

Initial report on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

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

August 2011

EXECUTIVE SUMMARY

The present written submission to the Committee on the Rights of the Child follows the Thailand initial report of 13 July 2011 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 Thailand on 27 February 2006. A detailed review of Thailand's current domestic legislation leads TRIAL to highlight that the current legal framework is lacunar and does not permit Thailand to live up to its commitments under the OP-AC in that respect.

The following developments thus provide for a closer scrutiny of Thailand's legislation, stating how it does not comply with the OP-AC on the question of recourse to universal jurisdiction mechanisms, allowing Thailand to properly prosecute those responsible for war crimes related to the involvement of children in armed conflict.

TRIAL

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- ▶ defends the interests of the victims before Swiss tribunals, international human rights organisms and the International Criminal Court

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- ▶ 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.

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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 Thailand.

TRIAL would like to draw the Committee's attention to the fact that, according to the actual Thai legislation, Thai authorities cannot effectively prosecute, based on 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 Thai legislation does not protect in a sufficient way children from their involvement in armed conflict. Although the Thai authorities have built a legal framework to promote the rights of the child, the criminalization of the recruitment, enlistment or use of children in armed conflicts does not yet exist. More specifically, despite the numerous legal clauses aiming at prohibiting children's conscription, the Thai legislation simply lacks a provision defining unlawful recruitment of children and their use in hostilities as a war crime.

Moreover, the current Thai legislation does not provide for universal jurisdiction over any kind of international crime. Although the current Thai Criminal Code does provide for universal jurisdiction of Thai courts over offences listed in a restrictive manner¹, it does not contain provisions regarding the sanction of grave breaches of international humanitarian law.

The following pages will address how the international community considers the involvement of children in armed conflict (I) and what it entails for States with regards to the particularities of the OP-AC (II), before focusing on Thailand's domestic legislation and how Thailand does not properly criminalize the offence of involving children in armed conflict (III), and stating that no legal grounds to prosecute those responsible for war crimes under the principle of universal jurisdiction exist in Thailand.

¹ Thai Criminal Code B.E. 2499 (1956) as amended until the Criminal Code (No. 17), B.E. 2547 (2003).

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 1977². 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 Conventions³.

As was affirmed by the UN Secretary-General in his report on the establishment of a Special Court for Sierra Leone, Article 4 of the Second Additional Protocol to the Geneva Conventions has long been considered to form part of customary international law, and at least since the entry into force of the statutes of the UN ad-hoc tribunals, its violation is also commonly accepted to entail individual criminal responsibility⁴.

The same prohibition can also be found in Article 38 of the 1989 Convention on the Rights of the Child⁵. This provision also renders clear its inextricable link with international humanitarian law. It is required from State Parties to respect and to ensure the respect of the prohibition of the involvement of children under 15 in armed conflict.

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

“The Committee recommends that awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of Article 38 of the Convention, *inter alia* with regard to children,

² 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”.

³ 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;”

⁴ 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”.

⁵ 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.”

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

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.⁷

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 1996.⁸

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,⁹ 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.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.

To conclude on this, the OP-AC itself clearly refers to the ICC prohibition to involve children in armed conflict as constituting a 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 (...).”

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

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

⁸ *Prosecutor v. Norman*, Case no. SCSL-04-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, paras 44 *et seq.*

⁹ 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.

¹⁰ *Prosecutor v. Norman*, *supra* n10, paras 44 *et seq.*

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 old¹¹, 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 the raise of the minimum age for their participation in armed conflict to 18¹². This wish of ICRC might have impulsed the adoption of the OP-AC which indeed extends the protection from involvement in armed conflicts to children under 18. The OP-AC thus seems to offer a similar protection to those under 18, through the extension of the previously gained protection for those under 15 to all children.

Indeed, 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 not attained the age of 18 are not compulsorily recruited into their armed forces”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”

Consequently, the OP-AC requires of State parties that they

“take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices”¹⁴.

However, the new protection granted by the OP-AC to children between 15 and 18 years might be slightly different than the protection already awarded to those under the age of 15 under international humanitarian law and the Rome Statute. Under international humanitarian law and the Rome Statute, recruitment or use in hostilities of children under the age of 15 constitutes a war crime (both in international and non-international armed conflict). Differently, the OP-AC imposes obligations on states parties regardless of the existence of an armed conflict and raises the minimum age to participate in hostilities to 18 years. Regarding the criminalization of the involvement of children in hostilities, it remained unclear whether the OP-AC asks for its prohibition as a war crime or as a simple crime under domestic law.

¹¹ Protocol Additional I to the Geneva Conventions. Article 77 Paragraph 2 «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. »

¹² Plan d'action relatif aux enfants dans les conflits armés. Entériné par le Conseil des Délégués, Genève, 1995, cf. www.icrc.org/web/fre/sitefre0.nsf/html/5FZGBM.

¹³ 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.

¹⁴ Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

In some of its recent conclusions, the Committee has nonetheless more strongly indicated that states parties' obligations require to adopt provisions criminalizing the recruitment and use of children as a war crime, taking into account the higher age standard established by OP-AC. In this regard, the Committee has welcomed the fact that the use of under-18s in hostilities is punishable as a war crime in the Finnish Penal code¹⁵ and has praised Norway's plan to introduce a higher standard than in the Rome Statute¹⁶.

Through numerous Concluding Observations, the Committee has interpreted the OP-AC in a constructive and protective manner. It seems today clear that State Parties to the OP-AC have to criminalize the recruitment, enrollment or use of children under 18 years as a war crime.

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 is to be prohibited, it is one thing to require States to proscribe such conduct in their domestic law as a war crime, but 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."¹⁷ It is obviously necessary that such 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 prevent and prohibit 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 children¹⁸. This possibility is provided for by customary international law and required by the Committee itself.

¹⁵ CRC Concluding Observations Finland, paragraph 3, CRC/C/OPAC/FIN/CO/1.

¹⁶ CRC Concluding Observations Norway, paragraph 8, CRC/C/OPAC/NOR/CO/1.

¹⁷ *Prosecutor v. Norman*, *supra* n10, para. 41.

¹⁸ 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.

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

“50. The Committee is deeply concerned that:

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

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

(c) Take all necessary measures to investigate, prosecute and punish alleged perpetrators of war crimes, especially those affecting children;”¹⁹

The Committee on the Rights of the Child confirmed its view when, in 2010, the Committee clearly asked Sri Lanka to effectively prosecute those responsible for enrolling children in armed conflicts :

“23. [...] The Committee also urges the State party to [...] to ensure effective implementation of its “zero tolerance” position on child recruitment, including systematic and vigorous investigations for every reported case, followed by prosecutions and convictions of responsible perpetrators”²⁰

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.”²¹

It is worth noting that these Concluding Observations are not isolated and seems to follow a steady course of action. Indeed, the Committee has adopted a similar stance regarding recently, for instance, Bosnia and

¹⁹ CRC, Concluding Observations Solomon Islands, 2 July 2003, UN Doc. CRC/C/15/Add.208.

²⁰ CRC, Concluding Observations Sri Lanka, 2010, CRC/C/OPAC/LKA/CO/1.

²¹ CRC, Concluding Observations Montenegro, 13 Sept-1 Oct 2010, paragraph 19.CRC/C/OPAC/MNE/CO/1.

Herzegovina²² and Sierra Leone's²³ initial reports. Previously, the Committee called for full use of universal jurisdiction as well, regarding Germany²⁴, Belgium²⁵ and Switzerland²⁶.

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

- “7. The Committee notes with regret the amendment of Article 9 of the Military Penal Code of 23 December 2003, which entered into force on 1 June 2004, because it limits the State party's extraterritorial jurisdiction for the prosecution of alleged perpetrators of war crimes to persons with a close link to Switzerland. The Committee particularly regrets that the State party's laws do not establish jurisdiction for cases in which the victim has a close link to Switzerland.
8. In the light of Article 4, paragraph 2, and article 6, paragraph 1, of the Optional Protocol, the Committee recommends that the State party:
 - (a) Review the recent amendment of Article 9 of the Military Penal Code with a view to restoring its full jurisdiction over war crimes, such as conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities;”²⁷

Regarding the slightly different protection offered to children below 15 years and those between 15 and 18 years (which mainly lies in the difference of criminalization of each prohibited behaviors), it has been stated above that the Committee seems on course to erase the protection gap endured by the latter. For instance, the Committee praised the Finnish initiative to set up the use of under-18s in hostilities as a war crime in its domestic legislation. This intention of the Committee became even more obvious in its comments on the report of Israel, as it commended on Israel's exercise of the universal jurisdiction over the war crime of conscripting and enlisting children under 15 years, but expressed its concerns considering the lack of a specific legal basis for exercising extraterritorial jurisdiction over other crimes under OP-AC which are committed against children under 18 years of age²⁸.

In other terms, the Committee now clearly expresses 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.

²² CRC, Concluding Observations Bosnia and Herzegovina, 13 Sept-1 Oct 2010, paragraph 16. CRC/C/OPAC/BIH/CO/1.

²³ CRC, Concluding Observations Sierra Leone, 13 Sept-1 Oct 2010, paragraph 26. CRC/C/OPAC/SLE/CO/1.

²⁴ CRC, Concluding Observations Germany, 13 Feb 2008, paragraph 14 et 15 a). CRC/C/OPAC/DEU/CO/1.

²⁵ CRC, Concluding Observations Belgium, 9 June 2006, paragraph 13 b). CRC/C/OPAC/BEL/CO/1.

²⁶ CRC, Concluding Observations Switzerland, 17 March 2006, paragraph 8. CRC/C/OPAC/CHE/CO/1.

²⁷ CRC, Concluding Observations Switzerland, 17 March 2006, paragraph 7 and 8. CRC/C/OPAC/CHE/CO/1.

²⁸ CRC, Concluding Observations Israel, paragraphs 30 and 31, CRC/C/OPAC/ISR/CO/1.

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. Thailand does not properly criminalize the offence of involving children in hostilities

Thai authorities consider that they properly comply with their commitments under the OP-AC as they insist in the State party's report that Thailand has built a general legal framework that correctly protects the rights of the child. TRIAL however raises some concerns in regards to precise obligations under the OP-AC and thinks that Thailand has not correctly incorporated in its criminal legislation the crime of unlawful recruitment of children and their use in hostilities as such, and has not defined it as a war crime. Thailand therefore falls short of its international obligations under the OP-AC.

According to the State Party, Thailand conforms to the prohibition of recruiting children below 18 years, as the 1954 Military Service Act Article 16 states that Thai male citizens who have reached the age of 18 years are required to register their names for the purpose of enlistment²⁹. Thailand declared, in its last report submitted to the Committee on the Rights of the Child, that "In the case where a member of the armed forces is reported to have violated these obligations, an Inquiry Committee will be set up to investigate the matter. If found guilty, the person will be subjected to the disciplinary measures and judiciary procedures of the military. Ever since the ending of the Second World War, no armed conflicts have occurred on Thai soils. Thailand's peace keeping personnel have never violated these obligations"³⁰. With regard to its armed forces, Thailand prohibits the recruitment of children under 18 but does not transform this conduct into a criminal activity, providing mainly for administrative sanctions; in that respect, the State Party does not live up to its international commitments under the OP-AC.

Moreover, Thailand did not enact a similar clause in order to prevent the conscription of children by armed groups, which might exist within its borders, especially in the border region to Myanmar. Thailand indeed pretends that "there are no armed groups operating within the territory of Thailand" as "Thailand does not have a policy which allows individuals or groups to establish operational bases on Thai soils which might affect the sovereignty and security of other countries". Nonetheless, Thailand also claims that "If there is evidence of any person taking away children taking temporary refuge in Thailand for recruitment purpose, such person will be criminalized according to the Thai Penal Code and the Child Protection Act of 2003"³¹. It is therefore necessary to review Thailand's criminal legislation and any clause related to the children's welfare.

The Thai Constitution protects, widely but vaguely, the rights of the child in Section 52, as it declares that children should enjoy their rights in a suitable environment and should "be protected by State against violence

²⁹ Military Service Act, B. E. 2497, 1954

³⁰ Paragraph 51/51 page 14/14 of the Thailand initial report regarding the OP-AC submitted to the CRC on 13 July 2011, CRC/C/OPAC/THA/1

³¹ Paragraph 36/51 page 10/14 of the Thailand initial report regarding the OP-AC submitted to the CRC on 13 July 2011, CRC/C/OPAC/THA/1

and unfair treatment". The Thai Constitution also prohibits forced labor in Section 38³². It is however to be noted that certain circumstances, such as an armed conflict, could legitimate an infringement of this clause. In this regard, Article 8 of the Thai Martial Law Order³³ empowers the Thai military "to recruit whatever and whoever they might need".

Furthermore, the Thai Child Protection Act contains numerous provisions that participate in the children's protection framework enacted by the Thai authorities. For instance, Article 22 requires "giving primary importance to the best interests of the child". Many institutions were created and are referred to throughout the Child Protection Act³⁴ to concretely provide the said protection to children in making Thai institutions and authorities responsible for the children's welfare³⁵. To be more specific, Article 26³⁶ in its paragraphs 5 and 6, prohibits to "use a child as an instrument for begging or committing crimes" and to "use, employ or ask a child to work or act in such a way that might be physically or mentally harmful to the child". This prohibition is matched with a sentence enacted in Article 78, which declares "Any person who violates Section 26 shall be liable to a term of imprisonment not exceeding three months or a fine not exceeding 30 000 Baht, or both".

In addition, the Thai Criminal Code, through Articles 310, 310bis, 312, 312bis and 317, grants anyone (and thereby also children) protection against deprivation of their liberty or slavery. Article 310bis for instance states

³² Section 38, Constitution of the Kingdom of Thailand, B.E. 2550 (2007). "Forced labour shall not be imposed except by virtue of the law specifically enacted for the purpose of averting imminent public calamity or by virtue of the law which provides for its imposition during the time when the country is in a state of war or armed conflict, or when a state of emergency or martial law is declared".

³³ The Thai Martial Law Order B.E. 2457, 1914 AD.

³⁴ Sections 5 and 20, Thai Child Protection Act of 2003.

³⁵ Sections 24, 28, 30 and 33, Thai Child Protection Act of 2003.

³⁶ Section 26, Thai Child Protection Act of 2003 "Under the provisions of other laws, regardless of a child's consent, a person is forbidden to act as follows:

- 1) Commit or omit acts which result in torturing a child's body or mind;
- 2) Intentionally or neglectfully withhold things that are necessary for sustaining the life or health of a child under guardianship, to the extent which would be likely to cause physical or mental harm to the child;
- 3) Force, threaten, induce, encourage or allow a child to adopt behavior and manners which are inappropriate or likely to be the cause of wrongdoing;
- 4) Advertise by means of the media or use any other means of information dissemination to receive or give away a child to any person who is not related to the child, save where such action is sanctioned by the State;
- 5) Force, threaten, induce, encourage, consent to, or act in any other way that results in a child becoming a beggar, living on the street, or use a child as an instrument for begging or committing crimes, or act in any way that results in the exploitation of the child; → Seems to prohibit the use of child soldiers, however it's not clear enough and the child's protection is therefore not properly ensured.
- 6) Use, employ or ask a child to work or act in such a way that might be physically or mentally harmful to the child, affect the child's growth or hinder the child's development;
- 7) Force, threaten, use, induce, instigate, encourage, or allow a child to play sports or commit any acts indicative of commercial exploitation in a manner which hinders the child's growth and development or constitutes an act of torture against the child;
- 8) Use or allow a child to gamble in any form or enter into a gambling place, brothel, or other place where children are not allowed;
- 9) Force, threaten, use, induce, instigate, encourage or allow a child to perform or act in pornographic manner, regardless of whether the intention is to obtain remuneration or anything else;
- 10) Sell, exchange or give away liquor or cigarettes to a child, other than for medical purposes.

If the offences under paragraph one carry heavier penalties under other law, penalties under such law shall be imposed."

that “Whoever, detaining or confining the other person or making in any manner to deprive other person without liberty bodily and making such other person to do any act for the doer or other person, shall be imprisoned not out of five years or fined not out of ten thousand Baht”³⁷ . Article 312bis³⁸ matches the prohibition of Article 310bis with a tougher sentence when the injured person is a child under 15 years of age.

Despite the general legal framework protecting the rights of the rights of the child, the **Thai legislation does not contain provisions that encompass all of the elements of the crime of involvement of children in armed conflicts** (conscripting, enlisting and using children in armed conflicts). One has to infer that the Thai legislation probably does prohibit some of the aspects of involving children in armed conflicts through Articles 26 and 78 of the Thai Child Protection Act, and/or Articles 310bis and 312bis of the Thai Criminal Code. But such provisions, not specifically aimed at combating this scourge, cannot be applied to cover all of the prohibited actions. Besides, the stronger, but still weak, protection offered to children in the Thai Criminal Code only refers to those under the age of 15 years, and is not suited to effectively combat the forced recruitment in the armed forces or in armed groups or the use in armed conflicts of children between 15 and 18.

To summarize, the Thai legislation promotes the rights of the child, prohibits limited harmful behaviors against children and creates an armory of institutions and persons in charge of those protective provisions. But as protective as it might seem, the Thai legislation remains insufficient for Thailand to fulfill its obligations under the OP-AC obligations, as no criminal provision clearly addresses the general prohibition to involve children under 18 years in armed conflict and matching the prohibited behaviors with adequate sentences. In other terms, although the State party seems sincerely concerned by the welfare of children, its concern mainly focuses on the prevention of children’s enlistment and recruitment in the Thai armed forces, without providing for a general criminalization directed at anyone who participates in the wider crime of involving children in armed conflicts within the definition of the OP-AC that would set an accurate criminal sentences for those who commit or in any other way participation in the commission of such a crime.

IV. Thailand does not provide legal grounds to prosecute those responsible of war crimes under the principle of universal jurisdiction

Thai courts usually have jurisdiction over cases related to Thailand’s interests.

³⁷ Section 310bis, Thai Criminal Code B.E. 2499 (1956) as amended until the Criminal Code (No. 17), B.E. 2547 (2003).

³⁸ Section 312bis, Thai Criminal Code B.E. 2499 (1956) as amended until the Criminal Code (No. 17), B.E. 2547 (2003) “If the commission of the offence according to Section 310 bis or Section 312 is committed to the child not exceeding fifteen years of age, the offender shall be punished with imprisonment of three to ten years and fined not exceeding twenty thousand Baht.

If the commission of the offence according to Section 310 bis or Section 312 causes:

(1)Bodily harm or mental harm to the victim, the offender shall be punished with imprisonment of five to fifteen years and fined not exceeding thirty thousand Baht

(2)Grievous bodily harm to the victim, the offender shall be punished with imprisonment for life or to seven to twenty years

(3)Death to the victim, the offender shall be punished with death, imprisonment for life or of fifteen to twenty years”.

Section 4 of the Thai Criminal Code lays down that:

“Whoever commit[s] an offence within the Kingdom, shall be punished according to the law”.

Section 8³⁹ adds that offences committed outside the Kingdom should be punished in Thailand according to its domestic legislation provided that the offender is a Thai person or that the Thai government or a Thai person is the injured person.

Thailand’s criminal legislation is nevertheless familiar with universal jurisdiction, as Section 7 of the Thai Criminal Code allows for the prosecution, under the principle of universal jurisdiction, of those responsible for specific crimes listed in a restrictive manner. Section 7 indeed declares that:

“Whoever to commit the following offences outside the Kingdom shall be punished in the Kingdom, namely:

- (1) Offences relating to the security of the Kingdom as provided in Section 107 to 129;
 - (1/1) The offence in respect of terrorization as prescribed by Section 135/1, Section 135/2, Section 135/3 and Section 135/4;
- (2) Offences relating to Counterfeiting and Alteration as provided in Section 240 to 249, Section 254, Section 256, Section 257 and Section 266 (3) and (4);
- (2bis) Offences relating to Sexuality as provided in Section 282 and Section 283;
- (3) Offence relating to Robbery as provided in Section 339, and Offence relating to Gang-Robbery as provided in Section 340, which is committed on the high seas.”⁴⁰

Although offences related to sexual slavery of children are crimes for which prosecution based on the principle of universal jurisdiction is provided (combination of Sections 7, 282 and 283), the large majority of the enumerated crimes is strictly related to Thai interests, or seems to reflect some of Thailand’s commitments under international law.

These grounds for jurisdiction of Thai criminal courts to which Thailand itself refers in its report recently submitted to the Committee on the Rights of the Child⁴¹, are therefore far from being sufficient to make it conceivable that the author of the crime of involvement of non Thai children in armed conflict, who would not

³⁹ Section 8, Thai Criminal Code B.E. 2499 (1956) as amended until the Criminal Code (No. 17), B.E. 2547 (2003) «Whoever commit an offence outside the Kingdom shall be punished in the Kingdom, provided that, and, provided further that the offence committed be any of the following namely:

(a)The offender is a Thai person [...]

(b) A Thai person or the Thai government to be the injured person [...].”

⁴⁰ Section 7, Section 282 paragraphs 2 to 4 and Section 283 paragraphs 2 to 4, Thai Criminal Code B.E. 2499 (1956) as amended until the Criminal Code (No. 17), B.E. 2547 (2003) .

⁴¹ “If there is evidence of any person taking away children taking temporary refuge in Thailand for recruitment purpose, such person will be criminalized according to the Thai Penal Code and the Child Protection Act of 2003”. Paragraph 36/51 page 10/14 of the Thailand initial report regarding the OP-AC submitted to the CRC on 13 July 2011, CRC/C /OPAC/THA/1.

himself be a Thai national, be prosecuted within Thailand's borders based on the principle of universal jurisdiction, were that offender to be present in Thailand.

It is worth noting that the Thai legislation does not refer to the commission of any international crime as the basis for prosecution in Thailand of these crimes, even when committed abroad by a foreigner against a foreigner. Consequently, as already stated above, as the Thai authorities fail to properly criminalize the offences related to the recruitment or use of children in armed conflicts, so do they fail to provide for a full implementation of the principle of universal jurisdiction to prosecute such crimes.

To conclude, it is the view of TRIAL that Thailand is not taking all "feasible" or "necessary measures" to prevent and prohibit the conscription, enlistment or use of children under the age of 18 years in armed conflicts. In particular, there is a poignant lacuna in Thailand's ability to impose penal sanctions for this crime, namely if it is committed abroad, by foreigners against foreigners. Thailand in fact creates a zone of greater tolerance for persons who have committed war crimes against children, thus making the State party a weak link in the global pursuit of accountability for these perpetrators. Far from fully implementing the principle of universal jurisdiction to properly prosecute those responsible for war crimes of the involvement of children in armed conflict, Thailand's current legislation does not live up to the State Party's obligations under the OP-AC.

CONCLUSIONS

TRIAL respectfully submits to the Committee on the Rights of the Child that the current state of Thailand domestic 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, enrollment and use of child soldiers based on the principle of universal jurisdiction.

RECOMMENDATIONS

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

1. In the list of issues,
 - a. Retain the current Thai legislation as a major issue to be taken up during the Pre-Sessional working group which is scheduled from the 10 to 14 October 2011.
2. During the dialogue with Thailand, pose the Thai delegation the following questions:
 - a. Does the Thai government agree that its current legislation does not contain provisions that encompass all of the elements of the crime of involvement of children in armed conflicts?

- b. Does Thailand agree that the lack of defining the enlistment, recruitment or use of children in armed conflicts as a war crime makes its present legislation inconsistent with its obligations under the OP-AC?
 - c. Does the Thai authorities agree that the implementation of the universal jurisdiction would lead to the full prosecution of those responsible for war crimes related to children involvement in armed conflict?
3. After the dialogue with the Thai delegation:
- a. Recommend to adopt new criminal provisions fully consistent with the State Party's obligations under the OP-AC to provide for effective prosecution of the war crime of involving children in armed conflicts, including 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
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