

EXECUTIVE SUMMARY

The present written submission to the Committee for the Rights of the Child follows the Democratic Republic of the Congo (DRC) initial report of July 2008 regarding its implementation of the Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-AC). TRIAL is focusing more specifically on the topic of universal jurisdiction, with a view to the effective prosecution of the war crime of recruiting, enrolling and using child soldiers in armed conflict, considered as one of the necessary measures to properly implement the OP-AC, ratified by DRC on 11 November 2001.

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

In its examination of DRC criminal legislation, TRIAL also studied a draft proposal that would lead DRC to attempt to address the scourge of impunity through better implementing the Rome Statute of the International Criminal Court¹. TRIAL praises and supports the proposed criminal legislation reform, especially the draft clauses addressing universal jurisdiction questions. Such a legislation would certainly allow DRC to better comply with its international commitments, notably the Convention on the Rights of the Child and its OP-AC.

The following developments thus provide for a closer scrutiny of both DRC current and proposed criminal legislation, stating how the former does not comply with the OP-AC on the question of recourse to universal jurisdiction mechanisms, while the latter does, were it to be adopted in its current form, allowing - at least on paper - DRC to properly prosecute those responsible for war crimes related to the involvement of children in armed conflict.

TRIAL

¹ Exposé des motifs dans Avant-Projet de Loi relative aux Chambres spécialisées pour la répression des violations graves du droit international humanitaire : organisation, fonctionnement, droit applicable, compétence et procédure. "L'initiative gouvernementale de la création des chambres spécialisées pour la répression des violations graves de droit international humanitaire est comme portée par un double courant d'exacerbation et de frustration d'un côté, et de maturation de l'engagement pour la lutte contre l'impunité, d'autre part".

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

In this sense, TRIAL:

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

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

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

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

DEVELOPMENTS

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

TRIAL would like to draw the Committee's attention to the fact that, regarding the actual Congolese criminal legislation, State party's authorities cannot effectively prosecute, under the principle of universal jurisdiction, persons who have recruited, enrolled or used children under the age of 18 as soldiers in an armed conflict. Currently, the current Congolese criminal legislation doesn't provide for universal jurisdiction at all. Indeed, while the current Criminal Code doesn't contain any provisions which would sanction grave breaches of international humanitarian law, the Congolese Military Criminal Code does provide for the repression of such crimes, but doesn't give Congolese prosecutors and military courts jurisdiction over cases that lack any direct link to the DRC. Above all the prosecution of those crimes would only take place if committed by enemy

forces² and the war crime of the involvement of children in armed conflict only seems to be considered as one breach of DRC legislation which wouldn't be justified by international humanitarian law³.

It should however be noted that DRC is currently working on a change of its legislation with a view to better comply with its international obligations. For reasons related to its highly conflicting history, DRC now seems keen to reinforce its criminal provisions to better prosecute those responsible for international crimes (war crimes, crimes against humanity, genocide). Such an initiative should be praised, although the content of the draft criminal legislation warrants deeper scrutiny in particular regarding the scope of universal jurisdiction.

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

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

The prohibition to recruit or use children under 15 in hostilities is codified in Article 77(2) of the First Additional Protocol to the Geneva Conventions of 1977⁴. The same prohibition is elevated to a "fundamental guarantee", in times of non-international armed conflicts, by virtue of Article 4(3) of the Second Additional Protocol to the Geneva Conventions⁵.

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

² Article 174 Loi n°024/2002 du 18 novembre 2002 portant Code pénal militaire. "Sont poursuivis devant les juridictions militaires, conformément aux dispositions en vigueur et à celles du présent Code, ceux qui, lors de la perpétration des faits, étaient au service de l'ennemi ou d'un allié de l'ennemi, à quelque titre que ce soit, notamment en qualité de fonctionnaires de l'ordre administratif ou judiciaire, de militaires ou assimilés, d'agents ou préposés d'une administration ou de membres d'une formation quelconque ou qui étaient chargés par eux d'une mission quelconque, et se sont rendus coupables de crimes depuis l'ouverture des hostilités soit dans le territoire de la République ou dans toute zone d'opérations de guerre, soit à l'encontre d'un national, d'un étranger ou d'un réfugié sur le territoire de la République, soit au préjudice des biens de toutes les personnes physiques visées ci-dessus et de toutes les personnes morales nationales, lorsque ces infractions, mêmes accomplies à l'occasion ou sous le prétexte de l'état de guerre, ne sont pas justifiées par les lois et coutumes de guerre."

³ Article 173 Loi n°024/2002 du 18 novembre 2002 portant Code pénal militaire. "Par crime de guerre, il faut entendre toutes infractions aux lois de la République commises pendant la guerre et qui ne sont pas justifiées par les lois et coutumes de la guerre."

⁴ 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".

⁵ 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 responsibility⁶.

The same prohibition can also be found in Article 38 of the 1989 Convention on the Rights of the Child⁷. This provision also renders clear its inextricable link with international humanitarian law. It is required from State Parties to respect and to ensure the respect of the prohibition of the involvement of children under 15 in armed conflict.

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

“The Committee recommends that awareness of the duty to fully respect the rules of international 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.”⁸

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

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

is a war crime.⁹

The Appeals Chamber of the Special Court for Sierra Leone has stated that the conscription or enlistment of children under the age of 15 years for them to participate actively in hostilities has constituted a war crime under customary international law since at least 1996.¹⁰

⁶ 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”

⁷ 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.”

⁸ Concluding observations of the Committee on the Rights of the Child, Uganda, 21 October 1997, UN doc. CRC/C/15/Add.80, para. 34.

⁹ The statute is available at <http://www.sc-sl.org/scsl-statute.html>.

¹⁰ *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.*

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

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

for international and non-international armed conflicts,¹¹ thus indicating the existence of this crime under customary international law. Incidentally, as was stated by the Appeals Chamber of the Special Court for Sierra Leone, this conduct was proscribed, as of 2001, in the criminal legislations of 108 States worldwide.¹² It seems therefore conclusive that the conscription, enlistment or use of children under the age of 15 years in hostilities constitutes a war crime under customary international law.

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

“The States Parties to the present Protocol

(...)

Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict,

(...)

Have agreed as follows”.

A gap of protection seems nonetheless to remain regarding the category of children between 15 and 18 years old. If it is asked of State Parties to preferably recruit the oldest when enrolling children from 15 to 18 years old, the ICRC found highly necessary to engage for a wider protection of children in armed conflict. A 1995 ICRC plan of action led it to require to raise the minimum age for their participation in armed conflict to 18¹³. This wish of ICRC might have impelled the adoption of the OP-AC which indeed extends the protection from involvement in armed conflicts to children under 18. The OP-AC thus offers a stronger protection to those under 18, through the extension of the previously gained protection for those under 15 to all children.

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

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

¹¹ Art. 8(2)(b)(xxvi) and art. 8(2)(e)(vii) of the Rome Statute, respectively. 8 *Prosecutor v. Norman*, *supra* n6, paras 44 *et seq.* 9 *Ibid.*, para. 41.

¹² *Prosecutor v. Norman*, *supra* n10, paras 44 *et seq.*

¹³ Plan d'action relatif aux enfants dans les conflits armés. Entériné par le Conseil des Délégués, Genève, 1995. <http://www.icrc.org/web/fre/sitefre0.nsf/html/5FZGBM>

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”

and that the State parties should

“take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices”¹⁵.

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

If the conscription, enlistment or use of children in armed conflict has to be prohibited, it is one thing to require States to proscribe this conduct in their domestic law as a war crime, while it is quite another to actually prosecute the persons responsible for such crimes. As the Appeals Chamber of the Special Court for Sierra Leone, citing the UN Special Representative for Children and Armed Conflict, stated: “Words on paper cannot save children in peril.”¹⁶ It is obviously necessary that the criminal provisions be applied by criminal courts.

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

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

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

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

One of the “*feasible*” (and arguably necessary) “*measures*” which permit to prevent the recruitment and use of children under 18 years of age is the exercise of universal jurisdiction over persons who have allegedly committed such acts against children¹⁷. This possibility is provided for by customary international law and required by the Committee itself.

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

¹⁴ Article 1 and 2 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

¹⁵ Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

¹⁶ *Prosecutor v. Norman, supra n10*, para. 41.

¹⁷ 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.

- “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;”¹⁸

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

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

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

It is worth noting that these Concluding Observations are not isolated and seems to follow a steady course of action. Indeed, the Committee has recently adopted a similar stance regarding, for instance, Bosnia and Herzegovina²⁰ and Sierra Leone²¹ initial reports. Previously, the Committee called full use of universal jurisdiction as well, regarding Germany²², Belgium²³ and Switzerland²⁴ among others.

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

- “7. The Committee notes with regret the amendment of Article 9 of the Military Penal Code of 23 December 2003, which entered into force on 1 June 2004, because it limits the State party’s extraterritorial jurisdiction for the prosecution of alleged perpetrators of war crimes

¹⁸ CRC, Concluding Observations Solomon Islands, 2 July 2003, UN Doc. CRC/C/15/Add.208

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

²⁰ CRC, Concluding Observations Bosnia and Herzegovina, 13 Sept-1 Oct 2010, paragraph 16. CRC/C/OPAC/BIH/CO/1

²¹ CRC, Concluding Observations Sierra Leone, 13 Sept-1 Oct 2010, paragraph 26. CRC/C/OPAC/SLE/CO/1

²² CRC, Concluding Observations Germany, 13 Feb 2008, paragraph 14 et 15 a). CRC/C/OPAC/DEU/CO/1

²³ CRC, Concluding Observations Belgium, 9 June 2006, paragraph 13 b). CRC/C/OPAC/BEL/CO/1

²⁴ CRC, Concluding Observations Switzerland, 17 March 2006, paragraph 8. CRC/C/OPAC/CHE/CO/1

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;²⁵

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

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

III. DRC current criminal legislation is not in accordance with the OP-AC

The Congolese Criminal Code is not applicable to international crimes and does not contain any references to serious breaches of international humanitarian law. It is the Congolese Military Criminal Code that currently deals with these issues.

However, the content of the Congolese Military Criminal Code (Article 174 more specifically²⁶) seems to be applicable only to suspects of war crimes, crimes against humanity and genocide that might have committed such crimes while belonging to the enemy. Such a partial view of the criminal justice is very disturbing and obviously not acceptable regarding DRC obligations under OP-AC Articles 4 and 6, which require from State

²⁵ CRC, Concluding Observations Switzerland, 17 March 2006, paragraph 7 and 8. CRC/C/OPAC/CHE/CO/1

²⁶ Article 174 loi n°024/2002 du 18 novembre 2002 portant Code Pénal Militaire. "Sont poursuivis devant les juridictions militaires, conformément aux dispositions en vigueur et à celles du présent Code, ceux qui, lors de la perpétration des faits, étaient au service de l'ennemi ou d'un allié de l'ennemi, à quelque titre que ce soit, notamment en qualité de fonctionnaires de l'ordre administratif ou judiciaire, de militaires ou assimilés, d'agents ou préposés d'une administration ou de membres d'une formation quelconque ou qui étaient chargés par eux d'une mission quelconque, et se sont rendus coupables de crimes depuis l'ouverture des hostilités soit dans le territoire de la République ou dans toute zone d'opérations de guerre, soit à l'encontre d'un national, d'un étranger ou d'un réfugié sur le territoire de la République, soit au préjudice des biens de toutes les personnes physiques visées ci-dessus et de toutes les personnes morales nationales, lorsque ces infractions, mêmes accomplies à l'occasion ou sous le prétexte de l'état de guerre, ne sont pas justifiées par les lois et coutumes de guerre."

parties to “take all feasible measures (...) to prohibit and criminalize” the involvement of children in armed conflict. It is thus clear that the OP-AC in no way restricts the prohibition to the only crimes committed by the enemy forces.

Moreover, the crime of involvement of children in armed conflict is not specifically addressed by the current military criminal code. Article 173 gives jurisdiction to DRC military courts to any kind of war crimes, without any precision that would go further into defining what war crimes are²⁷.

To conclude, Congolese military courts only enjoy jurisdiction over (vaguely defined) war crimes committed by the enemy within DRC borders or against one of its nationals. Far from implementing the principle of universal jurisdiction to properly prosecute those responsible for war crime of the involvement of children in armed conflict, DRC current legislation does not live up to the State Party’s obligations under the OP-AC.

IV. DRC draft criminal legislation

DRC initiated a new legislation which aims at the creation of specialized chambers for the prosecution of serious breaches of international humanitarian law. This project has been impelled by DRC Ministry of Justice and Human Rights and was recently adopted by DRC Council of Ministers on the 25 February 2011.

The draft legislation setting up specialized chambers explicitly refers, in the proposed Article 15, to various international conventions, among others the Convention for the rights of the child and the Rome Statute of the ICC, that would constitute the legal basis for prosecution of perpetrators of international crimes²⁸.

²⁷ Article 173 de Loi n°024/2002 du 18 novembre 2002 portant Code pénal militaire. “Par crime de guerre, il faut entendre toutes infractions aux lois de la République commises pendant la guerre et qui ne sont pas justifiées par les lois et coutumes de la guerre”.

²⁸ Article 15 de l’Avant-Projet de loi relative aux Chambres spécialisées pour la répression des violations graves du Droit international humanitaire. “Sans préjudice des dispositions de la présente loi, les chambres spécialisées pour la répression des violations graves de droit international humanitaire appliquent les instruments internationaux relatifs aux droits de l’homme et du droit international humanitaire régulièrement ratifiés par la République Démocratique du Congo, en particulier, en ce qui concerne le crime de génocide, les crimes de guerre et les crimes contre l’humanité :

- (a) le droit du Statut de Rome de la Cour pénale internationale, en tant qu’il constitue le droit international coutumier commun des Etats pour la répression des crimes graves du droit international humanitaire et en tant qu’il exprime les principes élémentaires d’humanité préexistant au Statut¹ ;
- (b) les Conventions de Genève du 12 août 1949 et leurs protocoles additionnels I et II en tant qu’ils constituent le droit applicable aux conflits internationaux et au aux conflits internes ;
- (c) la Convention pour la prévention et la répression du crime de génocide ;
- (d) la Convention contre la torture ou autres peines ou traitements cruels, inhumains ou dégradants ;
- (e) la Convention relative aux droits de l’enfant ;
- (f) les lois et coutumes de la guerre ;
- (g) les accords internationaux spécifiques conclus par la République Démocratique du Congo avec l’Organisation des Nations Unies ou ses agences, les organisations régionales ou sous-régionales, ou avec d’autres Etats en vue de la répression des violations graves du droit international humanitaire ;
- (h) les dispositions pénales congolaises conformes aux instruments internationaux ratifiés par la République Démocratique du Congo ;
- (i) la loi de mise en œuvre du statut de la Cour pénale internationale.”

The draft legislation also provides for prosecution of suspects of international crimes based on the principle of universal jurisdiction. The proposed Article 30²⁹ states that the specialized chambers would legally exercise their jurisdiction over those foreigners responsible for serious breaches of international humanitarian law committed abroad provided that no extradition can occur.

The recourse to universal jurisdiction is even more detailed in the projected Article 33³⁰, which provides for DRC criminal legislation to be applicable to anyone committing a crime or an offence abroad that DRC has an obligation to prosecute by virtue of any international agreement it has ratified.

Nevertheless, TRIAL expresses concerns about the potential restrictions that a strict interpretation of Article 33 could imply. Resorting to universal jurisdiction as a basis for prosecution of the crime of recruitment, enrolment and use of child soldiers seems to depend on three conditions being met, amongst which one potentially reduces the impact of such a powerful tool if not correctly interpreted. This element is the required presence of the perpetrator in DRC, reinforced with the condition that he is not extradited or deferred to the ICC or any other international criminal tribunal.

Through this element, DRC seems to consider its recourse to universal jurisdiction as being subsidiary to ICC or other international criminal tribunals' jurisdiction. The Rome Statute however sees the ICC jurisdiction as complementary to national jurisdiction of the States party to it³¹. In other terms, a strict interpretation of Article 33 could lead DRC to only intervene in the prosecution of international crimes as a last resort.

This said, TRIAL, on the precise point of universal jurisdiction as a mechanism constituting an effective measure to implement and enforce the provisions of the OP-AC shares with the Committee its view that DRC's draft criminal legislation, were it to be approved without substantive changes and interpreted in conformity with the Rome Statute of the ICC, does fall in line with the State party's obligation under the OP-AC.

²⁹ Article 30 de l'Avant-Projet de loi relative aux Chambres Spécialisées pour la répression des violations graves du Droit international humanitaire. "La présente loi est également applicable aux violations graves du droit international humanitaire commises par : un Congolais ou par un étranger hors du territoire de la République lorsque la victime est de nationalité congolaise au moment des faits ; un étranger dont l'extradition a été refusée à l'Etat requérant par les autorités congolaises aux motifs soit que le fait à raison duquel l'extradition avait été demandée est puni d'une peine ou d'une mesure de sûreté contraire à l'ordre public congolais ; soit que la personne réclamée aurait été jugée dans ledit Etat par un tribunal n'assurant pas les garanties fondamentales de procédure et de protection des droits de la défense."

³⁰ Article 33 de l'Avant-Projet de loi relative aux Chambres Spécialisées pour la répression des violations graves du Droit international humanitaire. "La présente loi est applicable à quiconque commet à l'étranger un crime ou un délit que la République Démocratique du Congo s'est engagée à poursuivre en vertu d'un accord international : si l'acte est aussi réprimé dans l'Etat où il a été commis ou que le lieu de commission de l'acte ne relève d'aucune juridiction pénale ; si l'auteur se trouve en République Démocratique du Congo et qu'il n'est pas extradé ou remis à la Cour pénale internationale ou à toute autre juridiction pénale internationale ; et si, selon le droit congolais, l'acte peut donner lieu à l'extradition, mais que l'auteur n'est pas extradé."

³¹ Article 1 of the Rome Statute. "An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions."

Nonetheless, considering the wider protection that the OP-AC offers to children in armed conflict, TRIAL would respectfully suggest to include the Optional Protocol in the list of international conventions that the draft legislation refers to in its Article 15, to fully prohibit the involvement of children in armed conflict through the proper prosecution of those responsible for this war crime.

CONCLUSIONS

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

TRIAL also respectfully submits to the Committee that the draft legislation recently adopted by DRC Council of Ministers seems to fulfill, on the same precise issue, DRC's commitments under the OP-AC, were an interpretation of the relevant provisions be made in conformity with the Rome Statute of the ICC.

RECOMMENDATIONS

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

1. In the list of issues,
 - a. require information on whether the Congolese government has taken into account its obligations under the OP-AC when deciding to reform its current criminal legislation through the creation of specialized chambers to prosecute serious breaches of international humanitarian law;
 - b. retain the current Congolese criminal legislation as a major issue to be taken up during the dialogue which is scheduled from the 19th of september until the 7th of october 2011.
2. During the dialogue with DRC, submit to the Congolese delegation the following questions:
 - a. Is it the Congolese Government's position that its current criminal legislation and its draft legislation aiming at the creation of the specialized chambers for the prosecution of war crimes relating to the principle of universal jurisdiction are consistent with its obligations under the OP-AC?
 - b. What domestic measures does the Congolese Government intend to take in order to improve the protection of children under the OP-AC through the proper use of the universal jurisdiction for the

prosecution of war crimes related to children involvement in armed conflict?

3. After the dialogue with the Congolese delegation:
 - a. Recommend that the new criminal provisions to be adopted be fully consistent with the State Party's obligations to provide for effective prosecution of the war crime of involving children in armed conflicts through the recourse to the principle of universal jurisdiction.

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


Philip Grant
TRIAL Director