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Committee for the Rights of the Child/
Pre-Sessional Working Group
Office of the United Nations High
Commissioner for Human Rights
Palais des Nations
CH-1211 Geneva 10
Switzerland

Geneva, 3 October 2005

Written Submission to the Committee for the Rights of the Child

Dear Sir, Dear Madam

Please find enclosed a written submission to the Committee for the Rights of the Child from TRIAL (Swiss Association against Impunity) with a view to the dialogue with Switzerland scheduled for January 2006.

I will be at your entire disposal to deliver any further information on the Swiss legislation which is referred to in this communication.

Yours sincerely,

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Switzerland :

The implementation of the Optional Protocol to the Convention of the Rights of the Child

Prosecution of War Crimes

Submission from TRIAL (Swiss Association against Impunity) to the Committe on the Rights of the Child

October 2005

TRIAL (Track Impunity Always) is an Association under Swiss law founded in June 2002. It is apolitical and non-confessional. 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.

To this end, TRIAL coordinates a network of lawyers capable of rapidly and efficiently instituting legal proceedings. These lawyers offer the victims of international crimes the necessary skills for their proper defense: the filing of legal complaints; defense of private law-entitlements within the criminal trial; liability procedures… The possibilities for taking action are numerous and in constant development. If need be, TRIAL can also take action on its own whenever it deems it necessary by alerting the Swiss authorities to the presence in Switzerland of those responsible for international crimes.

TRIAL draws support from a scientific board made up of able lawyers and scholars who are convinced of the necessity to engage this struggle. The Association, which is in the process of developing a documentation center, encourages input from the scientific community, while at the same time using all available communication channels (Internet, information bulletins, published reports, organization of seminars etc.), to educate and inform its members and the public at large. The Association also intends to collaborate with Swiss and foreign organizations pursuing similar goals and to establish the necessary connections with the relevant political and judicial authorities in the fight against impunity.

More information on www.trial-ch.org

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 Switzerland.

TRIAL would like to draw the Committee's attention to the fact that the Swiss judiciary can no longer effectively prosecute, under the head of universal jurisdiction, persons who have recruited, enrolled or used children under the age of 15 as soldiers in an armed conflict. This is due to an amendment of the Swiss Military Penal Code of 23 December 2003 which entered into force on 1 June 2004. For such prosecutions to be initiated today, it is necessary that suspected perpetrators have a "close link" with Switzerland.

However, article 6(1) of the OP-AC obliges Switzerland 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."

With regard to armed groups distinct from the armed forces of the State, article 4(2) of the OP-AC provides that Switzerland must "take *all feasible measures* to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and *criminalize such practices*."[1]

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 children under 15 years of age.[2] This possibility is provided for by customary international law.

States have the obligation to exercise universal jurisdiction in order to prosecute persons suspected of having recruited or used children under the age of 15 years in hostilities

The prohibition to recruit or use children in hostilities is codified in art. 77(2) of the First Additional Protocol to the Geneva Conventions of 1977. The same prohibition is elevated to a "fundamental guarantee", in times of non-international armed conflicts, by virtue of art. 4(3) of the Second Additional Protocol to the Geneva Conventions.

As was affirmed by the UN Secretary-General in his report on the establishment of a Special Court for Sierra Leone, the just mentioned art. 4 of the Second Additional Protocol to the Geneva Conventions has long been considered to form part of customary international law, and at least since the entry into force of the statutes of the UN ad-hoc tribunals, its violation is also commonly accepted to entail individual criminal responsibility.[3]

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[1] Italics provided.

[2] 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.

[3] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 octobre 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".

The same prohibition can also be found in art. 38 of the 1989 Convention on the Rights of the Child. This provision also renders clear its inextricable link with international humanitarian law: A violation of art. 38 always simultaneously amounts to a war crime. Hence 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."[4]

Equally, art. 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.[5] 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.[6]

Also art. 8 of the 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,[7] 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 laws of 108 States worldwide.[8] It seems therefore conclusive that the conscription, enlistment or use of children under the age of 15 years in hostilities constitutes a war crime under customary international law.

It is however 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."[9] It is obviously necessary that the criminal provisions be applied by criminal courts. This need has aptly been expressed by the Committee for the Rights of the Child in its Concluding Observations on the initial report submitted by the Solomon Islands:

> "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.(...)

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[4] Concluding observations of the Committee on the Rights of the Child, Uganda, 21 October 1997, UN doc. CRC/C/15/Add.80, para. 34.
[5] The statute is available at http://www.sc-sl.org/scsl-statute.html.
[6] *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*.
[7] 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.

(c) Take all necessary measures to investigate, prosecute and punish alleged perpetrators of war crimes, especially those affecting children;"[10]

In order to ensure compliance with the provisions contained in the Geneva Conventions, the drafters laid down the obligation – to be implemented in application of the principle *aut dedere aut iudicare* – to prosecute persons suspected of Grave Breaches of these Conventions notwithstanding their nationality. States are thus obliged to exercise universal jurisdiction in the prosecution of these acts. It is worth noting that art. 38(1) of the Convention on the Rights of the Child reiterates and reinforces member States' obligations under international humanitarian law which are relevant to the child.[11]

Furthermore, as the UN Security Council has stated in its resolution 1379 (2001),[12] the obligation to put an end to the impunity for crimes against children is not only proper to the parties to an armed conflict, but to all States of the international community:

"The Security Council, […]

8. *Calls upon* all parties to armed conflict to: […]

9. *Urges* Member States to:

(a) Put an end to impunity, prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children and exclude, where feasible, these crimes from amnesty provisions and relevant legislation, and ensure that post-conflict truth-and-reconciliation processes address serious abuses involving children;

(b) Consider appropriate legal, political, diplomatic, financial and material measures, in accordance with the Charter of the United Nations, in order to ensure that parties to armed conflict respect international norms for the protection of children; […]"

The same was stated by the UN Human Rights Commission in its resolution 2002/92,[13] which was adopted without a vote:

"I. Implementation of the convention on the rights of the child and other instruments […]

9. Calls upon *all States* to put an end to impunity, where applicable, for all crimes, including where children are victims, in particular those of genocide, crimes against humanity and war crimes, and to bring perpetrators of such crimes to justice; […]"[14]

Switzerland has decided to relinquish the option of universal jurisdiction

Until 1 June 2004, Switzerland was able to exercise universal jurisdiction in application of the former version of art. 9 of the Military Penal Code, which permitted to prosecute suspected perpetrators of the war crime of conscripting or enlisting children in an armed conflict. The Appeals instance of the Military Tribunal has ruled that:

[10] CRC, Concluding Observations Solomon Islands, 2 July 2003, UN Doc. CRC/C/15/Add.208)
[11] The OP-AC also recalls, in para. 12 of its preamble, the "the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law".
[12] UN Security Council resolution 1379 (2001) of 20 November 2001.
[13] UN Human Rights Commission resolution 2002/92 of 26 April 2002.
[14] Italics provided.

> "Il n'est pas contesté que l'art. 3 commun aux quatre Conventions de Genève (ci-après: l'art. 3 commun), avec les développements contenus dans le Protocole II, fait partie des "prescriptions des conventions internationales" visées à l'art. 109 al. 1 CPM de sorte que, par le biais de cette dernière disposition, *une violation de l'art. 3 commun et de l'art. 4 du Protocole II peut être réprimée*. (…)
>
> Il n'est pas non plus contesté que l'auteur étranger de violations des lois de la guerre, qui a agi à l'encontre de personnes étrangères, dans le cadre le cadre d'un conflit de caractère non international sur le territoire d'un Etat étranger, peut être poursuivi et condamné par des juridictions suisses en application de l'art. 109 CPM (…)"[15]

Today however, Switzerland cannot fully exercise universal jurisdiction *vis-à-vis* perpetrators of war crimes. Since the amendment of the Military Penal Code of 23 December 2003,[16] which entered into force on 1 June 2004, Swiss authorities can only prosecute foreign perpetrators of war crimes, committed abroad and against foreignes, if the perpetrators dispose of a "close link" with Switzerland.

As can be derived from the parliamentary discussions, the "close link" is established when a person has his or her permanent residence or center of vital interests in Switzerland. To be counted amongst this group are asylum-seekers and refugees, but also persons, whose core family lives in Switzerland, and persons who chose Switzerland for stationary medical treatment. No close link is established if a person is present in Switzerland for a shorter stay only.[17] Hence, since 1 June 2004 it is possible that a person culpable of conscripting or enlisting children under the age of 15 years in hostilities, can freely stay on Swiss territory, as long as a "close link" with Switzerland in the above-mentioned sense is not established.

The envisaged introduction of the "close link"-requirement was at the time decisively criticized by TRIAL, whose appeal to parliament was supported by 35 international-law professors at Swiss universities.[18]

Given this restriction of universal jurisdiction for war crimes by virtue of the "close link"-requirement, it is the view of TRIAL that Switzerland is not taking all "feasible" or "necessary measures" to prevent the conscription, enlistment or use of children in armed conflicts. In particular, there is a poignant *lacuna* in Switzerland's ability to impose penal sanctions for this crime, namely if it is committed abroad, by foreigners against foreigners.

Rather, by virtue of the self-imposed restriction of its ability to exercise universal jurisdiction, Switzerland in fact creates a zone of greater tolerance for persons who have committed war crimes against children, thus becoming a weak link in the global pursuit of accountability for these perpetrators.

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[15] ("It is uncontested that art. 3 common to the four Geneva Conventions [hereafter: common art. 3], taken together with its expansion in Protocol II, is part of the 'proscriptions contained in international conventions' which are referred to in art. 109(1) of the Military Penal Code, so that, by virtue of the latter provision, *a violation of common art. 3 and art. 4 of Protocol II may be criminally sanctioned.* […]
Neither is it contested that a foreign perpetrator of a violation of the laws of war, who acted against foreigners in the event of a non-international armed conflict on the territory of a foreign State, can be prosecuted and condemned by a Swiss court in application of art. 109 of the Military Penal Code. […]") Tribunal militaire de Cassation suisse, *Affaire Fulgence Niyonteze*, judgment of 27 April 2001, available (in french) at http://www.trial-ch.org/doc/cassation_FN_27.4.01.pdf, translation by TRIAL, italics provided.

[16] Cf. http://www.trial-ch.org/en/actions/action_modifCPM.htm.

[17] See the official minutes of the parliamentary discussions (in french and german), reference no. BO 2003 N 1987, available at http://www.parlament.ch/ab/frameset/d/n/4701/95429/d_n_4701_95429_95483.htm?DisplayTextOid=95484.

[18] See the list at http://www.trial-ch.org/fr/actions/actions_revisioncpm_signataires.htm.

Moreover, TRIAL notes with concern that the Swiss Federal Council has recently proposed not only to maintain the "close link"-requirement for war crimes, but to extend it to other crimes under international law (crimes against humanity and genocide).[19]

Recommendations

At this juncture of the development of Swiss criminal law, we suggest the Committee on the Rights of the Child take the following action:

1. In the list of issues,

a. require information on whether the Swiss government has taken into account its obligations under the OP-AC when proposing to maintain the "close link"-requirement for war crimes;

b. list the "close link"-requirement as a major issue to be taken up during the dialogue which is scheduled for january 2006.

2. During the dialogue with Switzerland in January 2006, pose the Swiss delegation the following questions:

a. Is it the Swiss Government's position that the "close link"-requirement for the prosecution of war crimes under the head of universal jurisdiction is consistent with its obligations under the OP-AC?

b. What measures does the Swiss Government intend to take in order to improve the protection of children under the OP-AC in order to compensate for the limitation of the Protocol's implementation by means of criminal sanctions?

[19] On 16 August 2005, the Federal Council has recently opened a public consultation procedure on the draft law on complementarity with the International Criminal Court in order to gauge the opinion of civil society. The draft can be consulted (in french) at http://www.ejpd.admin.ch/doks/mm/content/mm_view-f.php?mmID=2469&topic=Menschenrechte.