

PARAGUAY

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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Contents

About TRIAL	2
Executive Summary	3
Introduction	4
I. Prohibition and criminalisation of child recruitment and participation in hostilities under international law	4
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	9
III. Paraguay does not properly criminalise all the offences contained in the OP-AC	12
IV. Paraguay does not properly establish universal jurisdiction for all the offences contained in the OP-AC	14
Conclusions	15
Recommendations	15

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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 Paraguay 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/PRY/1).

TRIAL is focusing specifically on the issues of criminalisation and establishment 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 these issues as constituting 'necessary' measures to properly implement the OP-AC, ratified by the Paraguay on 27 September 2002.

A detailed review of Paraguayan criminal legislation leads TRIAL to highlight that the legal framework of the State Party is 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.

Despite commendably prohibiting both voluntary and compulsory recruitment of minors under the age of 18 in its armed forces, Paraguay still fails to adopt all the “feasible” and “necessary” measures to ensure the effective implementation and enforcement of the provisions of the Protocol, in particular with respect to the criminalisation, prosecution and punishment of the offences provided for therein.

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 Paraguay should take measures to enhance its protection of children involved in armed conflict in at least two respects.

On the one hand Paraguayan domestic legislation should provide for an explicit criminalisation of the customary law war crimes of conscription, enlistment or use of children under the age of 15 in armed conflict, the compulsory recruitment of persons under the age of 18 years, their use in hostilities and any recruitment and use in hostilities of children up to 18 years by non-State armed groups.

On the other hand Paraguay should establish in its domestic criminal law extraterritorial titles of jurisdiction (in particular the principle of universal jurisdiction) in order to effectively prosecute and punish persons who have violated any of the provisions of the OP-AC related to the recruitment or involvement of children 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 Paraguay.

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

Basing itself on a thorough analysis of Paraguayan 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 Paraguay 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 Paraguay implementation of the OP-AC provisions through an analysis of current Paraguayan 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 Conventions¹. 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 Conventions².

As was affirmed by the UN Secretary-General in his report on the establishment of a Special Court for Sierra Leone, Article 4 of the Second Additional Protocol to the Geneva Conventions has long been considered to

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".

form part of customary international law, and at least since the entry into force of the statutes of the UN ad-hoc tribunals, its violation is also commonly accepted to entail individual criminal responsibility³.

The same prohibition can also be found in Article 38 of the 1989 Convention on the Rights of the Child⁴.

This provision also renders clear its inextricable link with international humanitarian law. It is required from State Parties to respect and to ensure the respect of the prohibition of the involvement of children under 15 in armed conflict.

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

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

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 conflicts⁶, thus indicating the existence of this crime under customary international law.

Equally, Article 4 of the statute of the Special Court for Sierra Leone of 2002 confirms that

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

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

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

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

“[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 crime⁷.

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 1996.⁸

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 worldwide⁹. 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:

“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 old¹⁰.

In this respect it is quite important to underline the two-fold obligation to both prohibit and criminalise the offences in question.

The Committee has been repeatedly outspoken about the necessity for States to couple the generic prohibition of the conduct with “effective and dissuasive penalties”¹¹ in their domestic criminal legislation.

7 The statute is available at www.sc-sl.org.

8 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.

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

10 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.

11 CRC Concluding observations, Sudan, 6 October 2010, UN doc. CRC/C/OPAC/SDN/CO/1, para.24; see also the consistent pattern of Concluding observations where the Committee explicitly spelled out the double requirement of “prohibit and criminalise”, for instance CRC Concluding observations, FYROM, 11 June 2010, UN doc. CRC/C/OPAC/MKD/CO/1, para.9; 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. 14; CRC Concluding observations, Ukraine, 11 April 2011, UN doc. CRC/C/OPAC/UKR/CO/1 para. 20.

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 old¹², 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 18.¹³

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 implements a higher protection for children, requiring 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

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

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.¹⁷ 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.¹⁸ 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:

12 See FN 1.

13 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.

14 Article 1 OP-AC.

15 Article 2 OP-AC.

16 Article 4 OP-AC.

17 Article 1, 2 and 6 OP-AC.

18 Article 4 OP-AC.

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)¹⁹

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”²⁰,

stressing that this absence

“may perpetuate an environment of impunity and lack of accountability among the [...] [national] armed forces”²¹.

The Committee thus clearly called for the adoption of an explicit prohibition and criminalisation of the recruitment of children up to 18 years,²² 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.”²³

2. An explicit criminalisation in domestic legislation of the involvement in hostilities of persons under the age of 18 years²⁴

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 hostilities²⁵.

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

19 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 offence than that entailing their use in hostilities.

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

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

22 CRC Concluding observations, Republic of Korea, 27 June 2008, UN doc. CRC/C/OPAC/KOR/CO/1, para. 13.

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

24 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.

25 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.

“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.”²⁶

3. The criminalisation of the recruitment and use in hostilities of children up to 18 years by non-State armed groups²⁷ (even though there is no armed group present in the State party)²⁸

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.”²⁹

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”.³⁰

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:

“50. The Committee is deeply concerned that:

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

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.

28 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.

29 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.

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

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

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

- (c) Take all necessary measures to investigate, prosecute and punish alleged perpetrators of war crimes, especially those affecting children³¹.

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.³²

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

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

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

32 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.

number of Concluding Observations³³.

The Committee has repeatedly recommended the States parties to

“take steps to ensure that domestic legislation enables it to establish and exercise extraterritorial jurisdiction over war crimes of conscription and enlistment of children in hostilities”³⁴.

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.”³⁵

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.
8. In the light of Article 4, paragraph 2, and article 6, paragraph 1, of the Optional Protocol, the Committee recommends that the State party:
 - (a) Review the recent amendment of Article 9 of the Military Penal Code with a view to restoring its full jurisdiction over war crimes, such as conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities;³⁶

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

33 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.

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

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

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

universal jurisdiction over the customary law war crimes of conscription and enlistment of children under 15 years of age in hostilities³⁷,

- ▶ on the other hand to adopt measures to establish extraterritorial jurisdiction over the other crimes under the Optional Protocol³⁸.

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 criterion³⁹, represent an undue obstacle to the full implementation thereof and has been consistently ruled out by the Committee as unnecessary⁴⁰.

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

In its report, Paraguay maintains that its domestic law has been brought in compliance with OP-AC and other international standards with respect to recruitment of persons under the age of 18 years in armed forces through the following legislative and administrative enactments:

- ▶ on 27 May 2002 “Ley 1897/2002” formally incorporated the OP-AC as part of the Paraguayan national legal order by reproducing verbatim the text of the Convention⁴¹,
- ▶ on 27 September 2002, along with the instrument of ratification of the OP-AC, Paraguay deposited the binding declaration due to under Article 3 of the OP-AC⁴² establishing the age of 16 years as the minimum age for voluntary recruitment into its national armed forces,
- ▶ on 3 March 2006 the Commander in Chief of the Paraguayan Armed Forces issued “Orden Especial N°. 42” whereby the recruitment of individuals younger than 18 years of age into military service was absolutely prohibited⁴³,
- ▶ on 22 March 2006 the President of the Republic of Paraguay signed a new declaration replacing the

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

38 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.

39 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.

40 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.

41 CRC, Concluding observations, Paraguay, UN doc. CRC/C/OPAC/PRY/1, para. 8, 32.

42 Article 3(2) OP-AC: “Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.”

43 CRC, Concluding observations, Paraguay, UN doc. CRC/C/OPAC/PRY/1, para. 35.

one deposited with the instrument of ratification of the OP-AC on 27 September 2002 in order to ban the entry of children under the age of 18 in both compulsory and voluntary military service⁴⁴,

- ▶ on 6 November 2007 “Ley 3360/2007” modified Article 5 of “Ley 569/75” concerning compulsory military service, by positing that “Military service will be prohibited in all cases for persons under the age of 18 years”⁴⁵,
- ▶ on 20 May 2008 “Ley 3485/2008” amended “Ley N° 123/52” concerning special military courses offered at the Students’ Military Instruction Centre for Reserve Officers by raising the minimum entry age to 18 years⁴⁶.

There is no doubt that the removal of the declaration to the OP-AC submitted in 2002 permitting the voluntary recruitment of persons under 17 years of age and the changes in conscription law are important steps to be welcomed.

But this is not enough to comply with the obligations set forth by the OP-AC as seen in chapter I, especially in a country where the recruitment and ill-treatment of minors in the Army has been common practice and no one has ever been held accountable for these actions⁴⁷.

The State and the Army themselves have publicly acknowledged their responsibility and apologised for these facts in 2006⁴⁸.

Therefore it is all the more necessary for Paraguay to go beyond the mere formal incorporation of the OP-AC in the national legal order and the prohibition of all forms of military service under 18 years of age.

What is indispensable to properly implement the provisions of the OP-AC is the criminalisation of the offences embodied therein, i.e. attaching effective penalties to the violation of the stated prohibitions in order to enhance accountability and deterrence.

Unfortunately current Paraguayan criminal legislation (Criminal Code embodied in “Ley 1160/97” of 26 November 1997 as subsequently modified, lastly on 16 July 2008 by “Ley 3440/2008” in force from July 2009) totally lacks any criminalisation of the blameworthy conducts set forth in the OP-AC.

On the one hand Chapter VI of Title I (Book Two) of the Criminal Code, dealing with crimes against minors, does not contain any provisions with respect to the criminalisation of the compulsory recruitment (both in peace and in wartime) of persons under the age of 18 years in the State’s armed forces, their involvement in hostilities and their recruitment and use in hostilities by non-State armed groups.

44 Inter-American Commission on Human Rights, Report No. 85/09, Victor Hugo Maciel v Paraguay, 6 August 2009, para. 195.

45 CRC, Concluding observations, Paraguay, UN doc. CRC/C/OPAC/PRY/1, para. 13, 33.

46 CRC, Concluding observations, Paraguay, UN doc. CRC/C/OPAC/PRY/1, para. 34.

47 CRC, Concluding observations, Paraguay, 18 June 1997, UN doc. CRC/C/15/Add.75, para. 17; CRC, Concluding observations, Paraguay, 6 November 2001, UN doc. CRC/C/15/Add.166, para. 45-46; HRC, Concluding observations, Paraguay, 24 April 2006, UN doc. CCPR/C/PRY/CO/2, para. 14.

48 Inter-American Commission on Human Rights, Report No. 85/09, Victor Hugo Maciel v Paraguay, 6 August 2009, para. 187.

On the other hand the single Chapter of Title IX (Book Two) of the Criminal Code, dealing with crimes against Nations, only provides for the criminalisation of a limited number of war crimes, namely killings, serious injury to body or health, inhuman treatment, deportation, forced labor, imprisonment, compelling a prisoner of war to serve in the forces of a hostile power and pillaging⁴⁹.

There is no mention of offences related to the recruitment or use of child soldiers in hostilities. In this respect Paraguayan legislation falls short of what international customary law and the OP-AC itself require as a minimum, that is the criminalisation of the war crimes of conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

Article 8(1)(8) of Chapter II of Title I (Book One) of the Criminal Code (as modified by “Ley 3440/2008” from July 2009) holds that Paraguayan criminal law applies to crimes committed abroad that Paraguay is required, under an international treaty in force, to prosecute even when they have been committed abroad⁵⁰. This constitutes however too loose a provision to be sufficient for Paraguay comply with its obligations under OP-AC.

The wording of OP-AC is straightforward in calling on States Parties themselves to “enact all the legislative, administrative and other measures necessary to prohibit and punish”⁵¹ the offences contained therein. In this respect the OP-AC is not self-executing, and Paraguay cannot thus be considered as properly discharging its obligations through Article 8 of its Criminal Code.

In conclusion, being a party to the OP-AC, Paraguay is required to clearly and effectively prohibit and criminalise in its criminal law the whole set of offences under the purview of the OP-AC:

- ▶ conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities,
- ▶ compulsory recruitment of persons under the age of 18 years (both in peace and war time),
- ▶ involvement in hostilities of persons under the age of 18 years, and
- ▶ recruitment and use in hostilities of children up to 18 years by non-State armed groups.

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

Chapter II of Title I (Book One) of Paraguayan Criminal Code deals with the scope of criminal law application. Article 6, 7, 8 and 9 enumerate the different titles of jurisdiction to be vested in Paraguayan courts.

Following the analysis carried out in Chapter III above, it is clear that, since no criminalisation of the offences set out in the OP-AC exists, there may be no prosecution nor punishment for the perpetrators; therefore

49 Article 320, single Chapter of Title IX (Book Two) of Paraguayan Criminal Code, in “Ley 1160/97” of 26 November 1997.

50 Article 8 (1)(8), Chapter II of Title I (Book One) of Paraguayan Criminal Code, in “Ley 1160/97” of 26 November 1997 as modified by “Ley 3440/2008” of 16 July 2008; see below in Chapter IV the actual scope of the provision.

51 Article 4 and 6 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

dwelling upon the scope of the different heads of jurisdiction provided for in Paraguayan criminal law has little meaning.

Suffice it to say that, as hinted above, Article 8 of the Criminal Code establishes universal jurisdiction with respect to a list of criminal conducts specifically spelled out in the Article itself.

What is interesting to highlight for our purposes is that Article 8(1)(8) foresees the exercise of universal jurisdiction with respect to crimes which Paraguay is obliged to prosecute and punish on the basis of universality according to an international treaty in force for Paraguay itself. This paragraph is therefore a mere generic *renvoi* to certain international treaties already providing for universal jurisdiction.

As mentioned above, the Optional Protocol is not self-executing in this respect and necessitates a proper domestic implementation in terms of establishing extraterritorial grounds of jurisdiction for the offences it mandates to punish.

Therefore it is to be recommended that Paraguay, as soon as it criminalises in its domestic legislation the war crimes of recruitment and use of children under the age of 15 in hostilities, the compulsory recruitment of persons under the age of 18 years in the State's armed forces, their involvement in hostilities and their recruitment and use in hostilities by non-State armed groups (see above Chapter III), adopt extraterritorial titles of jurisdiction - preferably universal jurisdiction - over these offences in order to comply with the far-reaching obligations of the OP-AC and be in line with the spirit of ensuring its effective implementation and enforcement.

Conclusions

TRIAL respectfully submits to the Committee on the Rights of the Child that the current state of Paraguayan criminal legislation is not in line with the State party's obligations under the OP-AC with regards to the necessity to criminalise the conscription or enlistment of children under the age of 15 years into the national armed forces and their use in hostilities, the compulsory recruitment of persons under the age of 18 years in the State's armed forces, their involvement in hostilities and their recruitment and use in hostilities by non-State armed groups.

Moreover Paraguay fails to establish universal jurisdiction in holding perpetrators accountable for such conducts.

Recommendations

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

1. In the list of issues:
 - a. take up the absence of criminalisation and establishment of universal jurisdiction over the offences specified in the OP-AC (the war crimes of recruiting and involving children under the age

of 15 in armed conflicts, the compulsory recruitment of persons under the age of 18 years in the State's armed forces, their involvement in hostilities and their recruitment and use in hostilities by non-State armed groups) as a matter for discussion with the State Party;

2. During the dialogue with Paraguay:
 - a. request information on whether the State Party has taken into account its obligations under the OP-AC to criminalise the war crimes of recruiting and involving children under the age of 15 in armed conflicts, the compulsory recruitment of persons under the age of 18 years in the State's armed forces, their involvement in hostilities and their recruitment and use in hostilities by non-State armed groups; 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 to the involvement of children up to 18 years in armed conflicts.

3. After the dialogue with the State Party:
 - a. recommend that new criminal provisions be adopted to provide for effective criminalisation and prosecution of the war crimes of recruiting and involving children under the age of 15 in armed conflicts, the compulsory recruitment of persons under the age of 18 years in the State's armed forces, their involvement in hostilities and their recruitment and use in hostilities by non-State armed groups.

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.



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