³ Wessells, 30.

⁹⁴ Ibid, 36 (citing Cairns 1996; Straker 1992).

⁹⁵ Wessells, 63.

activities. Not all LRA child soldiers come to fully adopt new identities as soldiers and fight willingly or even without orders, although some do. On this point, Wessells observes that,

Some child combatants fight reluctantly, kill only when necessary, and constantly look for escape opportunities, whereas others learn to enjoy combat and redefine their identities as soldiers. A small minority become hardened perpetrators who relish the sight and smell of blood or initiate or participate willingly in atrocities that no one ordered them to commit.⁹⁶

Though it might seem counterintuitive, those who are most harmed by their experiences might be those child soldiers who become hardened perpetrators and who participate willingly in atrocities that no one ordered them to commit.

III. Reintegration

Liberia

According to Fleischman and Whitman, social workers and counselors working with demobilized child soldiers from Liberia find that many show symptoms of post-traumatic stress disorder (PTSD).⁹⁷ Common symptoms include having nightmares, wetting the bed, crying, inability to sleep, unsociability, being aggressive or hyperactive, and hearing voices. Many others suffer from anxiety and depression and have difficulty concentrating. Many children have no families to return to, and others are not welcome back to their families or communities. Some who do return find themselves stigmatized, ridiculed, or otherwise discriminated against.⁹⁸

James Pugel examined the role of three vectors of factors relating to individual demographics, wartime experiences, and community factors on reintegration success of Liberian child soldiers.⁹⁹ He examined reintegration success along nine outcomes under three categories:

⁹⁶ Fleischman and Whitman, *Easy Prey: Child Soldiers in Liberia*, 74.

⁹⁷ Ibid, 42.

⁹⁸ Ibid, 45.

⁹⁹ James Pugel, "Measuring Reintegration in Liberia: Assessing the gap between outputs and outcomes," in *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War*, ed. Robert Muggah (New York, NY: Routledge, 2008), 70-102.

societal, political, and economic.¹⁰⁰ He found that, “individual demographics were found to yield the most explanatory power in relation to interpreting reintegration success. While all five [individual demographic] factors that were examined [age, gender, married, education, home owners] revealed a correlation with reintegration success, the variables marital status (married) and education level (higher) proved the most influential.”¹⁰¹ Pugel concludes from his study that while reintegrating former child soldiers back into the community is important, it should not be done hastily because a “badly planned and executed reintegration strategy that fails to protect an individual’s economic future can present as much of a threat to security as a poorly implemented disarmament and demobilization intervention.”¹⁰² On his view, the efficacy of reintegration programs lies not simply in their swiftness to responding to the problem, but also in their ability to help former child soldiers reintegrate into the community in sustainable ways.

Mozambique

Boothby notes of his own study that, “As one of the few longitudinal studies of child soldiers, the Mozambique Life Outcome Study offers insights, not only into the negative effects of child soldiering, but also into the possibility of ‘good’ outcomes, even in light of severe traumatic events.”¹⁰³ His study started in 1988 by collecting the data of forty RENAMO soldiers who were demobilized and sent to a rehabilitation center after being captured by the government. The data captures RENAMO-related activities along the dimensions of events, severity, and duration against behavioral assessments such as aggression, trauma, and pro-social behavior.¹⁰⁴

¹⁰⁰ Pugel reports that data was not available to measure reintegration success along the psychological dimension, 84.

¹⁰¹ Ibid, 85.

¹⁰² Ibid, 90.

¹⁰³ Boothby, 231.

¹⁰⁴ Note that these measures are associated with the condition of PTSD, often attributed to soldiers after war and children after abuse.

The forty former child soldiers were united with their families in 1989. Twice a year from 1990-1992, NGOs and university students collected data on “reintegration, family reunification, community acceptance, educational progress, and livelihood pursuits.”¹⁰⁵ The age range of the soldiers was twelve to twenty at the conclusion of the first round of the study. A second research team collected from 2004-2005 on adult outcomes of former child soldiers relative to an objective, but contextual quality of life measure on what it means to do well in Mozambique. Data was collected on “housing, earnings, and family role fulfillment.”¹⁰⁶

Boothby’s first research team found that, upon their entrance to the rehabilitation center, the demobilized child soldiers exhibited a range of behaviors. Among them included listlessness, anxiousness, diffidence, and being active. While, at first, the older children bullied the younger ones and engaged in risky behavior, the group dynamics changed over time. The antagonism dissipated, developing trust became apparent, and pro-social behaviors increased. The time each soldier spent inside RENAMO influenced this shift in behavior. Boothby reports that, “In general, boys who spent six months or less with RENAMO (72 per cent) appeared to emerge with their basic trust in human beings and social values more or less intact.”¹⁰⁷ In describing the 28% of child soldiers who spent one year or longer with RENAMO, Boothby explains,

They continued to exhibit disobedient and uncooperative behaviours during the first three months at the centre. Despite their ability to articulate the belief that violence was wrong, these boys continued to use aggression as a principal means of exerting control and social influence... These boys’ self-images appeared to be bound up with the persona of their captors. They rarely

¹⁰⁵ Boothby, 233.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, 236.

described themselves as victims; rather, they tended to identify themselves as members of RENAMO.¹⁰⁸

The first research team found that, after a year at the center, both groups were accepted by and reunited with their families, with one exception. The majority (thirty-seven out of forty) reported being accepted by their communities as well. Traditional ceremonies help with this. While all boys received an education stipend to go back to school, after two years each of them had left school to earn money to live. The second research team found that thirty-seven out of forty RENAMO former child soldiers continued to reintegrate successfully, as measured by income, home ownership, food security, children's health and education, and engagement with the community standards, though they reported to continuing psychological struggles.¹⁰⁹

Only three out of six former child soldiers manifested negative adult outcomes. One twenty-year-old former RENAMO junior leader got into a dispute with a police officer and was shot and killed. Another former junior leader became an impoverished alcoholic after being shunned by the community for abusing his wife. Finally, the youngest soldier in the study developed full-blown schizophrenia, which rendered him dependent on his mother.

Boothby concludes that his findings highlight the importance of family and community acceptance, using traditional ceremonies to rebuild broken relations, and reinvigorating religious and spiritual beliefs of demobilized child soldiers to promote positive adult outcomes. He adds that efforts should be directed toward helping former child soldiers catch up to their peers along life cycle measures (e.g., employment, housing, farming, marriage, etc.) in light of their reports that the years they spent soldiering took away some of their early productive years.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, 242-3.

Sierra Leone

A study of ex-soldiers from Sierra Leone conducted by Humphreys and Weinstein (2003) examined the demographics of the two warring groups (the government's CDF and the RUF), particular motivations for joining and incentives for remaining in the groups, and ex-soldiers' attitudes about the disarmament, demobilization, and reintegration (DDR) process.¹¹⁰ Humphreys and Weinstein administered a closed-ended questionnaire to 1043 ex-soldiers from Sierra Leone and 250 non-soldiers. They found strong differences between the CDF and RUF on reintegration success. Nearly 75% of demobilized CDF soldiers returned to their communities and were accepted by them, whereas only 34% of RUF combatants returned home. What is more, demobilized soldiers who were abducted were less likely than volunteers to return to their communities. Humphreys and Weinstein explain this finding through an initial hesitation and unwillingness of the communities to accept these soldiers, which was a reported problem in 13% of cases. Over time, however, they found that communities became more willing to accept abductees, and, by the time their study was complete, only 5% of former abducted soldiers reported problems that prevented them from returning to their communities.

A further study conducted by Colin MacMullin and Maryanna Loughry (2004) examined the psychosocial adjustment of escaped former child soldiers in both Sierra Leone and in Uganda.¹¹¹ MacMullin and Loughry administered a questionnaire to 209 child soldiers from Sierra Leone from May-September 2000 and 567 child soldiers from Uganda from July-December 2001. They examined adjustment along four measures: anxiety and depression, hostility, pro-social behavior, and confidence. They tested for relations with the following

¹¹⁰ Humphreys and Weinstein, "What the Fighters Say: A Survey of Ex-Combatants in Sierra Leone (June-August 2003)" Interim Report July 2004 for the Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE) in association with Columbia University and Stanford University.

¹¹¹ Colin MacMullin and Maryanna Loughry, "Investigating psychosocial adjustment of former child soldiers in Sierra Leone and Uganda," *Journal of refugee studies* 17, no. 4 (2004): 460-472.

factors: abduction or not, age, gender, intervention after escape or returned home, length of time in armed group, length of time since escape, education, and pre-abduction experiences.

MacMullin and Loughry report the following findings as significant in their study. First, there was increased anxiety, depression, and hostility and decreased sociability and confidence among abducted children as compared to non-abducted children. Secondly, girls were found to be more anxious and depressed than boys. Thirdly, former abductees living with a parent were found to be less anxious and depressed than those living with non-parent guardians. Fourthly, the higher the child's education level before abduction, the better adjusted the child was after escape. Fifthly, the more time abductees spent in the armed group, the less well adjusted they were after escape. They conclude that the mode of recruitment through abduction is relevant to adjustment outcomes after demobilization for former child soldiers in Sierra Leone and Uganda.¹¹²

A team of researchers led by Theresa Betancourt has conducted several recent studies on the reintegration of child soldiers in Sierra Leone. Betancourt et al. (2008) found that successful reintegration strategies focus on teaching former child soldiers how to regulate strong emotions and deal with stress associated with war trauma.¹¹³ According, they proposed to incorporate a program of intensive, short-term teacher training to equip teachers with the skills they need to address the emotional needs that bring on frustration, stress, and anger in former child soldiers.

A later longitudinal study conducted by Betancourt et al. (2010) investigated internalizing and externalizing problems among former RUF child soldiers in Sierra Leone, as well as how post-war factors influence their mental health outcomes.¹¹⁴ Internalizing problems were

¹¹² Ibid, 467.

¹¹³ Theresa Betancourt et al., "High Hopes, Grim Reality: Reintegration and the Education of Former Child Soldiers in Sierra Leone," *Comparative Education Review* 52, no. 4 (Nov. 2008): 565-587.

¹¹⁴ Betancourt et al., "Sierra Leone's Former Child Soldiers: A Longitudinal Study of Risk, Protective Factors, and Mental Health," *Journal of American Academy of Child & Adolescent Psychiatry* 49, no. 6 (June 2010): 606-615. This study presents the findings of the multi-year research project conducted by Betancourt et al. Early findings of

measured by reported anxiety and depression and externalizing problems were measured by reported hostility. In addition to psychological reports of wellbeing, they also measured the relation between postwar adaptive or pro-social behaviors, war experiences, and postwar factors. Test subjects included both male and female demobilized child soldiers who ranged in age from ten to seventeen years at the start of the study. Sixty-nine percent of test subjects remained participants in the study throughout the entirety of the longitudinal course. Interviews were conducted in 2002, 2004, and 2008. If the average age at baseline was ten to seventeen, this means that in 2004, the range was twelve to nineteen, and at the final phase, the age range was sixteen to twenty-three. The longitudinal nature of the study allowed researchers to look at the short- and long-term mental health of former child soldiers.

Betancourt et al. found that increases in externalizing problems associated with hostility were linked with the war experience of killing or injuring others and the postwar experience of stigma. Former child soldiers who were accepted by their communities rather than stigmatized manifested decreases in externalizing problems. This suggests that the continued hostility among former child soldiers who carried out violent acts during the war may be significantly reduced by community acceptance after demobilization. As for postwar internalizing problems, being raped during the war left former child soldiers at higher baseline levels of anxiety and depression than those who were not raped. Increases in postwar internalizing problems were linked with younger involvement in the war and postwar social or economic hardship. Again, former child soldiers manifested lower baseline levels of internalizing problems with initial community acceptance and decreases or improvements in internalizing problems were linked with increases in

the study were reported in the following two articles: Betancourt et al., "Past Horrors, Present Struggles: The role of stigma in the association between war experiences and psychosocial adjustment among former child soldiers in Sierra Leone," *Social Science and Medicine*, 70 (2010): 17-26 and Betancourt et al., "Sierra Leone's Former Child Soldiers: A Follow-Up Study of Psychosocial Adjustment and Community Reintegration," *Child Development* 81, no. 4 (July/August 2010): 1077-1095.

community acceptance over time. Finally, the combination of the war of experience of killing or injuring others and postwar stigma were associated with decreases in adaptive and pro-social behaviors in former RUF child soldiers. This was mitigated, however, by social support, being in school, and increased community acceptance. Betancourt concludes that reintegration programs will be more successful if they take into account not only war experiences, but post-conflict factors like available support services, schooling, and community acceptance versus stigma.

In a subsequent study, Betancourt (2013) examined self-reported PTSD symptoms among 243 former RUF child soldiers from Sierra Leone. The average age was 16.6 years old and 30% were female. Former child soldiers were interviewed at two points, with the follow-up interview conducted four years after the initial interview. Baseline self-reports of PTSD were significantly associated with traumatic war experiences and postwar family abuse. Thirty percent of former child soldiers reported improvements over the four years. The death of a parent proved to be an exception: it was associated with self-reported worsening of PTSD symptoms over time. Betancourt and her researchers conclude that local forms of support, especially the family, play a vital role in positive psychological adjustment and reduction of PTSD in former child soldiers.

Uganda

Iise Derluyn et al. (2004) examined PTSD symptoms in former child soldiers who were abducted by the LRA in Uganda.¹¹⁵ She interviewed 301 former child soldiers, with the average age of abduction at 12.9 years old and the average time spent in the group at 744 days. Of the children interviewed, 233 (77%) saw someone being killed and 118 (39%) had to kill someone themselves. Seventy-one former LRA abductees also provided information for an impact of

¹¹⁵ Iise Derluyn, et al., "Post-traumatic stress in former Ugandan child soldiers," *The Lancet* 363, no. 9412 (2004): 861-863.

event scale, and among them, 69 (97%) reported post-traumatic stress reactions with clinical significance. For female former child soldiers in particular, the death of a parent, especially the mother, was particularly significant for increasing avoidance symptoms associated with PTSD.

Christophe Pierre Bayer et al. (2007) conducted a cross-sectional field study in 2005 to investigate the link between PTSD symptoms and openness to reconciliation and feelings of revenge in 169 former child soldiers from Uganda and the Democratic Republic of the Congo.¹¹⁶ The study took place at rehabilitation centers in both countries. The average age of former child soldiers was eleven to eighteen years old, with the average age at 15.3 years old. The average time within the armed group was 38 months and the average time since demobilization was 2.3 months before data collection. Of these former child soldiers, 92.9% reported to witnessing a shooting, 89.9% witnesses someone wounded, and 84% witnessed someone being beaten. As for committing violent acts themselves, 54.4% of former child soldiers reported to having killed someone. Moreover, 27.8% reported that they were forced to engage in sexual contact. Bayer et al. used the Child Posttraumatic Stress Disorder Reaction Index (CPTSD-RI) to measure PTSD, on which a score of 35 or higher denotes clinical significance. Out of the 169 former child soldiers interviewed, 59 (34.9%) scored higher than 35 on the CPTSD-RI scale. These former child soldiers showed less openness to reconciliation and more feelings of revenge. Bayer et al. concluded that the psychological trauma experienced by former child soldiers should be taken into account in their reintegration.

Verena Ertl et al. (2011) examined the effectiveness of a community-based reintegration program that was designed to reduce PTSD symptoms in formerly abducted child soldiers from

¹¹⁶ Christophe Pierre Bayer, Fionna Klasen, and Hubertus Adam, "Association of Trauma and PTSD Symptoms With Openness to Reconciliation and Feelings of Revenge Among Former Ugandan and Congolese Child Soldiers," *The Journal of the American Medical Association* 298, no. 5 (2007): 555-559.

Uganda.¹¹⁷ She used a randomized control trial that recruited 85 former child soldiers with PTSD (aged twelve to twenty-five) from among a population of 1113 Northern Ugandans. The study was carried out in a camp for internally displaced persons between November 2007 and October 2009. Former child soldiers were randomly assigned to one of three intervention groups. Twenty-nine former child soldiers were assigned to narrative exposure therapy, twenty-eight were assigned to an academic catch-up program with supportive counseling, and twenty-eight were assigned to a waiting list. Ertl et al. used the Clinician-Administered PTSD scale to measure PTSD, the Mini International Neuropsychiatric Interview to measure depression and suicide risk, and a locally constructed scale to measure perceived stigma. They conducted measurements on each of the three groups before treatment, at three months, at six months, and a fourth time at twelve months after intervention. Ertl et al. found significant improvement in PTSD symptoms in the narrative exposure therapy group, relative to the academic catch-up group or the waiting list group. From this, they concluded that successful reintegration strategies address PTSD through short-term trauma focused treatment.

Unlike most of the other researchers whose work is examined in this section, Wessells does not employ the PTSD paradigm to explain the condition of former child soldiers after demobilization. He uses a paradigm of moral development to explain children's willingness to commit atrocity and their resilience if given proper support through reintegration after demobilization. Wessells finds evidence in the relevant literature that how children respond to traumatic events depends on their age and stage of development as well as on the nature and the

¹¹⁷ Verena Ertl, et al., "Community-Implemented Trauma Therapy for Former Child Soldiers in Northern Uganda: A Randomized Controlled Trial," *The Journal of the American Medical Association* 306, no. 5 (2011): 503-512.

duration of their war experiences.¹¹⁸ While Wessells highlights that children may be morally harmed by their experiences, he also recognizes the potential resilience of children's values.¹¹⁹

Conclusion

This chapter examined the war experiences of child soldiers in four African conflicts in Liberia, Mozambique, Sierra Leone, and Uganda. Typical war experiences of child soldiers were extrapolated from empirical research on the methods of recruitment and retention used by armed groups in these countries. My review of the literature on child soldiering was not exhaustive, but rendered the following rough characterizations about child soldiers in four African conflicts.

In Liberia, most child soldiers are not coerced into armed groups, but volunteer against the backdrop of significant social, economic, political pressures. Once inside armed groups, non-coerced recruits are coerced into obedience and staying members of the group. In Mozambique, RENAMO uses both non-coercive and coercive methods of recruitment. To keep child soldiers inside armed groups, coercion makes them submissive and socialization makes them loyal, but most FCS interviewed in a famous life outcome study found ways to exit the group less than a few years later. Finally, the RUF in Sierra Leone and the LRA in Uganda primarily use coercive methods of recruitment like abduction, and target young to mid-adolescents, many of whom likely stay with the group throughout adolescence. The RUF and LRA use a combination of coercion, isolation, and socialization into the values of the group serves to bind child soldiers to the groups and prevent them from escaping once they are no longer physical limited to stay. The combination of coercion, isolation, and socialization of child soldiers is shown to be particularly

¹¹⁸ Wessells, 129, (citing de Jong 2002; Pynoos, Steinberg, and Goenjian, 1996; and Terr, 1991).

¹¹⁹ Ibid, 65.

effective at binding them to the armed group, as it creates loyalty to the leaders, transfers the group's values, or instills the belief that staying with the group is the best route to security.

On the reintegration prospects of former child soldiers, evidence shows that reintegration is the most difficult for child soldiers who were younger when they joined an armed group, who stayed the longest, and who were subject to the most extreme treatment. Some of this extreme treatment includes being forced to kill or injure others by threat of execution. The psychological condition of former child soldiers is currently being measured along several trajectories, with the PTSD being the dominant model. Another model looks at the condition of former child soldiers using a developmental rather than a disease paradigm. One overarching theme that emerged from the literature is that family and community acceptance is important for successful reintegration.

CHAPTER 3

THE IMPACT OF CHILD SOLDIERING ON ADULT DEVELOPMENT

Introduction

While the last chapter described typical experiences of child soldiers in four African conflicts, this chapter considers recent psychological research assessing the impact of those experiences on adult development. My review of the psychological research reveals that the experiences of child soldiers in the more extreme groups like the Revolutionary United Front (RUF) in Sierra Leone and the Lord's Resistance Army (LRA) in Uganda create a risk of serious damage to both their adult moral development and to the development of their practical reasoning. This conclusion regarding the risk to their moral development is based on recent research in moral psychology that shows that emotion plays a crucial role in moral motivation and moral judgment. The conclusion regarding risk to their practical reason is based on recent research in other areas of psychology showing that emotional damage can impair practical reasoning. Moreover, recent studies show that adolescence is a particularly vulnerable period of development, which puts child soldiers recruited at a young age and subject to the most extreme treatment especially at risk of defective development.

I present my review of the relevant psychological literature in five sections. Section I discusses the role of emotion in early moral thought. Section II introduces some basic ideas on morality and moral development that figure into the present chapter and also explains how my analysis of the moral development of child soldiers builds on existing research in this area. Section III outlines recent research on the connection between moral development and emotion. Here, I cite recent work in moral psychology that highlights the role of moral motivation and moral judgment in moral development, and I explain the important role of emotion in the proper

functioning of moral motivation and moral judgment. Section IV reviews recent work on practical reasoning and emotion, especially on how the latter influences the functioning of the former. Section V identifies experiences associated with child soldiering that are known to create a risk of harm to adult moral development and practical reasoning.

To gesture ahead, the next chapter advances the argument that international criminal law assumes that those it holds responsible are capable of normal moral perception in accordance with internationally accepted standards of right and wrong. This makes the evidence presented in this chapter that child soldiers in extreme groups risk having their moral judgment distorted by their experiences particularly relevant for determining their criminal responsibility. This is because moral perception is a form of moral judgment. In particular, it is a non-cognitive form of moral judgment that consists in “seeing” or “feeling” that something is right or wrong. Based on the fact that the experiences typical to child soldiers in extreme groups create a risk of harm to their moral judgment, I argue in Chapter 5 that an exception to the manifest illegality rule is warranted for the subset of ARC soldiers most harmed by their experiences. From here, I argue that an excuse for these ARC soldiers is warranted if the harm developed through no fault of their own, on the grounds that they have been deprived of the fair opportunity to choose to obey the law. What is more, I argue that they continue to be deprived of the fair opportunity to choose to obey the law so long as they remain in the forcibly limited and hostile circumstances of armed conflict. Even if my case that some ARC soldiers warrant full excuse is unsuccessful, the present chapter shows that child soldiers in extreme groups risk having serious impairment to their practical reason, thus at least providing grounds for mitigating their criminal responsibility.

I. On the role of emotion in early moral thought

The study of emotion has a long history in moral thought. This section offers a selection of some of the most influential views of emotion in moral thought from the ancients to the moderns. The next two sections then explain that contemporary moral psychologists are revisiting the role of emotion in moral development and practical reasoning. In particular, they have found that emotion is important to moral development because it contributes to moral motivation and moral judgment and is important to practical reasoning because it influences judgment and decision-making. These recent findings are consistent with earlier philosophical views on the role of emotion in moral psychology, especially the views of Aristotle and Hume.

Aristotle attended to the emotions (or passions, in Greek *pathe*) in his ethical and political writings after observing that emotions, as well as reason, powerfully influence human thought and action.¹²⁰ Aristotle observes that emotions can provide motive force to our actions, but can also lead us astray. He notes, for example, that anger can motivate people to fight for what is worth fighting for, but can also motivate people to take action foolishly. In order to guard against the danger of emotions leading persons astray, Aristotle holds that persons should be habituated from youth to have their emotions integrated with their reason. When emotions are integrated with reason, they become important sources of moral knowledge that can aid reason in deciding what to do. For our emotion to be properly integrated with our thinking, we need to be habituated from youth to feel pleasure at good things and pain at bad things.¹²¹ Reason helps to identify what is good and bad and allows adults to affirm or resist their habits, which education imparts

¹²⁰ Aristotle, *Nicomachean Ethics*, trans. Hippocrates G. Apostle (Grinnell, Iowa: The Peripatetic Press, 1984).

¹²¹ Ibid, 1103b20-25.

this to the youth through instruction and example so that good habits will be internalized and latter affirmed by mature reason.¹²²

Like Aristotle, the Stoics also observed that the emotions are capable of leading persons astray.¹²³ Unlike Aristotle, however, they advocated a process of emotion extirpation in order to neutralize the destructive potential of the emotions that lead persons against reason. In other words, they held that emotions should be removed from a person's psychological repertoire.¹²⁴ Implicit in this view is the notion that reason and emotion can be separated, so that emotions can be extirpated while reason remains unscathed.

The modern view advanced by David Hume challenges the view that reason has an active side that is capable of moving us to action.¹²⁵ Rather, for Hume, reason is necessarily cool and disengaged, and it is only our sentiments of pleasure and displeasure that are sources of moral judgments and moral motivation. Accordingly, we judge as good and praise what is perceived as useful, and conversely, we judge as bad and blame what is perceived as having negative utility. While abstract reason unhinged from emotion is a source of moral knowledge, it is incapable of forming concrete moral judgments or moving us to action. For this, we need sentiment, and for moral action specifically, we need the sentiment of fellow feeling to motivate us to act morally.

Unlike Hume, Kant thinks pure reason is capable of grasping moral knowledge and motivating us to act morally.¹²⁶ In other words, reason is sufficient a source of moral knowledge and moral motivation. On Kant's view, reason motivates us to action through respect for the

¹²² Montaigne is another example of a thinker like Aristotle who places importance on the role of emotions in character formation. On Montaigne, see especially chapter 3 in Alan Levine, *Early Modern Skepticism and the Origins of Toleration* (Lanham, MD: Lexington Books, 1999).

¹²³ George W. Harris, *Dignity and Vulnerability: Strength and Quality of Character* (Berkeley, CA: University of California Press, 1997).

¹²⁴ Roberts, *Emotions in the Moral Life*, 2013.

¹²⁵ David Hume, *An Enquiry Concerning the Principles of Morals*, ed. J.B. Schneewind (Indianapolis, IN: Hackett Publishing Company, Inc., 1983).

¹²⁶ Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3rd ed., trans. James W. Ellington (Indianapolis, IN: Hackett Publishing Company, Inc., 1993).

moral law. He describes respect as a rational esteem for the moral law that makes rational beings capable of appreciating and willing the moral law as their own law. We achieve autonomy when we will the moral law as our own law, as opposed to heteronomy, which results when inclination or feeling governs our will.¹²⁷ Many of Kant's moral writings focus on the metaphysics of morals, or on the intelligible structure of moral principles and how rational beings come to grasp and will them as their own law. Accordingly, he focuses less on the empirical conditions of ordinary moral action and more on the possibility that pure reason can become practical by grasping the moral law.¹²⁸

In conclusion, to summarize the arc of interest in emotion with respect to moral action from Aristotle to Kant, Aristotle holds that emotions are both necessary and desirable to the good life, the Stoics respond that we are better off getting rid of our emotions altogether and living solely by reason. Hume challenges the extirpation of the emotions on the grounds that reason alone is too weak to form concrete moral judgments or move us to moral action, for which we need emotion. Kant responds by arguing for the possibility of pure reason becoming practical by grasping the moral law with the intellect and by being motivated to act on it through respect or rational esteem.

Kant's prioritization of reason over emotion, and of reasoning over judgment, was the leading approach to the study of moral action in moral psychology during most of the twentieth century.¹²⁹ Philosophical interest in the role emotions in moral action has recently revived,

¹²⁷ See especially the Second Section of Kant's *Grounding for the Metaphysics for Morals*.

¹²⁸ Indeed, Kant's *Grounding* is structured as a transition "From the Ordinary Knowledge of Morality to the Philosophical," as indicated by the title of the First Section.

¹²⁹ As indicated by the wide contemporary support for Piagetian and Kohlbergian theories of development, which build on Kant's ideas. Jean Piaget, *The Moral Judgment of the Child*, trans. Marjorie Gabain (New York, NY: Harcourt, Brace & Co., 1932) and Lawrence Kohlberg, "The Child as a Moral Philosopher," *Psychology Today* 2, no. 4 (September 1968): 24-30.

however, after a period of dormancy.¹³⁰ This revival of interest is reflected in new approaches in contemporary moral psychology that examine the role played by emotion in moral motivation and moral judgment. As we will see, recent literature offers empirical support for a Humean view of moral motivation and an Aristotelian view of moral judgment. Moreover, I show that the only area of adult development in which emotions are not held to have a major role is in abstract utilitarian reasoning. Once we move from abstract reasoning to practical reasoning, however, recent research shows that emotions become relevant to the deliberative and decision-making process.

Before reviewing recent empirical work in psychology on the role of emotions in moral development, I first turn in the next section to briefly define some important concepts used throughout the chapter, defend my methodology, and explain how my analysis builds on existing research on how child soldiering has an impact on moral development.

II. The concepts of morality and moral development

This section introduces some basic ideas on morality and moral development that figure in the present chapter. First, I explain what I mean when I use the terms “moral” and “moral development.” This is important to do insofar as philosophers and psychologists sometimes use these terms differently. Secondly, I defend my application of the contemporary ideas and findings of Western moral psychology to child soldiers and ARC soldiers in Africa. This is important to overcoming the objection that cultural differences limit the generalizability of empirical studies on individuals in the Western world to individuals elsewhere in the world.

¹³⁰ Jonathan Haidt, “Morality,” *Perspectives on Psychological Science* 3, no. 1 (2008): 65-72.

Lastly, I explain how my analysis of the moral development of child soldiers builds on existing research in this area.

Defining terms: “moral” and “moral development”

At the outset, it is important to distinguish between how philosophers and psychologists typically use the term “moral,” and how I plan to use it. In the philosophical sense of the term, “moral” simply means concerned with right and wrong. In the psychological sense of the term, however, “moral” is sometimes used to denote that which is morally good, where this is typically assumed to be pro-social or law-abiding behavior. In what follows, I use the philosophical sense of “moral.” Thus, when I discuss the processes of “moral reasoning,” “moral motivation,” and “moral judgment,” I mean the processes of reasoning about right and wrong, being motivated by considerations of right and wrong, and applying the conclusions of one’s reasoning about right and wrong to the world in particular cases, respectively. Likewise, in discussing the “moral emotions,” I mean those emotions that may contribute to actions that are concerned with right and wrong, and hence may be evaluated from a moral point of view, rather than emotions that necessarily contribute to right or morally good actions.

In addition to construing the term “moral” differently, philosophers and psychologists also sometimes use “moral development” differently. From a philosophical point of view, moral development does not necessarily mean good moral development, whereas it typically does from a psychological point of view. Again, in what follows, I use the philosophical sense of the term

“moral development.” Hence, I consider distorted moral development to be moral development, even though it is development that goes against accepted standards of morality.¹³¹

A defense of the methodology

This subsection defends my methodology of applying contemporary ideas and findings of Western moral psychology to child soldiers and ARC soldiers in Africa. It is important to consider the objection that cultural differences may limit the generalizability of the psychological studies presented in this chapter from children and adults in the United States to children and adults in Africa. In response, there are two assumptions that my methodology seems committed to that require discussion. The first is the assumption that there are moral standards that remain constant across cultures. The second is the assumption that moral development across cultures is stable enough to permit application of psychological studies from the United States to persons in Africa. I consider and offer support for each of these assumptions in turn.

The first concern arises from the skeptical challenge that there are no moral standards that are constant across all cultures, so cross-cultural moral dialogue or analysis is pointless or highly problematic. This is part of the debate between moral relativism and moral universalism. My analysis can proceed without entering this labyrinthine debate, however, insofar as I am working within the standards established by international criminal law. As I show in Chapter 5, international criminal law identifies a sphere of activity as so fundamentally morally wrong that it may be considered “manifestly unlawful.”¹³² This sphere of activity includes the conduct alleged to constitute crimes against humanity and genocide, under international criminal law. I do not need to prove the truth of the claim that there are fundamental moral wrongs to dispute the

¹³¹ An example of this usage of moral development is presented in the subsection after next where I explain how my analysis builds on existing research conducted by Michael Wessells on the moral development of child soldiers.

¹³² Rome Statute, Part 3, Article 33, Section 1.

epistemic claim that, if such truths exist, they are obvious to everyone. Still, it is worth noting that if there *are* any fundamental moral truths, the sphere of activity proscribed as crimes against humanity and genocide under international criminal law may come as close as we are likely to get to them, or be the best examples of them. Accordingly, the concern raised by cross-cultural generalization of moral standards does not undermine my analysis.

The second assumption of my methodology that requires discussion is the assumption that moral development across cultures is stable enough to justify applying empirical findings from children and adults in America to children and adults in Africa. There are two areas of moral development at issue here: cognitive development and emotional development. Each of these areas of development depends on biological and social factors. I defend my application of empirical work on children and adults in America to children and adults in Africa on the basis that, if there are relevant differences between these groups on cognitive or emotional developments, the differences are likely to make my conclusions even stronger.

On cognitive development, I largely rely on Lawrence Kohlberg's model of moral development.¹³³ If there are important cross-cultural differences between children in his studies and children in Africa, the differences are likely to make my case for the impaired adult development of child soldiers even stronger. This is because, relative to children in Kohlberg studies, child soldiers are arguably exposed to more health-related risks to their biological development (e.g., malnutrition, disease) and have less access to core institutions that contribute to the social dimension of cognitive development (e.g., stable family structure, formal schooling).¹³⁴ If it is reasonable to expect that children who are at the greatest risk of recruitment

¹³³ Kohlberg, "The Child as a Moral Philosopher."

¹³⁴ Ilene Cohen and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict* (Oxford, UK: Clarendon Press, 1994); Rachel Brett and Irma Specht, *Young Soldiers: Why They Choose to Fight* (Boulder, CO and London, UK: Lynne Rienner Publishers, 2004) Vera Achvarina and Simon F. Reich, "No Place to Hide:

into groups like the Revolutionary United Front (RUF) in Sierra Leone or the Lord's Resistance Army (LRA) in Uganda are less cognitively advanced than similarly-aged children in Kohlberg's studies, and if a lower stage of cognitive development means more vulnerability to impairment, then it is reasonable to expect that the experiences that are found to harm cognitive development for more cognitively advanced subjects (e.g., U.S. children) would cause even more harm to less cognitively advanced persons (e.g., children at risk of recruitment into extreme groups in Africa). In other words, if there are important cross-cultural differences between cognitive development in the United States and in Africa, the differences are likely to make my case for the impaired adult development of ARC soldiers even stronger.

On emotional development, I apply contemporary Western moral psychology to the adult emotional development of child soldiers. This is based on my appraisal that there is sufficient cross-cultural stability in the development of the emotions to permit the generalizability of these findings. This is based on empirical research that shows near universality in emotion expression and recognition through facial expressions, and work that shows cross-cultural stability in the fact that emotions are learned from parents and through other close social relationships.¹³⁵

First, there is considerable evidence that emotions are expressed and recognized similarly across cultures. This work builds on early research conducted by Charles Darwin that shows that facial expressions are biologically based mediums of emotional expression.¹³⁶ Recent work shows that the expression of the emotions is similar in Europe, North and South American, Asia,

Refugees, Displaced Persons, and the Recruitment of Child Soldiers," *International Security* 31, no. 1 (Summer 2006): 127-164; Jens Chur Andvig and Scott Gates, "Recruiting Children for Armed Conflict," in *Child Soldiers in the Age of Fractured States*, eds. Scott Gates and Simon Reich (Pittsburgh, PA: Pittsburgh University Press, 2009), 77-92.

¹³⁵ Empirical work to support the first claim is cited in the following discussion and support for the second claim is found both in the following discussion and in other parts throughout the chapter.

¹³⁶ Charles Darwin, *The Expression of the Emotions in Man and Animals* (London: John Murray, Albemarle Street, 1872). Darwin held the face to be the primary medium of emotion expression.

and Africa, which leads researchers in this area to conclude that the facial expression of emotions are universal and innate.¹³⁷

Secondly, not only emotional expression and recognition, but also emotional development is learned through others, especially through parents and others in similar close social relationships.¹³⁸ Empirical work on child soldiering shows that children who are orphans or who come from homes where one or more parent is absent or has been killed by war violence are at great risk of recruitment into extreme groups like the RUF or LRA.¹³⁹ Insofar as emotional development depends on learning from parents, this already puts child soldiers who are at risk of recruitment into these groups at a disadvantage. Moreover, it is reasonable to expect that children who are recruited into extreme groups from homes where both parents are present are still at a disadvantage with respect to emotional development insofar as political violence places burdens on families, leaving children at risk of being neglected or abused. Even if the experiences do not rise to being this extreme, the demands that political violence places on the family make it more likely children at risk of recruitment spend their early years with adults who display emotions, like anxiety or hostility, in response to the stress caused by their situation.

Recent research finds that “children who live with frightened or demoralized adults can be overcome by much lower levels of stress.”¹⁴⁰ Other recent work also finds that children who

¹³⁷ Joan G. Miller and Xinyin Chen, “Introduction to Culture and the Development of the Emotions,” *International Society for the Study of Behavioural Development Newsletter* 1, no. 49, supplement to *International Journal of Behavioral Development* 30, no. 3 (May, 2006); Paul Ekman and Wallace v. Friesen, “Constants across cultures in the face and emotion,” *Journal of Personality and Social Psychology* 17, no. 2 (1971): 124–129.

¹³⁸ Nancy Eisenberg and Richard A. Fabes, “Emotion, regulation, and the development of social competence,” in *Emotion and social behavior: Review of personality and social psychology*, ed. Margaret E. Clark (Thousand Oaks, CA: Sage, 1992).

¹³⁹ Wessells, 40.

¹⁴⁰ James Garbarino, Kathleen Kostelny, and Nancy Dubrow, *No Place to Be a Child: Growing Up in a War Zone* (Lexington, MA: Lexington Books, 1991), 21.

experience stress are at a greater risk for emotional deficits later in life.¹⁴¹ Taken together, these findings suggest that even if children have parents at home before recruitment, their parental relations may disadvantage their emotional development considerably more than such relations do for children who do not grow up in societies rife with political violence.

In addition to developing the emotions through their relations with parents, children also develop emotions through their other close social relationships.¹⁴² Outside of the home, the school is an important place where children form social relationships. Children who are recruited into extreme armed groups like the RUF or LRA, however, are typically among those in society who have little access to formal education.¹⁴³ Outside of school, children may have few opportunities to foster close relationships with others. What is more, children in countries where child soldiering is prevalent may be challenged in forming lasting relationship with peers either because their peers enter armed groups or because they regard one another as fungible resources in the child soldier trade, thereby undermining trust among children in warring societies that use child soldiers. Insofar as children in societies rife with political violence are burdened with respect to forming close social relations with others, they are arguably at a disadvantage when it comes to emotional development in accordance with accepted standards of right and wrong, relative to similarly aged children in non-warring societies. This further suggests that if there are important cross-cultural differences in emotional development between subjects in recent studies by Western moral psychologists and children at risk of being recruited into extreme armed

¹⁴¹ Alexandra Cook, et al. "Complex Trauma in Children and Adolescents," *Psychiatric Annals* 35, no. 5 (May 2005): 390-99.

¹⁴² Researchers at the University of Oxford conduct a considerable amount of work in this area. A list of relevant recent publications can be found through their online database. "Publications," Emotions and Social Relations Research Group at the University of Oxford, accessed April 8, 2014 http://esrg.psy.ox.ac.uk/copy_of_publications.

¹⁴³ Wessells, 31, 45.

groups like the RUF or LRA, these differences are likely to make my case for the impaired emotional development of ARC soldiers from these groups even stronger.

On the moral development of child soldiers

Michael Wessells, who has conducted extensive research on child soldiering, finds that some children are harmed more than others by their experiences as child soldiers.¹⁴⁴ What is more, he explicitly discusses moral development as an area of development that is vulnerable to being harmed by child soldiering. My analysis builds on Wessells' research by introducing emotional distortion as the underlying mechanism that harms the moral development of child soldiers. In Chapter 5, I build on this work by arguing that defective moral development, which manifests itself through the lack of normal moral perception in accordance with internationally accepted standards of right and wrong, is relevant to culpability under international criminal law.

Wessells finds that while there are "elements of truth" to the "common stereotype" that, inside armed groups, child soldiers have "arrested moral development," this is not the whole story.¹⁴⁵ He holds that the stereotype that child soldiers do not develop morally is most plausible for children who are literally born into armed groups. On this point, he writes, "How children who are born into groups like the LRA, living all their formative years with them, will learn positive, life-affirming values and morals strains one's imagination."¹⁴⁶ He observes, however, that most children are not born into armed groups, but join later in childhood or adolescence.

For those who later join armed groups, Wessells finds that not all child soldiers will be harmed by their experiences, and for those who are harmed, there is variation in the kind and severity of the harm. In particular, he finds that how child soldiers developmentally respond to

¹⁴⁴ Ibid, 126-153.

¹⁴⁵ Ibid, 141.

¹⁴⁶ Ibid, 142.

their experiences is not uniform, but varies with four factors: the child's age at recruitment, stage of development at recruitment, the nature of the child's war experiences, and the duration of the child's time inside the armed group.¹⁴⁷ Greater risk of harm to moral development increases with a younger age of recruitment, lower stage of development at recruitment, exposure to more violent and extreme treatment, and a longer time spent inside an armed group. This is largely consistent with the findings presented in the last chapter. Wessells' main point on the moral development of child soldiers is that, rather than not develop a sense of morality, child soldiers who are recruited at a young age and spend their formative adolescent years inside extreme armed groups are likely to have developed a distorted sense of right and wrong:

Inside armed groups, children inhabit a different moral space defined by both the moral discourse of the armed group and children's discourse and action within the armed group. A common error is to assume that armed groups have no moral standards because of the horrible things they do. A closer inspection, however, reveals that many armed groups have moral standards, but the standards are inappropriate and sharply at odds with global standards as defined in human rights instruments.¹⁴⁸

Wessells' research lends support to the view, defended in this chapter, that child soldiers who grow up inside armed groups risk defective moral development as adults. In this chapter, I propose the idea that ARC soldiers in extreme armed groups risk developing a particular kind of defective moral development that consists in having distorted moral judgment through emotional distortion that arises in response to their experiences as child soldiers.

Before moving to discuss the important role of emotions in moral development and how the experiences of child soldiers in extreme armed groups creates a serious risk of harm to their development of the emotions, let us first identify the other main ways that moral development can be impaired. There are at least four main ways in which moral development can become impaired, including the way I suggested above as applying to ARC soldiers recruited at a young

¹⁴⁷ Ibid, 129, 131 (citing de Jong, 2002; Pynoos, Steinberg, and Goenjian, 1996; and Terr 1991 for the first two factors).

¹⁴⁸ Ibid, 143.

age into the most extreme armed groups and who remain soldiers into young adulthood. These four ways are: (1) impairment through cognitive distortion, (2) developing a false understanding of moral principles, according to accepted standards, (3) developing a normal understanding of moral principles, but not developing the practical knowledge of how to apply them correctly, and (4) not developing any moral understanding at all. Insofar as moral development consists in cognitive and emotional development, each of these four ways manifests itself through cognitive distortion, emotional distortion, or both.

As suggested above, I propose that ARC soldiers recruited at a young age into extreme armed groups risk developing a radically distorted sense of right and wrong such that they have a difficult time forming even the most basic moral judgments that many of us think are obvious. Many of our most basic moral judgments are moral perceptions that we form without conscious thought. Moral perception is the mode of moral judgment that consists in “seeing” or “feeling” that something is right or wrong. Moral perceptions are typically accompanied by a physiological or affective response, which is taken as a form of unconscious or pre-conscious judgment.¹⁴⁹ In the remainder of the chapter, I propose emotional distortion as the underlying mechanism that would produce an inability to have normal moral perception in accordance with accepted standards of right and wrong. Then, in Chapter 5, I examine how distorted moral judgment, relative to accepted standards of right and wrong, which is the result of emotional distortion that arises from child soldiering in extreme groups like the RUF or LRA should impact our judgments of criminal responsibility of ARC soldiers for crimes they commit in armed conflict.

¹⁴⁹ Lawrence Blum, “Moral perception and particularity,” *Ethics* 101, no. 4 (July 1991): 701-725. Blum *relates* moral perception to moral judgment, “understood here as the faculty which bridges the gap between moral rules (and principles) and particular situations,” however he argues that moral perception cannot simply be *identified* with moral judgment, as “In a given situation, moral perception comes on the scene prior to moral judgment; moral perception can lead to moral outside the operation of judgment entirely; and, more generally, perception involves moral capacities not encompassed by moral judgment,” 701-2.

III. Contemporary research on moral development and emotion

This section draws on recent work in moral psychology concerning the sources of moral action. It identifies the capacities that moral psychologists find to be relevant to adult moral development and explains how they function. A quasi-Humean and quasi-Aristotelian trend in recent literature is that the development of moral motivation and moral judgment are important parts of moral development alongside moral reasoning, and that emotions and affect are particularly important for the development and functioning of these capacities or processes. An alternative view that persists in the psychological literature builds on Kant and does not explicitly embrace an important role for emotions or affect in moral motivation, but rests moral motivation on forming the judgment that one must take responsibility for oneself, a judgment which is held to arise out of a concern for one's own cognitive competence. The next section then explores recent literature in other areas of psychology, including behavioral psychology and neuroscience, on the role of emotion and affect in practical reasoning and decision-making.

What capacities are relevant to adult moral development?

Until the early 1990s, the cognitive-developmental model of moral development, which was pioneered by Jean Piaget and Lawrence Kohlberg, dominated moral psychology.¹⁵⁰ Under this model, moral development is measured by the development of moral reasoning. Piaget's work focused on cognitive development and Kohlberg's work built on this to develop a theory of moral development. Kohlberg developed his model by presenting subjects with hypothetical moral dilemmas and asking them to explain how they would decide what to do. He found that moral development proceeded in stages from egoistic concern with the self toward a Kantian

¹⁵⁰ See Piaget, *The Moral Judgment of the Child*, and Kohlberg, "The Child as a Moral Philosopher."

conception of autonomy and respect for principles of justice, where the progression was made possible by increasing levels of cognitive sophistication.¹⁵¹

Kohlberg's model of moral development has met some important criticism, especially by Carol Gilligan, who criticizes it from a feminist perspective and argues that mature moral development includes caring and not merely respect for principles of justice.¹⁵² Related to Gilligan's critique, a new approach to moral psychology started gaining strength in the 1990s as an alternative to Kohlberg's Kantian cognitive-developmental approach.¹⁵³ The new approach to the study of moral development focuses less on cognitive development and moral reasoning and more on what actually makes ordinary people *act* in moral or pro-social ways.

One important impetus for this new approach stems from the empirical observation that moral thought does not always translate into moral action. As one scholar puts it, "It seems quite possible to have a good, even developmentally advanced, understanding of morality and not be guided by it in one's action choices."¹⁵⁴ Many contemporary moral psychologists identify moral judgment and moral motivation as processes distinct from moral reasoning, processes that allow persons to be guided by their understanding of morality in what they choose to do.¹⁵⁵

Generally speaking, moral reasoning is the process by which persons grasp moral principles, moral judgment is the process by which persons apply moral knowledge in particular

¹⁵¹ Lawrence Kohlberg and Richard H. Hersch, "Moral Development: A Review of the Theory," *Theory into Practice* 16, no. 2 (April, 1977): 53-9.

¹⁵² Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press), 1982.

¹⁵³ Jonathan Haidt, "Morality," 67-8.

¹⁵⁴ Augusto Blasi, "Emotions and Moral Motivation," *Journal for the Theory of Social Behavior* 29, no. 1 (March 1999): 1-19.

¹⁵⁵ Bryce Huebner, Susan Dwyer, and Marc Hauser, "The role of emotion in moral psychology," *Trends in Cognitive Science* 13, no. 1 (January 2009): 1-6. June Price Tangney, Jeff Stuewig, and Debra J. Mashek, "Moral Emotions and Moral Behavior," *Annual Review of Psychology* 58 (2007): 345-372. David A. Pizarro and Peter Salovey, "Being and Becoming a Good Person: The Role of Emotional Intelligence in Moral Development and Behavior," in *Improving Academic Achievement: Impact of Psychological Factors on Education*, ed. Joshua Aronson (San Diego, CA: Elsevier Press, 2002). Jonathan Haidt, "The Emotional Dog and Its Rational Tail: A Social Intuitionist Model of Moral Judgment," *Psychological Review* 108, no. 2 (2001): 814-834. Joshua Greene, "Why are VMPFC patients more utilitarian? A dual-process theory of moral judgment explains," *Trends in Cognitive Science* 11, no. 8 (2007): 322-323.

cases, and moral motivation is the process by which persons become motivated to act on their moral judgments. In light of recent findings that moral judgment and motivation rely heavily on emotions, contemporary moral psychology focuses on the role of emotion in moral judgment and moral motivation, and how these capacities are developed in ordinary people. Indeed, moral psychologist Jonathan Haidt asserts that contemporary moral psychology is in the midst of an “affect revolution.”¹⁵⁶ Moral reasoning has not, of course, been rendered irrelevant to moral psychology, but remains a core part of the study of moral development. Thus, the emerging body of work on moral motivation and moral judgment that is presented in the next two subsections should be taken to supplement existing knowledge on moral reasoning.

On the role of emotion in moral motivation

A wealth of recent work in moral psychology supports the view that emotions are the primary motivators of moral action.¹⁵⁷ “Moral emotions” is the term applied to the set of emotions and affective responses that have been found to have moral potential, which for moral motivation are primarily guilt, shame, and empathy.¹⁵⁸ These moral emotions motivate moral action by being associated with action tendencies to either regulate or inhibit antisocial conduct or to promote or prompt the undertaking of pro-social conduct.¹⁵⁹ While emotions have the potential to contribute to morality, moral psychologists point out that this potential must be developed through biological and social maturation.¹⁶⁰ This offers some support for Aristotle’s

¹⁵⁶ Haidt, “Morality,” 68.

¹⁵⁷ Blasi, “Emotions and Moral Motivation,” 3-5.

¹⁵⁸ Nancy Eisenberg, “Emotion, Regulation, and Moral Development.” *Annual Review of Psychology* 51 (2000): 665-697.

¹⁵⁹ Pizarro and Salovey, “Being and Becoming a Good Person,” 250.

¹⁶⁰ Eisenberg, “Emotion, Regulation, and Moral Development,” 680-2.

view, although as he is more concerned with virtue, Aristotle does not praise the moral potential of guilt, shame, or empathy, which he does not see as virtues of the morally excellent person.

Contemporary moral psychologists consider guilt, shame, and empathy to be moral emotions because of their ability to motivate people to act morally. Guilt and shame function as moral emotions not only through their occurrence, but also through their anticipation. In other words, it is not only the case that the actual experience of guilt or shame motivates people to action, but also the anticipation of feeling guilty or ashamed is found to motivate action. When guilt and shame function as moral emotions, the cognitive activity of thinking about pursuing a particular action is accompanied by an unpleasant feeling, which signals to the person having the thought that the action would be an undesirable one to pursue. Hence, guilt and shame acquire their motive force by integrating a thought or cognition with a feeling or an affective response.¹⁶¹

In addition to guilt and shame, empathy is a third moral emotion commonly identified in recent literature as contributing to moral motivation. Like guilt and shame, recent research finds that empathy also functions through the integration of cognition and affect.¹⁶² Cognition allows one to grasp the perspective of another person while retaining one's own perspective and affect allows one to feel the emotions that are more appropriate to another's perspective. One team of researchers describes this integrative task in the following way:

Current conceptualizations of empathy integrate both affective and cognitive components... [Feshbach] suggests that empathic responsiveness requires three interrelated skills or capacities: (a) the cognitive ability to take another person's perspective, (b) the cognitive ability to accurately recognize and discriminate another person's affective experience, and (c) the affective ability to personally experience a range of emotions (since empathy involves sharing another person's emotional experience).¹⁶³

Martin Hoffman, who has extensively studied the role of empathy in moral development, similarly describes empathy as "an affective response more appropriate to another's situation

¹⁶¹ June Price Tangney and Ronda L. Dearing, *Guilt and Shame: Emotions and Social Behavior* (New York, NY: Guilford Press, 2003).

¹⁶² Tangney, Stuewig, and Mashek, "Moral emotions and moral behavior," 248.

¹⁶³ Ibid.

than one's own."¹⁶⁴ He also finds support that empathy gives moral principles their motive force. On this point, he writes, "abstract moral principles, learned in 'cool' didactic contexts (lectures, sermons), lack motive force. Empathy's contribution to moral principles is to transform them into prosocial hot cognition – cognitive representations charged with empathic affect, thus giving them motive force."¹⁶⁵ Hoffman's view here offers support for Hume's view discussed above, as Hoffman is borrowing Hume's metaphor of cool reason as opposed to warm sentiment.

By saying that empathy contributes to hot cognition, Hoffman's work also supports the view that empathy is important to moral judgment. "Hot cognition" is a term moral psychologists use to describe cognition-in-context or active thinking in an actual case.¹⁶⁶ Empathy contributes to hot cognition by helping persons apply moral knowledge in particular cases. Hoffman finds that while moral principles provide the intelligible structure to the moral world, it is empathy that brings that structure to life in particular cases. As he writes, "Empathy activates moral principles and, either directly or through these principles, influences moral judgment and reasoning."¹⁶⁷ Hoffman's research lends support to the view that moral reasoning alone is insufficient to motivate people to act morally, and that emotions like empathy play an important role in moral motivation.

Alongside this research on the importance of emotions and affect to moral development, Kohlberg's view still has a presence in the literature and offers an alternative approach to moral motivation by continuing to focus on cognition over emotion. The contemporary Kohlbergian view, for example, holds that moral motivation is the product of moral cognition that produces a moral judgment that Kohlberg called a responsibility judgment. (As I will show below, however,

¹⁶⁴ Martin L. Hoffman, *Empathy and Moral Development* (Cambridge, UK: Cambridge University Press, 2000), 4.

¹⁶⁵ Ibid, 239.

¹⁶⁶ Laurence Steinberg, "Cognitive and affective development in adolescence," *Trends in Cognitive Science* 9, no. 2 (February 2008): 69-73.

¹⁶⁷ Hoffman, 247.

further recent work suggests that even this moral judgment is itself guided by emotion.) Even after Kohlberg came to recognize that moral reasoning did not always translate into action, he never explicitly embraced an important role for emotion or affect in moral development. Rather, as the mechanism of moral motivation, he posits that moral motivation follows from taking responsibility for one's self, which arises out of a concern for one's own cognitive competence, at least for persons at higher stages of cognitive development. Kohlberg's view here is related to Kant's view that rational esteem for the moral law is what gives the moral law its motive force over the will of the rational being.

Moral psychologist Thomas Wren explains that Kohlberg "postulated a new mode of moral cognition, the responsibility judgment"¹⁶⁸ in response to finding that moral thought did not always translate into moral action. Wren quotes Kohlberg and a colleague on this point:

We hypothesize that moral principles or 'structures of moral reasoning' lead to two more specific judgments, one a judgment of deontic choice, the other a judgment of responsibility. The first is a deontic decision function, a judgment of what is right. The second is a follow-through function, a judgment of responsibility to act on what one has judged to be right.¹⁶⁹

Wren observes that Kohlberg "apparently continued to believe that it is possible for deontic judgments by themselves to cause action, i.e., to function as moral motives, but he also held that often, especially in difficult situations, they motivate only to the extent that they are accompanied or 'followed through' by judgments of responsibility."¹⁷⁰ These are analogous to the demands that the moral law makes on the will of a rational being, according to Kant. Kohlberg observed that those who are at higher stages of cognitive development are more likely than those at lower stages to follow through their deontic judgments with a responsibility

¹⁶⁸ Thomas Wren, *Caring About Morality: Philosophical Perspectives in Moral Psychology* (Cambridge, MA: MIT Press, 1991), 144.

¹⁶⁹ Ibid, 144 (citing Kohlberg and Candee, 1984, p. 517).

¹⁷⁰ Ibid, 145.

judgment, which he held was the result of such persons taking their moral judgments as expressions of their freedom and power, and more importantly, as an expression of themselves.

As Wren explains, “For Kohlberg as well as for higher-stage subjects themselves, moral judgments are regarded as the expressions of one’s freedom and power to regulate one’s own motivational system in terms of those desires, hopes, and values deemed most central to one’s life. Put simply, the thought that a moral judgment is *my own* judgment makes it a moral motive for me.”¹⁷¹ The responsibility judgment figures in Kohlberg’s later work as a source of moral motivation, and it derives its motive force from an analogous source as respect for the moral law: autonomy. Wren elaborates that, on Kohlberg’s view, moral motivation comes from the concern we have with getting things right, especially pertaining to our own thinking. Moreover, Wren agrees with the view that “competence motivation is the motor of practical reasoning.”¹⁷² On this view, concern for our moral competence develops out of concern for our cognitive competence.

Throughout his work, Kohlberg insisted that deontological moral judgments, including the responsibility judgment that is a source of moral motivation, are produced by a sophisticated cognitive activity.¹⁷³ While Kohlberg never postulated an important role for emotion and affect in moral judgment or moral motivation, recent work in moral psychology suggests otherwise. In particular, recent work lends support to the view that moral judgments, especially our deontological moral judgments, are guided by emotion and affect, and Kohlberg’s responsibility judgment is a deontological judgment. Guilt and shame, for example, have been described as emotional or affective signs that a person has taken responsibility for violating a moral standard

¹⁷¹ Ibid, 148.

¹⁷² Ibid, 152.

¹⁷³ While being concerned with our own moral competence is not quite the notion of care that Gilligan held as a core part of mature moral development, one might observe a connection between it and a notion of care, insofar as caring about morality begins with caring about ourselves in a particular way. An important difference remains, however, insofar as Gilligan’s notion is care directed toward others on caring for others, while Kohlberg’s notion is care directed toward the self.

to which he or she holds him or herself.¹⁷⁴ This suggests that while Kohlberg may be right that morally mature people take their moral judgments more seriously, this may be because their emotions are also more mature and send information to their reason in deciding what to do, and when one has not done what one should have.

On the role of emotion in moral judgment

This subsection lays out recent work in moral psychology on the role of emotion in moral judgment. An emerging view is that moral judgments are not the result of a conscious or deliberate process of moral reasoning, but rather are formed through an unconscious and intuitive process that is heavily influenced by emotion and affect. This is especially true for deontological moral judgments, which are the conclusions of reasoning about rights and duties, but there is also support for this view with respect to utilitarian moral judgments, which are the conclusions of reasoning about optimal outcomes. This suggests that some emotional or affective link is missing in Kohlberg's account of the sophisticated activity used in forming the responsibility judgment. In addition to the moral emotions noted above, three further emotions are cited as particularly relevant sources of some of our most basic moral judgments: contempt, anger, and disgust.

On Jonathan Haidt's social intuitionist model of moral judgment, emotions and intuitions are the primary sources of our moral judgments.¹⁷⁵ Other work supports this view.¹⁷⁶ Haidt's model challenges Kohlberg's view that moral judgment is the result of a conscious, deliberate process of moral reasoning, and instead posits that a wide variety of emotions influence moral

¹⁷⁴ Eisenberg, "Emotion, Regulation, and Moral Development," 667.

¹⁷⁵ Haidt, "The Emotional Dog and Its Rational Tail," 814-834.

¹⁷⁶ Shaun Nicols, *Sentimental Rules: On the Natural Foundations of Moral Judgment* (New York, NY: Oxford University Press, 2004). J. Greene, et al., "An fMRI Investigation of Emotional Engagement in Moral Judgment," *Science* 293, no. 5537 (2001): 2105-2108. Piercarlo Valdesolo and David Destano, "Manipulations of Emotional Context Shape Moral Judgment," *Psychological Science* 17, no. 6(2006): 476-7.

judgment. Haidt's main point against the Kohlbergian cognitive-developmental view is that it is wrong with respect to how moral judgments are produced. Haidt does not maintain that moral judgments are impervious to moral reasoning, but finds rather that moral reasoning typically does not produce our ordinary moral judgments. His research shows a different process at work, which is that our moral judgments come first and then are subject to post hoc justification.¹⁷⁷ Haidt recognizes that our moral judgments can be mistaken and that rational reflection can figure this out, but his point is that rational reflection does not lead to our judgments in the first place, nor does it *typically* work to expose the biases upon which our judgments rest, but rather works to support those judgments.

Haidt finds considerable empirical evidence that ordinary moral judgments are produced as the natural conclusions of an intuitive and emotional physiological process. The emotions that he identifies as particularly relevant sources of our most basic moral judgments are contempt, anger, and disgust.¹⁷⁸ To illustrate how moral judgment works on Haidt's view, let us take an example that he uses involving disgust.¹⁷⁹ If a person feels disgust when looking at a dog being beaten, this is typically accompanied by the judgment that the action of beating the dog is wrong. Haidt tells us that his psychological model of moral judgment is consistent with intuitionism in philosophy, which "refers to the view that there are moral truths and that when people grasp these truths they do so not by a process of ratiocination and reflection but rather by a process more akin to perception, in which one 'just sees without argument that they are and must be

¹⁷⁷ Haidt, "Emotional Dog and Rational Tail," 818 ff.

¹⁷⁸ Jonathan Haidt, Paul Rozin, Laura Lowery, and Sumio Imada, "The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, and Disgust) and Three Moral Codes (Autonomy, Community, and Divinity)," *Journal of Personality and Social Psychology* 76, no. 4 (1999): 574-586.

¹⁷⁹ Thalia Wheatley and Jonathan Haidt, "Hypnotically Induced Disgust Makes Moral Judgments More Severe," *Psychological Science* 16, no. 10 (2005): 780-4.

true.’’¹⁸⁰ On the above example, this process of forming the moral judgment is a perceptual one insofar as the person *just sees* the action is wrong, and this “just seeing” is the source of the moral judgment that beating the dog is morally wrong. This is precisely the point made by Aristotle in the *Ethics* that persons of different moral characters see things differently.¹⁸¹

Other work by Joshua Greene offers partial support for Haidt’s model of moral judgment. Greene proposes a “dual-process” theory of moral judgment, which identifies two kinds of moral judgments we make that operate on different mechanisms.¹⁸² The first kind is deontological moral judgments, which are concerned with rights and duties. The second kind is utilitarian moral judgments, which are concerned with assessing the morally best outcomes. Greene finds that deontological moral judgments are indeed made through an automatic or intuitive process that is guided by emotions, but that utilitarian moral judgments are made through a controlled, cognitive process. In other words, Greene’s work offers support for Haidt’s finding that moral judgments are driven by intuition and emotion when it comes to deontological moral judgment, but it does not offer support for Haidt’s findings when it comes to utilitarian moral judgments. In the next section, I challenge this part of Haidt’s view on the basis of contemporary work in other parts of psychology.

To conclude, this section examined some important recent literature in moral psychology on the role of emotion in moral development. The affective aspects of emotions have been found to be particularly important for moral motivation and moral judgment, especially for deontological moral judgments. This has important implications for the cognitive-developmental model of moral development insofar as it suggests an important role for emotion and affect in the

¹⁸⁰ Haidt, “Emotional Dog,” 814.

¹⁸¹ Aristotle, *Nicomachean Ethics*, 1109b15-25. Here, Aristotle discusses how judgment depends on sensation, upon which he then holds that “look different” to the ethically virtuous person (relative to non-virtuous persons).

¹⁸² Joshua Greene, “Why are VMPFC patients more utilitarian?” 322-323.

sophisticated cognitive activity that generates moral judgments on Kohlberg's model of moral development, including the responsibility judgment that is a source of moral motivation. The capacity for utilitarian moral reasoning and judgment emerges as the only part of moral development that does not appear to depend on emotion and affect.

In the next section, I present research conducted in other areas of psychology that shows that emotion and affect influence practical reasoning and ordinary judgment, which calls into question the claim that utilitarian moral judgment is independent from emotion. Emotions inevitably factor into our judgments and can bias our judgments toward what is irrelevant, as observed by all of the philosophers discussed in section I. To guard against this bias, recent work in neuroscience suggests that it is neither possible nor desirable to guard against bias by simply getting rid of the emotions. This is based on research that shows that the absence of emotion and affect undermines the ability to grasp reasons for action, without which judgment and decision-making are impossible, leading to an undesirable condition for a human being. Taken together, this research supports the Aristotelian view that while emotions can lead persons astray, they are important contributors to judgment and decision-making, and thus to practical reason.

IV. Contemporary research on practical reasoning and emotion

This section examines two bodies of work in contemporary psychology on the role of emotion in practical reasoning. Generally speaking, practical reasoning is reasoning about what to do. This section presents recent research from two areas of psychology other than moral psychology that shows emotions are relevant to the study and exercise of practical reasoning. The first body of work comes from well-known research conducted in behavioral psychology by Daniel Kahneman. His research shows that emotions can aid judgment just as much as they can

impair it and that reason and emotion converge in practical reasoning. The second body of work comes from research conducted in neuroscience by Antonio Damasio. His research shows that the absence of emotion and affect undermines the executive functions associated with practical reasoning. Before presenting this research, I further explain the concept of practical reasoning.

On practical reasoning

Practical reason can be defined as “the general human capacity for resolving, through reflection, the question of what one is to do.”¹⁸³ On some views, this includes reasoning and reflection about which ends to adopt (a Kantian conception), but on a more standard notion, it is limited to reasoning and reflection about how to pursue given ends (an Aristotelian or Humean conception). On either view, practical reasoning is essentially concerned with action. Two further capacities go into the capacity to resolve, through reflection, the question of what one is to do. The first is the capacity for ordinary judgment, which allows a person to judge what is relevant in a particular case. The second is capacity for decision-making, which allows a person to execute or act on the conclusions of his or her reasoning.

The role of emotion in ordinary judgment

In his early collaborative work with Amos Tversky and Paul Slovic, Kahneman finds that our judgments under uncertainty are often influenced by various kinds of factors that bias us toward information that is not always relevant to the decision at hand.¹⁸⁴ They identify emotions as the sources of some of these biases. As explained above, the view that emotions can lead us

¹⁸³ “Practical Reason,” Stanford Encyclopedia of Philosophy, accessed February 28, 2014 <http://plato.stanford.edu/entries/practical-reason/>.

¹⁸⁴ Daniel Kahneman, Paul Slovic, and Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge, MA: Cambridge University Press, 1982).

astray has a long history in the philosophical and psychological study of emotions. Kahneman's early work on decision under uncertainty supports this view, but his more recent work suggests that this is not necessarily the case and that emotion can play a role in sound decision-making.

Kahneman's recent work finds evidence of two systems of thinking: System I thinking is fast, automatic, frequent, instinctual, emotional, stereotypical and subconscious while System II thinking is slow, effortful, infrequent, logical, calculating, and conscious.¹⁸⁵ He holds that both systems are important to sound decision-making. This is based on his findings that persons who are capable of good decision-making are capable of making reliable decisions under conditions of uncertainty where there is not time to engage in System II thinking. This is because we often find ourselves, in the real world, in conditions of uncertainty where we need to rely on our System I thinking. Reliable System I thinking depends on having emotions that are trained to focus on what is relevant so as not to bias our judgment toward what is irrelevant to the decision at hand. This supports Aristotle's view that, while raw emotions can lead us astray in judgment and decision-making, if we integrate our emotions with our reason, they can also supply us with information to lead to better judgment and decision-making.

Because moral judgment is a special kind of judgment, Kahneman's view of our two systems of thinking lends support to Greene's "dual process" theory of moral judgment, but also raises concerns about Greene's view that utilitarian thinking is not dependent on emotion. The link between their models is apparent insofar as System I thinking is associated with deontological moral judgments and System II thinking is associated with utilitarian moral judgments. While Greene found that utilitarian moral judgments are not guided by emotions, Kahneman finds in his early research that emotions enter into our judgments under conditions of

¹⁸⁵ Daniel Kahneman, *Thinking Fast and Slow* (New York, NY Farrar, Straus and Giroux, 2013).

uncertainty. This means that insofar as we make moral judgments in the real world, and not, say, in hypothetical scenarios, emotions will inevitably influence our thinking. Indeed, perhaps this can explain why Kahneman observes that reason is often unconsciously motivated by emotion, from which he concludes that reason and emotion actually converge.¹⁸⁶ Kahneman's findings here call into question Greene's view that utilitarian thinking does not depend on emotion, unless utilitarian thinking is confined solely to abstract thought and not connected with judgment. Once we move from the activity of utilitarian thinking to the activity of making utilitarian judgments, Kahneman's work supports the view that emotions are relevant. Because practical reasoning is concerned with action, it necessarily moves us from abstract thinking to judgment formation, and thus implicates the relevance of emotions.

Kahneman does not draw normative conclusions from his own research, but one might wish to do so in the following way. If emotions inevitably influence the judgments we make in the real world, then we may either try to get rid of our emotions or to integrate them with our reason so that they pick up where reason leaves off under conditions of uncertainty. The first proposal is similar to the Stoic view discussed above in the subsection on the nature of emotion. As noted there, this view does not have much philosophical support, regardless of whether it is even possible to remove one's emotions oneself. Even if it is possible to do so, it may be undesirable to do so. This is based on recent evidence in neuroscience, which is discussed in the next section, that shows that persons who lack the capacity for emotion and affect altogether are not better problem-solvers or decision-makers, but actually experience extreme difficulty in making even relatively simple decisions. Instead of getting rid of our emotions, it may be more desirable to develop them in ways that aid in our judgment and decision-making.

¹⁸⁶ Daniel Kahneman, "Perspective on judgment and choice: mapping bounded rationality," *American Psychologist* 58, no. 9 (2003): 697–720.

On the role of emotion in decision-making

Damasio's recent work in neuroscience corroborates some of the important findings of Kahneman's work and provides further evidence that reason and emotion are interdependent.¹⁸⁷ One of Damasio's more interesting observations is that patients who lack emotion and affect have problems with practical reasoning. This is based on his research with patients with damage to the part of the brain known as the prefrontal cortex (PFC).¹⁸⁸ While these patients seem to retain their ability to think abstractly, they are unable to apply their thought in actual cases to make sound judgments or decide what to do. In the more extreme cases, Damasio finds patients with serious PFC damage cannot grasp reasons in favor of deciding one course of action over another, even when the decision is all-things-considered an easy one to make and without any significant consequences (e.g., a patient struggled to decide when to schedule another visit with Damasio and could not see reasons for or against scheduling on one day rather than another).

Damasio explains the inability observed in persons with PFC damage through his "somatic marker hypothesis," under which persons with affective responsiveness are provided somatic markers that guide thought and aid decision-making. Damasio explains that,

*[S]omatic markers are a special instance of feeling generated from secondary emotions. Those emotions and feeling have been connected, by learning, to predicted future outcomes of certain scenarios. When a negative somatic marker is juxtaposed to a particular future outcome the combination functions as an alarm bell. When a positive somatic marker is juxtaposed instead, it becomes a beacon of incentive.*¹⁸⁹

Emotions and affect, in other words, provide visceral reactions that help ordinary persons focus on salient features of a particular case and select means to achieve ends. Damasio writes: "Somatic markers do not deliberate for us. They assist the deliberation by highlighting some

¹⁸⁷ Antonio Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York, NY Penguin Books), 2005.

¹⁸⁸ Ibid, 165-201.

¹⁸⁹ Ibid, 174.

options (either dangerous or favorable), and eliminating them rapidly from subsequent consideration.”¹⁹⁰ Damasio traces the neural site of somatic markers to the prefrontal cortices, which he explains is also the part of the brain that is “in good part coextensive with the system for critical secondary emotions.”¹⁹¹ He uses this to explain that patients with damage to the prefrontal cortex lack basic decision-making functions because they lack somatic markers.

Conclusion

Kahneman’s research shows that emotions can bias judgment and decision-making, especially under conditions of uncertainty. Insofar as ordinary judgment, and especially moral judgment, that occurs in the real world occurs under conditions of uncertainty, this calls into question whether even our utilitarian moral judgments are independent from the influence of our emotions. This concern, raised by the fact that our emotions can sometimes lead our practical reasoning astray, should not be taken to prescribe that we should try to rid ourselves of our emotion and affect. This is supported by Damasio’s research, which shows that our ability to experience the affective responsiveness associated with the emotions is necessary for functioning practical reasoning. Persons without affect are shown to suffer serious impairments to their judgment and decision-making. This not only shows that emotions are important to the development of our practical reason, but also lends some support to the Aristotelian view that to deal with the concern raised by the fact that emotion can lead us astray we may be better off keeping our emotions and integrating them with reason than trying to get rid of them altogether. As Roberts puts it, to return to a familiar point from earlier, “Emotions do not as such make us

¹⁹⁰ Ibid.

¹⁹¹ Ibid, 180.

miserable and dysfunctional, as Seneca and the Stoics would have it. Rather, it is the poor having of emotions or the having of poor emotions that makes for misery.”¹⁹²

V. Experiences of child soldiers that risk harm to adult development

This section applies existing knowledge about how emotions develop and the experiences that risk distorting them to the case of ARC soldiers. Emotions are found to be the primary movers of moral action and play an important role in guiding moral judgment. Emotions that are widely cited as moral emotions are empathy, guilt, and shame for moral motivation and contempt, anger, and disgust for moral judgment. This section explains what is reasonable to expect of the adult development of persons subject to the kinds of experiences that child soldiers in extreme groups have been subject to, including physical and psychological abuse, isolation, indoctrination, drugs, and exposure to violence.

At the outset, it is worth noting that research shows that certain experiences create a risk of harm to the development of the moral emotions and this harm can manifest itself in different ways. In some cases, harm can manifest itself by the blunting of the capacity to experience the emotion, and in others, it can distort the experience of the emotion. A paradigm example of the former is psychopathy, a condition identified in part by the inability to experience empathy. A paradigm example of the latter is post-traumatic stress disorder, where a person experiences a strong lingering sense of an emotion such as anger that is associated with general hyper-arousal in response to a traumatic event or series of events that originally was caused by a different emotion such as fear, even after the original source of fear is removed.¹⁹³

¹⁹² Robert C. Roberts, *Emotions in the Moral Life* (Cambridge, UK: Cambridge University Press, 2013), 34.

¹⁹³ William Herstein, “What is a psychopath?” *Psychology Today*, January 30 2013, accessed March 6, 2014 <http://www.psychologytoday.com/blog/mindmelding/201301/what-is-psychopath-0>. “What is Post-traumatic Stress

Experiences of child soldiers that create a risk of harm to moral motivation

Recent research on the development of guilt, shame, and empathy finds that children show early signs of these emotions during infancy, but that their development into moral emotions depends on cognitive maturation and the integration of cognition with affect.¹⁹⁴ These are partly biological, partly social processes. While the potential for guilt, shame, and empathy appear to be innate, their actualization into moral emotions is a social phenomenon.

Young children show early affective signs of guilt and shame, but they must be taught to experience these affective responses in response to the right things for them to function as moral emotions.¹⁹⁵ Other people, and especially parents, are found to play a pivotal role in this learning process.¹⁹⁶ Even if children who become child soldiers have developed an early sense of guilt and shame, it is reasonable to expect that their continued development of these emotions into moral emotions is either blunted or distorted by their experiences as child soldiers. This is especially true for child soldiers who are routinely punished for showing signs of guilt or shame at harming others, and rewarded for showing ruthlessness and indifference. These experiences are typical in extreme groups like the Revolutionary United Front (RUF) in Sierra Leone and the Lord's Resistance Army (LRA) in Uganda. It is reasonable to expect that child soldiers in these groups will grow into adults who continue to feel ruthlessness or indifference at harming others even when the threat of punishment is gone. This is especially true for children inside armed groups that are isolated and that use ideology as a buffer to neutralize the development of pro-

Disorder (PTSD)?" National Institute of Mental Health (NIMH), accessed March 6, 2014, <http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml>.

¹⁹⁴ Eisenberg, "Emotion, Regulation, and Moral Development."

¹⁹⁵ Hoffman, *Empathy and Moral Development*, 113-139.

¹⁹⁶ Ibid, citing his earlier research: Hoffman & Saltzstein, 1967, Hoffman, 1970, and Hoffman 1983. Eisenberg also recurrently discusses the role of parents in the development and socialization process in "Emotion, Regulation, and Moral Development."

social guilt and shame, which, again, is typical in the RUF and LRA.¹⁹⁷ This is buttressed by the fact that adolescence is a particularly vulnerable period of development of the integration of cognition and affect, without which guilt and shame cannot function as moral emotions.¹⁹⁸

What is more, the development of empathy as a moral emotion is vulnerable to distortion by experiences associated with child soldiering in some of the more extreme groups like the RUF or the LRA. As we saw above, the capacity to experience empathy as a moral emotion requires the integration of cognition and affect. The cognitive dimension of empathy is identification with another person's point of view, which ordinary children come to be capable of as they emerge out of their early egoism around age ten.¹⁹⁹ Being under a constant threat of harm, however, arguably makes it more difficult for children to emerge out of an egoistic concern for self. This is especially true for child soldiers in extreme groups who are subject not only to punishment for failure to comply with orders (which is something they can presumably control) but also to vicarious punishment for things others do (which is largely beyond their control). Being subject to punishment like this within a forcibly limited environment like armed conflict places a child under a constant threat of harm, which may reasonably be expected to augment the child's survival instincts. Thus there is reason to think that child soldiers who are constantly concerned with their own survival inside armed groups are particularly burdened with respect to developing the disposition to take on another person's point of view.

Chapter 2 explained that the average age of recruitment into the LRA is slightly older (i.e., thirteen to fourteen) than the average age at which typical children begin to emerge out of their egoism and making the development of mature empathy possible. There may be reason, however, for thinking that the children who are typically recruited into groups like the LRA are

¹⁹⁷ Wessells, 80.

¹⁹⁸ Steinberg, "Cognitive and affective development in adolescence," 69-73.

¹⁹⁹ Kohlberg, *The Child as a Moral Philosopher*, 1968.

not like ordinary children in this regard, and actually develop out of egoism later, in response to other pressures of their situation that arise out of growing up in the midst of political violence.

Even if child soldiers do develop have the *capacity* for early egoism before they become child soldiers, other research shows their experiences inside armed groups create a risk of harm to their *ability* to identify the emotions that others are experiencing. The most relevant experiences here are the abuse to which child soldier are subject inside armed groups and the fact they are inside the hostile circumstances of armed conflict. Research that shows that when children who have been abused look at neutral or non-hostile facial expressions, they are more likely than non-victims to interpret others' intentions to be hostile or threatening.²⁰⁰ One team of researchers explains that this is because "physically abused children have facilitated access to representations of anger."²⁰¹ This, combined with the fact that they remain in hostile circumstances of armed conflict, creates the risk that child soldiers who are abused by armed groups have their ability to identify the emotions that others are feeling distorted by their experiences, thereby undermining their capacity for empathy.

Even if child soldiers are able to develop the capacity to identify with others, it is likely they will identify with those who are gatekeepers to their immediate security.²⁰² This includes the leaders of the armed groups for which they fight. The psychological propensity of persons to

²⁰⁰ On how childhood abuse impacts the interpretation of emotion through facial images, see: Seth D. Pollak, Dante Cicchetti, Katherine Hornung, Alex Reed, "Recognizing Emotion in Faces: Developmental Effects of Child Abuse and Neglect," *Developmental Psychology* 36, no. 5 (2000): 679-88; Seth D. Pollak and Doris Kistler, "Early experience is associated with the development of categorical representations for racial expressions of emotion," *Proceedings from the National Academy of Sciences of the United States of America* 99, no. 13 (2002): 9072-9076; Seth D. Pollak and Pawan Sinha, "Effects of Early Experience on Children's Recognition of Facial Displays of Emotion," *Developmental Psychology* 38, no. 5 (2002): 784-91; and B.E. Gibb, "Reported History of Childhood Abuse and Young Adults' Information-Processing Biases for Facial Displays of Emotion," *Child Maltreatment* 14, no. 2 (Feb., 2009): 148-156. On how childhood abuse impacts the interpretation of language: Seth D. Pollak and Doris Kistler, "Early experience is associated with the development of categorical representations for racial expressions of emotion," *Proceedings from the National Academy of Sciences of the United States of America* 99, no. 13 (2002): 9072-9076.

²⁰¹ Pollak and Sinha, 784.

²⁰² Hoffman, *Empathy and Moral Development*, 197-217.

identify with those who are gatekeepers to their security is a well-known phenomenon typically referred to as the Stockholm syndrome.²⁰³ Child soldiers in armed groups who are taught to look at their leaders as father figures or spiritual saviors are especially at risk of identifying with those leaders. Perhaps the most notorious example is that of Joseph Kony, top leader of the LRA, who convinces children that he contains the spirits of Jesus Christ and the former revolutionary leader of the original movement in Uganda over which Kony took control when it was defeated.²⁰⁴ The more child soldiers identify with the leaders of the groups for which they fight, the more they will adopt the leaders' goals, which arguably distorts their experience of empathy away from its potential as a moral emotion. This may even explain part of what makes the process of indoctrination of child soldiers in groups like the LRA so effective.

Extreme armed groups like the RUF and LRA are also known to deliberately undermine trust among new child recruits, which can prevent fellow child soldiers from identifying with each other. The "buddy system" used by the RUF that was discussed in the last chapter provides a good example of such a technique. Under this system, new child recruits are paired with one another and told that if their buddy escapes, they will be punished for it. This works to undermine trust among recruits and to forge it between recruits and group leaders. The LRA uses methods designed to further similar goals, such as making new recruits compete for basic goods, like food and protection, and enforcing silence so they do not talk with one another. This provides reason for thinking that even if child soldiers in extreme groups like the RUF or LRA develop the cognitive and affective capacities to experience basic empathic identification, it is reasonable to expect that they would identify with the leaders of armed groups for which they

²⁰³ Irka Kuleshnyk, "The Stockholm syndrome: Toward an understanding," *Social Action & the Law* 10, no. 2 (1984): 37-42.

²⁰⁴ Peter Eichstaedt, "Kony 20Never: Inside the Mind of Africa's Most Wanted Man," *Foreign Affairs*, January 14, 2014, accessed March 12, 2014, <http://www.foreignaffairs.com/articles/140653/peter-eichstaedt/kony-20never>.

fight, rather than with fellow child soldiers or, what is even less likely, with their victims. While some may identify with victims early on, as they are punished or threatened with punishment for showing guilt and shame at harming others and rewarded for becoming hardened to the plight of their victims, it is reasonable to expect that this early empathic identification with victims is supplanted by empathic identification with the gatekeepers of their security.

So far, I have offered reason for thinking that even if child soldiers in extreme groups like the RUF and LRA develop the capacity for guilt, shame, and empathy, they develop them in a way promotes the aims of the armed groups for which they fight. It is reasonable to expect that those who are punished for showing signs of guilt and shame at harming others are desensitized or hardened toward harming others, thus removing the anticipation of feeling guilt and shame that prevents ordinary persons from harming others. What is more, if child soldiers are capable of identifying with others in a way that makes empathy possible, it is reasonable to expect this capacity is distorted and motivates them to act in ways that further the immoral aims of the armed groups for which they fight, which arises from having their sense of guilt and shame unhinged from the objects that typically elicit them in the ordinary course of moral development.

Experiences of child soldiers that create a risk of harm to moral judgment

Recent research shows that emotion and affect play an important role in forming moral judgments, especially deontological moral judgments. To recall, these are judgments about rights and duties and they contain a demand for action. They are, in other words, inherently motivating judgments. Kohlberg's responsibility judgment is a paradigm example. He identified something like Kantian autonomy as the basis for acting on one's ordinary moral judgments. Contemporary research also identifies the affective responses associated with guilt and shame as important

sources of the judgment that a person has taken responsibility for violating a moral standard to which he or she holds him or herself.²⁰⁵ While Kohlberg did not identify emotions or affect as important to the sophisticated cognitive activity that generates deontological moral judgments, recent work in moral psychology suggests that emotions like guilt and shame play an important role. This means that a distorted capacity for guilt and shame leads persons to make erroneous moral judgments and to lack the ability for normal moral perception. A person who cannot apply moral principles properly in particular cases through explicit cognitive application or through perception is thereby deprived of the opportunity to act on them, except of course by accident.

Guilt and shame are not the only emotions that, when distorted, risk undermining the capacity for normal moral judgment and perception in accordance with accepted standards of right and wrong. Contempt, anger, and disgust are also identified as important sources of basic moral judgments, which means that their distortion risks undermining the capacity for normal moral judgment and perception. The remainder of this subsection outlines the experiences of child soldiers in groups like the RUF and LRA that create the risk of serious harm to contempt, anger, and disgust and their potential to contribute to normal moral judgment and perception.

Contempt and anger serve as sources of moral judgment when they signal to the person experiencing them that something is morally wrong with a particular state of affairs. Upon their entrance into armed groups, it is reasonable that new child recruits who were forcibly recruited or abducted experience these emotions, and use them to form judgments that what is being done to them, and what they are ordered to do, is wrong. Jeff McMahan explains this as follows,

When child soldiers have been abused by those they serve, when they are threatened with terrible harms for refusing to fight, when they know they will be drugged before being sent to fight, when, as is often the case, their past missions have involved assaulting villages and killing unarmed villagers—in these

²⁰⁵ Eisenberg, “Emotion, Regulation, and Moral Development,” 667.

conditions, they should be able to infer that those who command them are not trustworthy and that the likelihood that they are doing wrong is very high.²⁰⁶ Over time, however, this inference regarding the wrongful nature of their conduct may be less reasonable to expect child soldiers to make, as they continue to be coerced to participate in the activities of armed groups. This is based on the psychological propensity of persons to remove sources of cognitive dissonance.²⁰⁷ Cognitive dissonance is the hypothesis that “The existence of dissonance, being psychologically uncomfortable, will motivate the person to try to reduce the dissonance and achieve consonance” and that “When dissonance is present, in addition to trying to reduce it, the person will actively avoid situations and information which would likely increase the dissonance.”²⁰⁸ This suggests that child soldiers who do at first infer that what they are doing is wrong may come to infer differently over time to avoid psychological discomfort, especially if they perceive that they have no feasible alternatives to staying inside the armed group.

Moreover, the groups that typically use the most violent modes of recruitment are also those that typically employ various strategies to break children from their prior lives and identities and transform them into soldiers (e.g., the RUF and the LRA). These initiation and indoctrination strategies, combined with the harsh punishments for acting against orders, work to remove sources of cognitive dissonance, thus heightening the proclivity for child soldiers in extreme groups to stop experiencing contempt and anger in response to their situation and come to identify with the groups for which they fight. Again, this is even more reasonable to expect the younger the child is when recruited, the more the group is isolated, the less contact it has with outside influences that challenge the ideology of the armed group.

²⁰⁶ Jeff McMahan, *Killing in War* (Oxford, UK: Clarendon Press of Oxford University Press, 2009), 201.

²⁰⁷ Bernd Beber and Christopher Blattman apply cognitive dissonance theory to explain why child soldiers remain inside armed groups in “The Logic of Child Soldiering and Coercion,” *International Organization* 67, no. 1 (Winter 2013): 65-104.

²⁰⁸ Leon Festinger, *A theory of cognitive dissonance* (New York, NY: Harper & Row, 1957), 3.

What is more, the typical experiences of child soldiers in extreme groups like the RUF and LRA create risks of harm to moral judgment and perception by distorting their capacities to experience disgust as a moral emotion in accordance with accepted standard of right and wrong. As we saw in Chapter 2, the RUF and LRA use coercion to make child soldiers kill others in a brutal fashion, sometimes afterward forcing them to drink the blood of their victims. These experiences create the risk of distortion to the ability to experience disgust as a moral emotion in accordance with accepted standard of right and wrong. Furthermore, leaders of armed groups are also known to give child soldiers hard drugs to desensitize them to violence and killing. Drugs also create the risk of distorting child soldiers' capacities to experience disgust as an emotion that aids in the formation of moral judgments that the activities in which they participate are morally wrong.

Experiences of child soldiers that risk harm to practical reasoning

This final subsection explains how damage to the moral emotions that is associated with the typical experiences of child soldiers in extreme armed groups also risks impairment to their practical reasoning ability. As we saw above, emotions both have the potential to impair ordinary judgment and decision-making, and also contribute to better judgment and decision-making. This subsection identifies experiences typical to child soldiers in extreme groups that risk the mal-development of emotion regulation capacities, making it reasonable to expect that the emotional tendencies they develop as young adults impair rather than aid their practical reasoning.

Contemporary work on adolescent development shows that adolescence is a particularly vulnerable time of development for several of the functions that allow emotions to aid practical

reasoning. According to Steinberg's review of recent work in this area, there are two primary reasons why adolescence is vulnerable.

First, much brain development during adolescence is in the particular brain regions and systems that are key to the regulation of behavior and emotion and to the perception and evaluation of risk and reward. Second, it appears that changes in arousal and motivation brought on by pubertal maturation precede the development of regulatory competence in a manner that creates a disjunction between the adolescent's affective experience and his or her ability to regulate arousal and motivation.²⁰⁹

Steinberg finds that adolescence is a period of developmental immaturity and vulnerability. In particular, adolescents are not yet capable of perceiving and evaluating risk and reward, or of understanding the information provided to them through their affective responses. These skills are core capacities that go into judgment and decision-making. What is more, adolescents are still developing what Steinberg calls "regulatory competence," which is achieved when "regulatory systems are gradually brought under the control of central executive functions, with a special focus on the interface of cognition and emotion."²¹⁰ He makes two points about this process. First, it takes a long time and, secondly, it does not occur until relatively later in development.²¹¹ Executive functions include planning, prioritizing, and organizing information, which are made possible in part by affect regulation, or the capacity to sufficiently inhibit or delay emotional reactions to allow for rational consideration.²¹² The executive functions are particularly important for practical reasoning insofar as judgment and decision-making require planning, prioritizing, and organizing information. Emotion distortion and affect regulation dysfunction risks harm to these capacities and thus may result in the impaired exercise of practical reason.

²⁰⁹ Lawrence Steinberg, 70.

²¹⁰ Ibid, 73.

²¹¹ Ibid.

²¹² Patricia E. Erickson and Steven K. Erickson, *Crime, punishment, and mental illness: law and the behavioral sciences in conflict*. New Brunswick, NJ: Rutgers University Press, 2008.

As explained above, child soldiers who grow up in extreme groups like the RUF or LRA are at the greatest risk of emotion distortion and affect regulation problems in response to their experience. These problems pose a risk to their capacities for judgment and decision-making, even if it leaves their abstract reasoning ability intact. This is based on an emerging body of literature that shows while the typical person becomes more capable of advanced cognition (e.g., abstract/hypothetical reasoning) during adolescence, “cognition-in-context” requires the integration of social, emotional, and cognitive processes that are not typically developed until young adulthood.²¹³ Ordinary adolescents have not fully developed the ability to apply their knowledge in particular cases. Erickson and Erickson explain that while adolescents technically have the equipment needed for adult-like reasoning, having that equipment does not mean adolescents can use it the way adults are expected to (i.e., reliably and efficiently).²¹⁴

Child soldiers who spend years inside extreme armed groups risk developing emotional distortion and affective regulation dysfunction. These problems are found to impair capacities for ordinary judgment and decision-making, thereby impairing practical reasoning. For example, it is reasonable to expect that child soldiers who are constantly under threat of harm will not develop the capacity to regulate their fear or anxiety even when they are no longer under direct duress. Emotions like fear and anxiety influence our perception of what is relevant in our emotion, often biasing our judgment toward what will protect us. The more one’s formative adolescent years are spent experiencing high levels of fear and anxiety in response to real threats to one’s wellbeing, the less reasonable it is to expect that these emotions are regulated even when those immediate threats are no longer present. This is based on research that shows that “states make traits.”²¹⁵

²¹³ Ibid, 71.

²¹⁴ Erickson and Erickson, *Crime, punishment, and mental illness*, 2008.

²¹⁵ “Inside the Teenage Brain,” PBS *Frontline* Special, accessed June 10, 2013 <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/>.

To conclude, this subsection explained that persons with distortion of their emotions and affective responses risk having their practical reasoning impaired. This is based on contemporary work on adolescent development that shows that the adolescence is a particularly vulnerable period of development of the executive functions, which are core functions that are employed in judgment and decision-making and which are vulnerable to severe damage by exposure to stress and trauma during adolescence. This means that child soldiers who remain in extreme armed groups like the RUF and LRA are especially at risk of damage to their practical reasoning ability.

Conclusion

This chapter considered recent work in psychology to assess the developmental impact of the typical experiences of child soldiers in four African conflicts. From my review of the research, I found that child soldiers in extreme groups like the RUF and LRA are at great risk for defective moral development and impaired development of their practical reasoning. The former claim regarding the risk of defective moral development among child soldiers in extreme groups is based on work in contemporary moral psychology that shows that emotions are important for moral development, and on empirical work on how the typical experiences of child soldiers in extreme groups risks distortion of their emotions. The latter claim regarding the risk of defective development of practical reasoning among child soldiers in extreme groups is based on recent work in other areas of psychology, namely behavioral psychology and neuroscience, that shows that emotions are required for practical reasoning, but can impair judgment and decision-making if not properly integrated with reason, and, moreover, that adolescence is a particularly vulnerable period of development precisely because it provides the developmental opportunity for reason and emotion to become integrated. The conclusion of this chapter is that even if the

experiences of child soldiers are not extreme enough to destroy their adult moral development or practical reason, recent work in psychology shows that child soldiers recruited at a young age and subject to the most extreme treatment are especially at risk of defective adult development.

In the next chapter, I examine three versions of an influential theory of excuse – the choice theory – against the background of the contemporary psychological literature presented in this chapter. I evaluate each of the three choice theories on their empirical defensibility and offer support for the theory that includes an important role for emotion in the capacity for choice that supports criminal responsibility. Then, in Chapter 5, I show that this version of the choice theory is also most consistent with international criminal law, which assumes that the persons it holds responsible are capable of normal moral perception in accordance with internationally accepted standards of right and wrong. Because normal moral perception is dependent on persons having basic emotional competence, international criminal law is consistent with a version of the choice theory that include emotions in the capacity for choice that supports criminal responsibility. This makes the evidence presented in this chapter, that child soldiers in extreme groups like the RUF and LRA are at a great risk of developing emotional disturbances that substantially distort their moral judgment and perception, important for determining their adult criminal responsibility.

CHAPTER 4

HOW DO WE THINK ABOUT THE CRIMINAL RESPONSIBILITY OF ARC SOLDIERS?

Introduction

According to an influential theory of criminal responsibility and excuse—the choice theory—criminal responsibility depends on persons having the capacity for choice and the fair opportunity to use it to choose to obey the law. Based on this theory, I seek to address the following two questions in this chapter and the next: Which view of the capacity for choice is most consistent with international criminal law? Can ARC soldiers who spent their formative years inside armed groups reasonably be held to have the fair opportunity to choose to obey the law while they remain inside armed conflict?

The next chapter argues that many such soldiers should not be held responsible under international law. In particular, I argue for the introduction of a new excuse into international criminal law for persons who cannot see the force of moral reasons to obey the law because, through no fault of their own, they lack normal moral perception. The basis of the argument is that such persons are deprived of the fair opportunity to choose to obey the law.

Section I of this chapter discusses the relation between law and morality and how this relation differs when we move from the domestic to the international context. In particular, I show that having the capacity to choose to obey the law for non-moral reasons is insufficient to ground obligations under international criminal law, under which, I argue, persons also need to be able to see the force of moral reasons for action. Section II then considers three versions of the choice theory of responsibility and excuse, which provide the moral grounds on which a new excuse may be developed to apply to traumatized ARC soldiers. The main areas of dispute between the three versions are, first, whether criminally responsible choice requires *moral*

choice, understood as the ability to appreciate moral reasons for choosing to obey the law and, secondly, whether how persons develop their capacity for choice is relevant to their criminal culpability.

I. The relation between law and morality

Introduction

To understand when it is fair to hold persons criminally responsible under international law, we must first understand the relationship between law and morality in the international context. The idea of *jus cogens* norms is particularly important here. *Jus cogens* norms are rules and principles that are taken as universally accepted by the international community and held to create obligations without explicit consent. These norms can be understood as deriving their force from morality and are important sources of international law, including international criminal law. This is different from domestic law, under which (at least in Western legal systems) only valid laws are understood to create legal obligations and where those obligations are taken to be binding irrespective of the moral basis of the law. This difference between international law and domestic law has important implications for the capacities persons need to be capable of knowing what the law is and choosing to obey it. Because of the dependence of international criminal law on *jus cogens* norms, persons under that law must be able to see the moral force of those norms, but because domestic criminal law is not dependent on such norms, this requirement does not hold under domestic law. To elaborate on the relationship between law and morality in the international context, I begin with Larry May's discussion of the nature of *jus cogens* norms, their origin in natural law theory, and his argument that it is unreasonable to expect persons in certain kinds of situations to comply with them. This chapter then builds on

May's view to argue that some individuals cannot be held to *jus cogens* norms, regardless of their specific content. Then, I use H.L.A. Hart's version of legal positivism and Joseph Raz's version of legal positivism to show how the differences between domestic and international law limit the scope of this exemption to the international context.

Law and morality in the international context

May argues that international criminal law is based on the following ideas. First, "that there are some principles that transcend national borders and achieve universal binding force," secondly, "some crimes so clearly harm the international community that they must be proscribed in all societies," and thirdly, that these crimes "are often said to violate *jus cogens* norms, norms that can be clearly known and understood by all as universally binding."²¹⁶ These ideas are based in the natural law tradition, which May admits he is skeptical of in its classical version,²¹⁷ but finds more defensible in contemporary versions developed with respect to international criminal law.²¹⁸ May even notes that recent developments in international criminal law largely owe themselves to the Nuremberg trials, which appealed to the idea of natural law in prosecuting Nazi perpetrators of mass atrocity.²¹⁹

Under the classical natural law theory of St. Thomas Aquinas, human laws derive their force from their consonance with natural law. For Aquinas, natural law is that part of God's law that human beings have access to through reason. Natural law tells us that the purpose of human law is to serve the common good. A law that does not serve the common good is an unjust law, which really is not a law at all, on Aquinas's view. This view is embodied in his famous maxim:

²¹⁶ Larry May, *Crimes Against Humanity: A Normative Account*, 24.

²¹⁷ *Ibid.*, 34.

²¹⁸ *Ibid.*, 35.

²¹⁹ *Ibid.*

Lex iniusta non est lex, which is Latin for “An unjust law is no law.” If human law goes against natural law, Aquinas argues that we must obey natural law, unless disobeying the human law will cause scandal or disturbance.

Contemporary natural law theorists typically do not appeal to God’s law as the basis for natural law, but rather to the set of rules and principles that are found in similar forms in nearly every legal system. These rules and principles are recognized as general principles of law, even where they lack explicit consent, as the basis for what is required for people, communities, and states to peacefully co-exist in political associations. Under contemporary natural law theory, *jus cogens* norms are regarded universally accepted among states in the international community and they are held to derive their binding force from this acceptance. As noted above, this acceptance is not necessarily acquired or conveyed through explicit consent, but is developed and expressed in the social relationships that people, communities, and states carry out with one another.

This view of *jus cogens* norms is consistent with the theory of law put forth by Ronald Dworkin.²²⁰ Dworkin starts with the political community as the basis for the obligation to obey the law. On his view, the obligation to obey the law is a kind of moral obligation. In particular, it is a kind of moral obligation called “associative obligation.” Associative obligations do not require consent, but arise out of the social relationships that people develop with one another over time.

Persons under associative obligations adopt a particular attitude toward their obligations, on Dworkin’s view.²²¹ He identifies four features that characterize this “associative attitude”: first, the obligations are regarded as special, or as holding distinctly within the group; secondly, the obligations are regarded as personal, or as running directly from each member to each other;

²²⁰ Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986).

²²¹ *Ibid*, 199-200.

thirdly, the obligations are regarded as being marked by a concern for the wellbeing of others in the group; and fourthly, this concern is regarded to extend to each member equally and not just to the group as a whole in some collective sense.

Although the obligations that all human beings are assumed to have to one another under international criminal law do not create the special bond Dworkin is talking about, his ideas that the law of a community reflects its political morality and that legal obligation is a kind of moral obligation that arises out of relationships are helpful for understanding the nature of international law and the place of *jus cogens* norms in it. It is along these lines that May objects to the idea that *jus cogens* norms apply to all persons, regardless of their specific content. Implicit in his view is the notion that international criminal law tries to capture some basic requirements of worldwide political morality, under which it is unfair to hold persons to standards they cannot reasonably be expected to satisfy.

To elaborate, May argues that implicit in international criminal law is the assumption that persons are capable of normal moral perception and can perceive the manifest illegality of their crimes. He traces this implicit requirement to the “manifest illegality” provision in the Rome Statute, which states that soldiers are not excused from criminal responsibility for acts of genocide or crimes against humanity simply because they were following the orders of a lawful superior. The idea of *jus cogens* helps to ground the idea that there are crimes that are manifestly unlawful and to identify which those are. May, however, challenges the application of these norms to soldiers in abnormal wartime situations on the basis that certain circumstances are known to greatly burden perception and judgment. On his view, some wartime situations are so extraordinary that they burden soldiers’ ordinary capacities for moral perception and judgment to such an extent that soldiers in these situations cannot reasonably be expected to exercise normal

moral perception to perceive the illegality of their conduct. Therefore, May argues that *jus cogens* norms should not apply in such cases.

Law and morality in the domestic context

While legal and moral obligation are bound together in the international context through the idea of *jus cogens* norms, it can be argued that they are not so bound in the domestic context. Legal positivism holds that legal obligation and moral obligation are distinct under a functioning domestic legal system: the law is essentially a matter of social fact, not of morality. H.L.A. Hart, who is perhaps the most influential legal positivist figure in recent history, holds that aside from the “minimum content of natural law,” there is no necessary connection between law and morality. On his view, laws give rise to genuine obligations, which may conflict with moral obligations but are not undermined as a result of such conflict.

On Hart’s view, a legal system is a union of what he calls “primary” and “secondary” rules. Primary rules are directed toward citizens and create genuine legal obligations that provide reasons for action. Only valid laws create legal obligations. A rule is a valid law if it satisfies all of the rules that are accepted by a particular legal system for making laws valid. The validity of a law is a separate question from its justness, on Hart’s view, and that the fact a law is unjust does not invalidate it. Legal obligation is not psychological or moral, but is a social fact that follows from persons’ accepting the law as sufficient reason for actions in a similar way as players of a game accept the rules of a game as sufficient reason for action.²²²

Though the specifics of Hart’s view have been disputed, the view that law does not derive its validity from morality continues to have currency. Joseph Raz, for example, argues that law is

²²² H.L.A. Hart, *The Concept of Law*, 2nd edition (Oxford, UK: Clarendon Press of Oxford University Press, 1994).

necessarily connected with morality only in that wherever there is law, the law *presents* itself as the morally legitimate authority over persons, rather than in that the law actually is a morally legitimate authority. People may take the law to provide sufficient reasons for action (because it solves coordination problems or threatens penalties, for example), but these are not moral reasons and do not give rise to a moral obligation to obey the law.²²³

While Raz's version of positivism is plausible against the background of a functioning domestic legal system, it is less so once we move to international law. This is because the benefits of complying with, and the penalties of deviating from, what international law requires may lack the force of *sufficient* reasons for actions. A primary benefit of domestic criminal law in functioning legal systems that can be held to provide sufficient reason for obeying it is that it solves coordination problems that directly affect the everyday lives of citizens, including coordination problems associated with efforts to prevent crime and respond to its occurrence. Complying with the law contributes to the order of the system, from which ordinary citizens are held to directly benefit, thus providing them sufficient reason for compliance. Moreover, a primary means through which domestic criminal law may be held to solve coordination problems that are related to keeping order is through the use of penalties to discourage deviations from the law. The use of penalties for non-compliance may thus be held to create further sufficient reasons for compliance (and, in particular, for those to whom the benefits the law provides do not apply to create sufficient reasons for compliance).

It is not clear this argument applies to international criminal law. First, it may be argued that international criminal law solves coordination problems that are more directly relevant to the affairs of states than to the lives of individuals. Some support for this can be found in the fact

²²³ Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd edition, (Oxford, UK: Oxford University Press, 2009).

that the ICC has complementary jurisdiction with states, which means that the ICC only steps in when states are unable or unwilling to prosecute crimes themselves.²²⁴ Secondly, even if international criminal law solves coordination problems that are as relevant to individuals as are the coordination problems that domestic criminal law solves, it may be argued that international criminal law is a much weaker instrument for the task. International criminal law has no police force, and accordingly, it has to rely more on the voluntary compliance of the relevant parties (i.e., states and individuals) than does domestic law. Because the ICC only assumes jurisdiction over cases arising in states that are unable or unwilling to prosecute crimes, relying on the voluntary compliance of these states in using their police force to apprehend perpetrators may be problematic. States that are *unable* to prosecute crimes may have police forces that are ill equipped to apprehend perpetrators and states that are *unwilling* to prosecute crimes may be complicit in them and hence unwilling to use their police force to pursue investigations at all. Thus, neither the benefits that persons may expect to receive as a result of the coordination efforts of international law nor the fear of international sanction is likely to provide persons with sufficient reason for compliance.

As Allan Buchanan has argued, the recent attempt by John Tasioulas²²⁵ to offer a Razian account of international law is inadequate because it neglects that “the distinctive benefits that an institution creates are most reliably secured if, in addition to the fear of coercion and the expectation of advantage relative to non-institutional alternatives, there are *moral reasons* to support the functioning of the institution.”²²⁶ Buchanan explains that it is important for

²²⁴ Rome Statute, Preamble, which states that, “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”

²²⁵ John Tasioulas, “The Legitimacy of International Law,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford, UK: Oxford University Press, 2010) (emphasis added).

²²⁶ Allan Buchanan, “The Legitimacy of International Law,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford, UK: Oxford University Press, 2010), 81.

international law to provide moral reasons for action to engender support for the law when “there are lapses in its ability to coerce and during periods when there is reason for some doubt that it is indeed advantageous for all relative to the non-institutional alternative.”²²⁷ In other words, having moral reasons to obey international law is important, on Buchanan’s view, when ordinary (i.e., non-moral) reasons do not provide sufficient reason to do so.

Conclusion

This section discussed the relationship between law and morality as it differs from the international to the domestic context. I explained that *jus cogens* norms are important sources of international law and that they are taken as universally accepted by the international community even in the absence of explicit consent. Moreover, I explained that some of the obligations created by international criminal law depend on *jus cogens* norms, which are held to acquire their binding force through their consonance with morality. Finally, I explained that the existence of a similarly close relationship between law and morality in domestic law is disputed by positivists, who argue that it such a relationship is not a necessary feature of a legal system.

To recall, under Hart’s view, there is no necessary connection between law and morality and valid laws are held to create genuine legal (as opposed to moral) obligations that provide sufficient reasons for action. Under the influential version of positivism put forth by Raz, by contrast, there is a necessary connection between law and morality, but this relationship is one of pretense: the law simply presents itself as the morally legitimate authority. Both views require that the law provides sufficient reason for action, but I mentioned why this might be problematic for international law.

²²⁷ Ibid.

There is a stronger case to be made that law and morality are necessarily connected under international criminal law. One important implication of the difference in the relationship between law and morality in the international and domestic contexts is that the capacities that persons must have to be capable of knowing what the law is and choosing to obey it differ between the two as we move from one context to the other. If, under domestic law, obligations derive their force from the non-moral validity of the law itself, then it may be argued that persons do not need moral capacities to be capable of knowing what the law is and of being capable of choosing to obey it. If under international law, by contrast, some obligations derive their force from *jus cogens* norms, then persons need to be capable of appreciating the moral force of those norms in order to know what international law requires and to be capable of choosing to obey it.

The next section draws on these differing views of the relation between law and morality, and the implications of this difference in grounding the obligation to obey the law, as I introduce and examine competing philosophical theories of criminal responsibility and excuse that have been developed for domestic criminal law. One of these theories is consistent with positivism, but the other two require persons to be capable of appreciating the moral significance of legal norms in order to be held responsible under the criminal law. Based on the close relationship between international law and morality, I argue that these theories offer a good foundation for thinking about criminal responsibility and excuse in the international context.

II. The choice theory of criminal responsibility and excuse

Introduction

In this section, I examine three versions of the choice theory of excuse that I build on in the next two sections in proposing a new excuse for traumatized ARC soldiers. The choice

theory holds that a person is excused from criminal responsibility if he or she lacked either the capacity to choose to obey the law or the fair opportunity to exercise that capacity. The main points of dispute between the three versions concern whether criminally responsible choice requires the ability to appreciate moral reasons for choosing to obey legal norms and whether the way in which persons develop their capacities for choice is relevant to their criminal culpability. These differences lead them to endorse different views on how the criminal law should address persons with various kinds of emotional disturbances. First, Michael Moore's version of the theory holds that the capacity for choice consists in the capacity to act on the conclusions of one's practical reasoning, restricts its focus to the moment of choice, and affords a limited role to emotions in aiding or impairing choice. Secondly, Peter Arnella's version of the theory, by contrast, holds that the capacity for choice requires moral choice, attends to the development of our choosing capacities, and affords a rich role to emotions in aiding and impairing choice. Thirdly, Antony Duff's view holds that the capacity for choice requires moral choice, but does not consider development directly relevant to culpability. In the next section, I argue that a version of the choice theory like Arnella's is most consistent with existing international law.

Moore

On Michael Moore's version, the capacity for choice consists in the capacity to act on the conclusions of one's practical reasoning. Moore does not include emotional competence among the requirements of the capacity for choice, although he observes that the criminal law assumes persons to have what he calls "emotionality," and that emotions can help motivate people to choose to obey the law because of the moral reasons in favor of doing so. Moore concedes that the emotions that typically make people care about doing what is right may be required for full

moral agency, but his view suggests that full moral agency may not be required of persons to hold them responsible under the criminal law.

In explaining his version of the choice theory, Moore draws on H.L.A. Hart's formulation of it. Quoting Hart, Moore writes: "What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for abstaining from what it [the law] forbids, and a fair opportunity to exercise these capacities."²²⁸ Moore explains that, while Hart first justified this view in utilitarian terms, arguing that a legal system that did not punish people for what they could not help doing offered the best balance between granting liberty to choosing beings and aiming to prevent crime, Hart later appealed to the principle that it is unfair to hold people criminally responsible for what they could not help doing or where they could not do otherwise to justify his view.

Moore considers various senses of the term "could" that might be implied by the principle that it is unfair to hold people criminally responsible for what they could not help doing or where they could not do otherwise.²²⁹ He argues that Hart offers the best understanding of the term. Hart split choice into two components: first, a non-defective choosing capacity and, secondly, a fair opportunity to use that capacity. The first has to do with the "equipment" of the actor, and the second with his or her "situation."²³⁰ Out of Hart's notion of choice, Moore develops his version of the choice theory of excuse, under which one is excused for an otherwise

²²⁸ Michael Moore, "Choice, Character, and Excuse," in *Placing Blame: A General Theory of the Criminal Law* (New York, NY: Oxford University Press, 1997) 550.

²²⁹ On the first sense, 'could' is understood in a behavioral sense, or as simply a report on what is actually done. He rejects this sense of the term because it does not explain so much as eliminate what needs to be explained. The second sense is a strong, incompatibilist sense whereby only that which is completely uncaused by external factors are things we 'could' do. Moore rejects this sense, too, because he rejects incompatibilism generally. The third sense of 'could' he considers is compatibilist and holds that the phrase 'he could have done otherwise' is "elliptical for 'he could have done otherwise if he had chosen to,'" *ibid*, 553. This sense is compatibilist because the existence of external factors does not negate our choice. In other words, even if our choice is caused, we still choose.

²³⁰ *Ibid*, 554.

criminal act “because and only because at the moment of such action’s performance, one did not have sufficient capacity or opportunity to make the choice to do otherwise.”²³¹

Moore’s description of choice shows that he construes choice as the capacity to act on the conclusions of one’s practical reasoning. This may be inferred from the following claims. First, Moore states that, “Choice, to be morally interesting, must include not only the initiation of basic actions but also the formation of the intentions and beliefs that guide and motivate the doing of basic actions.”²³² The process he describes is the process of practical reasoning. Secondly, Moore states that, “rationality and autonomy are the major presuppositions about persons made by the general part of the criminal law.”²³³ A rational person, on Moore’s view, is “one who acts to further her intentions, which intentions themselves achieve some intelligible end in light of some rational beliefs.”²³⁴ Beliefs are rational when they are based on the relevant evidence for belief.²³⁵ Moreover, he explains that a person who is autonomous is able to select some kind of reasons for action and execute his or her conduct in accordance with them.²³⁶ Taken together, these claims indicate that, on Moore’s view, the capacity for choice consists in the ability to act on the conclusions of one’s practical reasoning, which is made possible by rationality and autonomy.

In light of the fact that rationality and autonomy equip persons with the capacity to act on the conclusions of their practical reasoning, and hence make choice possible, it is fair to say that these attributes are basic *requirements* of choice, on his view. In addition to rationality and autonomy, Moore further recognizes that the criminal law assumes persons to have what he calls

²³¹ Ibid, 548.

²³² Ibid, 558.

²³³ Michael Moore, “Mental Illness and Responsibility,” in *Placing Blame* and “An Overview of the Criminal Law’s Theory of the Person” in *Placing Blame*.

²³⁴ Moore, “Mental Illness and Responsibility,” 608.

²³⁵ Ibid, 606.

²³⁶ Moore, “The Criminal Law’s Theory of the Person,” 610-14.

“emotionality.”²³⁷ His account nonetheless falls short of including emotional competence with rationality and autonomy as basic requirement of the capacity of choice. This means that, on his view, only someone with a cognitive incapacity (and not an emotional incapacity) will be excused from criminal responsibility on account of lacking the capacity for choice.

Moore does not independently require emotional competence for the capacity for choice, even though he observes that some emotions will inevitably factor into the process of practical reasoning, and, moreover, that emotions can provide people with motivation to obey the law by allowing them to appreciate the moral reasons for doing so.²³⁸ Aside from whatever emotions turn out to be needed for practical reasoning, however, no further emotional competence is required, on his view, for persons to have the requisite kind of choosing capacity to be held responsible under the criminal law. Moore appears to base this view on the empirical claim that emotions cannot directly incapacitate choice, but are always mediated through judgment and choice.²³⁹ To say that emotions are always mediated through judgment in a way that prevents emotions from directly incapacitating choice implies a view of judgment as a conscious and deliberate process. *If* emotions are always mediated through conscious judgment, then it makes sense that Moore would hold that no independent emotional competence is required for the capacity for choice.

To further illustrate Moore’s view of the relation between emotion and choice, let us consider the two examples he provides to explain and defend his view. Moore’s first example involves a heroin addict who steals to get money to buy heroin.²⁴⁰ His second example involves a person who is threatened with being shot in the knees unless he drives the gunman to the location

²³⁷ Ibid, 614.

²³⁸ Ibid, 559 and 615.

²³⁹ Ibid, 559-60.

²⁴⁰ Ibid, 554.

of someone the gunman intends to kill.²⁴¹ To recall, there are two ways in which persons may be excused, under Moore's theory. The first is by having a defective choosing capacity and the second is by being deprived of the fair opportunity to exercise choice. With respect to his two examples, Moore argues that the heroin addict cannot be excused either for having a defective choosing capacity or for being deprived of a fair opportunity to choose to obey the law, while the man threatened with being shot in the knees can be excused on account of being deprived of the fair opportunity to choose to obey the law. Let's consider each example in turn.

Moore argues that the heroin addict is not excused under the defective capacity prong of the choice theory of excuse because it is an "implausible psychological story" to suppose that even a strong desire for heroin can so overwhelm the heroin addict's practical reasoning as to incapacitate his capacity for choice.²⁴² He further argues that the heroin addict is also not excused under the no fair opportunity prong of the excuse. He explains that although the addict's opportunity to avoid stealing may be less than it is for those who are not addicted to heroin, as only he would suffer the negative effects of withdrawal without heroin, this situation of choice does not deprive the addict of a *fair* opportunity to choose to obey the law.²⁴³ To say otherwise is to adopt a "morally implausible view of how diminished our opportunities must be in order to excuse choices made in such circumstances."²⁴⁴

Let us move now to consider Moore's explanation for why a man who is threatened with being shot in the knees if he does not drive the gunman to the location of someone he intends to murder is excused from criminal responsibility. As noted above, Moore does not excuse the man on the grounds that the emotional disturbance brought about by the threat incapacitates his

²⁴¹ Ibid, 555.

²⁴² Ibid, 555.

²⁴³ Moore, "Choice, Character, and Excuse," 554.

²⁴⁴ Ibid, 555.

choice. Rather, he explains that we excuse the man because the “situation of choice” was “one not commonly attached to the choice of the rest of us.”²⁴⁵ While one may object that the situation of choice the heroin addict finds himself in is also not one commonly attached to the rest of us, Moore explains that a person’s “*fair* opportunity is not measured by his psychological difficulties, but rather by the objective facts of the matter.”²⁴⁶ This suggests that what excuses the threatened man is not how difficult it is *for him* avoid succumbing to the threat, but how difficult it would be for a person of reasonable firmness to resist compliance in his situation.

Under Moore’s theory, a person may be excused from criminal responsibility, on his view, if he or she lacks the sufficient capacity for choice or a fair opportunity to exercise it. The capacity for choice consists in the capacity to act on the conclusions of one’s practical reasoning. As such, a person with impairment to practical reasoning, or with cognitive impairment, will be excused from criminal responsibility, on his view. While he recognizes that emotions play a role in practical reasoning, and that emotions can help motivate people to choose to obey the law by allowing them to appreciate the moral reasons in favor of doing so, Moore does not require emotional competence for the capacity for choice. Nor can emotional disturbance undermine a person’s fair opportunity to choose to obey the law. This is primarily because he does not think that emotions can overwhelm cognitive judgment. Thus, emotional disturbance is implausible as an excuse from criminal responsibility, on his view.

Arnella

On Peter Arnella’s version of the choice theory, the capacity for choice requires the capacity to appreciate the moral significance of legal norms, in addition to practical reason. The

²⁴⁵ Ibid, 555.

²⁴⁶ Ibid, 561.

capacity to appreciate the moral significance of legal norms is made possible by emotional competence. This assumes a wider view of which aspects of a person's character are relevant to our culpability judgments than Moore's account. Moreover, it means that persons either with substantial cognitive distortion or with substantial emotional distortion may be excused from criminal responsibility, on Arnella's view. He introduces an important caveat with this, however, insofar as emotional distortion only excuses if it impairs one's ability to appreciate the moral significance of legal norms, and only applies to persons who are not at fault for this inability. Persons are presumed to be at fault for their inability to appreciate the moral significance of legal norms if they have been given socially created opportunities to develop it.

Arnella develops a view of choice as consisting in practical reasoning ability and what he calls "moral responsiveness," which requires moral judgment and moral motivation. Arnella understands these capacities in the psychological sense, as requiring moral judgment and moral motivation in accordance with accepted standards of right and wrong. Moreover, his view comports better than Moore's with the recent psychological research presented in the last chapter. For example, he holds that moral responsiveness, and hence moral judgment and moral motivation, are made possible by emotional competence, which was a main theme of the last chapter. Furthermore, he argues that persons are responsible for their rational choices only if they are responsible for what motivates those choices, namely their characters. While no one is fully responsible for their characters, persons may be presumed to be responsible for them in the requisite sense if they were provided certain kinds of developmental opportunities. Acquiring responsibility for our characters requires our having socially created opportunities for character development of which we are capable of taking advantage. This is consistent with the recurring theme in the last chapter that we develop core parts of character—our emotions and our ability to

recognize reasons for actions—out of our social relations with others. With this in view, let us now discuss in detail how Arnella develops his view out of his criticism of Moore.

Arnell's main objection to Moore's version of the choice theory is that it rests on too thin a conception of the moral agent's choosing capacity to ground criminal responsibility under the law.²⁴⁷ He argues that Moore's account is too "thin" because it defines moral agency "in the abstract without tying those capacities to the unique character of the individual possessing them."²⁴⁸ Not only the rationality of our choices, but also what motivates them, is relevant for Arnella.²⁴⁹ Arnella's view also develops out of a concern with the fairness of holding criminally responsible persons who cannot appreciate the moral significance of legal norms because they have some impairment to their "abilities to react to moral norms in thought, feeling, perception, and behavior" that prevents them from being able to control these aspects of their character.²⁵⁰

On the view Arnella develops, persons are excused from criminal responsibility on account of the distortion to their moral responsiveness so long as it was not caused by an earlier failure to do something that could have prevented the character defect from developing.²⁵¹ In other words, persons who had a fair opportunity not to develop the character defect that led to the criminal action are not excused, on his view. Arnella thus takes a wider view than Moore of what aspects of our characters are relevant to our culpability judgments and of what constitutes a fair opportunity to choose to obey the law. While Moore focuses on the moment of choice to decide whether a person had a fair opportunity to exercise choice, Arnella also looks to the development of persons' characters to see whether they had a fair opportunity to develop those parts of their

²⁴⁷ Peter Arnella, "Character, Choice, and Moral Agency: The Relevance of Character to our Moral Culpability Judgments," in *Crime, Culpability, and Remedy*, eds. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul (Oxford, UK: Basil Blackwell, 1990). 63.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid, 61.

²⁵¹ Ibid, 73.

character that provide persons with the ability to appreciate the moral significance of legal norms, which includes the development of their emotional competence.

Arnella argues that it is problematic that Moore's version of the choice theory would hold criminally responsible persons who are incapable of moral responsiveness through no fault of their own. Arnella's examples are psychopaths and brainwashed actors. Arnella points out that choice theorists like Moore concede that, because brainwashed actors and psychopaths are incapable of moral choice, it will be harder for them to choose to adhere to the law than for persons who appreciate moral reasons to make that choice, but nonetheless insist that such persons may be held criminally responsible because they have the ability to comply with legal norms for non-moral reasons.²⁵² This is problematic, on Arnella's view, because the force of legal norms as reasons for action comes from their moral force, which is beyond the "affective understanding" of both the psychopath and the brainwashed actor, both of whom lack the ability to appreciate and act on moral reasons through no fault of their own.²⁵³ According to Arnella, this problem with the choice theory's conception of moral agency points in the direction of a character-based conception of moral agency.

Even if one disagrees with his particular claims that psychopaths and brainwashed actors are not at fault for their conditions,²⁵⁴ one can still independently evaluate the principle upon

²⁵² Ibid, 66.

²⁵³ Ibid, 69.

²⁵⁴ Contrary to Arnella, some persons argue that psychopaths are at fault for their condition. Stephen Darwall, for example, accepts the description that psychopathy develops from "prior willful choices to reject the moral community," in Darwall, *Second Personal Standpoint* (Cambridge, MA: Harvard University Press, 2006), 88-90. Gary Watson also recognizes some plausibility to the view that psychopathy can develop willfully, and hence culpably. Specifically, if a person consents to becoming the moral outlaw that his circumstances and upbringing dispose him toward, then he may be at fault if he develops a psychopathic condition. Watson, "Responsibility and the Limits of Evil: Variations on a Strawsonian Theme," in *Agency and Answerability: Selected Essays* (Oxford, UK: Oxford University Press, 2004). Darwall and Watson both present these views in their discussions of the real world case of Robert Harris and whether he is responsible for murders he committed. Thomas Scanlon provides another route for finding psychopath at fault for their condition. He argues that while persons need the capacity to see the force of moral reasons in order to be fairly held responsible, there is an exception for persons who simply

which Arnella's view rests, which is that moral agents need the capacity to appreciate the moral significance of legal norms and are not to blame for actions they perform as a result of damage to their relevant choosing capacities that developed through no fault of their own. This, for example, would be the case with persons who had the relevant (emotional) part of their brain damaged through no fault of their own, but would arguably extend beyond this case as well. Again, however, Arnella notes the important caveat: a person who lacks moral responsiveness through an "earlier failure to do something about a character defect that clearly could impair his ability to make the right moral choice in certain circumstances" is morally culpable for this failure.²⁵⁵

Arnell explains that, "Only a character-based conception of moral agency can explain how individuals acquire this capacity for moral responsiveness and why it is sometimes fair to blame actors who fail to exercise this capacity."²⁵⁶ The character-based conception of moral agency presumes persons can exercise moral judgment and moral motivation to respond appropriately to moral reasons for action.²⁵⁷ He further explains that persons are only to blame for their rational choices if we assume that "moral agents can exercise some modest degree of control over those aspects of their character that motivate their rational choices."²⁵⁸ This requires, in addition to moral responsiveness, the capacity for critical self-reflection.²⁵⁹ It is

"resist changing what they can" in Scanlon, *What We Owe To Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 1998), 282-3. Like with psychopathy, one might object to Arnella's claim that brainwashed actors are not at fault for their own brainwashing. One way to find brainwashed actors at fault is to argue that they self-select themselves into the brainwashed role. As Christopher R. Browning explains, John Steiner defends some version of this argument for SS volunteers in Germany: Steiner "proposed the notion of the 'sleeper'—certain personality characteristics of violent-prone individuals that usually remain latent but can be activated under certain conditions" in Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York, NY: Harper Collins Publishers, 1998), 167.

²⁵⁵ Arnella, 73.

²⁵⁶ Ibid.

²⁵⁷ Ibid., 82.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

through critical self-reflection that persons acquire responsibility for their characters, a responsibility that Arnella insists needs to be presumed of persons to hold them criminally responsible under the law.

Persons acquire responsibility for their characters, on Arnella's view, when "some form of socially created *transformational opportunity* [is] made available to an individual who has the opportunity to take advantage of it."²⁶⁰ The dual sense of opportunity is worth paying attention to here. First, the transformational opportunity is socially created, and depends on factors outside the person. Secondly, the opportunity is individualized, and also depends on factors specific to the person, and specifically, to whether he or she can actually take advantage of the opportunities that have been provided by society. Fairness requires, on Arnella's view, that persons have these opportunities to develop their characters in order for us to hold them responsible for the actions that they perform as a result of having those characters.

Although it would seem to be natural for Arnella to argue that persons who lack the fair opportunity to develop aspects of their characters that help them to choose to obey the law should be excused from criminal responsibility, he does not draw this conclusion. Rather, he explains the implications of his view as follows:

Should an enlightened criminal law excuse the developmentally-disabled offender? Hardly. When sane adults commit violent crimes, we must hold them legally accountable, despite their deficits, as an act of community self-defense. However, we should not indulge in the moral hypocrisy of insisting that when we punish and even execute this group of offenders, we necessarily are giving them their just deserts. When we punish the developmentally disabled and mentally retarded offender, we are simply protecting ourselves.²⁶¹

Instead of arguing that persons warrant excuse if they lack the fair opportunity to choose to obey the law, he argues that we should still hold them accountable to protect ourselves from them. The

²⁶⁰ Ibid.

²⁶¹ Peter Arnella, "Demystifying the abuse excuse: is there one?" *Harvard Journal of Law and Public Policy* 19, no 3. (1996): 903-905.

implications of his argument are thus directed toward our own awareness of what we are doing in our practices of holding dangerous, but morally inculpable persons criminally responsible, rather than toward revising those practices so as to avoid holding such persons criminally responsible.²⁶²

In sum, Arnella argues that the kind of choice that supports criminal responsibility consists in persons having the fair opportunity to develop practical reason and the capacity to appreciate the moral significance of legal norms, as well as the fair opportunity to exercise them in the circumstances in which one acts. Because emotional competence is required for a person to be capable of appreciating the moral significance of legal norms, an emotional disturbance can undermine a person's capacity for criminally responsible action. This means that either a cognitive disturbance or an emotional disturbance can deprive a person of the fair opportunity to choose to obey the law, on his view.

What is more, Arnella argues that some persons have impaired abilities to exercise either their capacities for practical reasoning or capacities to appreciate the moral significance of legal norms. If this defect developed through no fault of the person's own, then he or she is deprived of the fair opportunity to choose to obey the law. While this provides moral grounds based on fairness for excusing such persons, Arnella concludes that overall justice may allow, and perhaps even require, that we instead hold them accountable through the criminal law in order to protect

²⁶² Peter Strawson famously argues that when we treat others this way, we adopt what he calls the "objective attitude" toward them. He contrasts the objective attitude with the participatory and reactive attitudes of love, anger, resentment, and so on. We adopt the objective attitude towards those who we regard as outside the moral community and Strawson explains that "to adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained; perhaps simply to be avoided," in Strawson, "Freedom and Resentment," 5, accessed March 12, 2014, http://people.brandeis.edu/~teuber/P._F._Strawson_Freedom_&_Resentment.pdf, (orig. pub. *Proceedings of the British Academy* 48 (1962): 1-25. R. Jay Wallace presents a similar view as Arnella in Wallace, *Responsibility and the Moral Sentiments* (Cambridge, MA: Harvard University Press, 1994). Darwall also argues in *The Second Person Standpoint* that we are justified in adopting practices that limit a dangerous person's liberty in self-protection, even if he or she does not meet the requirements for it to be fair to genuinely hold him or her responsible, 90.

ourselves. He concedes that when we use the criminal law to hold dangerous, but morally inculpable persons accountable, we are engaging in a practice that is better described as self-protection than holding persons responsible.

Duff

Antony Duff agrees with Arnella that character is relevant to our culpability judgments and our practice of excuse. Duff argues that the capacity for choice requires the basic normative understanding of the values embodied in the law and the ability to conform one's conduct to this normative understanding, in addition to the ordinary capacities associated with practical reason.²⁶³ This normative understanding captures roughly the same capacities as moral responsiveness does in Arnella's theory. Because Duff's view requires a basic normative understanding of the values embodied in the law, his view, like Arnella's, can also accommodate a character-based capacity excuse from criminal responsibility for persons in whom this normative capacity is destroyed. Duff further agrees with Arnella that considerations of character are relevant to whether a person has a fair opportunity to choose to obey the law, although the two disagree about how character is to be understood. Where Arnella's view of character takes into account how our characters are developed, Duff's view of character focuses on the specific characteristics that constitute it.²⁶⁴

Duff makes a distinction between two kinds of excuses: excuses (e.g., ignorance/mistake of fact) that negate liability by negating choice (in the minimal sense of being able to do otherwise) and excuses (e.g., duress or mental disorder) that negate liability for chosen actions. He concerns himself primarily with the second kind of excuses. Duff suggests two options to

²⁶³ R. A. Duff, "Choice, Character, and Criminal Liability," *Law and Philosophy* 12, no. 2 (November 1993): 345-383.

²⁶⁴ Arnella's view is closer to an Aristotelian conception of character and Duff's to a Humean conception.

explain how duress and mental disorder can excuse conduct. First, we could hold that actions done under duress or under the influence of a mental disorder are not “chosen.” This implies that the relevant sense of choice is a richer notion than the minimal notion supposed above.²⁶⁵ He rejects this option because it would exclude weakness of will from the purview of criminal liability and Duff holds the weak willed not to be excused. Second, we could hold that actions done under duress or mental disorder can excuse unless the agent could have chosen to act *differently*. This is a better standard, on his view, because it explains why the weak willed are not excused whereas those under duress and mental disorder are: the weak willed could have chosen *to obey the law*, but those under duress and mental disorder could not have. Duff uses Hart’s understanding of choice as requiring (a) fair opportunity to obey and (b) capacity to obey to argue that those under duress fail to meet condition (a) and those under mental disorder fail to meet condition (b).

Duff then considers in more detail the kinds of capacities that are necessary for choice. He identifies factual capacities and normative capacities that are presupposed by ascriptions of moral responsibility. The factual capacities he identifies include the capacity to recognize relevant empirical aspects of one’s action and its circumstances, the capacity of foreseeing the consequences of one’s actions, and the capacity for instrumental rationality to allow one to determine which actions will serve his or her ends. The normative capacities include basic normative understanding and the ability to conform one’s conduct to what one sees to be right. According to Duff, the factual capacities required for criminally responsible choice are not based in character, though the normative ones are.

²⁶⁵ Under this richer sense, an action is chosen if it “reflected a rational judgment that *x* was at least a good or reasonable thing to do under those circumstances, given alternatives,” *ibid*, 353.

From here, Duff then argues that a person with a mental disorder can be excused on the basis of impaired capacity to appreciate the normative aspects of her actions. In addition to this, persons who are unable to appreciate the normative aspects of their actions may also be excused under duress. Duff explains that in determining whether the excuse for duress applies in a particular case, we apply the standard of what it is reasonable to expect of a person under his or her circumstances. The reasonable person standard, also used in the criminal law, contains a normative standard, on Duff's view. He holds that the standard, properly understood, judges conduct in light of "someone with a reasonable or proper regard for the law and the values it protects, and having a reasonable or proper degree of courage."²⁶⁶ What is reasonable according to the law is what can be reasonably expected or demanded of citizens. Duff insists that when applying this standard to duress, it is crucial to consider what a reasonable person *who shares relevant characteristics with the defendant* would do in the circumstances at issue. Duff holds that in such cases any "actual characteristics that affected his response to the threat," including pathologies, are relevant characteristics.²⁶⁷

In conclusion, "What makes a person criminally liable" on Duff's view, "is... a wrongful action which, as the action of a responsible moral agent, manifests in and by itself some inappropriate attitude towards the law and the values it protects."²⁶⁸ Because we cannot explain the paradigm excuses of duress or mental disorder without reference to character, Duff holds that character is relevant to criminal responsibility; however, he argues we are not held criminally responsible for our characters, but rather for the actions we perform as a result of having them. Duff concludes that non-disordered, uncoerced criminal action is logically necessary and logically sufficient for criminal liability.

²⁶⁶ Ibid, 358.

²⁶⁷ Ibid, 359.

²⁶⁸ Ibid, 380.

Overall, Duff's view shares features with both Moore's theory and Arnella's. On the capacity for choice, Duff is largely in agreement with Arnella. On what counts as a fair opportunity to choose to obey the law, Duff's view is unlike Moore's in that he considers characteristics that are specific to individuals to be relevant to whether they had a fair opportunity to choose to obey the law. Duff is in agreement with Arnella here, but his view is also unlike Arnella's, as he does not limit the characteristics that can deprive a person of the fair opportunity to choose to obey the law to only those that persons are not at fault for developing.

Synthesis

Moore, Arnella, and Duff make valid points on the nature of choice and excuse, although each of their theories is open to objection as well. This subsection first reviews Moore's theory and shows that recent research in psychology on the role of emotion in choice that was presented in the last chapter lends support to Arnella's criticisms of it. Then, I further argue against Moore's theory by challenging his reasonable person standard for determining whether a person has been deprived of a fair opportunity to choose to obey the law and arguing, instead, in favor of Duff's standard that takes into account some of persons' specific characteristics. I argue, however, that Duff's account of which characteristics are relevant is incomplete. Duff considers relevant whichever characteristics actually affected a person's response to a threat, but I argue that the only characteristics that can undermine a person's fair opportunity to choose to obey the law are those they are not at fault for developing. That is to say, my argument supports Arnella's view that the notion of relevant characteristics must be tied to a view of responsibility for character. Finally, I consider and respond to an objection to Arnella's theory.

To recall, Arnella criticizes Moore's view on the ground that it takes too thin a view of the capacities for choice to ground criminal responsibility. On his view, Moore tries to separate our practical reasoning ability from the rest of our character, which is problematic because aspects of our character, including our patterns of feeling and perception, influence our practical reasoning. Recent work in psychology discussed in the last chapter supports Arnella's criticism of Moore's theory on this point. Emotions inevitably factor into the process of practical reasoning and can bias ordinary judgment and decision-making. Damasio and Kahneman observed, for example, that reason is inevitably and unconsciously influenced by emotion, which, if true, invalidates Moore's view that practical reasoning can operate relatively independently of other aspects of our character and that we can therefore exercise conscious control over these other aspects of our character, including our emotions.

Moore holds that emotions cannot incapacitate choice because emotions are always mediated through judgment and choice, but the psychological research presented in the last chapter suggests that this view is misguided. Recent work shows that emotions are not always mediated by conscious judgment and choice, but may be unconscious sources of our judgments. This is especially true for judgments regarding rights and responsibilities, although it has also been found to apply to utilitarian judgments. Insofar as it is true both that the choice to obey the law is the conclusion of either a judgment regarding rights and responsibilities or a utilitarian judgment, and that emotions factor into these judgments, then severe emotional disturbance can create a risk of incapacitating choice. In other words, recent empirical research suggests that Moore overstates the amount of conscious control we have over our emotions and the judgments and actions that they produce, which in turn leads him to endorse a misguided view of the role of emotion in the capacity for non-defective choice.

Moore further rejects the view that emotional disturbance can *sufficiently* impair practical reasoning to deprive a person of the fair opportunity to choose to obey the law. This is because, for Moore, the characteristics of persons that are relevant to whether they have a fair opportunity to choose to obey the law are the characteristics of a reasonable person, where a reasonable person is understood as a person of ordinary firmness. As most such persons do not have a debilitating emotional disturbance, the existence of this characteristic in the psychology of a particular individual is irrelevant to whether a person has a fair opportunity to choose to obey the law, on Moore's view. Recent work in psychology shows, however, that even if an emotional disturbance does not completely destroy practical reasoning ability, it can substantially impair that ability. This lends more support to Duff's view that specific characteristics of persons (e.g., emotional disturbance) should be taken into account in determining whether persons have a fair opportunity to choose to obey the law insofar as they influence the exercise of choice in a particular situation.

While psychology lends more support to Duff's view than to Moore's on this point, the question of which characteristics are relevant is largely a normative question that psychology cannot answer. Where Duff understands relevant characteristics as the actual characteristics that affected a person's response to a threat, there is more normative support for Arnull's view that the notion of relevant characteristics must be tied to a view of responsibility for character. Arnull argues that how a person developed his or her inability to exercise capacities for choice matters to whether he or she has the fair opportunity to exercise choice. On his view, the issue of whether a person has been deprived of a fair opportunity to choose to obey the law cannot simply be determined by looking at the person's immediate situation at the moment of choice, but must also be based on a consideration of how that situation of choice was created. Several notable

theorists of moral responsibility defend a similarly expanded notion of what considerations are relevant to whether persons have the fair opportunity to choose to obey the law.²⁶⁹ They hold that the opportunities persons have to *develop* into the kinds of beings who are capable of responding to reasons for action and choosing in light of them are also relevant to culpability.

The foregoing discussion shows that there are various strengths to Arnella's theory. First, his notion of the capacity for choice is more consistent than Moore's with recent work in psychology on choice. Secondly, his view of which characteristics are relevant to determining whether a person had a fair opportunity to exercise choice is consistent with recent work on moral responsibility. This work supports his view that the only characteristics that are relevant to depriving persons of the fair opportunity to exercise choice are those they developed through no fault of their own.

My analysis so far points in the direction of Arnella's theory as the superior version of the choice theory, although I now turn a critical eye toward it. In particular, I now show that Arnella's view depends on a rejection of the claim put forth by legal positivists that laws provide sufficient reason for action and that he does not defend his view. Arnella argues that persons must be capable of recognizing the moral reasons for obeying the law in order to be held criminally responsible for violating it. He bases this on his view that legal norms acquire their force from their consonance with morality. This assumes that a person must have the ability to appreciate moral reasons to choose to obey the law in order to have the fair opportunity to choose to do so.

²⁶⁹ See, for example, Susan Wolf, *Freedom within Reason* (New York, NY: Oxford University Press, 1990); Wallace, *Responsibility and the Moral Sentiments*; Gary Watson, *Agency and Answerability: Selected Essays* (Oxford, UK: Oxford University Press, 2004) and John Martin Fischer and Frank Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge, UK: Cambridge University Press, 1999).

Because laws also provide non-moral reasons for action (i.e., penalties), however, one could argue that the capacity to appreciate the moral significance of legal norms is unnecessary for persons to be capable of choosing to obey the law. This issue was discussed in Section I, where I argued that having the ability to appreciate moral reasons in support of international legal norms is required to obligate persons under international criminal law, although it is not necessary under domestic law. To recall, this is because part of international criminal law, unlike domestic law, is based on *jus cogens* norms that are taken as universally accepted and binding without explicit consent because they are held to derive their force from morality. As suggested in Section I, *jus cogens* norms are most relevant to explaining the manifest illegality provision of international criminal law.

Under domestic law, on the other hand, laws acquire both their status as law and their binding force through their non-moral validity and are held to provide sufficient non-moral reason for action. Thus, if Arnella's theory is to provide a defensible theory of criminal responsibility and excuse for domestic law operating within a functioning legal system, he must defend his assumption that the non-moral reasons for action that the law provides are insufficient to provide persons with the opportunity to choose to obey the law. Insofar as his theory is applied to criminal responsibility and excuse under international law, however, the objection I advance toward his theory does not apply.

Conclusion

In this chapter, I argued that Moore's theory as currently formulated rests on a misguided view of the role of emotion in the capacity for choice that makes his view empirically indefensible. From this, it follows that some characteristics that are specific to persons are

relevant to determining whether they have a fair opportunity to choose to obey the law. This is the standard as Duff understands it, and I argued that Duff's understanding is superior to Moore's. However, I disagreed with Duff with respect to which specific characteristics are relevant. Where Duff understands relevant characteristics as the actual characteristics that affected a person's response to a threat, I built on Arnella's theory to argue that the notion of relevant characteristics must be tied to a view of responsibility for character. I then argued that the only characteristics specific to persons that are relevant to depriving them of the fair opportunity to choose to obey the law are characteristics that they developed through no fault of their own. Lastly, I objected to Arnella's theory on the ground that it assumes without argument that legal norms acquire their force from their consonance with morality, which takes for granted that the law does not provide persons with sufficient non-moral reasons to choose to obey the law. This is problematic insofar as it is assumed without argument and because alternative views have considerable support from legal theorists to whom Arnella offers no response. Nonetheless, I argued that this objection does not preclude the application of his theory to international criminal law, where this assumption is considerably more plausible.

In the next chapter, I show that Arnella's view of choice and fair opportunity is consistent with existing international criminal law. In particular, I show that international criminal law assumes that persons whom it holds responsible are capable of practical reason and normal moral perception. Then, I argue on the basis of the previous empirical chapters that traumatized ARC soldiers who were recruited at a young age into extreme groups that subjected them to coercion, isolation, and socialization to standards of right and wrong that are radically at odds with accepted standards cannot simply be presumed to have normal moral perception. From there, I

argue that if they lack normal moral perception through no fault of their own, they are deprived of the fair opportunity to choose to obey the law.

CHAPTER 5

SHOULD ARC SOLDIERS BE HELD CRIMINALLY RESPONSIBLE UNDER INTERNATIONAL CRIMINAL LAW FOR ACTS THEY COMMIT IN ARMED CONFLICT?

Introduction

In this chapter, I first show in Section I that international criminal law is consistent with a version of the choice theory that requires practical reasoning and normal moral perception for the capacity of choice and that treats the fair opportunity to develop these capacities as part of the fair opportunity to exercise them. In Section II, I then argue, on the basis of the previous empirical chapters, that a subset of ARC soldiers, who are traumatized by their experiences as child soldiers, warrant excuse under this version of the choice theory. This is based on the view that persons who lack normal moral perception and have impaired practical reason, which developed through no fault of their own, are deprived of the fair opportunity to choose to obey the law. Finally, in Section III, I identify and respond to three objections to my account.

I. The capacity for choice

This subsection shows that international criminal law is consistent with Arnella's view that the capacity for choice consists in practical reasoning and basic moral competence. I first show that international criminal law assumes persons to have practical reason. Then I show that international criminal law assumes persons to have the basic moral competence of normal moral perception. I conclude the subsection by raising the concern that, while international criminal law assumes that all ordinary adults (understood as legal adults in whom practical reason is not destroyed) are capable of normal moral perception, this is not always the case.

Like U.S. criminal law, international criminal law recognizes an excuse from criminal responsibility for persons who cannot know what the law requires of them or conform their conduct to it because they are mentally ill.²⁷⁰ The Rome Statute states:

A person shall not be criminally responsible if, at the time of that person's conduct, the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.²⁷¹

Moore argues that contained in the similar excuse found in various U.S. state criminal codes is the assumption that persons need practical reasoning to be capable of choices that support criminal responsibility.²⁷² While there are problems with Moore's version of the choice theory, his interpretation here is a defensible one. As explained in Chapter 2, practical reasoning is the capacity for judgment and decision-making. The capacity for judgment is needed for persons to be capable of appreciating the unlawful nature of their conduct and the capacity for decision-making (or, making the decision to act on their judgments about what the law requires) is needed to conform their conduct to the law's requirements.

In addition to requiring practical reason for choices supporting criminal responsibility, international criminal law requires some basic moral competence. The provision in the Rome Statute that states orders to commit genocide or crimes against humanity are "manifestly unlawful" supports this interpretation. Larry May and Mark Osiel argue that for persons to be capable of seeing the manifest illegality of these crimes, they must have normal moral

²⁷⁰ Other formulations of this excuse that have been embraced in the law include the M'Naughten rule and the Durham rule. The M'Naughten rule, which is still the standard in about half of the U.S. States, created a presumption of sanity, unless the defense proved "at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong." The Durham rule, or the irresistible impulse test as it is also sometimes called, holds "that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." U.S. federal courts eventually rejected the Durham rule on the ground that it cast too broad a net. This information was found online through the Legal Information Institute at Cornell University, accessed April 2, 2014, http://www.law.cornell.edu/wex/insanity_defense.

²⁷¹ Rome Statute, Part 3, Article 31.

²⁷² Moore, "Mental Illness and Responsibility."

perception. “Moral perception” is a mode of moral judgment that does not depend on reasoning and is typically described through the metaphors of “seeing” or “feeling” that something is right or wrong. “Normal moral perception,” as I use the term, is moral perception in accordance with the basic standards of right and wrong that are accepted by the international community. Following May and Osiel, I argue that international criminal law assumes people to have the degree or level of sophistication of moral perception required to perceive the wrongfulness of international crimes. Because these crimes cover acts such as murder or mutilation of innocent people, it is fair to say that one simply needs normal moral perception to satisfy the assumption, where this is understood as the ability to see that these acts are wrong. Simply knowing that others think that such conduct is wrong is not moral perception as such, though it would be enough (in most circumstances) for a person to know that the behavior is “manifestly unlawful.” It is reasonable to expect, however, that the traumatized ARC soldiers to whom my argument applies lack this knowledge as well because they have been and remain isolated from persons who have normal moral perception.

To establish the proper background for my argument, I first lay out a brief history of the doctrine of manifest illegality and show that, despite the absence of explicit moral language in the Rome Statute’s version of the doctrine, it still assumes that ordinary adults are capable of perceiving where basic moral norms apply in accordance with accepted standards of morality, which is the same as knowing that others think certain conduct is wrong. To understand the manifest illegality doctrine, we need to briefly discuss the excuse of superior orders. Before the Nuremberg trials, which prosecuted Nazi perpetrators of the mass atrocity against the Jewish people, soldiers could be excused from criminal responsibility for acts they performed in war simply by establishing that they were following orders from a superior. This defense was

challenged at Nuremberg. The judges held that some actions are so obviously wrong that the fact that a soldier was following an order from a superior could not function as an excuse for performing them. Even if the law did not prohibit such acts, the Nuremberg Court held that they were “crimes against humanity” for which soldiers could be prosecuted, regardless of whether they were obeying orders. Soldiers who were ordered to commit mass atrocity against the Jews, for example, were expected to have the requisite moral perception to realize that what they were ordered to do was wrong and that they were required to do otherwise. As May explains, “Moral perception here is filtered through the lens of what humanity would consider outrageous” and “whether there was a moral choice to act differently than the soldiers acted.”²⁷³

The Rome Statute further narrows the defense of superior orders. The most relevant part of the Rome Statute’s view on the applicability of the superior orders excuse is the provision that “orders to commit genocide or crimes against humanity are manifestly unlawful.”²⁷⁴ As May observes, while the defense no longer makes any explicit reference to the morality of the order, “there seems to be a partial convergence with the Nuremberg defense, since ascertaining what is manifest requires use of moral perception.”²⁷⁵ Osiel recognizes something similar:

The doctrine of manifest illegality... rests on the assumption that every reasonable person possesses a moral sense, endowed by nature or instilled by society, enabling him to identify egregiously wicked conduct as such. The law makes no sense, in other words, unless conventional morality is sufficient to enable the person of ordinary understanding to identify radically evil orders as just that. To stress the fragility of conventional morality is therefore to shake the foundations of the manifest illegality rule.²⁷⁶

May and Osiel both provide convincing accounts that, through the manifest illegality provision, international criminal law assumes persons to have the requisite moral perception or moral sense to perceive the wrongfulness of international crimes. What is more, both object to the provision.

²⁷³ May, *Crimes Against Humanity*, 191.

²⁷⁴ Rome Statute, Part 3, Article 33, Section 2.

²⁷⁵ May, 197.

²⁷⁶ Mark Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (New Haven, CT: Yale University Press, 2001), 151.

May objects to the manifest illegality provision on the ground that it is too demanding as applied to ordinary soldiers in extreme combat situations. He considers the infamous massacre at My Lai, where American troops killed unarmed civilians, including women and children. Where some of these soldiers were prosecuted for the massacre, May questions whether they could reasonably have been expected to perceive that killing the My Lai villagers was unlawful and wrong, after having been engaged in a guerilla war with their enemy and having been notified by their superiors that every person in the village posed a threat to them. May's challenge to the idea that ordinary soldiers can exercise normal perception in the abnormal circumstances of armed combat is based on psychological research showing that hostile circumstances impair judgment.

Like May, Osiel objects to the manifest illegality provision, but unlike May's, his objection is focused on the uncertain scope of the provision. He does not reject the idea that some actions are clear immoralities that every ordinary soldier should know are wrong, and that events like those that unfolded at My Lai are avoidable, but he argues that the manifest illegality rule is not the answer. Instead, Osiel argues that the best way to prevent soldiers from following illicit orders and to prevent massacres like My Lai from happening again is to train soldiers properly, which, for Osiel, means returning to a code of martial honor and military virtue, under which soldiers are trained not only in military strategy, but also in military professionalism and ethics.

Like May and Osiel, I also interpret the manifest illegality provision to assume that ordinary adults are capable of normal moral perception. Moreover, I argue, like May, that some soldiers cannot reasonably be expected to exercise normal moral perception in the abnormal circumstances of armed conflict and I argue, like Osiel, that part of the problem is that some soldiers lack normal moral perception as a result of not having the proper ethical training.

Building on their work, I argue that the manifest illegality rule should not apply to soldiers who lack normal moral perception through no fault of their own. In the next subsection, I argue that this may be the case for a subset of ARC soldiers who were (1) recruited at a young age into extreme groups and (2) subject to coercion, isolation, and socialization in accordance with standards of right and wrong that are radically at odds with the standards accepted by the international community. I use the term “traumatized ARC soldiers” to refer to this subset and I define the term as follows. “Traumatized ARC soldiers” are ARC soldiers whom it is reasonable to expect would lack normal perception and have impaired practical reason as a result of being subject, throughout their adolescent formative years, to coercion, isolation, and socialization in accordance with standards that are radically at odds with internationally accepted standards of right and wrong, and who do, in fact, have these defects or had them at the time they performed the action(s) alleged to constitute a crime under the Rome Statute.

II. The fair opportunity to exercise choice

In this subsection, I argue that some traumatized ARC soldiers in extreme armed groups may lack normal moral perception in accordance with international standards as a result of their experiences as child soldiers, and that such soldiers are not at fault for their defective development. ARC soldiers may have developed such a defect if they were recruited at a young age into extreme groups that subjected them throughout their formative adolescent years to coercion, isolation, and socialization in accordance with standards of right and wrong that are radically at odds with international standards, and who remain, at the time of their crimes as adults, in the forcibly limited and hostile environment of armed conflict.

This judgment that such traumatized ARC soldiers are not at fault for their defective development is based on three ideas. The first is that it is unreasonable to expect them to have acted differently than they did in response to the threats that they faced as children during their early recruitment, initiation, and indoctrination inside armed groups. The second is that, based on this, it is unreasonable to expect them to have made choices that would have enabled them to develop differently than they did in light of these experiences. The third is that because they developed into adults with morally defective characters and remained in the forcibly limited and hostile environment of armed conflict at the time of their crimes, it is unreasonable to expect them to remedy their character defects by exercising the capacities that ordinary adults are expected to exercise.

In what follows, I explicate ideas by referring to the experiences of typical child soldiers in armed groups, as detailed in Chapter 2, and to the psychological research presented in Chapter 3 on the typical course of normal development and threats to it. Following Arnella's notion that the fair opportunity to exercise choice depends on the fair opportunity to develop one's choosing capacities. I approach the question of whether traumatized ARC soldiers are at fault for their defective development as the three-fold question of (1) whether they had the fair opportunity to exercise choice to obey the law during their recruitment and in response to the early pressures facing them once inside armed groups, (2) whether they had the fair opportunity to develop normal moral perception in accordance with international standards as child soldiers inside armed groups, and (3) whether they now have the fair opportunity to develop normal moral perception as morally defective adults who remain inside the forcibly limited and hostile environment of armed conflict. In the remainder of the section, I develop an account of how these questions should be resolved and I consider objections to my account along the way.

To begin with the first question above, which as we will see converges into the second, let us start with how child soldiers are recruited. As described in Chapter 2, some child soldiers are abducted, others are forcibly recruited, and still others volunteer for armed groups. Child soldiers who are abducted by armed groups are clearly not at fault for their entrance into these groups and, as explained in Chapter 2 many child soldiers in extreme armed groups like the RUF or LRA are recruited this way. I argue that for both forcible recruits and volunteers, the stage of the development of the child is relevant, for which the child's age can be used as a proxy. For forcible recruits, the harm threatened for non-compliance is a relevant consideration, and for volunteers, the reason the child volunteers is relevant to the judgment of whether he is at fault for joining an armed group.

I argue that, in most cases, child soldiers who are forcibly recruited into armed groups are not at fault for their recruitment. Through no fault of their own, they are timid and vulnerable, making them highly susceptible to threats to their bodily security. As discussed in Section II, Duff points out that children who cannot be held to be at fault for their natural developmental immaturity and vulnerability cannot be held to be at fault for the effect that their immaturity and vulnerability have on their response to threats to their security, and thus do not have a fair opportunity to exercise choice. As also noted in Section II, the fact that specific characteristics of persons affect their actual responses to threats is necessary, but not sufficient, for showing that they have been deprived of the fair opportunity to choose to obey the law. It is not simply the case that children are not at fault for succumbing to threats to their security on account of being timid and vulnerable. Rather, they are not fault for succumbing to threats that ordinary adults would be expected to withstand because they are not responsible for their timidity and vulnerability. It is the combination of the fact that children have characteristics that burden their

choice to resist threats and the fact that they are not responsible for these characteristics that warrants the judgment that they are deprived of the fair opportunity to choose to obey the law under threatening circumstances.

Let us now consider whether child volunteers are at fault for their entrance into armed groups. Very young children who are cognitively unable to understand the nature of their conduct or the consequences of their actions are not at fault for volunteering regardless of what motivates them to volunteer. This is because being unable to understand the nature of their conduct or the consequences of their actions shows they are incapable of acting on the basis of reasons. If they cannot at all act on the basis of reasons, then they cannot be considered responsible beings, and if they cannot be considered responsible beings, then their conduct simply reflects genetic predisposition or natural temperament, which is the result of “moral luck” for which they are not at fault.²⁷⁷ This only applies to very young children who have not yet developed cognitive competence, but because the decision to join armed forces is one with such considerable consequences given the possibility that one will have to kill or may be killed, even older children who have developed relatively mature cognitive competence are typically not presumed to have the ability to appreciate the relevant reasons for joining armed forces until late adolescence.

Under international criminal law, it is a crime to conscript or enlist children under 15 to participate actively in hostilities.²⁷⁸ The ICC has given active participation a broad interpretation to include “a wide range of activities, from those children on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the

²⁷⁷ On moral luck, see the now classic debate between Thomas Nagel and Bernard Williams. Nagel, *Mortal Questions* (New York, NY: Cambridge University Press, 1979) and Williams, *Moral Luck* (Cambridge, UK: Cambridge University Press, 1981).

²⁷⁸ Rome Statute, Part 2, Article 8.

combatants.”²⁷⁹ This sets the standard under international criminal law, making the age of lawful voluntary recruitment into an armed group 15 years old. Under U.S. federal law, on the other hand, persons must be 18 to volunteer for the armed forces, or, with parental consent, they may volunteer at age 17.²⁸⁰

I propose the following account for thinking about when children may be considered open to fault for volunteering for armed groups, which is largely consistent with the legal standards identified above. Typical children who are mid-adolescents or younger are not at fault for joining armed groups because they are not developed enough to appreciate the reasons for and against making such a decision. Based on their under cognitive underdevelopment, they can not reasonably be expected to reliably and accurately assess the facts that are relevant to such a decision. Nor can they reasonably be expected to foresee and appreciate the consequences of this decision on the particular actions they may be forced to perform or on how performing these acts create a risk of damaging their moral characters.

Older adolescents, on the other hand, may be responsible for their decision to join armed groups in some cases. To determine whether older adolescents are responsible for volunteering to join armed groups, it matters why they volunteered. In Chapter 2, I cited the following reasons for why children report to volunteering for armed groups: for security, to be reunited with family or friends, in promise of money or education, for political motivations, or to seek revenge. Based on the age standards discussed above, I argue in favor of the following. All other things being equal, older adolescents who reasonably believe that their only hope for security is to join armed groups are not at fault for doing so. I propose a similar standard for children who volunteer for

²⁷⁹ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 24 (March, 14 2002).

²⁸⁰ 10 U.S.C. 505, as provided by the Legal Information Institute at Cornell University Law School, accessed April 6, 2014, <http://www.law.cornell.edu/uscode/text/10/505>.

armed groups to be reunited with family or friends, in promise of employment or education, or for political motivation. In particular, I argue that older adolescents are not at fault for joining armed groups if their decision was based on the reasons stated above and they reasonably believe that the desired outcomes are likely (e.g., being reunited with family or friends, being provided employment or education, or participating in just revolution) and do not intend to cause more harm than they seek to avoid. To recall, this latter standard of not intending to cause more harm than one seeks to avoid comes from the existing excuse for duress under international criminal law.²⁸¹ While children who join armed groups are not under duress *per se*, the pressures they face may it reasonable to expect that may believe that joining an armed group is a justified response to their situation. Conversely, the judgment that older adolescents are at fault for joining armed groups on these bases becomes more plausible the less reasonable their beliefs are that their desired outcomes are likely and the more they should be aware that they would be pressured to perform actions for which they would cause more harm than they seek to avoid.

One might argue that the situation is different for children who volunteer for an armed group in order to seek revenge. The key question here is whether they reasonably believe that vengeful actions are just, which depends on their development of the conception of fairness. This is an issue of moral development, and in particular, of the development of moral reasoning and moral judgment. Even if children who volunteer to seek revenge can reason about fairness, it also matters whether they can apply their knowledge in particular cases, including to their own conduct, through moral judgment. As we saw in Chapter 3, moral judgment is heavily influenced by emotions, which creates the risk that children with underdeveloped emotional competences will have trouble making sound moral judgments in applying their knowledge to particular cases.

²⁸¹ See Chapter 1 for a more thorough treatment of the excuse of duress under existing international criminal and my application of it to ARC soldiers.

As I also showed in Chapter 3, the integration of reason and emotion occurs during adolescence and is a highly vulnerable process, especially to disruption caused by stress. The fact of joining an armed group for revenge itself shows that the child suffered some loss or harm for which he is seeking revenge. Because loss and harm create stress, it is reasonable to expect that the event(s) in response to which the child volunteers for an armed group disrupted the integration of his reason with emotion, thus impairing his ability to make moral judgments regarding the fairness of his revenge-seeking conduct on the basis of his general moral knowledge about fairness. The older the child is, however, when he suffered the harm or loss for which he seeks revenge, and the more developed his moral capacities are to grasp the moral reasons against revenge-seeking conduct, the more plausible the objection becomes that child soldier who volunteer for armed groups to seek revenge are fault for doing so.

The foregoing analysis of whether child soldiers may be held at fault for joining armed groups suggests that it is reasonable to presume lack of fault for children who join armed groups up at least up until mid-adolescence. With this in view, let us consider how to determine whether they are at fault for how they respond to the situations they face once inside armed groups. This is important because once inside armed groups, the actions that child soldiers perform in response to the situations they face shape their characters, including their moral perception. Hence, the standards we use for determining whether child soldiers are at fault for how they respond to the situations they face inside armed groups are tightly bound up with whether it is reasonable to consider them responsible for the characters they form inside these groups.

Chapter 2 explained that, once inside armed groups, children are subject to various kinds of treatment to keep them inside the groups. These methods of retention often include coercing child soldiers to perform violent acts early on in order to separate them from their former lives

and bind them to the group, as well as isolating them from society during their indoctrination into the values of the armed group. Some of the most coercive methods of retention used early on include physically binding children together (a method used by both the RUF and LRA) and publicly killing or harming children who try to escape in order to deter others from trying. In what follows, I explain which of these practices, if any, child soldiers may be at fault for participating in, including how they act in response to the threats they face.

Before doing so, it is worth noting that children can be morally at fault for some of the harms they inflict on others and recalling an earlier discussion from Chapter 4 that responsibility for one's character necessarily requires being held responsible for some decisions made in childhood. The crucial questions for my purposes are, first, whether child soldiers in extreme groups are morally fault for some of the harms they inflict inside those groups, and secondly, if so, is the degree of fault sufficient to hold those who develop defective moral characters as result responsible for those characters? I argue that not only must there be a high degree of fault that attaches to the particular actions performed by child soldiers for those who develop defective moral characters as a result to be responsible for those characters, but also that these particular actions must have been performed in light of a general awareness that performing such actions creates the risk of defective moral development to their characters. In other words, for the fault that may be found to attach to the particular actions of child soldiers to be sufficient to establish that they are responsible for the moral characters they develop as a result, they must be presumed to have been able, when performing such particular actions, to appreciate the likely way in which those particular actions would have an impact on the development of their characters.

With this in view, let us begin by considering whether child soldiers who are put through initiation rituals are at fault for their participation in these events. As explained in Chapter 2,

armed groups typically use initiation rituals that are aimed at separating children from their previous lives and binding them to the armed group. Armed groups like the RUF and LRA are known for initiating child soldiers into the group in ways that combine sheer brutality with symbolic traditionalism. Child recruits in these groups may be forced to kill a family member or friend as an initiation rite and then put through a ritual process that resembles the ones used by their indigenous communities for when children in the community mark their transitions into adulthood.

One might object that child soldiers who are ordered to kill a family member or friend during initiation are at fault for complying, regardless of whether they face the threat of imminent death upon refusing, and that this thereby makes them at fault for the situations that unfold after they perform these actions and the developmental outcomes that result. The force of this objection is undermined, however, by the fact that ordinary adults are excused on the basis of self-defense for using reasonable and proportionate force to prevent an imminent threat of death to themselves. This is the standard recognized under the Rome Statute for the excuse for self-defense to apply. Even if it would not be found reasonable for an ordinary adult to use force against innocents in self-defense, typical young children cannot be expected to grasp the moral prohibition on killing an innocent person to save one's own life, and even for older children who can, it is unreasonable to expect that they apply it when faced with the situation.

One may also object that the fact that some young children refuse to follow orders to kill a family member or friend during initiation is evidence that they have normal moral perception. If this is right, then one might insist that it undermines the relevancy of the question of whether child soldiers are given the fair opportunity to develop normal moral perception inside armed groups. Assuming that their refusal to kill a family member or friend is not simply the result of

being paralyzed by the situation, but reflects their moral refusal, they perceive that killing a family member or friend as wrong based on their relationship to that person, rather than because they grasp the broader moral principle that it is wrong to kill an innocent person to save one's own life and perceive that it applies to their case. Granted, their refusal may indicate that children of their age have some moral perception, but nothing in my argument implies or require the contrary. Rather, my argument is that these children cannot reasonably be expected to make the decisions they would need to make in order to develop the capacities and character that they would need as adults to have a fair opportunity to decide not to participate in atrocities and to obey the law instead. I have suggested that part of this consists in having the capacities to grasp moral principles like the prohibition against killing innocent persons to save one's own life and to properly perceive when it applies, including to one's own conduct, which, based on children's natural and non-culpable egoism, it is unreasonable to expect them to have.

If children who are forced to kill an innocent person during initiation are not at fault for this because they cannot reasonably be expected to understand that it is wrong, and it is also true that performing this act is a crucial point in the process of separating them from their previous lives and binding them to the group, then it starts to make the notion that these child soldiers are not at fault for their defective characters look more plausible. Next, suppose these children are put through rituals that resemble the traditional ceremonies used by their communities to mark the transition of children to adulthood. Based on the psychological research presented in Chapter 3, the juxtaposition of these events creates the risk that these children will develop cognitive dissonance as they try to make sense of their situation and that emotional disturbance will result.

Let us now consider some of the other methods used by armed groups to keep child soldiers from escaping as they affect whether child soldiers are at fault for their part in them. For

obvious reasons, soldiers cannot be faulted for remaining inside armed groups if they are physically restricted from leaving by being kept in a chain gang or tied to other child soldiers, as are child soldiers in the RUF and LRA. Moreover, child soldiers who are brought into the “bush” (or the isolated jungle) for training and indoctrination, like those in the RUF and LRA, cannot reasonably be expected to try to escape if they are credibly threatened for attempting to do so and have no sense of where they are or where to go if they escape. As explained in chapter 2, typical child soldiers in the RUF are also forcibly drugged to desensitize them to violence, and some reports document the same for child soldiers in the LRA. It is unreasonable to expect children with underdeveloped cognitive and emotional abilities to exercise these well under the influence of drugs, especially under hostile circumstances. As a result of being heavily intoxicated, it is reasonable to expect that child soldiers will focus their needs immediate needs, especially their security, from which it is unreasonable to expect that they manifest a conscientious attending to the facts of their situation that is it reasonable to expect from a child who is not heavily intoxicated.

Finally, in addition to being physical restrained, isolated, and drugged, child soldiers in extreme groups are also indoctrinated with highly questionable (and some patently false) factual accounts to explain their situation and reinforce the values of the group into which they are being socialized. As we saw in Chapter 2, the RUF leaders present themselves as parental figures to new child recruits and RUF “ideology officers” focus on making them loyal by indoctrinating them with a story about how the RUF is committed to the demands of the rural underclass, from which most child recruits are abducted. This is accompanied by accounts also told to them about how there is no hope for security outside the armed group, which makes it reasonable to expect that child soldiers will come to believe that their rebel camp offers a stability that is lacking in

the outside world. In the LRA, new child recruits are also indoctrinated with factual accounts to explain their situation and reinforce the values of the group into which they are being socialized. As indicated in the quotation from Wessells in Chapter 2, the LRA regularly lies to child soldiers, telling them that if they escape the Ugandan army will capture them and subject them to bodily harm or death. It is reasonable to expect they believe these claims because they have no contact without the outside world to test their truth. What is more, LRA leader Joseph Kony presents himself to the children as a savior, and appeals to their religiosity in order to make them believe his factual accounts and the values of right and wrong that those accounts are manufactured to reinforce.

Now that I have provided reason for thinking that child soldiers cannot be at fault if they do not escape armed groups that physically restrain them, isolate them in the jungle far from society, drug them to focus their attention on serving basic needs for survival, and provide them with highly questionable or patently false factual accounts about the nature of their situation, let us now consider whether they are at fault for the further violent acts they are ordered to commit early in their time inside armed groups. Child soldiers who are ordered to commit violent acts against others, in an effort to desensitize them to violence, cannot reasonably be expected to refuse if doing so means that they will suffer comparable harm to themselves.²⁸² Even if child soldiers in extreme groups would not face actual harm to their wellbeing or security for refusing to carry out orders or for not participating in violent group activities, they may reasonably believe that they would. Evaluating the actual consequences of their actions and determining what are reasonable responses to their situations are complex tasks that require normal cognitive

²⁸² This does not, of course, mean that we cannot praise those who do resist injustice. We can both praise child soldiers who resist injustice while holding that the law should be tailored to what is reasonable to expect of ordinary children.

and emotional maturity that typical children who grow up in peaceful environments do not develop until mid- to late adolescence. Recent research shows that being under stress during adolescence poses important threats to the development and integration of cognition and emotion, which makes it unreasonable to expect children who grow up in hostile environments to develop the ordinary capacities of children at similar ages who grow up in relatively peaceful environments.

I have argued above that it is unreasonable to expect typical child soldiers to withstand direct threats to their security made by others in the larger context of the pressures facing them inside armed conflict. Child soldiers in extreme armed groups like the RUF and LRA not only face such threats and pressures but are also taught that there is nothing morally wrong with harming others, including innocents. On the contrary, they are rewarded and applauded for it. The psychological research presented in Chapter 3 showed that normal moral development, including the development of normal moral perception, depends on an ongoing process of biological and social maturity that continues throughout adolescence. Moreover, there I presented research showing that adolescence is a particularly vulnerable period of development, which creates the risk of defective moral development. This creates the risk that child soldiers who had normal moral perception for their age before entering armed groups will have that perception distorted by traumatic experiences. I argue that the indoctrination of child soldiers in accordance with values that are radically at odds with internationally accepted standards of right and wrong are the kinds of experiences that can traumatize a developing child and distort his moral perception. Rewarding and applauding child soldiers for causing harm to others, especially innocents, are examples of indoctrinating experiences that can have this effect.

The foregoing discussion first sought to examine whether new child recruits had the fair opportunity to exercise choice to obey the law in the face of threats by armed groups and the pressures created by their circumstances. This question converged with the second question I posed to motivate the inquiry of whether, based on their experiences, child soldiers have the fair opportunity to develop normal moral perception in accordance with international standards inside armed groups. The discussion illustrated that those child soldiers who are not at fault for their part in the various processes of their recruitment, initiation, and indoctrination cannot be held to be at fault for the developmental outcome of these processes. Based on empirical and psychological research, I argued that child soldiers who are recruited at a young age into armed groups that subject them, through their formative adolescent years, to coercion, isolation, and socialization in accordance with values that are radically at odds with internationally accepted standards of right and wrong are not at fault if they develop defective aspects of their moral character, including distorted moral perception (i.e., not in accordance with international standards) as a result. Nor is it fair to hold them criminally responsible for choosing to violate the law if having these defects deprives them of a fair opportunity to choose to do otherwise.

Not only does contemporary empirical and psychological research support the view that it is unreasonable to expect child soldiers from extreme armed groups to develop normal moral perception in spite of their experiences as child soldiers, there is also support from contemporary moral theory that childhood abuse and other forms of childhood deprivation detrimentally affect adult development such that the adult is not at fault for their defective development.²⁸³ While

²⁸³ Wolf and Wallace both argue that adult victims of extreme childhood abuse or deprivation can be unfairly deprived of the opportunity to develop choosing capacities. On Wolf's view, childhood abuse may burden a person's ability to develop the tendencies associated with our practices of responsibility, and on Wallace's view, childhood abuse may significantly limit the opportunities a person has to develop the capacities of moral agency. Wolf observes that persons who have radically deprived childhoods are not provided with the opportunities that ordinary people have to develop the capacities of "normative competence," which is the ability to act in light of moral

some theorists argue that childhood abuse is insufficient to destroy a person's moral development,²⁸⁴ the treatment of child soldiers in extreme groups includes not only abuse, but also other harmful influences, including isolation and socialization in accordance with radically distorted notions of right and wrong. Thus, even if these theorists are right that even childhood abuse is insufficient to show that an adult is not at fault for his or her defective development, their arguments do not apply to child soldiers from extreme groups who are subject to treatment that goes beyond abuse.

As soldiers who commit crimes during childhood will not be held responsible under international criminal law in any case, the key question concerns the criminal responsibility of ARC soldiers--adult soldiers who were recruited as children, but who commit crimes after reaching adulthood within the group. The moral theorists who argue that childhood abuse and similar unfortunate formative circumstances do not undermine the blameworthiness of adults for their character defects also tend to argue that adults assume responsibility for their characters simply by not changing them. This view is associated with the third question posed above, which, to recall, is whether ARC soldiers have the fair opportunity to develop normal moral perception because they are adults.

One might argue that because ARC soldiers are no longer coerced, forcibly isolated, or subjected to extreme practices designed to socialize them into standards of right and wrong that

reasons for action, without which persons are not fully responsible beings. Normative competence is learned in society, according to Wolf, and part of it consists in coming to develop emotional competence, or experiencing the right emotions in response to the right situations. Persons with impairment of the capacities that go into normative competence cannot simply be expected to act in accordance with accepted standards of right and wrong because they are not as free to do so as are persons who developed normative competence. The last chapter showed that one of the areas of greatest concern with regard to the adult development of child soldiers is emotional development. Like Wolf, Wallace holds that responsible beings are distinguished by their possession of the capacities for normative competence, which he construes as the abilities to grasp and act on moral reasons for action. Wallace also observes that normative competence is developed within society and that certain kinds of extraordinarily unfortunate formative circumstances can deprive persons of the fair opportunity to develop it.

²⁸⁴ Darwall and Scanlon agree with Wolf and Wallace that persons need the capacity to act in light of moral reasons for action, but they reject the idea that childhood abuse can deprive a person of the fair opportunity to develop it.

are at odds with international standards that they now have the fair opportunity to develop normal moral perception and are at fault if they do not. This view concedes that the experiences of child soldiers in extreme groups deprive them of the fair opportunity to develop normal perception as children, but holds that once they become adults, they may reasonably be expected to exercise other abilities to fix their character defect and develop normal moral perception. Along these lines, it may be argued that traumatized ARC soldiers assume responsibility for their developmental defects by resisting changing what they can²⁸⁵ or by culpably consenting to being the kinds of persons that they have become.²⁸⁶

To determine whether this view is plausible, we need to identify the assumptions upon which it depends and whether they apply to the case of traumatized ARC soldiers who remain inside the forcibly limited and hostile environment of armed conflict. This view depends on the assumption that adults have reflective self-control.²⁸⁷ Reflective self-control is the set of abilities that allow persons to reflect on constitutive parts of their characters and the ends they incline them to pursue, and to judge whether to maintain or change their characters, and finally, to act on the conclusions of these judgments.

I argue that this view is highly problematic as applied to traumatized ARC soldiers who remain in armed conflict. First, while they may no longer be subject to direct threats rising to the level of coercion, the pressure of their situation that it is reasonable to expect will be felt by those with emotional disturbance who are in the forcibly limited and hostile circumstances of armed conflict will be comparable to the pressure that is felt by a person of ordinary firmness under a situation of direct coercion. Secondly, while traumatized ARC soldiers may no longer be forcibly

²⁸⁵ This is Scanlon's argument for why adults who were victims of childhood abuse and who cannot appreciate moral reasons are responsible for their own defects.

²⁸⁶ Watson considers this for this strategy for showing how a person with unfortunate formative circumstances is responsible for his or her own defective moral development, but, in the end, he only offers qualified support for it.

²⁸⁷ This description of reflective self-control, and its function, is largely drawn from Wallace's account of it.

isolated, it is reasonable to expect them to remain isolated from wider society on the basis that they think others to pose a threat to them. While one might say that if this is true, however, it concedes that on some level they must perceive that what they are doing is wrong, this concession does not necessarily follow. It is simply not the case that all instances in which a person perceive others to be a threat follow from the perception that he or she is doing, or has done, something wrong. Thirdly, while ARC soldiers may no longer be indoctrinated with highly questionable or patently false accounts that reinforce the values of the armed group into which they were socialized as child soldiers, it is reasonable to expect that this indoctrination has given rise to settled beliefs of ARC soldiers regarding the nature of their situation. It is unreasonable to expect that even if they are capable of reflective self-control, its exercise will penetrate the foundational myths that they were taught throughout their lives about their situation, so long as they remain isolated in the forcibly limited and hostile environment of armed conflict, especially if they are now addicted to drugs.

The three points above that explain why it is unreasonable to expect traumatized ARC soldiers to be able to exercise reflective self-control as adults is especially true for those who are still fully engulfed in active hostilities, but also applies to those in the wider circumstances of armed conflict. Although a more precise measure is needed for just how threatening and isolating their circumstances must continue to be for it to be unreasonable to expect that they are able to exercise reflective self-control, I propose the following provisional account. The more an ARC soldier is traumatized through no fault of his own, the less objectively threatening and isolating his circumstances must be to say that he is deprived of the fair opportunity to exercise reflective self-control, and the less an ARC soldier is traumatized through no fault of his own, the more objectively threatening and isolating his circumstances must be to say that he is deprived of the

fair opportunity to exercise reflective self-control. My view draws support from Arnella's point that fair opportunities consists not only in having socially created opportunities to assume responsibility for one's character, but also in being able to take advantage of those opportunities. Traumatized ARC soldiers with defective moral characters who remain in the forcibly limited and hostile environment of armed conflict cannot reasonably be expected to take advantage of whatever socially created opportunities to fix their defective characters may be said to be available in virtue of the fact that they are no longer subject to the direct threats that they faced as children.

Conclusion

This section argued that traumatized ARC soldiers, whom it is reasonable to expect would be traumatized by their experiences as child soldiers because they were recruited at a young age into extreme groups and subject to coercion, isolation, and socialization in accordance with standards of right and wrong that are radically at odds with the standards that are accepted by the international community, and who, as a result of these experiences, lack normal moral judgment and have impaired practical reason warrant excuse under the choice theory of responsibility and excuse. This is based on the view that because they lack normal moral perception and have impaired practical reason – impairments which developed through no fault of their own -- they are deprived of the fair opportunity to choose to obey the law. For an excuse to be applicable to these ARC soldiers, the law must first recognize that some persons lack normal perception that prevents them to perceive the manifest illegality of their conduct. Once this is recognized, an excuse can be introduced into international law for persons who cannot perceive the manifest illegality of their conduct because they lack normal moral perception

through no fault of their own, and for whom the lack of normal moral perception deprives them of the fair opportunity to choose to obey the law. In particular, I propose to incorporate this exception to the Rome Statute under Article 31 by adding a provision that states that a person shall not be criminally responsible if, at the time of that person's conduct, the person lacks the ability to perceive the manifest illegality of his or her conduct, where this inability developed as a result of performing wrongful, but non-culpable actions, which may be identified as acts performed under the specific conditions or circumstances that are recognized as grounds for exclusion of criminal responsibility under other provisions of the Statute.

III. Objections

This section identifies three objections to the argument that I developed in this chapter. The first objection is that if we carved out an exemption from the manifest illegality rule for traumatized ARC soldiers, it would undermine the grounds of the provision, which depends on its universality, and undermine the progress made by international criminal law in responding to mass atrocity. The second is that adopting the exception to the manifest illegality rule would require international criminal law to investigate persons' moral characters, which would, in turn, undermine its neutrality. The third objection is that if my account for why some traumatized ARC soldiers warrant excuse from criminal responsibility is embraced, it will commit us to extending a similar excuse to other groups, especially adult victims of childhood abuse and adult gang members recruited as children, and because this is a conclusion we should reject, it provides grounds for rejecting my account of why some traumatized ARC soldiers should be excused as well. In this section, I consider and respond to each of these three objections.

The political objection

The first objection to my argument is that my proposal requires the criminal law to investigate persons' moral characters and to take a stand on the good life, which it is not the business of the criminal law to do. It is on the basis of such a view that Duff has embraced a view of character that is only concerned with the actual traits persons manifest rather than how they develop.²⁸⁸ This objection is dependent on a particular view of the criminal law as understood within liberalism. The liberal view is that it is not the business of the state to make claims on the good life, and because the criminal law is an instrument of the state, the claim is applied there as well.²⁸⁹

In response, I partially concede this objection, but argue that it does not undermine my argument because the liberal model is not applicable to international criminal law. To understand my view, we need to recall some of the discussion from Section I of Chapter 4. There, I examined the relationship between law and morality as it functions in both the domestic and international contexts. I suggested that positivism is inadequate for understanding international criminal law because it cannot explain how *jus cogens* norms give rise to genuine obligations. To recall, Hart's positivism cannot explain how *jus cogens* norms give rise to obligations because only valid laws give rise to genuine obligations, and we obscure *jus cogens* norms if we try to understand them on the model of valid laws in Hart's sense. Moreover, Raz's positivism cannot explain how *jus cogens* norms give rise to obligations because Raz does not think persons are under genuine obligations to obey the law in the first place. Because some of the foundational

²⁸⁸ Duff, "Choice, Character, and Criminal Liability," see generally, section three, and Duff, "Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law," *Buffalo Criminal Law Review* 6, no. 1 (April 2002): 147-184.

²⁸⁹ This view can be traced to Mill's harm principle as developed in *On Liberty*, ed. Elizabeth Rapaport (Indianapolis, Indiana, 1978). Will Kymlicka identifies state neutrality on the good life as a "distinctive feature of contemporary liberal theory," in "Liberal Individualism and Liberal Neutrality," *Ethics* 99, no. 4 (July 1989): 883.

obligations persons have under international criminal law are held to derive their force from *jus cogens* norms, to fail to provide an account of how such norms acquire their binding force is to shake the foundations of international criminal law. Insofar as neither version of positivism considered offers a satisfactory way of understanding the nature of *jus cogens* norms, nor of understanding how they actually function in international criminal law, positivism was held to be an inadequate model for understanding that body of law.

From here, I then showed that either natural law theory or Dworkin's view offers a better way of understanding how *jus cogens* norms give rise to obligations. I suggested, moreover, that Dworkin's view offers the most promising way of understanding these norms and how they actually function in international criminal law through his notions that the law represents the political morality of the community and that legal obligation is a form of moral obligation that arises from relationships and without deliberate choice.

Following my discussion that law and morality are more closely connected under international criminal law than domestic law, I then showed that an important implication of this is that the capacities that persons must have to be capable of knowing what the law is and choosing to obey it change as we move from one context to the other. If, under domestic law, obligations derive their force from the non-moral validity of the law itself, then persons do not necessarily need moral capacities to be capable of knowing what the law is and of being capable of choosing to obey it. If under international law, by contrast, some obligations derive their force from *jus cogens* norms, then persons need to be capable of appreciating the moral force of those norms in order to know what international law requires and to be capable of choosing to obey it.

If persons' moral capacities are part of their capacity to choose to obey the law under international criminal law, then liberalism is not a useful model for understanding international

criminal law. This is based on the following claims. To have normal moral capacities to choose to obey the law depends on normal emotional competence. Persons' emotional competences are constitutive parts of their characters. To have the fair opportunity to choose to exercise one's choosing capacities to choose obey the law depends on having the fair opportunity to exercise normal emotional competence. For persons to have the fair opportunity to exercise normal emotional competence, they need to have the fair opportunity to develop normal emotional competence in the first place. The question of whether persons have the fair opportunity to develop emotional competence is a question of responsibility for character. Thus, if moral capacities are required for the capacity for choice under international criminal law, then that body of law cannot avoid questions of persons' responsibility for their character, and because the liberal model does not think it is the business of the criminal law to pursue these questions, the liberal model is not a useful model for international criminal law.

The legal implications objection

The second objection to my argument targets the legal implications of carving out an exception to the manifest illegality rule. According to this objection, carving out an exemption from the manifest illegality rule for traumatized ARC soldiers would undermine the grounding of the provision in universality. This would, in turn, invite the unwelcome consequence of undermining the force of the *jus cogens* norms upon which it rests, thereby undermining some of the important recent progress made by international criminal law.

In response, I argue that the force of this objection depends on adopting the classical natural law view of *jus cogens* norms, to which my view is not committed. The objection depends on adopting the natural law view because it assumes that *jus cogens* norms derive their

force from their universality, which, in turn, is derived from their participation in God's law or in some other higher-than-human law (e.g., Reason). Both of these sources are typically held to depend on a priori and universal metaphysical truths. Nothing in my view commits me to this view of *jus cogens* norms. On the contrary, I have suggested that Dworkin's theory provides a better account of *jus cogens* norms by understanding them as part of the political morality of the international community and by regarding the legal obligations to which they give rise as moral obligations arising from social relationships rather than deliberate choice.

If we understand the *jus cogens* norms that support some of our obligations under international criminal law in this way, then we can maintain that their force does not derive from a claim to universality, but rather from a claim to reasonableness. On this view, *jus cogens* norms apply where it is reasonable that they should apply and allow exceptions where it is not reasonable. In this dissertation, I have provided reason for thinking that part of what makes the application of *jus cogens* norms reasonable with respect to individuals is that their application depends on a recognition of the important ways in which human beings are shaped by their social environments.

For international criminal law to provide a reasonable way of responding to our disputes, including our most violent conflicts, it is not enough that international criminal law simply present itself as the morally legitimate arbiter and authority over us. International criminal law must also have a defensible claim to moral legitimacy. This requires, on the view I have been sketching out, that international criminal law recognizes that a core part of our moral development occurs inside, and depends on, political communities. It is thus reasonable to carve out an exception to the manifest illegality rule, which presumes that all adults have basic moral competences, for persons who have been deprived of the fair opportunity to develop these basic

abilities through no fault of their own. If we understand international criminal law as our political morality, in a Dworkinian spirit, then we can approach the issue of carving out such an exception to the manifest illegality rule not as undermining a metaphysical truth, but as a political decision, and one that is based in the political morality of the international community.²⁹⁰

In his ethical and political writings, Aristotle attended to the importance of political communities in shaping human moral development.²⁹¹ His framework offers an early approach to how to think about what it is reasonable to expect of human beings based on the circumstances in which they developed, a framework that, when suitably tailored to facts about human development known today, can offer a reasonable way of thinking about moral and criminal responsibility under extreme circumstances. What is more, we can embrace an Aristotelian view on the moral relevancy of the particular contexts in which persons develop morally, and use this in thinking about how to select principles of international criminal justice, without necessarily committing ourselves to an Aristotelian metaphysics. Rather, such an account can be based in psychology, as I have sought to show throughout this dissertation. It is worth recalling that a recurrent theme in Chapter 3 was that recent research in psychology offers support for an Aristotelian view of the role of emotion in moral development and the development of practical

²⁹⁰ My view here, thus, has something in common with Raz's "political conception of human rights," as articulated in Raz, "Human Rights without Foundations," in *The Philosophy of International Law*. Raz explains that his political conception of human rights seeks "to establish the essential features which contemporary human rights practice attributes to the rights it acknowledges to be human rights" and "to identify the moral standards which qualify anything to be so acknowledged," 8. To use a similar presentation, my view seeks to establish the essential features which international criminal law attributes to the persons it acknowledges to be capable of choice supporting criminal responsibility and to identify the moral standard which qualify a person to be so acknowledged. Raz adds that a further component of his political conception of human rights is that while human rights are moral rights, they are moral rights that only exist to the extent that governments are in the position to have the duties to protect the interests that the rights are said to protect. This rights-duties dyadic structure stems from Raz adopting a Hohfeldian conception of rights as correlatives with duties. My view does not depend on what would be a similar claim that the essential features which international criminal law attributes to the persons it acknowledges to be capable of choice supporting criminal responsibility only *really* apply in cases where international criminal law recognizes those features.

²⁹¹ Aristotle, *Nicomachean Ethics*, Book B.

reasoning. In conclusion, the exception recommended by my argument to the manifest illegality rule does not undermine the moral force of international criminal law by undermining its universality. Rather, it makes that law more reasonable by taking into account relevant facts about moral development in selecting principles of international criminal justice to reflect our political morality.

The slippery slope objection

The third objection to my argument is that even if there not problematic implications of accepting my account for international criminal law, there are problematic implications of accepting it. Based on the psychological research presented in Chapter 3, it may be observed that childhood abuse and the experiences associated with being a member of a violent gang also create the risk of harm to moral development, including moral judgment, and the development of practical reasoning. Even if the best account of choice that supports criminal responsibility under U.S. criminal law is one that only requires practical reasoning and not also normal moral perception in accordance with domestic U.S. standards of right and wrong, one might argue that impairment to practical reason that arises as a result of childhood abuse or from the experiences associated with being a member of a violent gang during adolescence deprives a person of the fair opportunity to choose to obey the law. The proponent of this argument might claim that my account of why some traumatized ARC soldiers warrant excuse under international criminal law commits me to the conclusion that such gang members also warrant excuse. Here, I respond to this claim and I explain for which cases my argument commits me to this conclusion and for which it does not.

In this dissertation, I have argued that some traumatized ARC soldiers warrant excuse from criminal responsibility under international criminal law on account of being deprived of the fair opportunity to choose to obey the law. This was based on the fact that if part of their capacity to choose to obey the law – their moral perception – is defective, they are thereby deprived of the opportunity to choose to obey the law for moral reasons. This deprivation of opportunity, however, is by itself insufficient to warrant excusing them, on my view. More specifically, I argued that only those for whom this deprivation is *unfair* warrant excuse under international criminal law. I then construed what counts as being deprived of the fair opportunity to choose to obey the law as a function of what it is reasonable to expect of persons. Thus, my full account for excusing some traumatized ARC soldiers is as follows. Traumatized ARC soldiers whom *it is reasonable to expect* have been traumatized by their experiences as child soldiers, and who, as a result of these experiences, have defective choosing capacities that deprive them of opportunities to choose to obey the law for moral reasons warrant excuse under international criminal law.

From here, I laid out the conditions under which it is reasonable to expect ARC soldiers would be traumatized by their experiences as child soldiers. I identified the following conditions as relevant: they were recruited at a young age into extreme groups and subject, throughout their formative adolescent years, to coercion, isolation, and socialization in accordance with standards of right and wrong that are radically at odds with the internationally accepted standards. These conditions were identified as grounds for warranting the judgment that their defective choosing capacities – their lack of normal moral perception and impaired practical reason – developed through no fault of their own. This was based on judgments regarding both what it is reasonable to expect of persons with their childhood experiences and what it is reasonable to expect of persons in their current circumstances, both of which were based on psychological research.

With the details of my argument in view, I am now in a position to explain the extent to which my conclusions apply to adult victims of childhood abuse and adult gang members who were recruited as children. I put forth the following account. If persons of either group developed impaired practical reasoning as a result of their childhood experiences, through no fault of their own, and remain in circumstances as adults where it is unreasonable to expect they would develop their practical reason, they may be said to be deprived of the fair opportunity to choose to obey the law, and an excuse from criminal responsibility may apply to them. I now turn to briefly examine each case to see what would need to be true for these conditions to be met.

For adult victims of childhood abuse to warrant excuse, it must first be true that their experiences must have impaired their practical reason in such a way as to deprive them of the opportunity to obey the law. Empirical research on child abuse in the U.S. shows that, “child abuse harms critical areas of development, such as attachment, self-control, and moral and social judgment, among others.”²⁹² This shows that child abuse creates the risk of impairing adult practical reasoning ability. What is more, further research shows that “children who have been exposed to physical abuse demonstrate a greater acceptance for the use of physical punishment”²⁹³ and that “the environment of children in physically abusive families conveys that aggression is an acceptable problem-solving tool.”²⁹⁴ This shows that child abuse creates the risk of distorting adult moral judgment. Other research, however, shows that the lasting impact of child abuse depends on the severity of the abuse as well as the degree of support and assistance available to the abused child. One study reports that, “[a]bused children may be protected from harm if they have a positive relationship with at least one important and consistent person in their

²⁹² David A. Wolfe, *Child Abuse: Implications for Child Development and Psychopathology*, 2nd ed. (Thousand Oaks: Sage Publications, 1999), 35.

²⁹³ Maria Scannapieco and Kelli Connell-Carrick, *Understanding Child Maltreatment: An Ecological and Developmental Perspective* (Oxford: Oxford University Press, 2005), 106.

²⁹⁴ *Ibid* (citing Dodge, Petit, and Bates, 1997).

lives who provides support and protection.”²⁹⁵ If it is true that most abuse of children is by family members, but also that abused children do not experience abuse from every other family member, then it is reasonable to expect that within the family abused children would develop such a relationship. If the presence of a single positive relationship in the abused child’s life can greatly minimize the negative impact of the abuse, then with the exception of extraordinary cases, even adult victims of child abuse may reasonably be expected to develop sufficiently functional practical reason so as to have the fair opportunity to choose to obey the law.

Let us take those victims of child abuse who do not develop positive relationships with others, however, and where the abuse to which they are subject occurs within a larger forcibly limited and hostile environment such that the damage to their practical reason is severe, as abuse that occurs in old-style mental institutions. For victims of child abuse that occurs within a larger forcibly limited and hostile environment to be excused as adults, it must also be true that they are not at fault for their impairment. This depends on the kind and chronicity of the abuse to which they were subject. Some children are only abused during a restricted segment of their childhood whereas others may be abused throughout childhood into adolescence. Arguably, we expect children to be able to withstand *some* pressures. Whether we expect them to withstand pressures that rise to the level of abuse is another matter, but this depends on how one defines abuse.

Supposing that children are abused severely enough and long enough that we would not expect them to have developed ordinary practical reason, we would still want to know whether they have the fair opportunity to develop it as after they become adults. Assuming that they are no longer in an abusive or other forcibly limited and hostile environment, and now have jobs and relationships with others, then it may be reasonable to expect them to have corrected their defect

²⁹⁵ Ibid, 32 (citing National Research Council, 1993).

of practical reasoning so that it is no longer so severe that it deprives them of the opportunity to choose to obey the law. For the sake of argument, let us assume that some adult victims of childhood abuse are so damaged by their experiences that they are unable as adults to maintain healthy relationship, but find themselves in other abusive relationships or isolate themselves from others. If adult victims of childhood abuse are in adult circumstances like this, for which they are not at fault, and under circumstances in which it is unreasonable to expect that they develop ordinary practical reason that would allow them to see the force of reasons to obey the law, then we might conclude that have been deprived of the fair opportunity to choose to obey the law, and warrant excuse if they commit crimes. Therefore, my conclusions regarding traumatized ARC soldiers may extend to adult victims of childhood abuse, but only in extreme cases that combine severe childhood abuse with continuing adult abuse or isolation.

Let us move on to consider adult gang members who were recruited as children. At first glance, these persons appear to share more characteristics with ARC soldiers than adult victims of childhood abuse, and so my conclusions that some traumatized ARC soldiers warrant excuse may be more applicable to them. On even a rudimentary knowledge of gangs, it is plausible that there are cases of adult gang members who were recruited as children and subject, throughout their adolescent formative years, to coercion, isolation, and socialization in accordance with standards of right and wrong which are at odds with accepted social standards. Moreover, based on the psychological work presented in Chapter 3, and the claims regard these experiences as applied to traumatized ARC soldiers, it is plausible that the experiences of adult gang members in extreme gangs that subject them to this treatment are sufficiently severe to impair their practical reasoning. Moreover, it is plausible that their impairment may manifest itself as an inability to see the law as a source of reasons for action.

For this deprivation that arises for their impairment to be unfair, it would need to be true that the adult gang members recruited as children are not at fault for their defective development. As with traumatized ARC soldiers, this would depend on how they were recruited as children, what accounted for their remaining inside the gangs throughout their adolescence, the severity of their adult impairment as a result of their experiences, and the opportunities they can reasonably be said to have as adults who remain inside gangs to develop their practical reason now. An important relevant difference between gang members and traumatized ARC soldiers is that the former are typically not isolated from the influences of larger society. On the contrary, in typical cases, gang members attend school, know people outside the gang, read newspapers, or watch TV. These interactions with others and this exposure to larger society, of which traumatized ARC soldiers have been deprived, make it reasonable to expect that typical gang members know that their behavior is considered deviant by most people. What is more, some gang members may even self-identify as deviant or understand their identity and the collective identity of their group as representing an opposition to the status quo, especially the legal and political status quo as embodied in the law. This sense of identity may come from thinking they are subject to an existing social and political order under which they have more of the burdens than the benefits.

As explained in Chapter 4 in the discussion of legal positivism, two main sources of (non-moral) reasons to obey the law are that the law provides penalties and that it solves coordination problems that benefit people. It may be common among gang members, however, to expect to be penalized at some point by the law from deviating from it. There is a significant presence of gangs who continue to operate inside prisons, while continuing operations outside

the prison.²⁹⁶ Penalties will not provide sufficient reason for complying with the law for persons who already expect to be penalized for their conduct, or what is more, who have close ties with individuals inside penal institutions, which can make the penalty seem less undesirable to them. Moreover, the benefits the law provides by solving other coordination problems aside from crime control, like upholding contracts, may not apply to gang members who do not have the formal stakes in the community that are typical of ordinary adults, like owning property or engaging in legitimate business enterprises. It is reasonable to expect that those who do not benefit from the coordination problems that the law solves will not see the fact that the law provides such benefits to others as sufficient reason for their own compliance. Taken together, these points suggest how adult gang members who were recruited as children could come to be unable to see the force of non-moral reasons to choose to obey the law.

On the other hand, adult gang members are clearly in a position to see that other ways of life are possible and that there are reasons for choosing to leave the gang. This is because they are not isolated, but exposed to the wider society where it is reasonable to expect that they are presented with examples of persons who do in fact benefit from the law, some whom may even have been in situations to their own at some point. In light of their engagement with and exposure to wider society, it is reasonable to expect that they see the force of some reason to obey the law, even if it is only in the form of seeing that others genuinely have such reasons. Thus, I argue that only gang members with experiences that are comparable to those of traumatized ARC soldiers, and especially comparable in their extreme childhood and continuing

²⁹⁶ The United States Department of Justice reports that, “Prison gangs are criminal organizations that originated within the penal system and they have continued to operate within correctional facilities throughout the United States. Prison gangs are also self-perpetuating criminal entities that can continue their operations outside the confines of the penal system,” accessed April 6, 2014, <http://www.justice.gov/criminal/ocgs/gangs/prison.html>.

adult isolation from wider society warrant an excuse from criminal responsibility under the account that I developed in this dissertation.

It is worth noting that under some jurisdictions of U.S. criminal law, gang membership is actually an aggravating factor in sentencing, regardless of whether an adult gang member was recruited into the gang as a child and spent his or her adolescent formative years inside the gang.²⁹⁷ One possible way to explain criminal law's stance here is that the law may be implicitly based on the view that even if such persons are unable to see the law as providing reason for action, they are still able to see the force of *moral* reasons to choose to obey the law, which are sufficient to enable them to choose to obey the law. If, however, U.S. criminal law does not include basic moral competence as part of the capacity for choice (as, to recall, Moore argues and as I have not shown to be false), then this argument is unavailable to explain and justify this part of U.S. criminal law.

If the capacity for practical reason is sufficient for having a fair opportunity to choose to obey the law under U.S. criminal law, then to make sense of the fact that persons, like adult gang members recruited as children, who have impaired practical reason, but who are held criminally responsible for the acts they perform as a result of that impairment, and are moreover, held at fault for their membership in coercive enterprises like gangs that recruited them as children, the law must be based on the judgment that they are at fault for their defective development. The law could be assuming that adult gang members recruited as children were at fault at some point in their early associations with gangs or are now at fault as adults for not correcting their defective condition developed as a result of their childhood experiences. Based on my account, however,

²⁹⁷ The National Gang Center's online database identifies the U.S. jurisdictions that impose enhanced sentences on the basis of gang membership, accessed April 6, 2014 <http://www.nationalgangcenter.gov/Legislation/Enhanced-Penalties-Sentencing>.

the more their experiences are comparable to those of traumatized ARC soldiers, the more this is a concern.

The remainder of this section responds to the argument that gang members are actually more traumatized by their experiences than are child soldiers, a view which may be developed out of claims made by James Garbarino, Kathleen Kostelny, and Nancy Dubrow in their book, *No Place to be a Child*.²⁹⁸ Garbarino et al. examine the experiences child soldiers in four conflicts: Cambodia, Mozambique, Nicaragua, and Palestine. Their book then concludes with a comparison of these experiences to the experiences of gang members in Chicago. The argument to which this section responds is that adult gang members who are recruited as children into some U.S. gangs are likely to be more traumatized than ARC soldiers.

Garbarino et al. explain that, “the comparison of gang-controlled communities with war zones serves to emphasize the traumatic nature of experiences with life-threatening events, which are unpredictable, uncontrollable, and overwhelming.”²⁹⁹ They then go on to suggest that gang members in the Chicago gangs they studied may be more traumatized by their experiences than the child soldiers they studied. They assert that, “Individuals who live in a war zone have an identifiable enemy and a sense that the conflict, no matter how long it has been going on, is essentially a temporary state of affair that will end once the conflict is resolved... In gang-controlled communities the enemy is not so easily identified.”³⁰⁰ Garbarino et al. explain that the enemy in gang-controlled communities is the wider social ills that plague the community, like drugs, poverty, and hidden sources of oppression. Moreover, they suggest that this kind of enemy is harder to see, to protect against, and to avoid. From their description of the relative situations

²⁹⁸ Garbarino, Kostelny, and Dubrow, *No Place to be a Child*, 1991.

²⁹⁹ Ibid, 145.

³⁰⁰ Ibid.

of child soldiers in Mozambique and gang members in Chicago, they suggest that the latter may be more harmed by their experiences and overall environment than are the former.

My aim here is not to dispute their particular comparison between some gang members in Chicago and child soldiers in Mozambique, but to challenge the applicability of the claim that child soldiers grow up with an identifiable enemy and a sense of the finiteness of their conflict to those who grow up in armed groups like the RUF and the LRA, which Garbarino et al. do not consider in their book. Chapter 2 presented evidence on typical experiences of child soldiers in extreme armed groups like the RUF and the LRA that challenges the notion that these child soldiers have an identifiable enemy and sense of the finitude of the conflict. First, many of them are forced to harm those they care about and are encouraged to attack their own communities, while being told by the leaders of their groups, who are forcing them to betray themselves in these ways, that they are the persons who have their best interests in mind. It is unreasonable to expect them to have a sense of an identifiable enemy in response to these experiences. Moreover, typical child soldiers in extreme groups are taught that their enemy is anything and everything outside the armed group, which further undermines the reasonableness of expecting ARC soldiers to have a notion of an identifiable enemy. Furthermore, it is unreasonable to expect ARC in extreme groups like the RUF or LRA to develop a sense of the finitude of their conflict if they were recruited at a young age, especially if the conflict was going on even before they were recruited. Thus, while Garbarino et al.'s comparative claims regarding typical child soldiers in Mozambique and gang members in Chicago may be plausible, they may be less plausible when addressing typical child soldiers in armed groups like the RUF or LRA. Insofar as their comparative descriptions are relevant to what it is reasonable to expect of adults who grow up in each kind of environment, it is worth noting that their descriptions of the child soldiers they

studied do not apply to child soldiers in the extreme armed groups examined in this dissertation. This alone does not undermine their claim that some gang members may be more traumatized than some child soldiers, but it does confine the scope of their comparative conclusions.

Conclusion

This chapter showed that international criminal law is implicitly committed to a view of the capacity for criminally responsible choice that requires practical reasoning and normal moral perception. I then argued on the basis of the previous empirical chapters that it is reasonable to expect that ARC soldiers recruited at a young age into extreme groups like the RUF and LRA and who are subject to coercion, isolation, and socialization according to standards of right of wrong that are radically at odds with accepted standards do not develop the capacity for normal moral perception. From here, I held that if this defect of moral perception developed through no fault of their own, then the manifest illegality rule should not apply to them.

From my analysis of how child soldiers could be at fault for their defective development, I argued that traumatized ARC soldiers whom it is reasonable to expect would be traumatized by their experiences as child soldiers because they were recruited at a young age into extreme groups and subject to coercion, isolation, and socialization in accordance with standards of right and wrong that are radically at odds with the standards accepted by the international community are deprived of the fair opportunity to develop normal moral perception as child soldiers inside these groups. I argued that they continue, as adults, to be deprived of the fair opportunity to develop normal moral perception so long as they remain in the forcibly limited and hostile environment of armed conflict. From here, I concluded that those to whom these conditions apply warrant an excuse under international criminal law and, moreover, that for this excuse to

be introduced into the law, an exception to the manifest illegality rule must be recognized. I propose to incorporate this exception to the Rome Statute under Article 31 by adding a provision that states that a person shall not be criminally responsible if, at the time of that person's conduct, the person lacks the ability to perceive the manifest illegality of his or her conduct, where this inability developed as a result of performing wrongful, but non-culpable actions, which may be identified as acts performed under the specific conditions or circumstances that are recognized as grounds for exclusion of criminal responsibility under other provisions of the Statute.

CHAPTER 6

CONCLUSION

This dissertation proposed to introduce a new excuse into international criminal law for persons who perform crimes against humanity and acts of genocide, but who, through no fault of their own, lack the normal moral perception that would allow them to perceive the manifest illegality of this conduct and see the force of moral reasons to choose to obey the law. I presented this excuse as a formulation of the choice theory of excuse, under which the capacity for choice requires practical reason, normal moral perception and the fair opportunity to exercise choice, taking into account the opportunities persons have to develop their choosing capacities. I showed that this view of the capacity for choice is consistent with international criminal law and I argued that persons who lack normal moral perception through no fault of their own and who are also in the forcibly limited and hostile circumstances of armed conflict, which burdens their ability to grasp non-moral reasons for obeying the law through practical reason, are thereby deprived of the fair opportunity to choose to obey the law for moral or non-moral reasons.

In this concluding chapter, I first lay out an overview of the argument developed in the previous chapters. Secondly, I examine the policy implications of excusing traumatized ARC soldiers from criminal responsibility. Thirdly, I examine some of the philosophical implications of my project by situating it within the broader philosophical debate about the moral relevance of the vulnerability of human beings and how this is relevant to thinking about the moral and criminal responsibility of persons who grew up in hostile environments of a type known to harm adult development.

I. Overview of the chapters

Chapter 1 offered an introduction to the question that this dissertation examines, which is whether there are any moral or legal grounds for excusing some traumatized ARC soldiers from criminal responsibility under international criminal law. I began by addressing the problem that the Rome Statute, which established the International Criminal Court, seeks to solve. Then, I explained under which provisions of the Rome Statute ARC soldiers are liable to prosecution, and systematically examined the existing excuses in relation to these soldiers. I showed that none of these excuses fully applies to traumatized ARC soldiers. I raised the concern that if these ARC soldiers lack normal moral perception in accordance with international standards of right and wrong, they will not be able to perceive the manifest illegality of conduct that is alleged to constitute international crimes under the jurisdiction of the ICC, and for which they may be prosecuted (i.e., crimes against humanity and acts of genocide). I used this concern to motivate the inquiry into whether there are any moral or legal grounds for introducing a new excuse into international criminal law to apply to persons who lack the normal moral perception that allows ordinary adults to perceive the manifest illegality of conduct for which they may be prosecuted.

Chapter 2 considered empirical work on the experiences of child soldiers in conflicts carried out in four African countries: Liberia, Mozambique, Sierra Leone, and Uganda. There, I presented information on the age of recruitment, mode of recruitment, and method of retention for typical child soldiers in these groups. From my survey of the literature, I made some rough characterizations of the various ways in which armed groups recruit and train children to become soldiers in these armed conflicts. In Liberia, social, economic and political pressures push mid-adolescents into armed groups, but they are not coerced to join; coercion, however, accounts for what keeps many of them inside armed groups. The Mozambican National Resistance

(RENAMO) uses a combination of non-coercive and coercive methods of recruitment, after which children aged six to sixteen are transformed into soldiers through coercion and socialization, but at most, remain with the group for only a few years. Sierra Leone's Revolutionary United Front (RUF) and Uganda's Lord's Resistance Army (LRA) primarily use coercive methods of recruitment, especially abduction, typically directed toward children between ten and fourteen. Methods of retention used by these groups combine coercion and socialization with isolation of child soldiers from the wider society, with many child soldiers staying in the groups throughout their adolescence. The combination of isolation, coercion, and socialization of child soldiers in accordance with the standards and values of the armed group is shown to be particularly effective at binding them to the armed group for various reasons. Among the most cited are that it creates loyalty to the leaders, transfers the group's values, or instills the belief that staying with the group is their best route to security.

After laying out empirical facts on child soldiering in these four African conflicts, I then reviewed some empirical literature on the reintegration prospects of former child soldiers (FCS) into society. This served two purposes. The first was to rely on the documented post-war conditions of child soldiers in order to gain some understanding of how child soldiering affects developmental outcomes. The second was to determine whether the damage to development brought on by child soldiering in extreme groups is likely to be permanent. My review of the reintegration literature revealed that emotional disturbance is typical in FCS, especially those from extreme groups, and is an obstacle to reintegration, but can improve over time with family and community acceptance and psychosocial support.

Chapter 3 then considered recent psychological research to further assess the impact of the experiences associated with child soldiering on adult development. From my survey of the

relevant literature, I concluded that the experiences of child soldiers in extreme groups like the RUF and the LRA create a risk of serious damage to areas of their adult moral development and to their practical reasoning. An underlying mechanism that can contribute to these developmental defects is emotional disturbance. Emotional disturbance can lead to defective moral development by distorting moral judgment and undermining moral motivation. Emotional disturbance can impair practical reasoning by biasing ordinary judgment toward irrelevant factors, upon which decisions are made. After presenting research in support of this, I then relied on empirical work in other areas of psychology to identify which experiences of child soldiers create the greatest risk of emotional disturbance. In light of recent studies that show that adolescence is a particularly vulnerable period of development of the emotions and the integration of the emotions with one's reasoning, I concluded that child soldiers who are recruited at a young age into extreme groups like the RUF or LRA, and who are subject to coercion, isolation, and socialization in accordance with the values of their armed group during their formative adolescent years are especially at risk of emotional disturbance that distorts their moral judgment and impairs their practical reasoning.

Chapter 4 discussed the relationship between law and morality in the domestic and international contexts. I showed that while legal positivism is a plausible theory of law and legal obligation for domestic law, it is less so for international criminal law. This is because positivism cannot offer a satisfactory account of *jus cogens* norms as sources of law and yet these norms are important sources of legal obligations under international criminal law. Then, I examined three versions of the choice theory of responsibility and excuse and evaluated them along two dimensions: empirical defensibility and consonance with the close relationship between law and morality that I argued at the beginning of the chapter applies under international criminal

law. I concluded that the superior version of the choice theory is one that requires practical reason and some basic moral competence for the capacity for choice and that considers how persons developed these capacities as relevant to whether they have the fair opportunity to exercise them.

Chapter 5 builds on the conclusion of the previous chapter to more fully develop a version of the choice theory for international criminal law, under which the capacity for choice requires normal moral perception and practical reasoning, and the fair opportunity for choice consists in the fair opportunity develop these capacities and exercise them at the moment of action. I defined “normal moral perception” as perception in accordance with the basic standards accepted by the international community, as embodied in the manifest illegality provision. Then, I examined the moral and legal grounds for excusing actions carried out by ARC soldiers from criminal responsibility using this version of the choice theory. I argued that there are grounds for excusing a subset of ARC soldiers, whom I called “traumatized ARC soldiers” from criminal responsibility under this theory. I defined “traumatized ARC soldiers” as ARC soldiers whom it is reasonable to expect would lack normal perception and have impaired practical reason as a result of being subject, throughout their adolescent formative years, to coercion, isolation, and socialization in accordance with standards that are radically at odds with internationally accepted standards of right and wrong, and who do, in fact, have these defects or had them at the time they performed the action(s) alleged to constitute a crime under the Rome Statute.

I argued that traumatized ARC soldiers warrant excuse from criminal responsibility under international criminal because they have been deprived of the fair opportunity to choose to obey the law. This was based on three ideas: first, persons who lack normal moral perception through no fault of their own are deprived of the fair opportunity to see the force of moral reasons for

obeying international criminal law; secondly, having access through practical reason to non-moral reasons for obeying the law is insufficient for having the fair opportunity to choose to obey the law on the international level; thirdly, persons with defective capacities for choice who are in the forcibly limited and hostile circumstances of armed conflict cannot reasonably be expected to exercise reflective self-control to change their situation or correct their defective characters while they remain in those circumstances.

II. What if traumatized ARC soldiers are excused?

The section examines the policy implications of excusing from criminal responsibility traumatized ARC soldiers who also, because of their defects, pose a threat to others. This is part of the broader issue of how a society should respond to morally inculpable, but dangerous persons. If my proposal is incorporated into international criminal law, some traumatized ARC soldiers will be excused from criminal responsibility, raising the concern that, because of their excusing defects, they will endanger other people. In what follows, I recall Arnella's solution to this problem, provide reasons for rejecting it, and introduce my own.

To recall, Arnella argues that persons who are deprived of the fair opportunity to develop the ability to appreciate the moral significance of legal norms are thereby deprived of the fair opportunity to choose to obey the law, but may nonetheless justly be held accountable through the criminal law in order to serve the social goal of self-protection. While self-protection is a highly important aim of justice that any reasonably decent society must promote, it must be weighed against competing values, such as fairness to individuals, and the prospects for other social goods, like the promotion of lasting peace.

Although I have moral objections to Arnella's strategy of using the criminal law as a default institution to promote self-protection, I agree that some form of incapacitation may be required for persons who pose a threat to others and who cannot be rehabilitated or morally corrected. With respect to traumatized ARC soldiers, in particular, my concerns with defaulting to self-protection as the value to be promoted lie in the fact that there is considerable evidence that the damage caused by child soldiering, while highly debilitating, is not necessarily incorrigible. If traumatized ARC soldiers can be rehabilitated, morally reformed, or reintegrated into society in a way that does not pose a danger to others, then I argue there are reasons on behalf of justice and fairness to pursue this strategy.

Chapter 2 reviewed some research on reintegration efforts directed toward former child soldiers and found that most of those studies are capable of successfully reintegrating into society with the proper support. Family and community acceptance were found to be highly important factors in successful reintegration of former RUF child soldiers. Other studies show that the difficulties facing former child soldiers are primarily financial and that successful reintegration is promoted if they have access to legitimate employment opportunities after they are demobilized. While these studies only represent a sample of reintegration efforts, the findings are consistent and suggest that most former child soldiers do not commit violent crimes after leaving armed groups and re-entering society.

While it is true that, even if traumatized ARC soldiers may be successfully reintegrated into society, this does not mean that their moral development has been corrected, their successful reintegration into society does uphold fairness for them and does not undermine justice by failing to protect others in society. It is also important to recognize that some traumatized ARC soldiers may be so damaged by their experiences that they are, in fact, incorrigible, or may justly be

deemed incorrigible after reintegration efforts have failed or their moral condition does not improve over time. The experiences to which child soldiers are subject in some extreme armed groups are extraordinary and can have an extraordinarily detrimental influence on the vulnerable course of moral development. Still, traumatized ARC soldiers whose moral conditions are incorrigible warrant a form of civil commitment, rather than punishment. In this regard, traumatized ARC soldiers are like the criminally insane, who pose a threat to others and so who may be confined, but who are not punished, as they do not meet the basic requirements of criminal responsibility.

Subjecting traumatized ARC soldiers who pose a threat to others to civil commitment rather than punishment serves the aim of protecting society while upholding the fairness and integrity of international criminal law by only punishing those who are capable of knowing what they are doing is wrong and choosing to obey the law.

III. Some philosophical implications

In this section, I explore some philosophical implications of my project by situating it within the broader philosophical debate about the moral relevance of the vulnerability of human beings. I draw heavily on the ideas of George W. Harris, as developed in his book, *Dignity and Vulnerability*.³⁰¹ Harris argues against the Kantian idea that the ultimate locus of human worth is our strength. Rather, the values of good character, on his view, are also connected to our fragility and vulnerability.³⁰² He points to the Aristotelian framework, under which good character is both strong *and* vulnerable, as providing a better model for understanding what gives human beings dignity than the Kantian framework, even though Kant's ideas are considered to be a main source

³⁰¹ Harris, *Dignity and Vulnerability*, 1997.

³⁰² Ibid, 4.

of the idea of dignity and its relevance to moral thought.³⁰³ In what follows, I present Harris' framework and then propose some directions for future research building on his framework to develop an account of the moral relevancy of the developmental vulnerability of children who grow up under extreme circumstances.

Harris begins from the idea that integrity of an entity makes it what it is, and that for human beings, our integrity gives us moral worth. He then introduces some terminology in setting up his framework. To understand his argument, we need to understand what he means by the following: "integral breakdown," "integral stress," and "integral strength." This paragraph explains how Harris defines these terms and their relation to the concept of integrity, as he understands it. According to Harris, the integrity of an entity consists in its dispositional structure, which is demarcated by its limitation thresholds of strength and fragility.³⁰⁴ He uses the term "integral breakdown" to describe what happens when an entity reaches its limitation thresholds, which are met in response to what he calls "integral stress." Integral stress is the stress put on an entity that jeopardizes its ability to retain its categorical qualities, which are those qualities that make it what it is and that give the entity its integrity. Finally, Harris defines "integral strength" as the ability of an entity to resist integral stress.

Using this framework, Harris argues that a perfectly admirable human character would not be one of unlimited integral strength. Harris insists that at least some of the qualities that are both categorical to humanness and that make us good persons are due to our fragility. The main target of Harris' argument is the Kantian concept of pure practical reason as the locus for our

³⁰³ Ibid, 131.

³⁰⁴ Ibid, 5-7.

intrinsic worth. Rather, our worth as human and as moral beings depends to a significant degree on pathological features of our agency related to our vulnerability to breakdown under stress.³⁰⁵

Harris distinguishes between three kinds of breakdown: “malignant,” “non-vicious,” and “benign.” Malignant breakdown occurs because of the presence of some vice and the absence of a sufficient amount of strength.³⁰⁶ Non-vicious breakdown occurs due to the lack of exceptional virtue, but without the presence of vice.³⁰⁷ Benign breakdown occurs when caring is the internal source of the stress, where there is no relevant vice, and where we cannot imagine an exceptional virtue that would allow the agent to deal with the stress in a way that avoids the breakdown.³⁰⁸

While Harris insists upon an important moral role for human vulnerability, he does not deny the importance of strength of character. He argues that we need a conception of strength of character that avoids excessive weakness or self-pity.³⁰⁹ Moreover, he says that there is nothing admirable in sympathizing with corrupt individuals like Hitler or Jeffrey Dahmer.³¹⁰ A distinction can be made between corrupt persons and persons who succumb to non-malignant breakdown under conditions of integral stress. In concluding, Harris insists that an Aristotelian framework may accommodate such a distinction, whereas the Kantian model cannot.³¹¹

Harris’ framework for understanding and morally evaluating the various ways in which adults breakdown under stress can be used to develop a similar framework for understanding and morally evaluating the various ways in which children break down under stress. His categories of vicious, non-malignant, and benign breakdown can be used to develop similar categories that are applicable to children and that provide an account of what it is reasonable to expect of children

³⁰⁵ Ibid, 11.

³⁰⁶ Ibid, 13.

³⁰⁷ Ibid, 15.

³⁰⁸ Ibid, 18.

³⁰⁹ Ibid, 124.

³¹⁰ Ibid, 72.

³¹¹ Ibid, 131.

in response to particular stressful situations and broader extreme environmental circumstances. Such a framework that takes into account children's heightened vulnerability, which is accounted for by their developmental immaturity, would add to the international debate about what it is reasonable to expect of children who grow up as child soldiers inside armed groups as well as to domestic debates about what it is reasonable to expect of children who grow up inside gangs. In light of the importance of these debates, I propose directions for future research that develop a framework like Harris's for understanding the vulnerability of children and its moral relevancy to evaluating their conduct under stress and the adult characters that are shaped through these responses.

To explore this direction for future research calls for more empirical work to be done on how child soldiering in armed groups affects adult development, especially moral development. While there has been considerable research conducted on former child soldiers (or demobilized child soldiers who remain under the legal age of adulthood), there is a noticeable gap in the literature on empirical work on ARC soldiers. Moreover, future empirical work should be conducted to explore the ways in which the experiences of child soldiers in armed groups are similar to, and distinct from, the experiences of children who grow up in other forcibly limited or hostile environments, and how these experiences have an impact on adult development. This empirical work could then be used to develop a philosophical framework for understanding what it is reasonable to expect of adults who grow up in different kinds of extreme circumstances, which in turn can be used to inform our evaluative judgments of whether it is fair to hold them morally and criminally responsible for wrongful or criminal actions they perform as adults.

Conclusion

This dissertation began by introducing new developments in international criminal law that have taken place over the last century in how the international community has pursued the goal of responding to mass atrocity through law. The ICC is still in its nascent phase as an institution, thus making it the case that its role may remain largely symbolic for the near future. This dissertation adds to contemporary international debates about how the ICC should develop as an institution and how the Rome Statute should develop as a body of law.

One of the most salient contemporary issues pertaining to armed conflict has to do with the overwhelming presence of active combatants in the world today who are child soldiers. The issue of child soldiering has also proven to be important legal concern for the ICC, as the first individual to be tried and sentenced under international criminal law, Congolese warlord Thomas Lubanga Dyilo, was found guilty of the war crimes of conscripting and enlisting child soldiers to participate actively in hostilities. There is a clear consensus among the international community that child soldiering presents an immensely important social and political problem facing our era. I have argued that it presents an important legal problem as well. The legal status of child soldiers under international criminal law is clear in that persons under the age of 18 are excluded from the jurisdiction of the ICC, but I have showed that the legal status of traumatized ARC soldiers is less clear under international criminal law. While none of the existing excuses recognized by the Rome Statute fully applies to their case, many are relevant to evaluating their case.

This dissertation brought together empirical facts about the typical experiences of child soldiers in extreme armed groups and recent psychological literature on how those experiences create the risk of serious harm to adult development to raise the concern that traumatized ARC

soldiers do not meet the requirements of criminally responsible choice under international criminal law. Based on this concern, I proposed to introduce a provision into the Rome Statute that would provide a legal basis for excusing such persons from criminal responsibility under international criminal law. Because international criminal law is developing as a body of law, it is an important time at which to make proposals for how that law should be interpreted and for revising existing provisions to push the law closer toward the ideals that motivated its creation. One of these ideals, as identified in the Preamble to the Rome Statute, is international justice.³¹² Following May, many of whose ideas this dissertation has built on, I have argued that fairness to the offender is an important part of securing international justice through law,³¹³ and that it requires that we only hold persons responsible under international criminal law if they have both the capacity for the kind of choice that supports criminal responsibility under that law and the fair opportunity to develop the ability to exercise that capacity in the first place.

³¹² Rome Statute, Preamble.

³¹³ May, *Crimes Against Humanity*, 2005.

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