

THE RUSSIAN FEDERATION

**Initial 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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Table of contents

About TRIAL	2
Introduction	3
I. Prohibition and criminalization of child recruitment and participation in hostilities under international law.....	4
II. States have an obligation under the OP-AC to exercise universal jurisdiction in order to prosecute persons suspected of all the crimes related to children involvement in armed conflict embodied in the Protocol.....	8
III. The Russian Federation does not properly criminalize all the conducts prohibited pursuant to the OP-AC	10
IV. The Russian Federation does not properly establish universal jurisdiction for all the conducts prohibited pursuant to the OP-AC.....	15
Recommendations.....	18

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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 defends the interests of victims of the most serious international crimes by litigating cases and submitting alternative reports before international human rights bodies (UN treaty bodies and regional courts) and filing criminal complaints before national courts on the basis of universal jurisdiction.

Moreover, TRIAL raises awareness among stakeholders and the general public regarding the necessity of an efficient national and international justice system for the prosecution of international crimes.

The organization enjoys consultative status with the UN Economic and Social Council (ECOSOC) since 2009.

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

Introduction

The Initial Report and the Adoption of the List of Issues

On 4 September 2012, the Russian Federation presented its initial report to the Committee on the Rights of the Child (CRC/C/OPAC/RUS/1).

On 11 July 2013, at its 62nd-63rd pre-sessional working group session, the Committee on the Rights of the Child adopted the **list of issues to be taken up in connection with the consideration of the initial report of the Russian Federation**.¹

TRIAL appreciates the opportunity to bring to the attention of the Committee on the Rights of the Child (hereinafter “the Committee”) 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 (hereinafter “OP-AC”) by the Russian Federation.

Given TRIAL’s area of expertise, this report focuses solely on a specific set of obligations contained in Articles 1, 2, 4 and 6 of the OP-AC concerning the prohibition and prosecution of crimes related to the involvement of children in armed conflict. The omission of other subjects does not imply by any means that TRIAL considers that the Russian Federation fully complies with all the other obligations under the OP-AC.

TRIAL would like to draw the Committee’s attention to the fact that current Russian legislation is not fully in compliance with the obligations established by the OP-AC on the issue of criminalization and punishment of all the conducts prohibited therein.

The present alternative report addresses 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 regard to their obligations to prohibit and criminalize certain acts (chapter I) and to establish universal jurisdiction in order to effectively prosecute and punish such acts (chapter II). The report then assesses the strengths and deficiencies of the implementation by the Russian Federation of Articles 1, 2, 4 and 6 of the OP-AC through an analysis of Russian domestic legislation and policies on recruitment and use of child soldiers (chapters III and IV).

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

1. The prohibition to recruit or use children under 15 years in hostilities was codified in Article 77(2) of the 1977 First Additional Protocol to the Geneva Conventions.¹ The same prohibition was elevated to a “fundamental guarantee” in times of non-international armed conflicts pursuant to Article 4(3) of the Second Additional Protocol to the Geneva Conventions² and it has been considered to be customary international humanitarian law by the International Committee of the Red Cross (hereinafter “the ICRC”).³
2. As it 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* tribunals, its violation is also commonly accepted to entail individual criminal responsibility.⁴
3. The same prohibition can also be found in Article 38 of the 1989 Convention on the Rights of the Child.⁵ This provision also renders clear its inextricable link with international humanitarian law. It is required from States parties to respect and to ensure the respect for the prohibition of the involvement of children under the age of 15 years in armed conflict.
4. In that respect, the Committee stated already in 1997 that:

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

¹ Article 77(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: “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) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977: “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”.

³ See Rules 136 and 137 of the 2005 ICRC Customary International Humanitarian Law Study, at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>, pag. 482-488.

⁴ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN doc. S/2000/915, para. 14: “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”.

⁵ Article 38 of the Convention on the Rights of the Child, adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990: “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.”

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".⁶

5. Adopted in 1998, Article 8 of the Rome Statute of the International Criminal Court (hereinafter "the ICC Statute") 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.
6. Equally, Article 4 of the 2002 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.⁸
7. The Appeals Chamber of the Special Court for Sierra Leone held that the conscription or enlistment of children under the age of 15 years to participate actively in hostilities has constituted a war crime under customary international law since at least 1996.⁹ This conduct was proscribed, as of 2001, in the criminal legislation of 108 States worldwide.¹⁰ 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.
8. To conclude on this, the preamble of the OP-AC itself clearly refers to the prohibition to involve children in armed conflict contained in the ICC Statute:

"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, [...]"

9. 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 the age of 15 years.¹¹

⁶ Committee on the Rights of the Child (CRC), Concluding Observations, Uganda, 21 October 1997, UN doc. CRC/C/15/Add. 80, para. 34.

⁷ Respectively, Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute of the International Criminal Court, entered into force on 1 July 2002.

⁸ Statute of the Special Court for Sierra Leone, entered into force on 16 January 2002, at www.sc-sl.org.

⁹ Special Court for Sierra Leone (SCSL), 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. 44ff.

¹⁰ *Ibid.*, para. 44.

¹¹ CRC Concluding observations, Tunisia, 6 February 2009, UN doc. CRC/C/OPAC/TUN/CO/1, para. 13, where the Committee spells out the reasons for the need of an actual criminalization besides the simple prohibition of the recruitment and use of children in hostilities.

10. A gap of protection seems nonetheless to remain regarding the category of children between 15 and 18 years. If in 1977 what was required from States parties to the First Additional Protocol to the Geneva Conventions was to preferably recruit the eldest when enrolling children from 15 to 18 years old,¹² the ICRC then found 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 years.¹³
11. This commitment is reflected in the adoption of the OP-AC, which indeed extends the protection from involvement in armed conflicts to children under the age of 18 years through the extension of the previously gained protection of those under the age of 15 years.
12. Indeed the OP-AC requires States parties to
- “take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities”,¹⁴*
- and to
- “ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces”.¹⁵*
13. Regarding armed groups, the OP-AC enunciates the general rule that
- “Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years”.¹⁶*
14. 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 crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities.
15. On the contrary, States parties to the OP-AC shall enact all legislative, administrative and other measures necessary to prohibit and punish the whole range of offences related to the involvement of children in armed conflict.¹⁷ In particular, in line with the most recent jurisprudence by the Committee, the following measures are required:
- a) An explicit criminalization in domestic legislation of the compulsory recruitment of persons under the

¹² See *supra* note 2.

¹³ *Plan d'action relatif aux enfants dans les conflits armés*, Geneva, 1995, at www.icrc.org/fre/resources/documents/misc/5fzgbm.htm.

¹⁴ Article 1 OP-AC.

¹⁵ Article 2 OP-AC.

¹⁶ Article 4 OP-AC.

¹⁷ Articles 1, 2 and 6 OP-AC.

age of 18 years (both in peace and war times).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 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 offences and that recruitment as such is criminalized by the law for both peace and wartime.”*²²

b) An explicit criminalization in domestic legislation of the involvement in hostilities of persons under the age of 18 years.²³

The Committee has several times expressed its regret for 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 the domestic legislation of a State party to the OP-AC, the Committee conclusively added:

“The Committee is of the view that the administrative policy [...] 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.

The Committee encourages the State party to explicitly criminalize direct involvement of any persons

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

¹⁹ CRC Concluding Observations, Ukraine, *supra* note 18, para. 19.

²⁰ CRC Concluding Observations, Uganda, *supra* note 18, para. 27.

²¹ CRC Concluding Observations, Republic of Korea, *supra* note 18, para. 13.

²² CRC Concluding Observations, Slovenia, *supra* note 18, para. 11.

²³ CRC Concluding Observations, Ukraine, *supra* note 18, 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, *supra* note 18, 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, *supra* note 18, para. 19, CRC Concluding Observations, Republic of Korea, *supra* note 18, para. 13, CRC Concluding Observations, Bosnia and Herzegovina, *supra* note 23, para. 13, CRC Concluding Observations, Mongolia, *supra* note 23, para. 13.

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

c) The criminalization of the recruitment and use in hostilities of children up to 18 years by non-State armed groups²⁶ (even if there is no armed group present in the State party).²⁷

Finally the Committee has often 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

16. 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

17. The need to properly prosecute and punish has been expressed early on by the Committee:

“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; [...]

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

18. In order for the existing criminal provisions to be successfully applied by national courts, it is therefore necessary to establish in national legislation certain grounds of jurisdiction according to which courts are allowed to adjudicate on specific crimes.

²⁵ CRC Concluding Observations, Ireland, *supra* note 23, para. 14-15.

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, *supra* note 26, para. 23-24; CRC Concluding Observations, Sudan, *supra* note 26, para. 23; CRC Concluding Observations, The Former Yugoslav Republic of Macedonia, *supra* note 26, para. 10.

²⁹ SCSL, Prosecutor v. Norman, *supra* note 9, para. 41.

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

19. Recalling the nature of States' obligations under the OP-AC, Article 6(1) mandates States to
- "take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within [...] [their] 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."*
20. Therefore, one of the "feasible" and "necessary" measures to prevent the recruitment and use of children under the age of 18 years of age in hostilities is the exercise of universal jurisdiction over persons who have allegedly committed such acts against children.³¹
21. This possibility is provided for by customary international law³² and the Committee itself 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.
22. The Committee thus clearly called for the adoption of the principle of universal jurisdiction in a conspicuous number of Concluding Observations.³³ In particular, the Committee has recommended that States parties should
- "take steps to ensure that domestic legislation enables [...] [them] to establish and exercise extraterritorial jurisdiction over crimes covered by the Optional Protocol [...] without the criterion of double criminality".³⁴*
23. In this respect it must 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 a State party to eliminate from its books a precise limitation it had previously added to the exercise of universal jurisdiction:
- "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*

³¹ The Special Court for Sierra Leone applied an analogous reasoning when it stated that "feasible measures" of implementation (in the context of Articles 4 and 38 of the Convention of the Rights of the Child) include criminal sanctions: SCSL, *Prosecutor v. Norman*, *supra* note 9, para. 41.

³² See, *inter alia*, Rule 157 of the 2005 ICRC Customary International Humanitarian Law Study, *supra* note 3, pag. 604.

³³ CRC, Concluding Observations, Bosnia and Herzegovina, *supra* note 23, para. 16; CRC, Concluding Observations, Sierra Leone, *supra* note 26, para. 26; CRC, Concluding Observations, Germany, 13 February 2008, UN doc. CRC/C/OPAC/DEU/CO/1, para. 14, 15 a); CRC, Concluding Observations, Belgium, 9 June 2006 UN Doc. CRC/C/OPAC/BEL/CO/1, para. 13 b); CRC, Concluding Observations, Switzerland, 17 March 2006, UN doc. CRC/C/OPAC/CHE/CO/1 para. 8.

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

establish jurisdiction for cases in which the victim has a close link to Switzerland.

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

24. It is thus 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 prohibition of all the conducts prohibited pursuant to the OP-AC³⁶ and that any additional condition on the use of universal jurisdiction, for instance the double criminality criterion³⁷, represents an undue obstacle to the full implementation thereof and has been ruled out by the Committee as unnecessary.

III. The Russian Federation does not properly criminalize all the conducts prohibited pursuant to the OP-AC

In the “List of Issues” adopted on 11 July 2013, the Committee requested the Russian Federation, *inter alia*, to “provide information on the steps taken by the State party to ensure that children under the age of 18 are not voluntarily recruited into military service in the State party” and to “clarify whether the legislation of the State party fully criminalizes all the offences covered by the Optional Protocol, including the recruitment and use of children in hostilities by non-State armed groups”.

A. Prohibition to recruit and use children under the age of 18 years in hostilities

25. Article 13 (2) of the Federal Act N° 53-FZ of 28 March 1998 on the Military Conscription and Military Service Act (hereafter, “the Military Conscription and Military Service Act”) provides that conscription is an obligation for men between 18 and 27 years old and women with a military proficiency qualification. Moreover, according to Articles 8 and 22 of the same Act, the decision to enlist citizens in the military service is made after they reach the age of 18.
26. However, all boys have to undergo specific sessions of military basic training during their final year at school (Article 13 (1) of the Military Conscription and Military Service Act), that is when they are only 15 or 16 years old. The training is provided by the staff teachers of the educational institutions “in

³⁵ CRC, Concluding Observations, Switzerland, *supra* note 33, para. 7-8.

³⁶ CRC, Concluding Observations, Bosnia and Herzegovina, *supra* note 23, para. 16; CRC, Concluding Observations, Montenegro, *supra* note 34, 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, The Former Yugoslav Republic of Macedonia, *supra* note 26, para. 12; CRC, Concluding Observations, Serbia, *supra* note 27, para. 23; CRC, Concluding Observations, Liechtenstein, *supra* note 27, para. 16; CRC, Concluding Observations, Israel, 4 March 2010, UN doc. CRC/C/OPAC/ISR/CO/1, para. 31.

³⁷ The ‘double criminality’ principle is a jurisdictional criterion according to which a crime committed abroad can be prosecuted only if the underlying acts represent also a crime in the State where they were committed.

compliance with the State educational standards” (Article 13 (1) of the Military Conscription and Military Service Act). Even though that does not directly lead to recruitment or use of children in hostilities, it certainly allows the military extensive access to schools and students’ information which can be used for recruitment purposes. At the same time, non-state armed groups may take the opportunity to recruit such children³⁸, as happened in the North Caucasus, since they know that children are well-prepared for military action.

27. In conclusion, even though Russian legislation does not explicitly provide for the recruitment or use of children under the age of 18 years in hostilities, the excessive exposure of under-age children to military life and principles is worrisome. In a commentary on Russian Law, the author of the chapter on the Military Conscription and Military Service Act, stated that “[the concept of involving children/minors in any form of military activity] is not acceptable in a free society and does not contribute to democracy in any way; a democratic society confers choices on citizens and ought not seek to indoctrinate”³⁹. Therefore Article 13 (1) of the Military Conscription and Military Service Act does not seem in line with the spirit of the obligations contained in the OP-AC concerning the protection of children under the age of 18 years from participation in hostilities and may open the way to abuses.

The Russian Federation has not taken sufficient measures to prevent the recruitment of children under the age of 18 years in the armed forces and their use and participation in hostilities.

B. An explicit criminalization in domestic legislation of the compulsory recruitment of persons under the age of 18 years (both in peace and war times)

28. According to the report, “Russian law contains no provisions that hamper the implementation of the Optional Protocol. There is no need to amend Russian law in order to implement the Optional Protocol.”⁴⁰
29. However, it must be noted that the Criminal Code only contains provisions indirectly criminalizing the unlawful conscription into the armed forces, such as abuse of office (Article 285 of the Criminal Code), exceeding of authority (Article 286 of the Criminal Code), misappropriation of official powers (Article 288 of the Criminal Code), forgery by an official (Article 292 of the Criminal Code) and negligence⁴¹ (Article 293 of the Criminal Code)⁴².
30. Thus, contrary to the obligations embodied in the OP-AC as interpreted by the Committee, there is no explicit criminalization in domestic legislation of the compulsory recruitment of persons under 18 years

³⁸ Commission on Human Rights, 26 March 1996, E/CN.4/1996/13, para. 74.

³⁹ Foley A., Statute on the Order of Performing Military Service, in Russian Law Commentaries, 2001, p. 47.

⁴⁰ Initial Report of the Russian Federation, 4 September 2012, UN doc. CRC/C/OPAC/RUS/1, para. 21.

⁴¹ Article 293 of the Russian Criminal Code defines negligence as “non-performance or inadequate performance by an official of his or her duties as a result of an unconscientious or careless attitude to his or her work, where this causes serious damage or a serious violation of the rights and legal interests of citizens or organizations or of legally protected interests of society or the State”.

⁴² Initial Report of the Russian Federation, 4 September 2012, UN doc. CRC/C/OPAC/RUS/1, para. 18.

of age. The absence of a specific criminalization represents a violation by the Russian Federation of the OP-AC and may lead to the absence of punishment of (especially high-ranking) officials in case of violation or abuse of the provisions contained in the Military Conscription and Military Service Act.

31. For instance, during the Second Chechen War, there were allegations of under-age conscription according to the regional Committee of Soldiers' Mothers⁴³ – even though these data were not officially confirmed – but to TRIAL's knowledge no one has ever been investigated or convicted for it.⁴⁴

The Russian Federation does not properly criminalize nor sanction the compulsory recruitment of children under 18 years old into State forces.

C. An explicit criminalization in domestic legislation of the involvement in hostilities of persons under the age of 18 years

32. As seen above, the Committee repeatedly held that it is necessary to provide for a domestic criminalization of the involvement in hostilities of persons under the age of 18 years and for "effective and dissuasive penalties"⁴⁵ for criminal behaviour.
33. Yet, Russian criminal legislation does not provide any specific rule proscribing and punishing the use or involvement in hostilities of children under 18 years of age. Moreover, the initial report completely fails to address this specific obligation under the OP-AC. The only provision loosely related to the use in hostilities of children is Article 150 of the Criminal Code proscribing the involvement of a minor in the commission of a crime. As a consequence, TRIAL submits that the conduct is not properly criminalized and sanctioned in Russian legislation.
34. A project of so-called "adoption" or sponsoring of orphans, homeless children or children from single-parent families was implemented from 1997 and formalized by presidential decree in 2000⁴⁶. In the framework of such project, there are serious allegations according to which children between 14 and 16 years old were voluntarily enrolled and attached to military units⁴⁷. Together, they "formed "boys' squads" which were reportedly integrated to varying degrees into regular units of the Russian army"⁴⁸. Even though the government had previously affirmed that this program supplied accommodation and

⁴³ Child Soldiers International, *Child Soldiers Global Report 2004 - Russian Federation*, 2004, available at : http://www.refworld.org/docid/4988063237.html#_ftn7; RFE/RL, *Newsline*, 7 April 2003, available at : <http://www.rferl.org/content/article/1142892.html>.

⁴⁴ Child Soldiers International, *Child Soldiers Global Report 2004 - Russian Federation*, 2004, available at : http://www.refworld.org/docid/4988063237.html#_ftn7.

⁴⁵ CRC Concluding Observations, Ukraine, *supra* note 18, para. 19, CRC Concluding Observations, Republic of Korea, *supra* note 18, para. 13, CRC Concluding Observations, Bosnia and Herzegovina, *supra* note 23, para. 13, CRC Concluding Observations, Mongolia, *supra* note 23, para. 13.

⁴⁶ Child Soldiers International, *Child Soldiers Global Report 2004 - Russian Federation*, 2004, available at : http://www.refworld.org/docid/4988063237.html#_ftn7.

⁴⁷ Child Soldiers International, *Child Soldiers Global Report 2004 - Russian Federation*, 2004, available at : http://www.refworld.org/docid/4988063237.html#_ftn7.

⁴⁸ Child Soldiers International, *Child Soldiers Global Report 2004 - Russian Federation*, 2004, available at : http://www.refworld.org/docid/4988063237.html#_ftn7.

education to these children, there have been claims that it would inflict rough conditions on children and would expose them to the risks of military training⁴⁹. No effective investigation – let alone prosecution – has been registered so far regarding those violations. Moreover, no detailed information on the current legal status of the project can be publicly found. TRIAL suggests the Committee to ask the delegation of the Russian Federation for more information in this respect.

The Russian Federation does not properly criminalize nor sanction the use, involvement and participation in hostilities of children under 18 years old.

D. The criminalization of the recruitment and use in hostilities of children up to 18 years by non-State armed groups

35. The State report highlights that Russian domestic legislation provides a provision explicitly criminalizing the establishment of an illegal armed group and related illegal conduct such as the leadership, financing of or participation in such group (art. 208 of the Criminal Code of the Russian Federation (hereafter, the Criminal Code)) as well as the organization of or participation in a criminal association (art. 210 of the Criminal Code).⁵⁰
36. Yet, the criminalization of the formation of non-State armed groups does not automatically provide for the prohibition and punishment of the recruitment or use in hostilities of children under the age of 18 in non-State armed groups.
37. In this respect the State reports the number of recorded cases of juveniles convicted by the ordinary courts for offences under Articles 208 and 210 of the Criminal Code⁵¹. Yet, the relevant question at stake is rather the statistics concerning persons involved in non-State armed groups (leaders, sympathisers or other persons associated to these groups) who have been prosecuted and punished for recruitment or use in hostilities of children under the age of 18 and whether these conducts can be punished under current Russian criminal legislation.
38. The issue is all the more important in light of the serious and numerous allegations according to which many non-State armed groups operating in the North Caucasus, especially in Chechnya, did recruit and use children under 18 years of age during the two Chechen wars. Notably, during the first Chechen war:

“Chechen leaders, still subject of the legal system of the Russian Federation, did not hesitate to treat children as combatants. Dzhokhar Dudayev, then president of the self-proclaimed Chechen Republic of Ichkeria, mobilized all males between 14 and 17 years old.”⁵²

39. Several UN reports confirm these allegations. In 1996 at the fifty-first session of the UN Commission on

⁴⁹ Child Soldiers International, *Child Soldiers Global Report 2004 - Russian Federation*, 2004, available at : http://www.refworld.org/docid/4988063237.html#_ftn7.

⁵⁰ Initial Report of the Russian Federation, 4 September 2012, UN doc. CRC/C/OPAC/RUS/1, para. 19.

⁵¹ Initial Report of the Russian Federation, 4 September 2012, UN doc. CRC/C/OPAC/RUS/1, para. 19.

⁵² Rothbart D., Korostelina K., Cherkaoui M. D, *Civilians and modern war: Armed Conflict and the Ideology of Violence*, 2012, p. 98.

Human Rights, the Commission described and deplored the consequences of the First Chechen war – highlighted that the Chechen separatist forces included many male and female children, some aged of 11 years⁵³. Six years later, the Special Representative of the Secretary-General for Children and Armed Conflict – following a visit to the Russian Federation, including the northern Caucasus – stated that “insurgency groups [were still] enlist[ing] children into their ranks; they [were] also provid[ing] financial incentives for children to plant landmines and explosives”⁵⁴. Moreover, during the Second Chechen war, “Maskhadov [a leader of the Chechen independence movement and third President of the Chechen Republic of Ichkeria], Basayev [a leader of the Chechen independence movement] and their associates lowered the age of recruitment to 12 years and formed special units that consisted of child soldiers who were trained”⁵⁵ in order to carry out specific military tasks.

40. Even if it is hard – not to say impossible – to determine the exact number of child soldiers involved in armed opposition forces⁵⁶, “available information indicated that boys participated in a number of armed political groups, including the main Chechen armed opposition, Islamist groups and village-based defense units. Some girls under 18 were reportedly used as suicide bombers. Boys were also believed to be involved in criminal gangs of under-18s, which were sometimes attached to local fighters seeking to profit from the war economy.”⁵⁷ These elements were also confirmed by military sources⁵⁸.
41. Several specific episodes can be mentioned in this regard. For instance, young girls were used in suicide bombings in 2002, during the Moscow theatre siege⁵⁹. Also, two children were used for attacking the headquarters of the pro-Russian Chechen government in December 2002⁶⁰. Plus, a surgeon reported that his under-18 nephew was about to join the Chechen fighters influenced by many friends who were already with them⁶¹.
42. Despite all these allegations, not a single instance of investigation of these cases – let alone prosecution of those responsible – has been registered until today.

⁵³ Commission on Human Rights, *The Situation of Human Rights in the Republic of Chechnya of the Russian Federation*, 26 March 1996, E/CN.4/1996/13, para. 74.

⁵⁴ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Special Representative for Children and Armed Conflict Concludes Russian Federation Trip ; Welcomes Assurances on Voluntary Return of Displaced Chechen Populations*, 2002, HR/4610.

⁵⁵ Rothbart D., Korostelina K., Cherkaoui M. D., *Civilians and modern war: Armed Conflict and the Ideology of Violence*, 2012, p. 98.

⁵⁶ Ibidem.

⁵⁷ Child Soldiers International, *Child Soldiers Global Report 2004 - Russian Federation*, 2004, available at : http://www.refworld.org/docid/4988063237.html#_ftn7.

⁵⁸ Jamestown Foundation, *Chechen fighters getting younger*, in *Chechnya Weekly*, 8 July 2002.

⁵⁹ Communication from *Chechenskoe Obshchestvo* newspaper, 15 March 2004.

⁶⁰ Kurz R. W., Bartles C. K., *Chechen Suicide Bombers*, in *Journal of Slavic Military Studies*, N° 20, p. 540, available at : <http://fmso.leavenworth.army.mil/documents/Chechen-Suicide-Bombers.pdf>.

⁶¹ Baiev K., *The Oath: A Surgeon Under Fire*, Simon & Schuster, London, 2003, p. 163.

The Russian Federation does not properly criminalize nor sanction the recruitment and use in hostilities of children up to 18 years by non-State armed groups.

The Russian Federation has not taken sufficient measures to investigate, prosecute and punish the recruitment of children under the age of 18 years in non-State armed groups and their use and participation in hostilities during the two Chechen wars.

IV. The Russian Federation does not properly establish universal jurisdiction for all the conducts prohibited pursuant to the OP-AC

In the “List of Issues” adopted on 11 July 2013, the Committee requested the Russian Federation, *inter alia*, to provide information on “whether the State party can establish and exercise extraterritorial jurisdiction over all offences under the Optional Protocol”.

43. Russian legislation generally entrusts national courts with territorial and active personality jurisdiction in Articles 11 and 12 (1) and (2) of the Criminal Code.
44. Pursuant to Article 11 (1) of the Criminal Code, “any person who has committed a crime in the territory of the Russian Federation shall be brought to criminal responsibility under this Code”⁶². Article 11 (2) clarifies that Russian territory also comprises its territorial waters and its air space and Article 11 (3) includes any criminal offence perpetrated “on board a ship registered in a port of the Russian Federation and to or on one on the open sea or in the air space outside the confines of the Russian Federation”⁶³.
45. Article 12, in its first two paragraphs, establishes the active personality principle by stating that “citizens of the Russian Federation and stateless persons who permanently reside in the Russian Federation and who have committed crimes outside the boundaries of the Russian Federation shall be brought to criminal responsibility under this Code” if their deeds are recognized “as crimes in the State on whose territory they were committed” and if they have not been convicted in the foreign State⁶⁴. Moreover, “servicemen of the military units of the Russian Federation located beyond the confines of the Russian Federation shall bear criminal responsibility for their crimes committed in the territories of foreign states under this Code, unless otherwise stipulated by international agreements of the Russian Federation”⁶⁵.
46. Article 12 (3) of the Criminal Code sets forth the principles of protective jurisdiction and of universal jurisdiction. It provides that “foreign nationals and stateless persons who do not reside permanently in the Russian Federation and who have committed their crimes outside the boundaries of the Russian Federation shall be brought to criminal responsibility under this Code in cases, if the crimes run counter to the interests of the Russian Federation” (protective jurisdiction) and adds that the same applies “in

⁶² Article 11 (1) of the Russian Criminal Code.

⁶³ Article 11 (3) of the Russian Criminal Code.

⁶⁴ Article 12 (1) of the Russian Criminal Code.

⁶⁵ Article 12 (2) of the Russian Criminal Code.

cases provided for by international agreement of the Russian Federation, and unless they have been convicted in a foreign state and are brought to criminal responsibility in the territory of the Russian Federation” (universal jurisdiction).

47. The wording of Article 12 (3) clearly shows that Russian judicial authorities are entrusted with universal jurisdiction in the case of a crime whose punishment under universal jurisdiction is sanctioned by an international agreement to which Russia is a party, which is a generic *renvoi* to certain international treaties already providing for universal jurisdiction. If the obligations embodied in the OP-AC, as interpreted by the Committee, are a potential basis for jurisdiction in this respect, these obligations are not self-executing and require a proper implementation in domestic criminal law.
48. As for Russian courts’ jurisdiction over the crimes related to the involvement of children in armed conflict and the obligations under the OP-AC, a first issue of concern stems from the lack of proper criminalisation of all the offences embodied in the OP-AC, as spelled out above in chapter III. The fact that the direct involvement of any person under the age of 18 in hostilities, the voluntary enlistment of children under 15 years and the compulsory recruitment of children under 18 in Russian armed forces, and the recruitment of children under 18 by non-State armed groups do not feature as autonomous and specific criminal offences in Russian legislation forecloses any possibility of criminal accountability for these crimes.
49. Moreover, TRIAL notes that Russian legislation does not provide for the war crimes related to child soldiers, that is “conscripting or enlisting children under the age of fifteen years old into the national armed forces or using them to participate actively in hostilities”⁶⁶, even though the Russian Federation’s Regulations on the Application of International Humanitarian Law state, in the context of non-international armed conflicts, that “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”⁶⁷.
50. A second problem is related to the obligation to effectively investigate and prosecute allegations of unlawful use of children in armed conflict, that represents at the same time an international humanitarian law violation and a grave human rights violations. The obligation to carry out effective investigations and prosecutions of suspected perpetrators of humanitarian law violations and serious human rights abuses stems not only from the OP-AC but is well established in international human rights law, including in the International Covenant on Civil and Political Rights⁶⁸. Without effective investigations and prosecutions, crimes remain unpunished and any deterrent effect of the legislation is lost or significantly weakened.

⁶⁶ See *supra* note 7.

⁶⁷ Russian Federation, *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation*, Moscow, 8 August 2001, §81.

⁶⁸ Article 2 of the International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, at <http://www2.ohchr.org/english/law/ccpr.htm>; see also “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, adopted by UN General Assembly Resolution 60/147 of 16 December 2005, at <http://www2.ohchr.org/english/law/remedy.htm>.

51. The lack of effective prosecution of public officials allegedly responsible for OP-AC-related offences may in part be the consequence of the failure by Russian courts to directly enforce international law⁶⁹, despite the fact that the Russian Constitution explicitly recognizes that international law is part of the Russian domestic legal system⁷⁰ and that Russian Constitutional Court has repeatedly confirmed this legal state of affairs⁷¹.
52. TRIAL therefore submits that the establishment and exercise of universal jurisdiction over the crimes related to the involvement of children in hostilities in the Russian Federation results in practice unsatisfactory and not in line with the obligations provided for in the OP-AC.

The Russian Federation does not properly establish and exercise universal jurisdiction over the crimes related to the involvement of children in armed conflict provided by the OP-AC.

Russian legislation does not provide for the war crime of ‘conscripting or enlisting children under the age of 15 years old into the national armed forces or using them to participate actively in hostilities’.

The fact that the Russian Federation is not a party to the Rome Statute further weakens its domestic system vis-à-vis the prohibition and repression of international crimes, in particular the recruitment and use of children in armed conflict.

⁶⁹ See: Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee – Russia* (CCPR/C/RUS/CO/6), 29 October 2009, para. 4.

⁷⁰ Article 15(4) of the Constitution of the Russian Federation of 12 December 1993: “The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.”

⁷¹ See, for instance, the Russian Constitutional Court, Chechnya case, 31st July 1995. An unofficial English translation of the judgement was published by the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.

Recommendations

53. In light of the above, TRIAL submits that the current state of Russian legislation and policy is not fully in line with the State party's obligations under the OP-AC concerning the prohibition and prosecution of the crimes related to the involvement of children in armed conflict.
54. TRIAL respectfully suggests that the Committee, in its Concluding Observations, recommends the Russian Federation to:
- a) adopt the necessary measures to effectively criminalize and prosecute the compulsory recruitment of persons under the age of 18 years into the State's armed forces;
 - b) adopt the necessary measures to provide for an effective criminalization and prosecution of the involvement in hostilities of persons under the age of 18 years;
 - c) adopt the necessary measures to effectively criminalize and prosecute the recruitment of persons under the age of 18 years into non-State armed forces;
 - d) amend its domestic legal framework in order to make all conducts prohibited by the OP-AC subject to universal jurisdiction;
 - e) amend its domestic legal framework introducing the war crime of 'conscripting or enlisting children under the age of 15 years old into the national armed forces or using them to participate actively in hostilities' and subject this crime to universal jurisdiction;
 - f) ratify the Rome Statute for the Establishment of an International Criminal Court, and its Agreement on Privileges and Immunities (APIC); consider the ratification of the Kampala Amendments to the Rome Statute; fully align its national legislation with all obligations under the Rome Statute, including incorporating the Rome Statute definition of crimes and general principles; and adopt domestic provisions that enable effective cooperation with the International Criminal Court.

TRIAL remains at the full disposal of the Committee 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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