

UNITED STATES OF AMERICA

**Second Report of 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 the United States of America's (USA) second 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/USA/2).

TRIAL focuses 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 the USA on 23 December 2002.

A detailed review of USA criminal legislation leads TRIAL to highlight that the legal framework of the State Party is not fully in compliance with the commitments accepted under the OP-AC on the question of criminalization and punishment of all the offenses embodied in the Protocol.

Despite commendably addressing the criminalization, prosecution and punishment of the war crime of recruitment, enlistment or use of children under the age of 15 in armed conflict with a law enacted in 2008, the State Party 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.

Similarly USA legislation falls short of the OP-AC obligations to take all the "feasible" and "necessary" measures to ensure that armed groups that are distinct from the armed forces of a State do not recruit or use in hostilities persons under the age of 18 years.

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, TRIAL is of the view that the USA should take measures to enhance its protection of children involved in armed conflict in at least two respects.

On the one hand USA legislation should provide for an explicit prohibition and criminalization of 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 USA legislation should establish extraterritorial titles of jurisdiction (in particular the principle of universal jurisdiction) in order to effectively prosecute and punish persons who have recruited, enrolled or used children under the age of 18 as soldiers in an 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 by the USA.

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

Undertaking a thorough analysis of USA national legislation and of 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 the State Party 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 legally 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 criminalize certain acts (I) and to establish a jurisdictional network in order to effectively prosecute and punish such acts (II). The document then proceeds with an assessment of USA implementation of the OP-AC provisions through an analysis of current USA domestic legislation on both aspects (III and IV).

I. Prohibition and criminalization 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 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 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 criminalize the recruitment or the active involvement in hostilities of children under 15 years old¹⁰.

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 old¹¹, 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 18.¹²

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.

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 criminalization besides the simple prohibition of the recruitment and use of children in hostilities.

11 See FN 1.

12 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.

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”¹³,

and to

“ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces”.¹⁴

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”.¹⁵

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.¹⁶ 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.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 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 criminalization in domestic legislation of the compulsory recruitment of persons under the age of 18 years (both in peace and war time)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

13 Article 1 OP-AC.

14 Article 2 OP-AC.

15 Article 4 OP-AC.

16 Article 1, 2 and 6 OP-AC.

17 Article 4 OP-AC.

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

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 years,²¹ 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

2. An explicit criminalization in domestic legislation of the involvement in hostilities of persons under the age of 18 years²³

The Committee has several times regretted 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 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 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

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

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

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

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

23 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.

24 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.

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

3. 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 oftentimes 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

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”.²⁹

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:

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

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

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

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

26 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.

27 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.

28 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.

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

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

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 criminalize 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.³¹

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 number of Concluding Observations³².

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”³³.

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

31 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.

32 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.

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

criminality.³⁴

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”³⁵

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 hostilities³⁶,
- ▶ on the other hand to adopt measures to establish extraterritorial jurisdiction over the other crimes under the Optional Protocol³⁷.

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 criterion³⁸, represent an undue obstacle to the full implementation thereof and has been consistently ruled out

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

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

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

37 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

38 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.

by the Committee as unnecessary³⁹.

III. The USA does not properly criminalize all the offenses contained in the OP-AC

At the time the United States of America ratified the Optional Protocol, it determined that its existing laws and policies were adequate to implement its obligations under the OP-AC⁴⁰ and it reiterated this assertion in drawing up this second Report⁴¹.

In reality the USA War Crimes Statute completely failed, up until its modifications in 2008, to specifically include the crimes covered in the Protocol⁴².

In 2008 the USA consolidated its legal framework through the enactment of two new statutes: the Child Soldiers Accountability Act (CSAA) of 2008, Public Law No. 110-340, enacted October 3, 2008, and the Child Soldiers Prevention Act of 2008, enacted as Title IV of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law No. 110-457, December 23, 2008.

The CSAA introduced both criminal and immigration sanctions for persons recruiting or using child soldiers under the age of 15.

The said Act amended the USA Criminal Code to add a provision that prohibits whoever

“knowingly recruits, enlists, or conscripts a person under 15 years of age into an armed force or group; or knowingly uses a person under 15 years of age to participate actively in hostilities”⁴³.

Whoever violates, or attempts or conspires to violate, this prohibition is subject to a fine or imprisonment of up to 20 years or both and, if death of any person results, may be fined and imprisoned up to life⁴⁴.

For the purposes of the Act, 'armed force or group' is defined to mean

“any army, militia, or other military organization, whether or not it is state-sponsored, excluding any group assembled solely for nonviolent political association”⁴⁵.

Furthermore the CSAA amended the Immigration and Nationality Act by laying out new grounds of

39 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.

40 CRC, Initial Report of the United States of America, 22 June 2007, UN doc. CRC/C/OPAC/USA/1, para. 5.

41 CRC, Second Report of the United States of America, 22 January 2010, UN doc. CRC/C/OPAC/USA/2, para. 9, 80.

42 CRC Concluding observations, United States of America, 25 June 2008, UN doc. CRC/C/OPAC/USA/CO/1, para. 22.

43 USA Criminal Code, Title 18, Part I, Chapter 118, para. 2442 “Recruitment or use of child soldiers”, para. (a).

44 USA Criminal Code, Title 18, Part I, Chapter 118, para. 2442 “Recruitment or use of child soldiers”, para. (b).

45 USA Criminal Code, Title 18, Part I, Chapter 118, para. 2442 “Recruitment or use of child soldiers”, para. (d)(2).

inadmissibility⁴⁶ and deportability⁴⁷ for “any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 (...)”.

It should certainly be welcomed that the CSAA properly amended the USA Criminal Code to expressly criminalize the war crimes of recruiting, conscripting or using children under the age of 15 into armed conflict, introducing effective sanctions for the perpetrators. It is also commendable that in early February 2012 the Child Soldiers Accountability Act was first relied on by a US federal immigration judge to issue an order to remove a former Liberian military leader and human rights violator who was found to have recruited and used child soldiers while fighting in the Liberian civil war in the 1990s.⁴⁸

But this does by no means exhaust the State Party’s obligations under the OP-AC.

As we have seen above, the OP-AC raises in several respects the standard of protection to persons under the age of 18 years.

Being a party to the OP-AC carries also a duty to domestically criminalize 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.

The fact that USA law prohibits and criminalizes insurgent activities by non-governmental actors against the United States, irrespective of age,⁴⁹ and other forms of participation in insurgent groups willing to engage in armed conflict with foreign powers with whom the United States is at peace⁵⁰ is not a valid reason to be exempted from the obligation to provide for the criminalization of the exploitation of children under the age of 18 by foreign non-State armed groups.

In conclusion, in order to comply with the OP-AC standards the USA should further amend its criminal legislation in order to criminally punish:

- ▶ the recruitment and use in hostilities of children up to 18 years old by non-State armed groups,
- ▶ the compulsory recruitment of persons under the age of 18 in the State’s army,
- ▶ the involvement in hostilities of children up to 18 years old.

IV. The USA does not properly establish universal jurisdiction for all the offenses contained in the OP-AC

The War Crimes Statute in the USA Criminal Code established extraterritorial heads of jurisdiction (in particular active and passive personality jurisdictions) over certain war crimes but it did not include any of the crimes

46 USA Criminal Code, Title 8, Chapter 12, SubChapter II, Part II, para. 1182 “Inadmissible Aliens” (a)(3)(G).

47 USA Criminal Code, Title 8, Chapter 12, SubChapter II, Part IV, para. 1227 “Deportable Aliens” (a)(4)(F)).

48 M. Rockwell, “Liberian deported in first ICE child soldier recruitment case”, Government Security News, 7 February 2012.

49 USA Criminal Code, Title 18, Part I, Chapter 115, para. 2381 “Treason”.

50 USA Criminal Code, Title 18, Part I, Chapter 45, para. 960 “Expedition against friendly nation”.

provided for in the OP-AC⁵¹.

With the entry into force of the CSAA, the United States has adopted extensive jurisdiction to adjudicate over the crime of recruiting or using child soldiers under the age of 15.

In fact Section 2442 of the amended USA Criminal Code now provides jurisdiction over these offenses if:

- ▶ the alleged offender is a U.S. national or lawful permanent resident;
- ▶ the alleged offender is a stateless person whose habitual residence is the United States;
- ▶ the alleged offender is present in the United States, irrespective of nationality; or
- ▶ the offense occurs in whole or in part within the United States.⁵²

Therefore the USA, in the spirit of ensuring the effective implementation and enforcement of the provisions prohibiting and criminalizing the recruitment and use of children under the age of 15 in hostilities, besides the territoriality and active personality principle, commendably adopted the *forum deprehensionis* rule.

This is also called the principle of conditional universal jurisdiction, in that it asserts adjudicative jurisdiction over alleged criminals who are present in the United States regardless of their nationality and regardless of where the crime took place, with the only condition that the accused is present on the territory of the United States at the start of the proceedings.

But still, as noted above in Chapter II, it is not enough under the OP-AC to establish universal jurisdiction over the war crimes of recruitment and use of children under the age of 15 in hostilities. It is also necessary for States parties to strengthen measures to establish extraterritorial jurisdiction over all the other crimes provided therein.

Thus it is to be recommended that, as soon as the USA criminalize in their domestic legislation 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), the State Party should also adopt extraterritorial jurisdiction over these crimes, in particular in the form of the *forum deprehensionis* rule, in order to enhance the network of accountability established by the OP-AC and ensure that the United States can not be considered as a safe haven in this respect.

Conclusions

TRIAL therefore respectfully submits to the Committee on the Rights of the Child that the current state of USA criminal legislation is not fully in line with the State party's obligations under the OP-AC with regards to the necessity to criminalize 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 to establish universal jurisdiction over such offenses.

51 USA Criminal Code, Title 18, Part I, Chapter 118, para. 2441 "War Crimes".

52 USA Criminal Code, Title 18, Part I, Chapter 118, para. 2442 "Recruitment or use of child soldiers", para (c).

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 criminalization and establishment of universal jurisdiction over the offenses specified in the OP-AC other than the war crimes of recruiting and involving children under the age of 15 in armed conflicts as a matter for discussion with the State Party;

2. During the dialogue with the USA:
 - a. request information on whether the State Party has taken into account its obligations under the OP-AC to criminalize 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 offenses related with 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 criminalization and prosecution of 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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