Targeting Child Soldiers

Frédéric Mégret, Associate Professor, Faculty of Law, McGill University
Canada Research Chair in Human Rights and Legal Pluralism
Centre for Human Rights and Legal Pluralism

An intriguing question came up in a recent conference organized by Professor Amos Guiora of Quinney College of Law, namely whether one would agree to a drone strike that targeted a child deemed, for example, to be a grave security threat. The question was asked generally and with no particular legal frame of reference in mind (although it probably leaned more towards the national security side of the equation), but I want to address it as if the laws of war were the relevant framework. For the sake of convenience, I will therefore assume a situation where all the other facts are unproblematic, namely that (i) there is an unmistakable armed conflict (leaving aside the issue of whether it is international or non-international), (ii) the child soldiers are members of the enemy armed forces, wearing recognizable uniforms, (iii) their under-age status is at least in some cases knowable and known by the attacker.

To the best of my knowledge, the question of whether it might be lawful to target child soldiers is one that has been curiously little explored despite the otherwise vast literature on child soldiers, perhaps because such is the focus on the crime of recruiting and the personal plight of child soldiers or perhaps, more interestingly, because it touches on one of these sensitive blind spots of the laws of war that are the closest thing it has to a taboo. Tellingly, a Google search on "targeting child soldiers" revealed only references to demobilization and welfare programs which, perhaps awkwardly, resorted to this same warlike terminology. Yet it seems difficult to consider that the fundamental illegality of recruiting child soldiers would not have some implications for the in-field practice of the laws of war.

One answer that seemed to emerge from the conference attendees was that it would be legal to target child soldiers, but immoral to do so unless one were in an actual combat situation, or possibly acting in self-defense. I am a little chagrined by this posited dichotomy of morality and law but I want to prod the intuition a little further, because of the way I think it allows us to think through some of the complexities of the status of the child soldier, the notion of participation in hostilities, and the evolving nature of the laws of war.

Perhaps the most obvious starting point is that under the laws of war, in normal circumstances, the assumption is that all members of the enemy armed forces who are not hors-de-combat can be targeted wherever and whatever they are up to. Nor is there any indication that, from a humanitarian point of view, the attacker should care much about the conditions in which members of the opposite armed forces came to serve. They may have been coerced, or forcefully conscripted for example, even in violation of international law, but under the laws of war that does not

change anything to the fact that they are combatants, part of the other party's armed effort and a potential direct threat to one's forces. They are, in other words, fair game, and the attacking forces will bear no responsibility for the delinquent party's putting of children into harm's way.

Conversely, it is hard to escape the feeling that there is something more than a little obscene about the cold contemplating of killing children in a context where international criminal law (in the service, no doubt, of the laws of war) has now been telling us for a decade quite insistently that the mere fact of recruiting children for war is an international crime of no small proportion (against the background of social perceptions where, needless to say, killing children outside warfare is not viewed kindly). I want to suggest a little mental experiment in which we imagine a training camp for child soldiers that are not in any immediate position to wage war but are clearly, maybe have already been, involved in combat. Imagine then that, availing himself of all the latitude of the laws of war, a commander were to order the bombing of the camp, causing the deaths of hundreds of children (soberingly, upon doing research for this paper I came to the realization that this is precisely what the Sri Lankan Air Force was accused of having done in 2006).

Aside from the impact on troop morale and the inevitable reactions of public opinions, I think it would be fair to say that this might give rise to an awkward normative moment for the tradition that prides itself in being that of international *humanitarian* law. Maybe the legal condoning of the killing of children in times of war, then, is a case of pushing the privilege of belligerency one step too far. Moreover, I struggle to consider that this would only be a moral problem, and that the laws of war would have nothing more creative to offer than a shrug.

If this dilemma sounds reminiscent of something, it is surely of the complexities that arise as a result of an enemy surrounding, even shielding itself with civilians. In a sense, though, the case of the child soldier is even more complicated. Whereas in the civilians-as-shields scenario the figures of the civilians and combatants can theoretically and practically be distinguished, in the child soldier they are notoriously fused: both victim and perpetrator, combatant and non-combatant, angel and demon. In other words, in the shields scenario the attacker might still do its best and hope to end up hitting more combatants than non-combatants; in the child soldier scenario, the combatants *are* the shield, and the attacker is in for some sobering decisions. In both cases, the fear is that it would be unfair for a party to an armed conflict to be able claim both combatant (privilege of belligerency) and non-combatant status (protection) for its troops. Therein lies one of the terrible dilemmas for humanitarianism.

So what is one to do? Answers will vary depending on whether the issue is one before a court (e.g.: as a war crimes), or if the question is merely to develop the best possible policy under the laws of war. I will focus on the latter because I think it is probably too early to think about the former, and one ought to influence the other anyhow. A first lesson from the civilians-as-shields famous scenario is that

international humanitarian law certainly ascribes blame on the attacked party (it commits a war crime), but does not entirely absolve the attacking party that goes ahead with an attack hoping to blame civilian deaths entirely on the attacked's turpitude. One expects better, then, of the attacking party than essentially swooping to the level of the attacked. This is in line of course with an increasingly influential non-reciprocal understanding of the laws of war, where each sides remains at least theoretically bound to the highest humanitarian standards, notwithstanding the other side's descent into infamy.

Now, one of the reasons we think child soldier recruiting is ignominious is not only because it deprives them of freedom and that being in the army is no way to spend a childhood, but of course that in times of war it exposes them to injury, pain, trauma and death. It would be somewhat curious if the party that deliberately and most directly shares in (even though it is not the primary cause of) the infliction of these wrongs were to have its humanitarian credentials entirely untarnished. For criminal law purposes, for example, it is unlikely that causality could be attributed entirely to the child soldier recruiters.

It may be helpful, as often with the Geneva conventions, to think creatively in terms of status, somewhere at the intersection of combatancy and non-combatancy. Specifically, it could be helpful to treat child soldiers as either non-combating members of the armed forces (akin to medical or religious military personnel, notwithstanding the fact that they may potentially engage in hostilities), or as non-combatants *tout court* (notwithstanding the fact that they are actually members of the armed forces who would normally be targetable as such), *subject to the exception that they may be treated as combatants if and only to the extent that they participate in hostilities*, in the sense that that expression is understood in relation to civilians.

This is an intermediary position and it is one fashioned from the normative clay that is international humanitarian law based on a desire to achieve normative coherence. It is not one, as far as I know, that is sustained by any particular body of practice, let alone opinio juris. Nonetheless, I see it as striking a fair middle ground between the repulsive idea of knowingly targeting children who should never have been on the battlefield in the first place, and the evident risk to one's troops of treating what are actual combatants with, as it were, "kids' gloves." It gives child soldiers an extra chance, although no guarantee if they actually participate in hostilities, of escaping unscathed; it reinforces the idea that it is the duty of all responsible parties to an armed conflict to protect childhood within the bounds of military necessity, narrowly understood. I doubt failing this standard could be treated as a war crime today, but thinking through these sorts of issues is a good example of an area where law and morality ought to be able to find a common ground.