AUSTRALIA

Initial Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

Submission from TRIAL (Swiss Association against Impunity)

to the Committee on the Rights of the Child

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About 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.

Executive Summary

The present written submission to the Committee on the Rights of the Child follows Australia 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) (UN Document CRC/C/OPAC/AUS/1).

TRIAL is focusing specifically on the issue of universal jurisdiction with a view to enhancing the effective prosecution of the crimes related to the involvement of children in armed conflict embodied in the Protocol as it considers this issue as one of the 'necessary' measures to properly implement the OP-AC, ratified by Australia in September 2006.

A detailed review of Australian criminal legislation leads TRIAL to highlight that the legal framework of the State Party presents some elements which are not in compliance with the commitments taken up under the OP-AC on the question of criminalisation and punishment of all the offences embodied in the Protocol.

Acknowledging that Australian legislation commendably addresses the criminalisation, prosecution and punishment of the war crime of conscription, enlistment or use of children under the age of 15 in armed conflict for national armed forces as embodied in Article 8 of the ICC Statute and it also makes an offence for a member of an armed group distinct from the armed forces of a State to use, conscript or enlist a person under 18 years old according to the provisions of the OP-AC in both international and non-international armed conflicts, Australia still fails to adopt all the “feasible” and “necessary” measures in order to ensure that members of its armed forces who have not attained the age of 18 years do not take a direct part in hostilities and are not compulsorily recruited.

Basing itself on the most recent jurisprudence of the Committee on the Rights of the Child on how to interpret the obligations set forth in the OP-AC, it is the view of TRIAL that Australia should take measures to enhance its protection of children involved in armed conflict in two respects.

On the one hand Australian legislation should provide for an explicit prohibition and criminalisation of the compulsory recruitment and use in hostilities of persons under the age of 18 years.

On the other hand Australia should entrust its courts with universal jurisdiction to effectively prosecute and punish persons who have compulsorily recruited or used children under the age of 18 as soldiers in armed conflict.

Introduction

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) by Australia.

TRIAL would like to draw the Committee's attention to the fact that current Australian legislation is not fully in compliance with the obligations contained in the OP-AC on the issue of criminalisation and punishment of all the offences embodied therein.

Basing itself on a thorough analysis of Australian national legislation and on the most recent jurisprudence of the Committee on the Rights of the Child, TRIAL will carefully assess the strengths and deficiencies of the State Party's domestic legislation highlighting where the latter falls short of the OP-AC obligations and which are the measures that Australia should take in order to fully comply with the Optional Protocol and enhance its protection of children involved in armed conflict.

The following pages will address how the international community deals with the recruitment and involvement of children in armed conflict and what that entails for States parties to the OP-AC with regards to their obligations to prohibit and criminalise certain acts (I) and to establish a jurisdictional network in order to effectively prosecute and punish them (II).

The document then proceeds with an assessment of Australian implementation of the OP-AC provisions through an analysis of current Australian domestic legislation on both aspects (III and IV).

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

The prohibition to recruit or use children under 15 in hostilities was codified in Article 77(2) of the 1977 First Additional Protocol to the Geneva Conventions[1]. The same prohibition was 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 Conventions[2].

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

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".

tribunals, its violation is also commonly accepted to entail individual criminal responsibility[3].

The same prohibition can also be found in Article 38 of the 1989 Convention on the Rights of the Child[4].

Adopted in 1998, 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[5], thus indicating the existence of this crime under customary international law.[6]

The Appeals Chamber of the Special Court for Sierra Leone has held 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]

According to the Appeals Chamber of the Special Court for Sierra Leone, this conduct was proscribed, as of 2001, in the criminal legislation of 108 States worldwide[8].

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 crimes, as it states in the paragraph 5 of its preamble:

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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 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."

5 Art. 8(2)(b)(xxvi) and art. 8(2)(e)(vii) of the Rome Statute, respectively.

6 In this respect see also Article 4 of the statute of the Special Court for Sierra Leone of 2002 confirming 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.

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 Prosecutor v. Norman, supra FN 8, para. 44.

> "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, [...]".

Therefore it is evident that under the OP-AC States are first and foremost under an obligation to prohibit and criminalise the recruitment or the active involvement in hostilities of children under 15 years old[9].

A gap of protection seems nonetheless to remain regarding the category of children between 15 and 18 years old. If in 1977 what was asked from States Parties to the First Additional Protocol to the Geneva Conventions was to preferably recruit the oldest when enrolling children from 15 to 18 years old[10], the ICRC then found highly 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.[11]

This wish of the ICRC is reflected in 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 of those under 15 to all children.

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"[12],

and to

> "ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces".[13]

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".[14]

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

10 See FN 1.

11 Plan d'action relatif aux enfants dans les conflits armés. Entériné par le Conseil des Délégués, Geneva, 1995, accessible at www.icrc.org/fre/resources/documents/misc/5fzgbm.htm.

12 Article 1 OP-AC.

13 Article 2 OP-AC.

14 Article 4 OP-AC.

Therefore a State bound by the OP-AC shall enact all legislative, administrative and other measures necessary to prohibit and punish both the use in hostilities and the compulsory recruitment into its armed forces of children under 18 years of age.[15] Moreover, States must enact legislative measures prohibiting and punishing the use in hostilities and any form of recruitment of children under 18 by armed groups distinct from national armed forces.[16] As a result, it is clearly not enough for States parties to the OP-AC to provide domestically for the prohibition and criminalisation of the customary law war crimes of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities.

According to the most recent jurisprudence by the Committee on the Rights of the Child, other measures are required:

1. An explicit criminalisation in domestic legislation of the compulsory recruitment of persons under the age of 18 years (both in peace and war time)[17]

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 criminalised in domestic legislation"[18],

stressing that this absence

> "may perpetuate an environment of impunity and lack of accountability among the […] [national] armed forces"[19].

The Committee thus clearly called for a full incorporation of the provisions of the Optional Protocol into State domestic legislation through the adoption of an explicit prohibition and criminalisation of the recruitment of children up to 18 years,[20] adding that States Parties should

> "criminalis[...][e] the mere recruitment of children at the ages of 16 and 17 and their use in hostilities as separate offences and that recruitment as such is criminalised by the law for both peace and wartime."[21]

2. An explicit criminalisation in domestic legislation of the involvement in hostilities of persons under the

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15 Article 1, 2 and 6 OP-AC.

16 Article 4 OP-AC.

17 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 shall be criminalised both in peacetime and in wartime as a separate offense than that entailing their use in hostilities.

18 CRC Concluding observations, Ukraine, 11 April 2011, UN doc. CRC/C/OPAC/UKR/CO/1, para. 19.

19 CRC Concluding observations, Uganda, 17 October 2008, UN doc. CRC/C/OPAC/UGA/CO/1, para. 27.

20 CRC Concluding observations, Republic of Korea, 27 June 2008, UN doc. CRC/C/OPAC/KOR/CO/1, para. 13; CRC Concluding observations, Thailand, 3 February 2012, UN doc. CRC/C/OPAC/THA/CO/1, para. 6.

21 CRC Concluding observations, Slovenia, 12 June 2009, UN doc. CRC/C/OPAC/SVN/CO/1, para. 11.

age of 18 years[22]

The Committee has several times regretted the lack of a specific legal provision criminalising the involvement of children under the age of 18 years in hostilities[23].

Elaborating on such a deficiency present in Irish domestic legislation, the Committee conclusively added:

> "The Committee is of the view that the administrative policy of the Irish Defence Force, pursuant to the Defence Forces Regulations and Administrative Instructions, to preclude all military personnel under 18 years of age from services abroad is not a sufficient guarantee against engagement by persons under 18 years of age in armed conflict, as required by article 1 of the Optional Protocol.
>
> 15. The Committee encourages the State party to explicitly criminalise 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."[24]

3. The criminalisation of the recruitment and use in hostilities of children up to 18 years by non-State armed groups[25] (even though there is no armed group present in the State party)[26]

Finally the Committee has oftentimes recommended States Parties to the OP-AC to

> "explicitly prohibit by law and criminalise the recruitment and use of children in hostilities by non-State armed groups."[27]

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22 CRC Concluding observations, Ukraine, 11 April 2011, UN doc. CRC/C/OPAC/UKR/CO/1, para. 19; CRC Concluding observations, Bosnia and Herzegovina, 1 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, 27 June 2008, UN doc. CRC/C/OPAC/KOR/CO/1, 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.

23 CRC Concluding observations, Ukraine, 11 April 2011, UN doc. CRC/C/OPAC/UKR/CO/1, para. 19, CRC Concluding observations, Republic of Korea, 27 June 2008, UN doc. CRC/C/OPAC/KOR/CO/1, para. 13, CRC Concluding observations, Bosnia and Herzegovina, 1 October 2010, UN doc. CRC/C/OPAC/BIH/CO/1, para. 13, CRC Concluding observations, Mongolia, 3 March 2010, UN doc. CRC/C/OPAC/MNG/CO/1, para. 13.

24 CRC Concluding observations, Ireland, 14 February 2008, UN doc. CRC/C/OPAC/IRL/CO/1, para. 14-15.

25 CRC Concluding observations, Sierra Leone, 1 October 2010, UN doc. CRC/C/OPAC/SLE/CO/1, para. 23-24; CRC Concluding observations, Sudan, 6 October 2010, UN doc. CRC/C/OPAC/SDN/CO/1, para. 23; CRC Concluding observations, The Former Yugoslav Republic of Macedonia, 11 June 2010, UN doc. CRC/C/OPAC/MKD/CO/1, para. 10; CRC Concluding observations, Democratic Republic of Congo, 3 February 2012, UN doc. CRC/C/OP AC/COD/CO/1, para. 33.

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

27 CRC Concluding observations, Sierra Leone, 1 October 2010, UN doc. CRC/C/OPAC/SLE/CO/1, para. 23-24; CRC Concluding observations, Sudan, 6 October 2010, UN doc. CRC/C/OPAC/SDN/CO/1, para. 23; CRC Concluding observations, The Former Yugoslav Republic of Macedonia, 11 June 2010, UN doc. CRC/C/OPAC/MKD/CO/1, para. 10; CRC Concluding observations, Thailand, 3 February 2012, UN doc. CRC/C/OPAC/THA/CO/1, para. 18; CRC Concluding observations, Democratic Republic of Congo, 3 February 2012, UN doc. CRC/C/OP AC/COD/CO/1, para. 33.

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

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 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".[28]

The need to properly prosecute and punish has been expressed early on by the Committee on the Rights of the Child in its Concluding Observations on the initial report submitted by the Solomon Islands in 2003:

> "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"[29].

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.

Recalling the nature of the States parties' obligations under OP-AC, Article 6(1) obliges 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",

whereas Article 4(2) requires States to

> "take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices."

Therefore, one of the "feasible" (and arguably necessary) "measures" which permit to prevent the recruitment and use of children under 18 years of age in hostilities is the exercise of universal jurisdiction over persons who have allegedly committed such acts against children.[30]

This possibility is provided for by customary international law and has been repeatedly required by the Committee itself.

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28 Prosecutor v. Norman, supra FN 8, para. 41.

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

30 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.

The Committee on the Rights of the Child has consistently held that the obligation to prosecute and punish not only applies to 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 are missing.

The Committee thus clearly called for the adoption of the principle of universal jurisdiction in a conspicuous number of Concluding Observations[31].

The Committee has repeatedly recommended States parties to

> "ensure that [...][their] domestic legislation effectively enables [...][them] to establish and exercise universal jurisdiction over war crimes related to conscription, enlistment and use of children in hostilities […]"[32].

The Committee has likewise added that States parties should

> "take steps to ensure that domestic legislation enables it to establish and exercise extraterritorial jurisdiction over crimes covered by the Optional Protocol […] without the criterion of double criminality.[33]"

In this respect it has to 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 Switzerland to scratch from its books a precise 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.
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> 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:

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31 CRC, Concluding Observations, Bosnia and Herzegovina, 1 October 2010, UN doc. CRC/C/OPAC/BIH/CO/1, para. 16; CRC, Concluding Observations, Sierra Leone, 1 October 2010, UN doc. CRC/C/OPAC/SLE/CO/1, para. 26; CRC, Concluding Observations, Germany, 13 February 2008, UN doc. CRC/C/OPAC/DEU/CO/1, para. 14, 15 a); CRC, Concluding Observations, Belgium, 9 June 2006 UN Doc. CRC/C/OPAC/BEL/CO/1, para. 13 b); CRC, Concluding Observations, Switzerland, 17 March 2006, UN doc. CRC/C/OPAC/CHE/CO/1 para. 8.

32 CRC Concluding observations, Democratic Republic of Congo, 3 February 2012, UN doc. CRC/C/OP AC/COD/CO/1, para. 37; CRC, Concluding Observations, Bosnia and Herzegovina, 1 October 2010, UN doc. CRC/C/OPAC/BIH/CO/1, para. 16.

33 CRC, Concluding Observations, Montenegro, 1 October 2010, UN doc. CRC/C/OPAC/MNE/CO/1, para. 19; CRC Concluding observations, Thailand, 3 February 2012, UN doc. CRC/C/OPAC/THA/CO/1, para. 20.

(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"[34]

Therefore the Committee has specified that the jurisdictional obligation can be seen as a two-fold obligation:

- on the one hand to ensure that domestic legislation enables national courts to establish and exercise universal jurisdiction over the customary law war crimes of conscription and enlistment of children under 15 years of age in hostilities[35],
- on the other hand to adopt measures to establish extraterritorial jurisdiction over the other crimes under the Optional Protocol[36].

It is thus evidently 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 prohibitions laid down in the OP-AC and that any additional condition on the use of universal jurisdiction, for instance the double jeopardy criterion[37], represent an undue obstacle to the full implementation thereof and has been consistently ruled out by the Committee as unnecessary[38].

III. Australia does not properly criminalise all the offences contained in the OP-AC

In its report, Australia acknowledges that its Commonwealth Criminal Code Act of 1995 (hereinafter referred to as "Criminal Code"), as it stood before the Country ratification of the OP-AC, required amendments in order to be in compliance with the new international standards.[39]

For that purpose Sections 268.68 and 268.88 of the Criminal Code, dealing with the war crimes of using,

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34 CRC, Concluding Observations, Switzerland, 17 March 2006, UN doc. CRC/C/OPAC/CHE/CO/1, para. 7-8.

35 CRC, Concluding observations, Bosnia and Herzegovina, 1 October 2010, UN doc. CRC/C/OPAC/BIH/CO/1, para. 16.

36 CRC, Concluding Observations, Montenegro, 1 October 2010, UN doc. CRC/C/OPAC/MNE/CO/1, 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, FYROM, 11 June 2010, UN doc. CRC/C/OPAC/MKD/CO/1, para. 12; CRC, Concluding observations, Serbia, 11 June 2010, UN doc. CRC/C/OPAC/SRB/CO/1, para. 23; CRC, Concluding observations, Liechtenstein, 4 March 2010, UN doc. CRC/C/OPAC/LIE/CO/1, para. 16; CRC, Concluding Observations Israel, 4 March 2010, Un doc. CRC/C/OPAC/ISR/CO/1, para. 31; CRC Concluding observations, Thailand, 3 February 2012, UN doc. CRC/C/OPAC/THA/CO/1, para. 20.

37 The 'double jeopardy' principle is a jurisdictional criterion according to which the crime committed abroad can be prosecuted only if the underlying acts are 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, para. 16-17; CRC, Concluding observations, Montenegro, 1 October 2010, UN doc. CRC/C/OPAC/BLR/CO/1, para. 18-19; CRC, Concluding observations, FYROM, 11 June 2010, UN doc. CRC/C/OPAC/MKD/CO/1, para. 12; CRC, Concluding observations, Germany, 13 February 2008, UN doc. CRC/C/OPAC/DEU/CO/1, para. 15; CRC Concluding observations, Thailand, 3 February 2012, UN doc. CRC/C/OPAC/THA/CO/1, para. 19.

39 CRC, Initial Report of Australia, October 2008, UN doc. CRC/C/OP AC/AUS/1, para. 18.

conscripting or enlisting children in an armed conflict respectively in international and non-international armed conflicts, were modified "in accordance with the Optional Protocol".[40]

As a consequence of the above-mentioned amendment, Australia claims that "all Australian laws were compliant with the Optional Protocol at time of ratification (and remain so)".[41]

Taking a closer look at the relevant amendment, the enactment of the International Criminal Court (Consequential Amendments) Act of 2002 brought about a modification of Section 268.68 of the Australian Criminal Code dealing with international armed conflicts.

The new Section prescribes that:

> "*National armed forces*
>
> (1) A person commits an offence if:
>
> (a) the perpetrator uses one or more persons to participate actively in hostilities as members of the national armed forces; and
>
> (b) the person or persons are under the age of 15 years; and
>
> (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.
>
> Penalty: Imprisonment for 17 years.
>
> (2) A person commits an offence if:
>
> (a) the perpetrator conscripts one or more persons into the national armed forces; and
>
> (b) the person or persons are under the age of 15 years; and
>
> (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.
>
> Penalty: Imprisonment for 15 years.
>
> (3) A person commits an offence if:
>
> (a) the perpetrator enlists one or more persons into the national armed forces; and
>
> (b) the person or persons are under the age of 15 years; and
>
> (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.
>
> Penalty: Imprisonment for 10 years.

40 CRC, Initial Report of Australia, October 2008, UN doc. CRC/C/OP AC/AUS/1, para. 18.

41 CRC, Initial Report of Australia, October 2008, UN doc. CRC/C/OP AC/AUS/1, para. 19.

Other armed forces and groups

(4) A person commits an offence if:

(a) the perpetrator uses one or more persons to participate actively in hostilities other than as members of the national armed forces; and

(b) the person or persons are under the age of 18 years; and

(c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 17 years.

(5) A person commits an offence if:

(a) the perpetrator conscripts one or more persons into an armed force or group other than the national armed forces; and

(b) the person or persons are under the age of 18 years; and

(c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 15 years.

(6) A person commits an offence if:

(a) the perpetrator enlists one or more persons into an armed force or group other than the national armed forces; and

(b) the person or persons are under the age of 18 years; and

(c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty for a contravention of this subsection: Imprisonment for 10 years".[42]

In the same occasion (the enactment of the International Criminal Court (Consequential Amendments) Act of 2002) Section 268.88 of the Australian Criminal Code was also modified by copying *verbatim* Section 268.68 and providing for exactly the same crimes and types of punishment with respect to non-international armed conflicts.[43]

It is certainly true that these amendments go a long way to implementing the provisions of the OP-AC by raising the age requirement from 15 years to 18 years for members of armed groups that are not national armed forces[44] and by criminalising the relevant conducts regardless of whether they were committed at the

42 Section 268.68 of the Commonwealth Criminal Code Act of 1995 (Australian Criminal Code).

43 Section 268.88 of the Commonwealth Criminal Code Act of 1995 (Australian Criminal Code).

44 CRC, Initial Report of Australia, October 2008, UN doc. CRC/C/OP AC/AUS/1, para. 50.

time of an international armed conflict or an armed conflict not of an international character.

However, this does not exhaust all the State Party's obligations under the OP-AC.

As we have seen above, the OP-AC requires States to explicitly criminalise in domestic legislation both the compulsory recruitment in the State's armed forces and the involvement in hostilities of persons under the age of 18 years.

As a consequence, Australian Criminal Code cannot be deemed to completely fulfil the State Party's obligations to criminalise all behaviours prohibited by the OP-AC.

In conclusion Australia should further amend its criminal legislation in order to criminally punish:

- the compulsory recruitment of persons under the age of 18 in the national armed forces,
- all involvement in hostilities of children up to 18 years old, especially in light of the fact that the minimum voluntary age for service in the Australian armed forces is 17 years[45].

IV. Australia does not properly establish universal jurisdiction for all the offences contained in the OP-AC

The scope of jurisdiction to be exercised by Australian courts over criminal offences is regulated in part 2.7 of the Australian Criminal Code of 1995 (as amended up to Act No. 80 of 2011) (Divisions 14 to 16).

Jurisdiction over crimes in Australia has long been governed by the deep-rooted common law principle of the territoriality of criminal law, now codified in Division 14 of its Criminal Code[46].

But further titles of jurisdiction are also envisaged in Australian criminal law as enshrined in the four categories (from A to D) of Division 15 of the Criminal Code.[47]

The above-mentioned International Criminal Court (Consequential Amendments) Act of 2002, besides incorporating, as seen above, some of the crimes under the purview of the OP-AC, aimed at broadening the scope of jurisdiction of Australian courts with respect to those international crimes "that are also crimes within the jurisdiction of […] [the International Criminal] Court".[48]

In this sense Section 268.117 of the Criminal Code (as modified after the 2002 Act) provides that Section 15.4 (one of the categories of extraterritorial jurisdiction) applies to genocide, crimes against humanity and war crimes, among which the crimes listed in Section 268.68 and 268.88, namely conscripting or enlisting children

45 CRC, Initial Report of Australia, October 2008, UN doc. CRC/C/OP AC/AUS/1, para. 25.

46 Section 14.1 "Standard Geographical jurisdiction" of the Commonwealth Criminal Code Act of 1995 (Australian Criminal Code).

47 Section 15.1 to 15.4 "Extended Geographical jurisdiction" of the Commonwealth Criminal Code Act of 1995 (Australian Criminal Code).

48 Section 268.1, para 2 of the Commonwealth Criminal Code Act of 1995 (Australian Criminal Code).

under the age of 15 into the national armed forces or using them to actively participate in hostilities, and also conscripting, enlisting or using persons under 18 years old into an armed group.

Section 15.4 of the Criminal Code prescribes that

"If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia."

The combination of Section 268.117 and Section 15.4 of the Australian Criminal Code thus entrusts Australian courts with universal jurisdiction over the crimes present in national legislation concerning the involvement of children in armed conflicts.

In line with the spirit of ensuring an effective implementation and enforcement of the provisions prohibiting and criminalising the recruitment and use of children under the age of 15 in national armed forces and under the age of 18 in other armed groups, Australia commendably adopted universal jurisdiction over these offences.

But yet, as noted above in Chapter II of the present report, it is necessary for States parties to adopt measures establishing extraterritorial jurisdiction over all the crimes related to the involvement of children in armed conflict, notably also the compulsory recruitment (both in peace and war time) in the State's armed forces and the involvement in hostilities of persons under the age of 18 years.

In conclusion, it is to be recommended that, as soon as it criminalises in its domestic legislation the compulsory recruitment of persons under the age of 18 years in the national armed forces and their involvement in hostilities (see above Chapter III), Australia also adopt extraterritorial jurisdiction over these crimes, in particular in the form of universal jurisdiction, in order to enhance the system of accountability established by the OP-AC and ensure that Australia cannot be considered as a safe haven in this respect.

Furthermore, TRIAL respectfully submits that the requirement of written consent on the part of the Attorney-General[49] in order to proceed with the exercise of jurisdiction over the offences related to the involvement of children in armed conflict could represent an undue obstacle to the full and effective implementation of the provisions of the OP-AC.

Therefore it is TRIAL opinion that, in line with the jurisprudence of the Committee ruling out any additional condition on the use of jurisdiction over the relevant crimes[50], Australia shall consider the feasibility of easing the present procedural requirement in order to facilitate a smoother enforcement of the prohibition and criminalisation of the recruitment and use of children in armed forces.

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49 Section 268.121, para. 1 of the Commonwealth Criminal Code Act of 1995 (Australian Criminal Code).

50 CRC, Concluding Observations, Montenegro, 1 October 2010, UN doc. CRC/C/OPAC/MNE/CO/1, para. 19; CRC Concluding observations, Thailand, 3 February 2012, UN doc. CRC/C/OPAC/THA/CO/1, para. 20.

Conclusions

TRIAL respectfully submits to the Committee on the Rights of the Child that the current state of Australian criminal legislation is not fully in line with the State party's obligations under the OP-AC with regards to the requirement to criminalise the compulsory recruitment and the involvement in hostilities of persons under the age of 18 years in the national armed forced, and to the obligation to establish universal jurisdiction for such crimes.

Recommendations

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

1. During the dialogue with Australia:
    a. request information on whether the State Party has taken into account its obligations under the OP-AC to criminalise the compulsory recruitment of persons under the age of 18 years in the State's armed forces and their involvement in hostilities; 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 extraterritorial jurisdiction for the prosecution of all the offences related with the involvement of children up to 18 years in armed conflicts;
    c. ask the State party specific information about the exercise of universal jurisdiction over crimes related to the involvement of children in armed conflict and to clarify whether the requirement of the express written consent by the Attorney General has represented an hindrance to an effective prosecution of the said crimes.

2. After the dialogue with the State Party:
    a. recommend that new criminal provisions be adopted to provide for effective criminalisation and prosecution of the compulsory recruitment of persons under the age of 18 years in the State's armed forced and their involvement in hostilities.

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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