

NEPAL

**Report on the Implementation of the Optional Protocol to
the Convention on the Rights of the Child on the
Involvement of Children in Armed Conflicts**

**Submission from TRIAL (*Track Impunity Always*)
to the Committee on the Rights of the Child**

June 2014

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About TRIAL

Founded in 2002 TRIAL is an association under Swiss law based in Geneva putting the law at the service of victims of international crimes (genocide, crimes against humanity, war crimes, torture and enforced disappearances). TRIAL fights against the impunity of perpetrators and instigators of the most serious crimes under international law and their accomplices. The organization defends the interests of the victims before Swiss and foreign courts and various international human rights bodies. TRIAL also raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of crimes under international law. To date TRIAL has defended more than 350 victims in the course of 143 international proceedings, the first 27 of which have all been won by the organization. In addition, 40 reports were submitted to the United Nations and 15 criminal complaints filed in Switzerland, which have led to various investigations and a trial.

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Introduction

The Initial Report

On 3 January 2007 Nepal ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (hereinafter “OP-AC”).

On 15 October 2012 Nepal presented to the Committee on the Rights of the Child its Initial Report (CRC/C/OPAC/NPL/1) pursuant to Article. 8, para. 1, of the OP-AC.

1. TRIAL appreciates the opportunity to bring to the attention of the Committee on the Rights of the Child (hereinafter “the Committee”) information regarding the implementation of the OP-AC by Nepal.
2. Given TRIAL’s area of expertise, this report focuses solely on a specific set of obligations contained in Articles 1, 2, 4 and 6 of the OP-AC concerning the prohibition and prosecution of crimes related to the involvement of children in armed conflict. The omission of other subjects does not imply by any means that TRIAL considers that Nepal fully complies with all the other obligations under the OP-AC.
3. TRIAL would like to draw the Committee’s attention to the fact that current Nepalese legislation is not in compliance with the obligations established by the OP-AC on the issue of criminalization and punishment of all the conducts prohibited therein. This is all the more troublesome in light of the serious concerns related to the lack of accountability for perpetrators of offences proscribed by the OP-AC during the decade-long armed conflict between governmental forces and Maoist rebels that afflicted the country from 1996 to 2006.
4. The present alternative report addresses the international legal framework concerning the recruitment and involvement of children in armed conflict and what that entails for States parties to the OP-AC with regard to their obligations to prohibit and criminalize certain acts (chapter I) and to establish universal jurisdiction in order to effectively prosecute and punish such acts (chapter II). The report then assesses the strengths and deficiencies of the implementation by Nepal of Articles 1, 2, 4 and 6 of the OP-AC through an analysis of Nepalese domestic legislation and policies on recruitment and use of child soldiers (chapters III, IV and V).

I. Prohibition and criminalization of child recruitment and participation in hostilities under international law

5. The prohibition to recruit or use children under 15 years of age in hostilities is codified in Article 77, para. 2, of the 1977 First Additional Protocol to the Geneva Conventions¹. The same prohibition was elevated to a “fundamental guarantee” in times of non-international armed conflicts pursuant to Article 4, para. 3, of the Second Additional Protocol to the Geneva Conventions² and is now considered to be a customary rule of international humanitarian law³. Accordingly, the UN Secretary-General affirmed in his report on the establishment of a Special Court for Sierra Leone that 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 responsibility⁴.
6. The same prohibition can also be found in Article 38 of the 1989 Convention on the Rights of the Child⁵. This provision is strictly related to international humanitarian law. It is required from States parties to respect and to ensure the respect for the prohibition of the involvement of children under the age of 15 years in armed conflict.
7. In that respect, the Committee stated already in 1997 that:

¹ Article 77, para. 2, of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: “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 endeavor to give priority to those who are oldest”. Nepal has neither signed nor ratified Optional Protocol I Additional to the Geneva Conventions.

² Article 4, para. 3 (c) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977: “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”. Nepal has neither signed nor ratified Optional Protocol I Additional to the Geneva Conventions.

³ See Rules 136 and 137 of the 2005 International Committee of the Red Cross (ICRC) Customary International Humanitarian Law Study, at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>, pp. 482-488.

⁴ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN doc. S/2000/915, 4 October 2000, para. 14: “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”.

⁵ Article 38 of the Convention on the Rights of the Child, adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990: “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 endeavor 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”.

“The Committee recommends that awareness of the duty to fully respect the rules of international 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”⁶.

8. Article 8 of the Rome Statute of the International Criminal Court (hereinafter “the ICC Statute”) 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 conflicts⁷, thus indicating the existence of this crime under customary international law⁸.

9. Equally, Article 4 of the 2002 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 crime⁹.

10. The Appeals Chamber of the Special Court for Sierra Leone held that the conscription or enlistment of children under the age of 15 years to participate actively in hostilities has constituted a war crime under customary international law since at least 1996¹⁰.

11. To conclude on this, the preamble of the OP-AC itself clearly refers to the prohibition to involve children in armed conflict contained in the ICC Statute:

“The States Parties to the present Protocol [...]

Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the 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, [...].”

⁶ Committee on the Rights of the Child (CRC), Concluding Observations, Uganda, 21 October 1997, UN doc. CRC/C/15/Add.80, para. 34.

⁷ Respectively, Article 8, para. 2 (b)(xxvi), and Article 8, para. 2 (e)(vii), of the ICC Statute, entered into force on 1 July 2002.

⁸ Nepal is not a party to the ICC Statute. The ratification of the ICC Statute as well as the amendment of domestic legislation to comply with the obligations stemming from the ICC Statute would contribute strengthening the protection of children during armed conflicts in the country.

⁹ Statute of the Special Court for Sierra Leone, entered into force on 16 January 2002, at www.sc-sl.org.

¹⁰ Special Court for Sierra Leone (SCSL), 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. 44ff.

12. Therefore it is evident that under the OP-AC States parties are first and foremost under an obligation to prohibit and criminalize the recruitment or the active involvement in hostilities of children under the age of 15 years¹¹.
13. A gap of protection seems nonetheless to remain regarding the category of children between 15 and 18 years of age. If in 1977 what was required from States parties to the First Additional Protocol to the Geneva Conventions was to preferably recruit the eldest when enrolling children from 15 to 18 years old¹², the International Committee of the Red Cross (ICRC) then found necessary to engage for a wider protection of children in armed conflict. A 1995 ICRC plan of action led to the requirement to raise the minimum age for their participation in armed conflict to 18 years¹³.
14. This commitment is reflected in the adoption of the OP-AC, which indeed extends the protection from involvement in armed conflicts to children under the age of 18 years.
15. The OP-AC requires States 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”*¹⁴,
- and to
- “ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces”*¹⁵.
16. 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”*¹⁶.
17. As a result, it is clearly not enough for States parties to the OP-AC to provide domestically for the prohibition and criminalization of the customary law war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities.
18. On the contrary, States parties to the OP-AC shall enact all legislative, administrative and other measures necessary to prohibit and punish the whole range of offences related to the involvement of children in armed conflict¹⁷. In particular, in line with the most recent jurisprudence by the Committee, the following measures are required:

¹¹ CRC, Concluding observations, Tunisia, 6 February 2009, UN doc. CRC/C/OPAC/TUN/CO/1, para.13, where the Committee spells out the reasons for the need of an actual criminalization besides the simple prohibition of the recruitment and use of children in hostilities.

¹² See *supra*, note 1.

¹³ Plan d'action relatif aux enfants dans les conflits armés, Geneva, 1995, at www.icrc.org/fre/resources/documents/misc/5fzgbm.htm.

¹⁴ Article 1 OP-AC.

¹⁵ Article 2 OP-AC.

¹⁶ Article 4 OP-AC.

¹⁷ Articles 1, 2 and 6 OP-AC.

a) An explicit criminalization in domestic legislation of the compulsory recruitment of persons under the age of 18 years (both in peace and war times)¹⁸

Actually, the Committee has repeatedly expressed its concern about the fact that

“the recruitment [...] of persons under the age of 18 years is not explicitly prohibited nor criminalized in domestic legislation”¹⁹,

stressing that this absence

“may perpetuate an environment of impunity and lack of accountability among the [...] [national] armed forces”²⁰.

The Committee thus clearly called for the adoption of an explicit prohibition and criminalization of the recruitment of children up to 18 years²¹, adding that States parties should

“criminaliz[e] the mere recruitment of children at the ages of 16 and 17 and their use in hostilities as separate offenses and that recruitment as such is criminalized by the law for both peace and wartime”²².

b) An explicit criminalization in domestic legislation of the involvement in hostilities of persons under the age of 18 years²³

The Committee has several times expressed its regret for the lack of a specific legal provision criminalizing the involvement of children under the age of 18 years in hostilities²⁴.

Elaborating on such a deficiency present in the domestic legislation of a State party to the OP-AC, the Committee conclusively added:

“The Committee is of the view that the administrative policy [...] to preclude all military personnel under 18 years of age from services abroad is not a sufficient guarantee against

¹⁸ CRC, Concluding Observations, Ukraine, 11 April 2011, UN doc. CRC/C/OPAC/UKR/CO/1, para. 19; CRC, Concluding Observations, Uganda, 17 October 2008, UN doc. CRC/C/OPAC/UGA/CO/1, para. 27; CRC, Concluding Observations, Republic of Korea, 27 June 2008, UN doc. CRC/C/OPAC/KOR/CO/1, para. 12; CRC, Concluding Observations, Slovenia, 12 June 2009, UN doc. CRC/C/OPAC/SVN/CO/1, para. 11. Here the CRC clearly stated that the mere recruitment of children at the ages of 16 and 17 years shall be criminalized both in peacetime and in wartime as a separate offense than that entailing their use in hostilities.

¹⁹ CRC, Concluding Observations, Ukraine, *supra* note 18, para. 19.

²⁰ CRC, Concluding Observations, Uganda, *supra* note 18, para. 27.

²¹ CRC, Concluding Observations, Republic of Korea, *supra* note 18, para. 13.

²² CRC, Concluding Observations, Slovenia, *supra* note 18, para. 11.

²³ CRC, Concluding Observations, Ukraine, *supra* note 18, para. 19; CRC, Concluding Observations, Bosnia and Herzegovina, 10 October 2010, UN doc. CRC/C/OPAC/BIH/CO/1, para. 13-14; CRC, Concluding Observations, Mongolia, 3 March 2010, UN doc. CRC/C/OPAC/MNG/CO/1, para. 13; CRC, Concluding Observations, Republic of Korea, *supra* note 18, para. 12; CRC, Concluding Observations, Tanzania, 10 October 2008, UN doc. CRC/C/OPAC/TZA/CO/1, para. 20; CRC, Concluding Observations, Ireland, 14 February 2008, UN doc. CRC/C/OPAC/IRL/CO/1, para. 14-15.

²⁴ CRC, Concluding Observations, Ukraine, *supra* note 18, para. 19; CRC, Concluding Observations, Republic of Korea, *supra* note 18, para. 13; CRC, Concluding Observations, Bosnia and Herzegovina, *supra* note 23, para. 13; CRC, Concluding Observations, Mongolia, *supra* note 23, para. 13.

engagement by persons under 18 years of age in armed conflict, as required by article 1 of the Optional Protocol.

The Committee encourages the State party to explicitly criminalize direct involvement of any persons under the age of 18 in hostilities, both at home and abroad, with a view to fully respecting the spirit of the Optional Protocol and to provide full protection for children in all circumstances”²⁵.

c) The criminalization of the recruitment and use in hostilities of children up to 18 years by non-State armed groups²⁶ (even though there is no armed group present in the State party)²⁷

Finally the Committee has often recommended States parties to the OP-AC to

“explicitly prohibit by law and criminalize the recruitment and use of children in hostilities by non-State armed groups”²⁸.

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

19. If the conscription, enlistment or use of children in armed conflict, has to be prohibited, it is one thing to require States to proscribe these conducts in their domestic law as a crime, while it is quite another to actually prosecute and punish 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 save children in peril”²⁹.

20. The need to properly prosecute and punish has been expressed early on by the Committee:

“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; [...]

The Committee recommends that the State party [...]

²⁵ CRC, Concluding Observations, Ireland, *supra* note 23 paras. 14-15.

²⁶ CRC, Concluding Observations, Sierra Leone, 1 October 2010, UN doc. CRC/C/OPAC/SLE/CO/1, paras. 23-24; CRC, Concluding Observations, Sudan, 6 October 2010, UN doc. CRC/C/OPAC/SDN/CO/1, para. 23; and CRC, Concluding Observations, The Former Yugoslav Republic of Macedonia, 11 June 2010, UN doc. CRC/C/OPAC/MKD/CO/1, para. 10.

²⁷ CRC, Concluding Observations, Serbia, 11 June 2010, UN doc. CRC/C/OPAC/SRB/CO/1, paras. 20-21; CRC, Concluding Observations, Liechtenstein, 4 March 2010, UN doc. CRC/C/OPAC/LIE/CO/1, para. 13.

²⁸ CRC, Concluding Observations, Sierra Leone, *supra* note 26, paras. 23-24; CRC, Concluding Observations, Sudan, *supra* note ??, para. 23; CRC Concluding Observations, The Former Yugoslav Republic of Macedonia, *supra* note 26, para. 10.

²⁹ SCSL, Prosecutor v. Norman, *supra* note 10, para. 41.

*(c) Take all necessary measures to investigate, prosecute and punish alleged perpetrators of war crimes, especially those affecting children*³⁰.

21. In order for the existing criminal provisions to be successfully applied by national courts, it is therefore necessary to establish in national legislation certain grounds of jurisdiction according to which courts are allowed to adjudicate on specific crimes.

22. Recalling the nature of States parties' obligations under the OP-AC, Article 6, para. 1, mandates States to

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

whereas Article 4, para. 2,) requires States to

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

23. Therefore, one of the “feasible” and “necessary” measures to prevent the recruitment and use of children under the age of 18 years of age in hostilities is the exercise of universal jurisdiction over persons who have allegedly committed such acts against children³¹.

24. This possibility is provided for by customary international law³² and the Committee itself has consistently held that the obligation to prosecute and punish not only applies to crimes that are 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 are missing.

25. The Committee thus clearly called for the adoption of the principle of universal jurisdiction in a conspicuous number of its concluding observations³³. In particular, the Committee recommended that States parties should

“take steps to ensure that domestic legislation enables [...] [them] to establish and exercise extraterritorial jurisdiction over crimes covered by the Optional Protocol [...] without the criterion of double criminality”³⁴.

³⁰ CRC, Concluding Observations Solomon Islands, 2 July 2003, UN Doc. CRC/C/15/Add.208.

³¹ The SCSL applied an analogous reasoning when it stated that “feasible measures” of implementation (in the context of Articles 4 and 38 of the Convention of the Rights of the Child) include criminal sanctions: SCSL, Prosecutor v. Norman, *supra* note 10, para. 41.

³² See, *inter alia*, Rule 157 of the 2005 ICRC Customary International Humanitarian Law Study, *supra* note 3, p. 604.

³³ CRC, Concluding Observations, Bosnia and Herzegovina, *supra* note 23, para. 16; CRC, Concluding Observations, Sierra Leone, *supra* note 26, para. 26; CRC, Concluding Observations, Germany, 13 February 2008, UN doc. CRC/C/OPAC/DEU/CO/1, paras. 14, 15 a); CRC, Concluding Observations, Belgium, 9 June 2006 UN Doc. CRC/C/OPAC/BEL/CO/1, para. 13 b); and CRC, Concluding Observations, Switzerland, 17 March 2006, UN doc. CRC/C/OPAC/CHE/CO/1 para. 8.

³⁴ CRC, Concluding Observations, Montenegro, 1 October 2010, UN doc. CRC/C/OPAC/MNE/CO/1, para. 19.

26. In this respect it must be underlined that the Committee has recommended States to eliminate any additional barriers to the exercise of universal jurisdiction. In 2006 the Committee went so far as to expressly ask a State party to eliminate from its legislation a precise limitation it had previously added to the exercise of universal jurisdiction:

“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. 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”³⁵.

27. It is thus fair to conclude that the recourse to the principle of universal jurisdiction should be considered as a “feasible” and “necessary” measure to effectively implement the prohibition of all the conducts prohibited pursuant to the OP-AC³⁶ and that any additional condition on the use of universal jurisdiction, for instance the double criminality criterion³⁷, represents an undue obstacle to the full implementation thereof and has been ruled out by the Committee as unnecessary³⁸.

III. Nepal does not properly criminalize all the conducts prohibited pursuant to the OP-AC

28. In its initial report, the government of Nepal refers to the legislative limitations to all forms of use and recruitment of children under 18 years of age in the Nepal Army (NA), in the Nepal Police (NP) and in the Armed Police Force (APF)³⁹.

³⁵ CRC, Concluding Observations, Switzerland, *supra* note 33, paras. 7-8.

³⁶ CRC, Concluding Observations, Bosnia and Herzegovina, *supra* note 23, para. 16; CRC, Concluding Observations, Montenegro, *supra* note 34, para. 19; CRC, Concluding Observations, Argentina, 11 June 2010, UN doc. CRC/C/OPAC/ARG/CO/1, para. 16; CRC, Concluding Observations, Japan, 22 June 2010, UN doc. CRC/C/OPAC/JPN/CO/1, para. 15; CRC, Concluding Observations, The Former Yugoslav Republic of Macedonia, *supra* note 26, para. 12; CRC, Concluding Observations, Serbia, *supra* note 27, para. 23; CRC, Concluding Observations, Liechtenstein, *supra* note 27, para. 16; CRC, Concluding Observations, Israel, 4 March 2010, UN doc. CRC/C/OPAC/ISR/CO/1, para. 31.

³⁷ The “double criminality” principle is a jurisdictional criterion according to which a crime committed abroad can be prosecuted only if the underlying acts represent also a crime in the State where they were committed.

³⁸ CRC, Concluding Observations, Belarus, 28 April 2011, UN doc. CRC/C/OPAC/BLR/CO/1, paras. 16-17; CRC, Concluding Observations, Montenegro, *supra* note 34, paras. 18-19; CRC, Concluding Observations, The Former Yugoslav Republic of Macedonia, *supra* note 26, para. 12; CRC, Concluding Observations, Germany, *supra* note 33, para. 15.

³⁹ The APF is a paramilitary force established by ordinance on 22 January 2001. Organized in combat brigades, the APF is tasked with counterinsurgency operations. Its operative functions encompass law enforcement, counter-terrorism, border security, hostage rescue and riot control. For further information, see <http://www.apf.gov.np/index.php?c=3&lan=en>.

29. First and foremost, the State party refers to the prohibition of child recruitment enshrined in Article 22, para. 5, of the 2007 Interim Constitution of Nepal⁴⁰, which reads:

*“No **minor** shall be employed in factories, mines or in any other such hazardous work or shall be **used** in army, police or in conflicts”* [emphasis added].

It also underlines⁴¹ that, pursuant to Article 33 of the Interim Constitution

*“The State shall have the follow[ing] responsibilities: [...] (m) **To implement international treaties and agreements effectively, to which State is a party**”* [emphasis added].

and pursuant to Article 35, para. 9,

*“The state shall pursue a policy of **making special provisions of social security for the protection and welfare of single women, orphans, children, helpless, the aged, disabled, incapacitated persons and the disguising tribes**”* [emphasis added].

30. Besides constitutional provisions, the government of Nepal recalls⁴² that, according to section 9 of the Nepal Treaty Act⁴³,

*“In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party [...] inconsistent with the provisions of prevailing laws, **the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws**”.* [emphasis added]

and, in this connection, it refers⁴⁴ to the declaration made by Nepal upon ratification of the OP-AC, establishing 18 years as the minimum age for being recruited in the NA or in the APF⁴⁵.

31. Moreover, the State party points out that “the existing legislation, rules and procedures for recruitment into the national security forces [...] do not permit any person who has not attained the age of 18 to join”⁴⁶ and underlines that *de facto* “there is no compulsory recruitment in Nepal”⁴⁷.
32. With reference to the former of the abovementioned stances, Nepal describes the recruiting process in its armed forces⁴⁸, in the NP⁴⁹ as well as in the APF⁵⁰, without however providing any reference to their legal basis⁵¹. Nonetheless, the age-limitations described are in accordance with the criteria of eligibility for service in the security forces designed, respectively, by the 1962 Royal Army New Recruitment

⁴⁰ Initial Report of Nepal (hereinafter “State party report”), 15 October 2012, UN Doc. CRC/OPAC/NPL/1, paras. 7 and 69.

⁴¹ State party report, para. 9.

⁴² State party report, para. 10.

⁴³ Nepal Treaty Act, 2047 (1990), entered into force on 11 November 1990.

⁴⁴ State party report, para. 11.

⁴⁵ Declaration of Nepal pursuant to Article 3 of the OP-AC: “(1) The minimum age for recruitment in the Nepal Army and the Armed Police Force shall be 18 years. (2) The recruitment in the Nepal Army and the Armed Police Force shall be voluntary and shall be conducted through open competition”.

⁴⁶ State party report, paras. 11 and 50.

⁴⁷ State party report, para. 51.

⁴⁸ State party report, para. 52, subpara. 1.

⁴⁹ State party report, para. 52, subpara. 2.

⁵⁰ State party report, para. 52, subpara. 3.

⁵¹ Note 16 of the State party report generally refers to the “*Regulation of Army Act, 2006*” [emphasis added] which however does not identify any existing Nepalese law.

Rules, the Police Rules⁵² and by the Armed Police Force Rules⁵³. Pursuant to such requirements, persons who have not attained the age of 18 are not suitable to enter Nepalese security forces.

33. With regard to compulsory recruitment, the State party asserts that “there is no provision for compulsory recruitment of children or any adults for that matter in national security forces and use of children in hostilities”⁵⁴. Nepal underlines that the qualifications required by the 1962 Royal Army New Recruitment Rules, by the 1992 Nepal Police Rules and by the 2003 Armed Police Force Rules solely refer to voluntary recruitment of persons how have already attained the 18 years of age⁵⁵.
34. As for the recruitment and use of children by armed groups, in its Initial Report Nepal recalls⁵⁶ the efforts undertaken by the State to rehabilitate and protect former child soldiers involved in the decade-long armed conflict. It makes reference to the National Plan of Action for the Rehabilitation and Reintegration of Children Affected by Armed Conflict⁵⁷ and stresses that, in accordance with the United Nations Security Council Resolution 1612 (2005)⁵⁸, the Nepal Task Force for Children and Armed Conflict co-chaired by the United Nations Children’s Fund (UNICEF) and the United Nations Office of the High Commissioner for Human Rights(OHCHR) set up a monitoring mechanism that monitors and report on “the recruitment and use of child soldiers in violation of applicable international law and on other violations and abuses committed against children affected by armed conflict”⁵⁹.
35. The State party, however, does not refer to any specific legal provision prohibiting, let alone criminalizing, the recruitment or use of child soldiers by armed groups.
36. With regard to the State party’s assertions, it shall be noted at the outset that the recruitment proceedings designed under the Royal Army New Recruitment Rules, the Police Rules and the Armed

⁵² Police Rules, 2049 (1992), entered into force on 21 December 1992, Section 13:

“1) Any person who has the following qualifications may take part in an open competition for the post of Police Inspector:

a) having completed the age of Twenty years [...];

2) In the case of the qualification of a person who takes part in open competition to be held for the post of Assistant Sub-Inspector of Police, the age and educational qualification shall be as follows and the other qualification shall be as specified in Sub-rule (1):

(a) having completed the age of Eighteen years [...];

and Section 20:

“(1) A candidate who intends to be appointed to the posts of police constable and police peon shall have to fill in a form as referred to in Schedule-2and make an application to the Police Headquarters and Regional Police Office or Regional Police Training Center.

(2) A candidate who makes application pursuant to Sub-rule (1)shall have the following qualification:

(a) having completed the age of Eighteen years [...].”

⁵³ Armed Police Force Rules, 2060 (2003), entered into force on 26 May 2003, Section 8:

“The following qualifications shall be required in order to be appointed to the following post of the Armed Police Service [...]:

a) For the Armed Police Inspector:(1) having completed the age of Twenty One [...];

b) For Armed Police Sub-Inspector:(1) having completed the age of eighteen years [...];

c) For Armed Police Personnel and Armed Police Peon or equivalent thereto:(1) having completed the age of eighteen years [...].”

⁵⁴ State party report, para. 70.

⁵⁵ State party report, para. 71.

⁵⁶ State party report, paras. 54 - 57.

⁵⁷ See below, para. 56.

⁵⁸ UN Security Council, Resolution 1612 (2005), UN Doc. S/RES/1612(2005), 26 July 2005.

⁵⁹ *Ibid.*, para. 2, (a). According to the UN Security Council Resolution 1612 (2005), the monitoring mechanism shall report, in particular, on the following six gross violations: killing and maiming of children, recruiting and using child soldiers, attacks against schools or hospitals, rape or other grave sexual violence against children, abduction of children, denial of humanitarian access to children. The Reporting Mechanism on children affected by armed conflict violations was dissolved in 2012 after the Unified Communist Party of Nepal – Maoists (UCPN-M) had been delisted from the annual Security General report on children and armed conflict.

Police Force Rules cannot be properly qualified as prohibition to recruit child soldiers or to employ them in conflict. What these pieces of legislation do, in fact, is to establish criteria for eligibility to become a member of the State security forces: the persons who do not match the parameters spelled out in those laws are prevented from entering the security forces. From a legal standpoint, this is different from prohibiting their recruitment. Indeed, in the former scenario persons who do not match certain parameters suffer a limitation of a right of theirs (*i.e.*, the right to become a member of the security forces); in the latter, instead, the legal limitation burdens those public officers who are mandated with the selection of the new personnel by imposing on them an obligation to refrain from recruiting persons who are entitled to a particular protection, such as persons who have not attained 18 years of age. All the domestic legal provisions referred to by Nepal actually suit to the description of the former scenario.

37. The only existing prohibition proper in this regard is the one enshrined in Article 22, para. 5, of the 2007 Interim Constitution which, however, is affected by at least two flaws. First of all, the letter of such provision refers to “minors”, without defining the scope of this expression. This is of particular concern, considering that relevant Nepalese laws still define children as “minors not having completed the age of sixteen years”⁶⁰. Secondly, it only prohibits the *use* of minors in army, police or in conflicts. The simple recruitment of minors that, as mentioned⁶¹, is *per se* prohibited under international law, does not seem to fall within this provision. Further references to Articles 33 (m) and 35, para. 9, of the Interim Constitution, dealing respectively with the State’s obligation to implement international treaties and to frame special provisions to ensure the protection of children, are of little help. These two norms, in fact, simply spell out an obligation that the State party already has pursuant to general principles of public international law⁶². None of them actually contributes to give a step forward towards the implementation of the OP-AC. Rather, they merely reiterate that the State is under an obligation to implement the OP-AC. However, they need to be implemented through ordinary legislation as much as the OP-AC itself.
38. Formally, the 1990 Treaty Act has the effect to provide a sort of direct implementation to international treaties to which the State is party. However, in practice, the Treaty Act has gone widely unimplemented⁶³. Moreover, conventional provisions requiring States parties to prohibit specific conducts, to criminalize them, and to establish their criminal jurisdiction over them, are not self-executing.

⁶⁰ Children's Act, 2048 (1992), (hereinafter “the Children’s Act”) entered into force on 20 May 1992, Section 2, a). Similarly, Section 2 of the Child Labour (Prohibition and Regulation) Act, 2000, (hereinafter “the Child Labour Act”) entered into force on 21 June 2000, establishes: “(a) *Child* means a child who has not completed sixteen years of age”. Accordingly, Section 3 of the Contract Act (2000), entered into force on 17 June 2000, provides: “Person competent to Conclude Contracts: (1) Any person other than those mentioned below may be competent for concluding a contract; (a) Those who have not attained 16 years of age [...]”. However, Section 2, (d) of the Human Trafficking and Transportation (Control) Act, 2007, entered into force on 24 July 2007, prescribes: “*Child* means a person who has not reached the age of eighteen years”.

⁶¹ See *supra*, paras. 5 – 18.

⁶² Vienna Convention on the Law of Treaties, entered into force on 27 January 1980, arts. 26, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”, and 27, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

⁶³ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Mission to Nepal*, UN Doc. E/CN.4/2006/6/Add.5, 9 January 2006, para. 26.

39. Admittedly, no specific prohibition currently exists under Nepalese legislation with regard to compulsory recruitment⁶⁴. The only legal guarantee against forced recruitment of people under 18 years of age, once more, is given by the eligibility criteria recalled above⁶⁵.
40. It is of course laudable that people under 18 years of age are not suitable to be recruited. Nonetheless, this does not satisfy the obligation to forge an express prohibition to their recruitment in the State security forces and to their direct employment in hostilities in compliance with the obligations stemming from Articles 1 and 2 of the OP-AC⁶⁶. This is all the more troublesome in consideration of the fact that, as referred above⁶⁷, the OP-AC requires States parties not only to prohibit but also to explicitly criminalize in domestic legislation the compulsory recruitment of persons who have not attained 18 years of age as well as their direct deployment in hostilities.
41. This implies, in the Committee's view, the necessity to frame in the national legislation "effective dissuasive penalties" for criminal behaviour⁶⁸. Furthermore, concerning the recruitment and use in hostilities of children up to 18 years by non-State armed groups, the conduct must be criminalized in domestic legislation even though there is no armed group present in the territory of the State party⁶⁹.
42. The only provisions currently in force in Nepal which codify as crimes conducts which may relate to the forced recruitment of children and their involvement in hostilities are included in the Child Labour Act, 2000 and in the Children's Act, 1992. The former prohibits the employment of children under 14 years of age in any kind of work and the employment of any child – that is considered to be any person under 16 years⁷⁰ – in "riskful" [sic] occupations⁷¹ such as, among others not relevant to the present report, the "distribution, of match, explosives and other fire ness [sic] goods"⁷². In addition, such act forbids engaging children under threat, coercion or anyways against their will⁷³. Such crimes are sanctioned with imprisonment up to three months or one year respectively. In addition, perpetrators may be imposed a fine⁷⁴.
43. The Children's Act forbids exercising any form of torture or cruel treatment on children⁷⁵. Once more, the term "child" solely refers to people who have not attained 16 years of age. Neither the term "torture" nor the term "cruel treatment" are defined by this law or by any other within Nepalese legislation. The

⁶⁴ See State party report, para. 70 and *supra*, paras. 28 – 38.

⁶⁵ See *supra*, paras. 28 – 38.

⁶⁶ See *supra*, paras. 5 – 18.

⁶⁷ *Ibid.*

⁶⁸ See *supra*, paras. 5 – 18.

⁶⁹ *Ibid.*

⁷⁰ See *supra*, note 60.

⁷¹ Child Labour Act, *supra* note 60, Section 3: "Child not to be engaged in Work:

(1) Nobody shall engage in work a child who has not completed fourteen years of age as a labourer.

(2) Nobody shall engage a child in a riskful [sic] occupation or work set forth in the Schedule".

⁷² Schedule attached to the Child Labour Act, para. d).

⁷³ *Ibid.*, Section 4: "Child not to be Engaged in Work Against his Will: Nobody shall engage in work a child as a labourer by pleasing, gratifying or misrepresenting him or under greediness or fear or threat or coercion or any other way against his will".

⁷⁴ *Ibid.*, Section 19, paras. 1) and 2): "Punishment:

(1) Whosoever commits an act in contravention of sub section (1) of Section 3 shall be punished with imprisonment up to three months or with a fine up to rupees ten thousand or with both.

(2) Whosoever commits an act in contravention of sub section (2) of Section 3 or Section 4 shall be punished with imprisonment up to one year or a fine up to rupees fifty thousand or with both".

⁷⁵ Children's Act, *supra* note 60, Section 7: "No child shall be subjected to torture or other cruel treatment".

sanction provided by the Children's Act for offences in contravention of this provision is a term of imprisonment up to one year and a fine⁷⁶.

44. From the ordinary meaning to be attributed to the terms of the abovementioned provisions it appears self-evident that none of them may be considered as an expressed criminalization of the conducts forbidden by the OP-AC, as requested by the Committee⁷⁷. It is true, indeed, that the crimes recalled may cover some of the conducts proscribed by the OP-AC. For instance, the crime of engagement of children in dangerous activities may partly be linked to Articles 2 and 4 of the OP-AC. Yet, the scope of such provision is extremely limited, in consideration to the conducts defined "riskful" [sic]. As not all activities within the security forces necessarily involve the distribution of matches, explosives and other fire ness [sic] goods, this provision cannot be considered as a criminalization of child-recruitment in and by itself. Moreover, it is doubtful that the term "engagement" resorted to by the norm may be interpreted as recruitment, especially with reference to non-State armed groups. In any event, this norm as much as all the others referred to above, is only addressed to children under 16 years of age. Thus, also the prohibition to "engage" children against their will and the respective criminalization of conducts contravening this norm cannot be said to satisfy the requirements of Articles 2 and 4 of the OP-AC inasmuch as it leaves without any protection children between 16 and 18 years of age.
45. At any rate, none of the above codify the involvement and use of child soldiers in hostilities as crimes under domestic law. The flaws in current Nepalese legislation have already been noticed by the Committee itself. In occasion of its thirty-ninth session the Committee, after noting

*"with grave concern the reports of abduction and forcible conscription of children by the armed groups for political indoctrination and for use as combatants, informants, cooks or porters and as human shields"*⁷⁸,

recommended the State party to

*"criminalize abduction, recruitment and use of children for military purposes by any armed forces or armed group"*⁷⁹.

46. Regardless to the Committee's recommendations, however, Nepal has failed to take any measure to bring its legislation in line with its international obligations. Also after it became party to the OP-AC⁸⁰, Nepal has taken no steps have to forbid and criminalize the compulsory recruitment of children under 18 years of age, their involvement in hostilities, and their recruitment and use in hostilities by non-State armed groups.
47. In conclusion, TRIAL submits that the recruitment of children under 18 years old into State forces and non-State armed groups is not properly prohibited, criminalized and sanctioned in Nepalese legislation,

⁷⁶ *Ibid.*, Section 53, para. 3: "Whoever commits any offence in contravention to Section 7 or 15, he shall be liable to a punishment with a fine up to five thousand rupees or with imprisonment for a term that may extend to one year or with both. In case of torture and cruel treatment, he may be made liable to pay a reasonable amount of compensation to the Child".

⁷⁷ See *supra*, paras. 5 – 18.

⁷⁸ Committee on the Rights of the Child, Concluding Observations: Nepal, UN Doc. CRC/C/15/Add.261, 21 September 2005, para. 81.

⁷⁹ *Ibid.*, para. 82, a).

⁸⁰ Nepal ratified the Optional Protocol to the Convention on the Rights of the Child on 3 January 2007 (see *supra*, Introduction) after having received the Committee's Concluding Observations on its second periodic report on 21 September 2005.

and that no measure whatsoever has been taken to prevent the recruitment of children by non-State armed groups.

IV. Ongoing impunity for past violations

48. During the decade-long conflict between governmental forces and Maoist insurgents that stormed Nepal from 1996 to 2006⁸¹, persons who had not attained the 18 years of age were conscripted, enrolled and recruited by both parties. Recruitment by security forces was rare and children were mostly used as spies or informants⁸². In spite of a constant denial on part of the Maoists⁸³, the rebels widely resorted to the use of children in their ranks⁸⁴. In this context, children were mandated with a variety of functions, being used as soldiers, spies, guards, messengers, cooks, porters and suppliers⁸⁵. The Maoists mostly recruited children aged between 10 and 16 into the militia on part-time basis⁸⁶. While the official policy of the insurgents was to enroll children into the army only after they attained 16 years of age, most of them were much younger⁸⁷.

49. According to the OHCHR,

“The recruitment of children into armed groups was a significant issue during the conflict in Nepal and it was addressed by the parties to the conflict and the United Nations within the framework of Security Council Resolution 1612 (2005) on children in armed conflict”⁸⁸.

50. Child recruitment was not the only crime perpetrated against children during the decade long conflict in Nepal. Thousands of children were displaced, killed⁸⁹, injured, forcefully separated from their families, left orphans or abducted⁹⁰, sexually abused⁹¹, exploited, imprisoned⁹² and tortured⁹³. Many of them

⁸¹ In details on the history of the conflict see OHCHR, *Nepal Conflict Report, An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006* (hereinafter, *Nepal Conflict Report*), 2012, pp. 28 – 61. In its Initial Report Nepal makes reference to the decade long armed conflict in three instances: see State party report, paras. 35, 55 and 78.

⁸² Coalition to Stop the Use of Child Soldiers, *Global Report 2008*, p. 247; UN Secretary General, *Report of the Secretary-General on children and armed conflict in Nepal*, UN Doc. S/2006/1007, 20 December 2006.

⁸³ Coalition to Stop the Use of Child Soldiers, *Global Report 2008*, *supra* note 82, p. 247.

⁸⁴ Tracey B. Begley, *The Extraterritorial Obligation to Prevent the Use of Child Soldiers*, in *American University International Law Review*, Vol. 27:3, 20012, pp. 616 and 619.

⁸⁵ Partnerships for Protecting Children in Armed Conflict (PPCC), *Children and Armed Conflict, How to put pressure on persistent perpetrators? Lessons learned from Nepal*, 9 July 2012, p. 1.

⁸⁶ Coalition to Stop the Use of Child Soldiers, *Global Report 2008*, *supra* note 82, p. 247: the Maoists usually enrolled child soldiers “through special recruitment campaigns such as “one family, one member for the Party”, where children were recruited forcibly or voluntarily; through the community activities of Maoist cultural groups, full or part-time militias and associated organizations, such as the students’ and women’s organizations, or directly by the PLA; and through the widespread practice of mass abductions and forced participation in mass meetings and cultural events in rural areas”.

⁸⁷ *Ibid.*, p. 247.

⁸⁸ OHCHR, *Nepal Conflict Report*, *supra* note 81, p. 71.

⁸⁹ UN Secretary General, *Report of the Secretary-General on Children and Armed Conflict in Nepal*, *supra* note 81, paras. 32 – 37. See also OHCHR, *Nepal Conflict Report*, *supra* note 81, pp. 70, 93, 97 and 98.

⁹⁰ *Ibid.*, paras. 29 -31.

⁹¹ *Ibid.*, paras. 43 – 46. See also OHCHR, *Nepal Conflict Report*, *supra* note 81, pp. 23 and 172.

⁹² *Ibid.*, paras. 13 and 24 – 28.

⁹³ *Ibid.*, para. 13. See also OHCHR, *Nepal Conflict Report*, *supra* note 81, pp. 134 and 138.

faced trial on various charges due to conflict-related activities that they had been forced to perform by the parties to the conflict.

51. Being forced to take part to hostilities, children were obliged to become victims, witnesses and sometimes even perpetrators of the above mentioned offences. Against this background, it appears evident that the lack of accountability for conflict-related crimes against children can leave child victims vulnerable to further violations and abuses. This must be read in the overall context of impunity for crimes committed during the conflict. As the Human Rights Committee recently observed with concern “not a single conflict-related case has been successfully prosecuted through the criminal justice system”⁹⁴.
52. With the signature of the Comprehensive Peace Agreement (hereinafter CPA) in 2006⁹⁵ the government of Nepal on the one hand and the Maoists on the other committed not to recruit or use child soldiers any longer and to immediately release and discharge the ones they had employed during the conflict⁹⁶.
53. According to the Secretary General of the United Nations,

“6. [...] The United Nations teams assessed 2,973 Maoist army members to have been under 18 years of age at the time of the ceasefire. An additional 1,035 adults assessed to be over 18 were declared to have been recruited after the cut-off date of 25 May 2006.

7. In addition, 8,640 Maoist army members who were initially registered in February 2007 did not present themselves for the verification process and were automatically disqualified. Many are believed to have been children who were released from the Maoist army informally or self-released, without the benefit of planned reintegration. There are also consistent reports that significant numbers of informally released children have been drawn into the Young Communist League”⁹⁷.
54. On 16 December 2009 the government of Nepal and the Unified Communist Party of Nepal – Maoists (UCPN-M) agreed upon an action plan for the discharge of so-called “disqualified army personnel”, *i.e.*, soldiers who were under the age of 18 during the conflict⁹⁸. “The Action plan included the establishment of a UN Monitoring Mechanism to monitor and report on the implementation of commitments made regarding Maoist army personnel, who at the time of verification were minors”⁹⁹.
55. Thus, following the end of the conflict a total number of around 3,000 child soldiers were discharged¹⁰⁰. The last batch of former child soldiers was released on 8 February 2010¹⁰¹.

⁹⁴ Human Rights Committee, Concluding Observations on Nepal, UN doc. CCPR/C/NPL/CO/2 of 28 March 2014, para. 5.a.

⁹⁵ Comprehensive Peace Agreement (CPA), concluded by the government of Nepal and the Communist Party of Nepal (Maoists), 21 November 2006. The CPA formally ended the conflict between governmental forces and the insurgents.

⁹⁶ CPA, Section 7.6.1: “Both sides fully agree to provide special protection to the rights of women and children, to immediately prohibit all types of violence against women and children, including child labor, as well as sexual exploitation and harassment, and not to include or use children who are of eighteen years or below than that in the armed force. Children so affected shall, immediately, be rescued and necessary and appropriate assistance shall be provided for their rehabilitation”.

⁹⁷ UN Secretary-General, *Report on children and armed conflict in Nepal*, 18 April 2008, UN Doc. S/2008/259, paras. 6 and 7.

⁹⁸ UN News Center, *UN and Nepal sign action plan for release of nearly 3,000 Maoist child soldiers*, 16 December 2009, available at <http://www.un.org/apps/news/story.asp?NewsID=33280#.U2cyaStH5jo>.

⁹⁹ OHCHR, *Nepal Conflict Report*, p. 71. See *supra*, note. 81.

¹⁰⁰ IRIN, *Nepal: Rehabilitation Challenge for Child Soldiers*, 12 January 2010, available at <http://www.irinnews.org/report/87704/nepal-rehabilitation-challenge-for-child-soldiers>. While in its initial report the State party speaks of 4008 discharged “disqualified soldiers”,

56. Following such event, in November 2010 the government of Nepal endorsed a further National Plan of Action for the Reintegration of Children Affected by Conflict (hereinafter, 2010 Plan of Action). Notably, the State party has failed to thoroughly implement this new Plan of Action, thereby denying to children affected by the conflict the full enjoyment of their rights to reparation, rehabilitation and social reintegration¹⁰².
57. After the end of the conflict and the progressive demobilization of previously enrolled child soldiers no further recruitment of children has taken place by either the NA or any other armed group even though political parties have often resorted to the use of children in strikes¹⁰³.
58. However, while proceeding to the demobilization of former child soldiers the State party has not taken any measure to promote accountability for those responsible for the crime of child recruitment¹⁰⁴. As noted by the UN Secretary-General
- “the Government has not taken the necessary steps to [...] ensure effective accountability for violations and abuse committed by both parties during and after the conflict”¹⁰⁵.*
59. During the conflict the provisions of the OP-AC were not binding for Nepal¹⁰⁶ as the State became a party to this protocol only on 3 January 2007¹⁰⁷. Nonetheless, while the recruitment of child soldiers and their direct deployment in hostilities ceased before the entry into force of the OP-AC for Nepal, the lack of investigation, prosecution and sanction of those responsible for such war crimes continues to date, with the consequence that the relevant provisions of the OP-AC now apply to such ongoing violations.
60. As underlined above, the joint reading of Articles 6, para. 1, and 4. para. 2, of the OP-AC do entail a responsibility for States parties to investigate, prosecute and sanction those responsible for the crimes

that figure actually refers to the discharge of both soldiers who were either under the age of 18 during the conflict or soldiers who were recruited after the end of the conflict, not all of whom were actually minors (See State party report, para. 80). Accordingly, see BBC News, *Nepal Former Child Soldiers Freed*, 7 January 2010, available at http://news.bbc.co.uk/2/hi/south_asia/8444801.stm.

¹⁰¹ National Human Rights Commission, *Implementation Status of National Human Rights Commission and Universal Periodic Review Recommendations on Child Rights*, December 2012, p. 84. See also UNICEF, *Last Group of Maoist Child Soldiers Discharged in Nepal*, 17 February 2010, available at http://www.unicef.org/protection/nepal_52791.html: “On 8 February, with a blessing of red ‘tika’ on their foreheads and garlands of marigolds around their necks, the group of 237 former child combatants and 31 late recruits left the military behind and re-entered civilian life”.

¹⁰² In detail on the State party’s failure to implement the 2010 plan of action and the related breach of obligations stemming from art. 7 of the OP-AC see the alternative report submitted to the Committee on the Rights of the Child by the Human Rights Treaty Monitoring Coordination Center (HRTMCC) in June 2014 in relation to the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts.

¹⁰³ PPCC, *Children and Armed Conflict, How to put pressure on persistent perpetrators? Lessons learned from Nepal*, *supra* note 85, p. 3: “PPCC did not document active recruitment of children after the signing of the Comprehensive Peace Accord in 2006. The 2009 action plan and the National Plan of Action for Rehabilitation and Reintegration ensured that all minors, still associated with the Maoists in 2009, were discharged from the cantonments and that they received a rehabilitation package”.

¹⁰⁴ Accordingly, see also PPCC and Whatchlist on Children and Armed Conflicts, *Children affected by Armed Conflict in Nepal: Recommendations to the Security Council Working Group*, 2010, p. 1: “while the action plan has been successful in Nepal in terms of ending the grave violation of child recruitment, as it stands, it is an imperfect tool to end impunity for the perpetrators of such violations”.

¹⁰⁵ UN Secretary-General, *Report on children and armed conflict in Nepal*, 18 April 2008, UN Doc. S/2008/259, para. 13.

¹⁰⁶ Vienna Convention on the Law of Treaties, *supra* note 62, art. 28.

¹⁰⁷ See *supra*, Introduction.

of child recruitment and use in hostilities¹⁰⁸. Consequently, States that fail to undertake such measures are responsible for a breach of the OP-AC.

61. Moreover, the obligation to carry out effective investigations and prosecutions of suspected perpetrators of grave breaches of humanitarian law and serious human rights abuses stems not only from the OP-AC but is well established in international human rights law, including in the International Covenant on Civil and Political Rights¹⁰⁹. Without effective investigations and prosecutions, crimes remain unpunished and any deterrent effect of the legislation is lost or significantly weakened.

62. Also the Paris Principles and Guidelines on Children Associated with Armed Forces and Armed Groups¹¹⁰ endorsed by Nepal and 58 other States in February 2007 stress that

“Ending impunity for those responsible for unlawfully recruiting or using children in armed conflict, and the existence of mechanisms to hold such individuals to account can serve as a powerful deterrent against such violations”¹¹¹.

63. The UN Secretary-General has made clear that:

“The Government of Nepal should take significant steps in the area of legal reform, accountability and reconciliation to promote the protection of children and end impunity for abuses and violations against them, including enacting a law criminalizing the recruitment of persons under 18 years. It should take further steps to ensure that law enforcement agencies and the courts investigate and prosecute crimes against children and strengthen legal institutions to ensure that human rights issues are addressed and also to ensure that any strengthening or reform of law enforcement and criminal justice systems are in line with international standards”¹¹².

64. Nepal is therefore under an ongoing obligation to investigate, prosecute and sanction those responsible for: a) compulsory recruitment of children under 18 years of age in State security forces; b) direct involvement of children in hostilities; c) recruitment and use of children in hostilities by armed groups.

65. Nonetheless, in the absence of any criminalization whatsoever of such offences or of any other offence even vaguely related to the conscription, recruitment, enrolment or use of child soldiers in the domestic legislation¹¹³, the prosecution of those responsible for such crimes cannot take place. As a matter of fact, to date not a single person suspected of being responsible for such crimes has been investigated, prosecuted and sanctioned¹¹⁴.

¹⁰⁸ See *supra*, paras. 5 – 18.

¹⁰⁹ Article 2 of the International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2200A(XXI) of 16 December 1966, entered into force on 23 March 1976, at <http://www2.ohchr.org/english/law/ccpr.htm>; see also “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, adopted by UN General Assembly Resolution 60/147 of 16 December 2005, at <http://www2.ohchr.org/english/law/remedy.htm>.

¹¹⁰ Paris Principles and Guidelines on Children Associated with Armed Forces and Armed Groups, 30 January 2007.

¹¹¹ *Ibid.*, para. 8.1.

¹¹² UN Secretary-General, *Report on children and armed conflict in Nepal*, *supra* note 95, para. 44.

¹¹³ See *supra*, paras. 28 – 47.

¹¹⁴ Accordingly, National Human Rights Commission, *Implementation Status of National Human Rights Commission and Universal Periodic Review Recommendations on Child Rights*, *supra*, note. 101, Preface. To this end see also, PPCC, *Children and Armed Conflict, How to put pressure on persistent perpetrators? Lessons learned from Nepal*, *supra* note 85, p. 3: “Until this day, not a

66. Moreover, the Truth and Reconciliation Commission Act (hereinafter TRC Act) passed by the Parliament of Nepal in 25 April 2014 and approved by the President of Nepal on 11 May 2014 in spite of widespread criticism expressed by victims, human rights defenders and civil society, does not recognize the impact of the conflict on children¹¹⁵.
67. In recognition of the violations and abuses suffered by children during the armed conflict, children should be an integral part of the transitional justice process in order to allow their voices to be heard and to promote justice and accountability, besides reconciliation. Children's participation to the process should strengthen and enhance their protection and their active involvement should be granted through special protection measures. Failure to address their concerns also wastes the capacity and potential of children and adolescents to serve as catalysts for reconciliation and peace-building within their own communities.
68. In general, the TRC Act breaches international law under several counts, and no transitional justice mechanism has been established at the time of writing. The major flaws of the newly adopted TRC Act can be summarized as follows: (1) the Commissions' excessive power to conduct mediation to reconcile victims and perpetrators even in cases of gross human rights violations (section 22) and the prohibition of any legal action in mediated cases (section 25 (2)(a)); (2) the TRC's discretionary power to recommend amnesties even for those involved in crimes under international law and gross human rights violations (section 26); (3) the lack of criminalization of offences that amount to crimes under international law and the grossly inadequate system of referral to prosecution mechanisms and (4) the non-recognition of victims' right to reparation (sections 2(e) and 23). In particular, Section 26 of the TRC Act provides the two commissions therein designed with discretionary power to recommend amnesties even for perpetrators of child recruitment and use in hostilities.
69. TRIAL therefore submits that the State party is responsible for ongoing multiple violations of the OP-AC, and in particular of the obligations stemming from Articles 6, para. 1, and 4, para. 2, due to the total lack of accountability for those responsible for the crimes of unlawful use and recruitment of child soldiers during the conflict.

V. Nepal does not properly establish universal jurisdiction for all the offences prohibited pursuant to the OP-AC

single perpetrator of child recruitment and use has been prosecuted in Nepal"; PPCC and Whatchlist on Children and Armed Conflicts, *Children affected by Armed Conflict in Nepal: Recommendations to the Security Council Working Group*, supra note 104, p. 5: "However, not a single perpetrator has been brought to court. There currently is no law in Nepal that criminalizes child recruitment and holds the perpetrators accountable".

¹¹⁵

In detail on the TRC Act see Advocacy Formu, TRIAL (Track Impunity Always) and REDRESS, *Paying Lip Service to Justice, The Newly Adopted TRC Act Breaches International Law and Flouts the Decision of the Supreme Court of Nepal*, submitted to UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Working Group on Enforced or Involuntary Disappearances, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Special Rapporteur on Violence against Women, its Causes and Consequences, June 2014.

70. In its Initial Report, Nepal asserts that the domestic legislation entrusts Nepalese courts with territorial, active and passive personality titles of jurisdiction¹¹⁶.
71. Under Nepalese law there exist no provision whatsoever related to the principle of universal jurisdiction, *i.e.*, under the domestic legislation it is not possible to prosecute those responsible for a crime that has no connection with Nepal, be it territorial or personal, passive or active. This means that Nepalese courts only have jurisdiction to judge upon crimes perpetrated in the territory of Nepal or, if committed abroad, only when either the author or the victim of the crime is of Nepalese nationality¹¹⁷.
72. Besides jurisdictional grounds, at any rate, the absence of substantive provisions criminalizing the compulsory recruitment of persons who have not attained 18 years of age, their deployment in hostilities and their recruitment and use in hostilities by non-state armed groups¹¹⁸ makes it impossible for Nepalese authorities to investigate, prosecute, judge and sanction those found to be responsible for these conducts.
73. This shortcoming actually prevents national authorities from prosecuting anybody who is suspected of being responsible for any of the offences proscribed by the OP-AC, regardless to possible grounds of jurisdiction¹¹⁹.
74. Such shortcoming would be, if only partly, mitigated if Nepalese legislation provided for the possibility to extradite those responsible of child recruitment and use in conflict to countries that enjoy the necessary titles of jurisdiction to prosecute them. Universal jurisdiction on the one hand and the *aut dedere aut judicare* principle on the other are two conceptually distinct rules of international law but they are strictly related. The former requires States to prosecute those responsible of crimes under international law even when they are committed outside their territory and are not linked to the States themselves by active or passive nationality principles; the latter, instead, requires States to either exercise their jurisdiction over persons suspected of being responsible for crimes under international law or to extradite them to other States that are both willing and able to do so¹²⁰. The ultimate purpose of both these rules is to ensure that persons responsible for crimes under international law are effectively investigated, prosecuted and sanctioned.
75. In this connection, in its initial report, the State party recalls that in 2012 it enacted an Extradition Ordinance¹²¹ which, however, bears little significance in relation to the issue of child soldiers for both active as well as passive extradition.
76. With regard to active extradition, Nepal may send a request to the government of a third country only when a person hiding in such country “has committed an offence in Nepal”¹²². This cannot be the case in relation to the conducts proscribed by the OP-AC given that they are not crimes under Nepalese law.

¹¹⁶ State party report, para. 75. Such titles of jurisdiction are established by Section 19 of the New General Act (*Muluki Ain*) 1964 and by specific laws in relation to the specific conducts criminalized. There is no general principle in this regard.

¹¹⁷ See, accordingly, Amnesty International, *Universal Jurisdiction, a Preliminary Survey of Legislation Around the World*, 2011, pp. 19, 85 and 86.

¹¹⁸ See *supra*, paras. 28 – 47.

¹¹⁹ See *supra*, paras. 48 – 69.

¹²⁰ International Law Commission, *Preliminary Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare)*, UN Doc. A/CN.4/571, 7 June 2006, para. 31.

¹²¹ State party report, para. 76.

77. The principle of passive extradition designed by the Extradition Ordinance, while being equally ineffective in relation to child soldiers for the very same reasons related above, also entails an autonomous breach of the obligations stemming from the OP-AC. In fact, as the State party itself points out, its “section 4 defines extraditable offence as the offence that entitles the punishment of at least three-year imprisonment in accordance with Nepalese laws in force and offence that entitles the punishment of at least three-year imprisonment in accordance with the laws of the requesting State”¹²³. However, the Committee has already clarified that considerations related to the criterion of double criminality cannot hinder the prosecution of those responsible for the conducts prohibited by the OP-AC¹²⁴. Due to this provision, Nepal not only is prevented from establishing universal jurisdiction over alleged perpetrators of compulsory child recruitment, employment of children in hostilities and recruitment and use of children in armed groups; it is even prevented from extraditing them to other States that could legitimately establish their jurisdiction over such offences and prosecute, judge and sanction the perpetrators accordingly. In turn, these legal shortcomings potentially make of Nepal a perfectly suitable “safe heaven” for persons responsible of crimes of child recruitment and use worldwide.
78. TRIAL therefore submits that the establishment and exercise of universal jurisdiction over the crimes related to the involvement of children in hostilities in Nepal is completely unsatisfactory and not in line with the obligations provided for in the OP-AC.

Conclusions

79. In light of the above, TRIAL respectfully submits to the Committee that the current state of Nepalese legislation and policy is not fully in line with the State party’s obligations under the OP-AC concerning the prohibition and prosecution of the crimes related to the involvement of children in armed conflict. In particular,
- a) the recruitment of children under 18 years of age into State forces and non-State armed groups is neither properly prohibited nor criminalized and sanctioned in Nepalese legislation;
 - b) insufficient measures have been taken by domestic authorities to prevent the recruitment of children by non-State armed groups;
 - c) insufficient measures have been taken by domestic authorities to investigate the serious allegations concerning the responsibility of Nepalese officials for recruitment and use of children by Maoists insurgents during the decade-long armed conflict that took place in Nepal from 1996 to 2006, and to prosecute and sanction those responsible;
 - d) the TRC Act of May 2014 is contrary to Nepal’s obligations pursuant to the OP-AC as it enables the two commissions to recommend amnesties even for those responsible for child recruitment and use in hostilities, thus fostering impunity;

¹²² Extradition Ordinance, 2012, Section 20.

¹²³ State party report, para. 76.

¹²⁴ See *supra*, para. 25.

- e) the establishment of jurisdiction over the crimes related to the involvement of children in armed conflict in Nepal is not in line with the obligations provided for in the OP-AC;
- f) the Extradition Ordinance, 2012 hinders the extradition of persons responsible for the crimes of child recruitment and use in hostilities to other States that are willing and able to exercise their jurisdiction over such offences;
- g) the fact that Nepal is not a party to the ICC Statute further weakens its domestic system vis-à-vis the prohibition and repression of crimes under international law, in particular the recruitment and use of children in armed conflict.

Recommendations

80. TRIAL respectfully requests to the Committee to recommend Nepal to:

- a. Adopt the necessary measures to provide for an effective criminalization and prosecution of the compulsory recruitment of persons under the age of 18 years in the State's armed forces and their involvement in hostilities;
- b. Adopt the necessary measures to effectively criminalize and prosecute the recruitment and use in hostilities of persons under the age of 18 years by non-State armed groups;
- c. Investigate into the serious allegations concerning the recruitment and use of child soldiers by Maoists during the decade-long armed conflict and prosecute, judge and sanction those responsible;
- d. Amend the TRC Act without further delay, ensuring that the two new commissions respect international standards and fully guarantee victims' rights, and, in particular, do not have the power to recommend amnesties or similar measures that have the effect of exempting those responsible for crimes under international law, including children recruitment and use in hostilities, from any criminal proceedings or sanction;
- e. Amend its domestic legislation in order to make all conducts prohibited by the OP-AC subject to universal jurisdiction;
- f. Amend its domestic legislation in order to permit the extradition of persons suspected of being responsible for the recruitment and use of child soldiers;
- g. Ratify the ICC Statute, and its Agreement on Privileges and Immunities (APIC); consider the ratification of the Kampala Amendments to the ICC Statute; fully align its national legislation with all obligations under the ICC Statute, including incorporating the ICC Statute definition of crimes and general principles; and adopt domestic provisions that enable effective cooperation with the ICC.

TRIAL remains at the full disposal of the Committee should it require additional information and takes this opportunity to renew to the Committee the assurance of its highest consideration.

A handwritten signature in blue ink, appearing to read 'Philip Grant', with a horizontal line drawn across the middle of the signature.

Philip Grant

TRIAL Director