WHY A CHILD IS NOT A SOLDIER

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Children are Civilians Too.
—Heinrich Böll

INTRODUCTION

To a book in honour of Navi Pillay, I thought it fitting to contribute an essay on a theme which resonates in the breadth of her expertise and appointments. The issue of ‘child soldiers’ is one that, amongst many others, is of concern to those who hold the office of United Nations High Commissioner for Human Rights and judges of international criminal courts. Notably, the issue is also at the centre of the Lubanga indictment that was the first to reach trial at the International Criminal Court where she held her most recent international judicial appointment.

Whilst it is not difficult to argue that a child should not be a soldier, what may be thought more difficult is to contend that a child cannot be—or is not—as a matter of law, a soldier.

This essay will seek to explore the questions whether the term ‘child soldier’ is, in fact or in law, erroneous; and if its use would or could be detrimental to the protections international law demands be afforded to children.

From a consideration of the cumulative effects of elements of both international humanitarian law (IHL) and international human rights law, with respect to children, I will consider if it is demonstrable that the term ‘child soldier’ has no legal merit, and is counterproductive to the very demands for protection of the child that those international law
legal instruments call for. Whilst critical of the term, I am not seeking to criticise those who use the term in its descriptive form. I rather urge them to reflect on that use and its possible consequences to the recognition of, and respect for, the protections international law affords children in situations of armed conflict.

When I talk of the lack of legal merit of force of the phrase, I am proposing that, as a matter of law, there is no such category as ‘child soldier.’ I will attempt to demonstrate that contention—conclusively, in respect of children below the age of fifteen and, persuasively, in respect of those fifteen to eighteen. I do not contend that children do not participate in conflict. To do so would not only be unsustainable against the clear evidence of such participation, but also would defeat the very laws which seek to hold accountable those who conscript, enlist or use children in situations of armed conflict. Rather I insist that such participation is, and can only be, as a civilian and not as a soldier.² I hope to demonstrate this proposition with evidence of the fact that at the initial point of recruitment, or use the child can be nothing but a civilian.

The arguments I present are by necessity truncated. There are no doubt areas of the discussions introduced below which will need to be explored much further. That indeed is part if the intent in preparing this essay. My fervent hope, nonetheless, is that some, if not many, will find this outline sufficiently persuasive in recognising the difficulties inherent in the use of the phrase ‘child soldier.’

Child involvement in adult wars

In the introduction to the so-called Paris Principles,³ it was remarked that despite widespread condemnation regarding their recruitment and use by armed forces and armed groups, ‘children continue to be involved in adult wars and … become disabled or die in such conflicts.’ If wars are waged by adults, and fought by soldiers, then by ordinary

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² I will return periodically to the issue of participation of civilians and soldiers during the course of this paper. I am conscious that the term soldier as a generic description is problematic with respect to combatant status in international humanitarian law. However, I will endeavour to make specific reference to international legal instruments pertinent to the definition of that status and indicate other descriptions associated with those who are soldiers.