

EXECUTIVE SUMMARY

The present written submission to the Committee for the Rights of the Child follows Greece's initial report regarding its implementation of the Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-AC). TRIAL is focusing more specifically on the topic of universal jurisdiction, with a view to the effective prosecution of the war crime of recruiting, enrolling and using child soldiers in armed conflict, considered as one of the necessary measures to properly implement the OP-AC, ratified by Greece on 22 November 2003.

A detailed review of Greek criminal legislation leads TRIAL to highlight that the legal framework of the State Party is lacunar and does not permit Greece to live up to its commitments under the OP-AC.

The following developments provide for a closer scrutiny of Greek criminal legislation, stating how it does not comply with the OP-AC on the question of recourse to universal jurisdiction mechanisms.

TRIAL

TRIAL (Swiss Association against Impunity) is an association under Swiss law founded in 2002. It is apolitical and non-confessional. One of its principal goals is the fight against impunity of the perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity and acts of torture.

In this sense, TRIAL:

- ▶ fights against the impunity of the perpetrators and instigators of the most serious international crimes and their accomplices
- ▶ defends the interests of the victims before Swiss tribunals, international human rights organisms and the International Criminal Court
- ▶ raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of international crimes.

In particular, TRIAL litigates cases before international human rights bodies (UN Treaty bodies and regional courts) and files criminal complaints on behalf of victims before national courts on the basis of universal jurisdiction.

The organisation enjoys consultative status with the UN Economic and Social Council (ECOSOC).

More information can be found on www.trial-ch.org.

DEVELOPMENTS

TRIAL appreciates the opportunity to bring to the attention of the Committee on the Rights of the Child information regarding the implementation of the Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP- AC) in Greece.

TRIAL would like to draw the Committee's attention to the fact that the Greek judiciary cannot effectively prosecute, under the head of universal jurisdiction, persons who have recruited, enrolled or used children under the age of 18 as soldiers in armed conflicts. This is due to the Greek criminal legislation, which considers universal jurisdiction to be applicable only under certain strict circumstances. Article 8 of the Greek Criminal Code, which sets out the elements that need to be given in order for Greek authorities to assess their jurisdiction over international crimes committed abroad, defines those crimes in an exhaustive manner, excluding the war crime of children involvement in armed conflict.

Article 8(k) of the Greek Criminal Code does however seem to consider other crimes (than those enumerated) as potentially prosecutable under the principle of universal jurisdiction. It mainly declares that the Greek criminal legislation is applicable as well to the prosecution of "any other crime for which specific provisions or international conventions signed and ratified by the Greek State provide for the application of Greek criminal legislation". The phrasing of the Greek Criminal Code as it stands does not seem to provide for a full recourse to the principle of universal jurisdiction in the struggle to put an end to the crime of involving children in armed conflicts.

The following pages will address how the international community considers the involvement of children in armed conflict (I) and what that entails for States with regards to the particularities of the OP-AC (II), before focusing on Greece current domestic legislation (III).

I. The recruitment and use of children under 18 years of age is a grave breach of international humanitarian law and therefore considered as a war crime

The prohibition to recruit or use children under 15 in hostilities is codified in Article 77(2) of the First Additional Protocol to the Geneva Conventions of 1977¹. The same prohibition is elevated to a “fundamental guarantee”, in times of non-international armed conflicts, by virtue of Article 4(3) of the Second Additional Protocol to the Geneva Conventions².

As was affirmed by the UN Secretary-General in his report on the establishment of a Special Court for Sierra Leone, Article 4 of the Second Additional Protocol to the Geneva Conventions has long been considered to form part of customary international law, and at least since the entry into force of the statutes of the UN ad-hoc tribunals, its violation is also commonly accepted to entail individual criminal responsibility³.

The same prohibition can also be found in Article 38 of the 1989 Convention on the Rights of the Child⁴. This provision also renders clear its inextricable link with international humanitarian law. It is required from State Parties to respect and to ensure the respect of the prohibition of the involvement of children under 15 in armed conflict.

In that respect, the Committee for the Rights of the Child stated in its Concluding Observations of 1997 on the initial State report submitted by Uganda:

“The Committee recommends that awareness of the duty to fully respect the rules of international

¹ Article 77(2) Protocol I additional to the Geneva Conventions “The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest”.

² Article 4(3)(c) Protocol II additional to the Geneva Conventions: “Children shall be provided with the care and aid they require, and in particular: (...) (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”.

³ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN doc. S/2000/915: “Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused”

⁴ Article 38 of the Convention on the Rights of the Child “1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”

humanitarian law, in the spirit of Article 38 of the Convention, *inter alia* with regard to children, should be made known to the parties to the armed conflict in the northern part of the State party's territory, and that violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators.”⁵

Equally, Article 4 of the statute of the Special Court for Sierra Leone confirms that

“[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities”

is a war crime.⁶

The Appeals Chamber of the Special Court for Sierra Leone has stated that the conscription or enlistment of children under the age of 15 years for them to participate actively in hostilities has constituted a war crime under customary international law since at least 1996.⁷

Also Article 8 of the Rome Statute of the International Criminal Court provides the Court with jurisdiction over the war crime of

“[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”

for international and non-international armed conflicts,⁸ thus indicating the existence of this crime under customary international law. Incidentally, as was stated by the Appeals Chamber of the Special Court for Sierra Leone, this conduct was proscribed, as of 2001, in the criminal legislations of 108 States worldwide.⁹ It seems therefore conclusive that the conscription, enlistment or use of children under the age of 15 years in hostilities constitutes a war crime under customary international law.

To conclude on this, the OP-AC itself clearly refers to the ICC prohibition to involve children in armed conflict, under the head of war crime, as it states in the paragraph 5 of its preamble:

“The States Parties to the present Protocol

(...)

Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the

⁵ Concluding observations of the Committee on the Rights of the Child, Uganda, 21 October 1997, UN doc. CRC/C/15/Add.80, para. 34.

⁶ The statute is available at <http://www.sc-sl.org/scsl-statute.html>.

⁷ *Prosecutor v. Norman*, Case no. SCSL-04-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, paras 44 *et seq.*

⁸ Art. 8(2)(b)(xxvi) and art. 8(2)(e)(vii) of the Rome Statute, respectively. ⁸ *Prosecutor v. Norman*, *supra* n6, paras 44 *et seq.* ⁹ *Ibid.*, para. 41.

⁹ *Prosecutor v. Norman*, *supra* n10, paras 44 *et seq.*

inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict,

(...)

Have agreed as follows”.

A gap of protection seems nonetheless to remain regarding the category of children between 15 and 18 years old. If it is asked of State Parties to preferably recruit the oldest when enrolling children from 15 to 18 years old, the ICRC found highly necessary to engage for a wider protection of children in armed conflict. A 1995 ICRC plan of action led it to require to raise the minimum age for their participation in armed conflict to 18¹⁰. This wish of ICRC might have impelled the adoption of the OP-AC which indeed extends the protection from involvement in armed conflicts to children under 18. The OP-AC thus offers a stronger protection to those under 18, through the extension of the previously gained protection for those under 15 to all children.

The OP-AC implements a higher protection to children, requiring State parties to

“take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities” and to “ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces”¹¹

Regarding armed groups, the OP-AC enunciates the general rule that

“Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years”

and that the State parties should

“take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices”¹².

II. States have an obligation under the OP-AC to exercise universal jurisdiction in order to prosecute persons suspected of war crime related to children involvement in armed conflict

If the conscription, enlistment or use of children in armed conflict has to be prohibited, it is one thing to require States to proscribe this conduct in their domestic law as a war crime, while it is quite another to actually prosecute the persons responsible for such crimes. As the Appeals Chamber of the Special Court for Sierra Leone, citing the UN Special Representative for Children and Armed Conflict, stated: “Words on paper cannot

¹⁰ Plan d'action relatif aux enfants dans les conflits armés. Entériné par le Conseil des Délégués, Genève, 1995. <http://www.icrc.org/web/fre/sitefre0.nsf/html/5FZGBM>.

¹¹ Article 1 and 2 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

¹² Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

save children in peril.”¹³ It is obviously necessary that the criminal provisions be applied by criminal courts.

Article 6(1) of the OP-AC obliges State parties to

“take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction”.

Article 4(2) of the OP-AC provides that State parties must

“take *all feasible measures* to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and *criminalize such practices*.”

One of the “*feasible*” (and arguably necessary) “*measures*” which permit to prevent the recruitment and use of children under 18 years of age is the exercise of universal jurisdiction over persons who have allegedly committed such acts against children¹⁴. This possibility is provided for by customary international law and required by the Committee itself.

This need to properly prosecute has apparently been expressed by the Committee for the Rights of the Child in its Concluding Observations on the initial report submitted by the Solomon Islands in 2003 already:

“50. The Committee is deeply concerned that:

(a) The recruitment of children under the age of 18 by militias occurred during the recent armed conflict in the State party and that other cases of alleged war crimes affecting children have not been duly investigated; (...)

51. The Committee recommends that the State party (...)

(c) Take all necessary measures to investigate, prosecute and punish alleged perpetrators of war crimes, especially those affecting children;”¹⁵

The Committee on the Rights of the Child even went a step further in some of its more recent Concluding Observations to consider that such an obligation not only applies to war crimes that were in some way linked to the prosecuting State (because they were committed on the territory of that State, or because the perpetrator or the victims were nationals of that State), but also when such links were missing.

The Committee thus clearly called for universal jurisdiction to be implemented in the paragraph 19 of its Concluding Observations presented to Montenegro in 2010:

¹³ *Prosecutor v. Norman, supra n10, para. 41.*

¹⁴ The Special Court for Sierra Leone applied an analogous reasoning when it stated that “feasible measures” of implementation (in the context of arts 4 and 38 of the Convention of the Rights of the Child) include criminal sanctions: *Prosecutor v. Norman, Case no. SCSL-04-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, para. 41.*

¹⁵ CRC, Concluding Observations Solomon Islands, 2 July 2003, UN Doc. CRC/C/15/Add.208

- “19. The Committee recommends that the State party take steps to ensure that domestic legislation enables it to establish and exercise extra-territorial jurisdiction over crimes covered by the Optional Protocol and recommends establishing extraterritorial jurisdiction over crimes under the Optional Protocol without the criterion of double criminality.”¹⁶

It is worth noting that these Concluding Observations are not isolated and seems to follow a steady course of action. Indeed, the Committee has recently adopted a similar stance regarding, for instance, Bosnia and Herzegovina¹⁷ and Sierra Leone¹⁸ initial reports. Previously, the Committee called full use of universal jurisdiction as well, regarding Germany¹⁹, Belgium²⁰ and Switzerland²¹ among others.

In the latter case, the Committee went so far as to expressly ask Switzerland to scratch from its books the limitation it had previously added to the exercise of universal jurisdiction:

- “7. The Committee notes with regret the amendment of Article 9 of the Military Penal Code of 23 December 2003, which entered into force on 1 June 2004, because it limits the State party’s extraterritorial jurisdiction for the prosecution of alleged perpetrators of war crimes to persons with a close link to Switzerland. The Committee particularly regrets that the State party’s laws do not establish jurisdiction for cases in which the victim has a close link to Switzerland.
8. In the light of Article 4, paragraph 2, and article 6, paragraph 1, of the Optional Protocol, the Committee recommends that the State party:
- (a) Review the recent amendment of Article 9 of the Military Penal Code with a view to restoring its full jurisdiction over war crimes, such as conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities;”²²

In other terms, the Committee has consistently expressed the position that the OP-AC requires a full implementation of the principle of universal jurisdiction from State Parties. Such an obligation implies that recourse to the principle of universal jurisdiction should be considered as a feasible and necessary measure to effectively implement the prohibitions laid out in the OP-AC. Any additional condition on the use of universal jurisdiction can represent an undue obstacle to the full implementation thereof.

¹⁶ CRC, Concluding Observations Montenegro, 13 Sept-1 Oct 2010, paragraph 19. CRC/C/OPAC/MNE/CO/1

¹⁷ CRC, Concluding Observations Bosnia and Herzegovina, 13 Sept-1 Oct 2010, paragraph 16. CRC/C/OPAC/BIH/CO/1

¹⁸ CRC, Concluding Observations Sierra Leone, 13 Sept-1 Oct 2010, paragraph 26. CRC/C/OPAC/SLE/CO/1

¹⁹ CRC, Concluding Observations Germany, 13 Feb 2008, paragraph 14 et 15 a). CRC/C/OPAC/DEU/CO/1

²⁰ CRC, Concluding Observations Belgium, 9 June 2006, paragraph 13 b). CRC/C/OPAC/BEL/CO/1

²¹ CRC, Concluding Observations Switzerland, 17 March 2006, paragraph 8. CRC/C/OPAC/CHE/CO/1

²² CRC, Concluding Observations Switzerland, 17 March 2006, paragraph 7 and 8. CRC/C/OPAC/CHE/CO/1

It follows that the obligation not to involve children in armed conflict through the OP-AC goes over what other branches of international law provide for, and that there is a clear obligation under the OP-AC to prosecute those responsible for this war crime.

III. Greece has restricted opportunities to prosecute those responsible for war crimes under the universal jurisdiction

Greek criminal legislation allows for prosecution of war crimes based on the principle of universal jurisdiction in a limited number of situations.

According to Article 8 of the Greek Criminal Code,

“Greek criminal legislation is applicable both to nationals and non-nationals of this country, irrespective of the laws of the place of their commission, for the following acts committed abroad: a) high treason and betrayal of the country directed against the Greek state; b) crimes connected with military service and conscription (special section, Ch.H); c) a punishable offence committed by them as employees of the Greek state; d) an act against a Greek employee during the performance of his duties or in connection with his duties; e) perjury in proceedings pending before the Greek authorities; f) piracy; g) currency-related crimes (special section, Ch. I); h) an act of slave-trafficking or procurement for the purpose of debauchery; i) the unlawful trade in narcotic drugs; j) unlawful circulation of and trade in obscene publications; k) any other crime for which specific provisions or international conventions signed and ratified by the Greek state provide for the application of Greek criminal legislation.”

Rather than establishing a global universal jurisdiction for any kind of war crimes, the Greek Criminal Code specifically refers to a series of prohibited behaviours committed abroad that its courts can prosecute. Among these crimes committed abroad for which Greek courts could exercise their jurisdiction, the majority of them is related to greek nationals or Greece interests abroad, and therefore responds to the traditional criminal jurisdiction of any state which would prosecute a crime committed against its interests.

Article 8 of the Greek Criminal Code however adds that Greek courts can prosecute crimes such as piracy²³ or slave trafficking²⁴, which thus organises universal jurisdiction in relation to crimes purely international, or non related to any Greek interests.

It is worth noting that the exercise of universal jurisdiction in such domains remains limited by the exhaustive enumeration of crimes for which it can be called into play.

²³ Article 8 f) Greek Criminal Code

²⁴ Article 8 h) Greek Criminal Code

In particular, it shall be noted that the war crime of involving children in armed conflicts is not specifically included.

Article 8 k) of the Greek Criminal Code nonetheless seems to consider “any other crime” committed abroad to be potentially prosecuted by Greek courts. But this clause is linked to a highly restrictive condition, namely, that there exists a specific provision or an international conventions signed and ratified by Greece which provides for the application of Greek criminal legislation.

The OP-AC does not contain such a specific provision, like does for instance the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 5 to 7), that would constitute a commitment by the State party to establish its jurisdiction and exercise it when certain conditions are met. The obligations under the OP-AC are phrased in a more general manner and in good part, when it comes to the exercise of universal jurisdiction for the war crime of involving children in armed conflicts, are made clearer from the recommendations issued by the Committee on the Right of the Child.

Articles 4 and 6 of the OP-AC are in that sense not self-executing norms. Greece should therefore not rely on a clause that refers to international law norms that would trigger Greek jurisdiction over specific prohibited acts. Such a legal construction does not constitute a "necessary measure to ensure the effective implementation and enforcement of the provisions of the OP-AC" within the meaning of Article 6 OP-AC. On the contrary, the State Party should itself take all necessary legislative measures to clearly ascertain its jurisdiction over the war crime of involving children in armed conflicts.

It is the view of TRIAL that, absent such a clause establishing Greek jurisdiction over such a crime, the State Party will not have taken all necessary measures to ensure the full implementation and enforcement of the OP-AC.

CONCLUSIONS

TRIAL therefore respectfully submits to the Committee on the Rights of the Child that the current state of Greece criminal legislation is not compatible with the State party's obligation under the OP-AC, with regards to the necessity to provide for prosecution of the war crime of recruitment, enrolment and use of child soldiers based on the principle of universal jurisdiction.

RECOMMENDATIONS

TRIAL respectfully suggests that the Committee on the Rights of the Child take the following action:

1. In the list of issues
 - a. take up the absence of universal jurisdiction over the war crime of involving children in armed conflicts as a matter for discussion with the State Party;

2. During the dialogue with Greece
 - a. request information on whether the State Party has taken into account its obligations under the OP-AC to establish its jurisdiction over the war crime of involving children in armed conflicts and whether it envisages to adapt its legislation in the future to comprehensively reflect its international obligations under the OP-AC;
 - b. ask the State Party which measures it intends to take to improve the protection of children under the OP-AC through the proper use of universal jurisdiction for the prosecution of war crimes of involving children in armed conflict.

3. After the dialogue with the State Party:
 - a. recommend that new criminal provisions be adopted to provide for effective prosecution of the war crime of involving children in armed conflicts through the recourse to the principle of universal jurisdiction.

TRIAL remains at the full disposal of the Committee on the Rights of the Child should it require additional information and takes the opportunity of the present communication to renew to the Committee the assurance of its highest consideration.



Philip Grant

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