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**PROSECUTING INTERNATIONAL
CRIMES AGAINST CHILDREN AND
QUESTIONS OF CRIMINAL
RESPONSIBILITY: THE
INTERNATIONAL LEGAL
FRAMEWORK**

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Prosecuting International Crimes against Children and Questions of Criminal Responsibility: the International Legal Framework

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Summary: States in post-conflict situations are faced with the difficulty to balance judicial and non-judicial means intended to achieve accountability for crimes committed during the conflict and to contribute to national reconciliation. Adopted policies are based on the specific circumstances of each state. Nevertheless, due consideration should be given to the duties that are imposed on states by international law. In this paper, a short overview is provided of the obligations of states under international law to prosecute persons accused of genocide, war crimes, crimes against humanity, torture and enforced disappearances, specifically focusing on crimes against children. The paper also reviews the existing international norms regarding children who may be accused of having participated in the commission of such crimes themselves, for example as child soldiers, identifying some outstanding questions regarding their criminal responsibility for such acts.

Children are widely affected by atrocities as victims and they have been specifically targeted for some international crimes. The recruitment of children for participation in an armed conflict is one of the most frequent and egregious violations targeting children. It is prohibited under several international conventions. The Special Court for Sierra Leone established that such recruitment below the age of fifteen years also is a crime under customary international law. The Rome Statute for the International Criminal Court (ICC) also recognizes under-age recruitment as a war crime. The fact that the very first cases before the ICC, Lubanga and Katanga cases, concern the recruitment of child soldiers or the use of children to actively participate in hostilities, underscores both the seriousness of these crimes and the international priority to try and punish their perpetrators.

Analysis of these recent developments, the evolving norms of international law and state practice shows that there is a duty of states to prosecute persons accused of having committed international crimes, including crimes against children, if these acts occurred within their own territory. The obligations to prosecute alleged authors of international crimes committed abroad, based on the principles of active or passive nationality or universal jurisdiction, vary from one crime to the other. At the same time, states often adopt amnesty laws which preclude prosecution for crimes committed during a conflict. This paper examines the permissibility of amnesties under international law, distinguishing between different types of amnesties used by states (e.g. 'self-amnesties' and amnesties as part of a peace agreement). It concludes that there is no firmly established rule of international law expressly prohibiting states to grant amnesties. However, according to a recent trend in national and international jurisprudence, amnesties for international crimes and serious human rights violations are increasingly being condemned. Moreover, a trend can be seen in amnesties adopted in the last ten years, which increasingly exclude their application to genocide, war crimes and crimes against humanity.

The paper also examines whether under international law children may be prosecuted when they are accused to have participated in the commission of international crimes themselves. It concludes that, although to date no legally binding norm exists on this point, an international consensus is clearly evolving with regard to children accused of international crimes, in particular child soldiers. Children accused to have committed such crimes under the age of eighteen shall primarily be seen as victims and, in any case, may not be tried by an international criminal court or tribunal. Their case should be considered within their own state, where they should benefit either from an adequate juvenile justice

system, or preferably from alternative accountability processes. Moreover, States do have a legally binding obligation under international law, as laid down in the CRC, to establish and apply juvenile justice systems to children accused of having infringed the penal law, and to seek alternatives to judicial proceedings. They also have an obligation to agree on a minimum age for criminal responsibility (MACR), which still varies significantly among States.

Keywords: children, transitional justice, international crimes against children, criminal responsibility

Acknowledgments: Since international law and in particular international criminal law are continuously evolving, this paper on the legal framework of prosecuting international crimes against children will never be complete or fully up to date. Thanks to the valuable comments from many experts, the paper at least addresses the main issues, even though further adjustments will certainly be required.

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1. INTRODUCTION

After an armed conflict is ended, the dilemmas of transitional justice arise. Governments of states in a post-conflict situation are faced with many demands within their societies, ranging from public trials to revenge; from the need for truth to the affirmation of collective innocence.¹ They need to decide on the establishment and role of judicial and non-judicial accountability mechanisms, which could include truth commissions or local approaches to justice and reconciliation. The question may also arise if amnesties should be granted to persons who were directly involved in atrocities against the population. If children were forced to participate in the violence, the issue of criminal responsibility of alleged child perpetrators might need to be addressed as well. Since the end of the 1980's states as well as scholars have increasingly supported a more integrated approach of transitional justice, in which prosecution and punishment may be part of the process, albeit in combination with other means, including truth-seeking and reconciliation mechanisms.²

While the policy choices of transitional justice are taken at the national level, the options should nevertheless be framed by international law. Governments and TRC commissioners therefore need to be informed about the status and evolution of the relevant international norms. Similarly, child protection agencies including UNICEF, supporting governments in the process of transitional justice, should be aware of recent developments in international law and state practice. This paper aims to contribute to this process by presenting a concise overview of the most relevant norms of international law and of the main trends in state practice. In particular, it will address the following questions: Are states legally bound to prosecute persons accused of international crimes, in particular the unlawful recruitment of children in armed conflict, and try them before their national courts? (Par.1). Are amnesties for such crimes permissible under international law and what is the current practice of states? (Par.2). Finally, the paper briefly reviews the evolving international rules regarding the criminal responsibility of children themselves for their participation in acts amounting to international crimes, highlighting some unresolved questions and dilemmas requiring further discussion. The paper will conclude with some recommendations for states and child protection agencies.

2. THE OBLIGATION TO PROSECUTE: THE INTERNATIONAL LEGAL FRAMEWORK

With the creation of the International Criminal Court (ICC) a large majority of states confirmed their commitment to end the practice of impunity for atrocities such as genocide, war crimes and crimes against humanity. However, the statute of the ICC determines that prosecutions by the

¹ See Editorial Note, *International Journal of Transitional Justice*, Vol. 1, 2007, pp. 1-5.

² See Orentlicher, Diane, '*Settling Accounts*' *Revisited Reconciling Global Norms with Local Agency*, 1, *International Journal of Transitional Justice* (2007), pp. 10-23.

Court are *complementary* to judicial action at the national level. States still have the primary responsibility for the repression of international crimes.³

In this paragraph an overview will be provided of the relevant norms deriving from international conventions for the prosecution of the so-called ‘core crimes’ included in the ICC Statute, as well as torture and enforced disappearances.⁴ Specific attention will be given to crimes against children, in particular their unlawful recruitment to take part in an armed conflict. It will also examine the elements pointing to the evolution of rules of customary law containing an obligation to prosecute and reference will be made to the different bases of jurisdiction of states: territoriality, active or passive nationality and universality.

States are free to decide which jurisdictional principles to apply within their national legal system by establishing these jurisdictional bases in their penal legislation. The most common jurisdictional basis is *territoriality*, which applies to all persons accused of a crime committed within the territory of the state exercising its jurisdiction. Jurisdiction based on *active nationality* allows a state to prosecute an accused having the nationality of that state, for crimes committed abroad. *Passive nationality* refers to the nationality of the victim of a crime, permitting a state to prosecute those accused of crimes committed abroad against its own nationals. If a state has included *universal jurisdiction* among its jurisdictional bases, it may also prosecute persons accused of certain crimes committed abroad, irrespective of the nationality of the accused and of the victims. A distinction should be made between the concepts of ‘conditional’ and ‘absolute’ universal jurisdiction. Conditional universal jurisdiction is defined as the “narrow” notion of universal jurisdiction. According to this interpretation, only the State where the accused is in custody may prosecute him and therefore, the presence of the accused on the territory is a precondition for the establishment of jurisdiction. Differently, under a broader version of the universality principle (so-called absolute universal jurisdiction), a State may prosecute persons accused of international crimes regardless of their nationality, the place where the crime was committed, the nationality of the victim and of the author, and even irrespective of the fact that the author is in custody or present in the State.⁵

Given the scope of this paper, the analysis cannot be exhaustive; it aims to present the main trends in international law as it has evolved to date.

³ Rome Statute of the International Criminal Court (hereafter ‘Rome Statute’), 17 July 1998, UN Doc A/CONF.183/9, Preamble, par 6 (recalling that ‘*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.*’) and par.10 (affirming that the Court ‘*shall be complementary to national criminal jurisdictions*’) as well as Article 17.

⁴ The ‘core crimes’ included in the Rome Statute for the International Criminal Court for which it currently has jurisdiction are genocide, war crimes and crimes against humanity. The existence of an international duty to prosecute will also be considered for the crimes of torture and forced disappearances (independently from the categories of crimes against humanity and war crimes as defined in the Rome Statute), since they often occur in conflict situations, requiring a response in a transitional justice context. F

⁵ See Antonio Cassese, *Is the bell tolling for universality?: a plea for a sensible notion of universal jurisdiction*, in 1 Journal of International Criminal Justice (2003), nr 3, pp. 589-595.

2.1. Duty or right to prosecute authors of international crimes?

The duty of states to prosecute persons accused of crimes under international law (or ‘international crimes’) is included in several international conventions. For a number of crimes, this duty is either reinforced by, or solely based on customary international law.

The main international conventions explicitly containing an obligation for States to prosecute are the 1948 Genocide Convention⁶; the 1949 Geneva Conventions,⁷ and the Additional Protocols thereto of 1977; the 1984 Convention against Torture⁸ and the International Convention for the Protection of All Persons from Enforced Disappearance.⁹ Moreover, the Statutes of the *ad hoc* tribunals for former Yugoslavia and Rwanda and the hybrid criminal courts and tribunals for *inter alia* Sierra Leone, Cambodia, and Timor Leste also establish a duty to prosecute the international crimes included therein. These Statutes primarily establish this duty for the relevant court or tribunal itself. As for the International Criminal Court, however, the Rome Statute explicitly confirms the pre-existing conventional obligations of States to prosecute international crimes in its Preamble and reinforces these obligations through its principle of complementarity.¹⁰

As a precondition for the prosecution of the abovementioned international crimes, the States Parties to these Conventions are bound to incorporate the international definitions of these crimes in their national penal legislation and establish specific penalties for these offences which are commensurate with their serious nature. For each of the international crimes considered in this paper, the status of international law as to the duty to prosecute will briefly be outlined below. For each of these crimes, it will be indicated if the relevant conventions include specific references to children as victims.

2.1.1 Genocide

Based on Article VI of the Genocide Convention, states have an obligation to prosecute and try persons charged with genocide or any other acts enumerated in this convention. Acts amounting to genocide include ‘*imposing measures to prevent births within the group*’, and ‘*forcibly*

⁶ Convention on the Prevention and Punishment of Genocide, UNGA Resolution 260 A (III) of 9 December 1948, 78 UNTS 277.

⁷ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, UNTS, volume 75, 31 (hereafter First Geneva Convention); Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, UNTS, volume 75, 31 (hereafter Second Geneva Convention); ; Convention relative to the Treatment of Prisoners of War, 12 August 1949, UNTS, volume 75, 135 (hereafter Third Geneva Convention); and Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS, volume 75, 287 (hereafter Fourth Geneva Convention). The ratification of these conventions is almost universal: 194 States have ratified (or acceded to) the four Geneva Conventions.

⁸ *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984. As of June 2004, this Convention had entered into force in 136 States.

⁹ Adopted on 20 December 2006.

¹⁰ *Supra*, note 10.

*transferring children of the group to another group.*¹¹ The obligation to prosecute is, however, limited to prosecution by a competent court in the state where the act was committed (principle of territoriality¹²) or by an international penal tribunal.¹³ Two other limitations to this obligation exist: *first*, the duty to prosecute only exists when the specific intent of the author to destroy a particular group of people in whole or in part is established, and *secondly*, this duty only applies when the victims belong to the same national, ethnical, racial or religious group. The obligation therefore does not apply to the killing of people belonging to the same political group, which excludes the application of the Genocide Convention to many internal conflicts.¹⁴

The obligations of the Genocide Convention are generally accepted to have acquired the status of customary international law and several scholars even accept the peremptory nature of these obligations.¹⁵ This conclusion is based on interpretations given by the International Court of Justice (ICJ) in two instances.¹⁶ It is generally considered that states also have the right -and according to some even the obligation-, to exercise universal jurisdiction for the act of genocide, based on customary international law or *jus cogens*.¹⁷

2.1.2 Torture

The 1984 Convention against Torture contains the obligation to prosecute persons accused of torture or any other crime defined in this convention, based on the principles of territoriality and active nationality. It *permits* a State Party also to establish and exercise its jurisdiction based on the passive nationality principle, *if that State considers it appropriate.*¹⁸ Moreover, the Convention against Torture *‘does not exclude any criminal jurisdiction exercised in accordance with internal law.’*¹⁹ The Convention therefore allows States to adopt even broader legislation

¹¹ Genocide Convention, Article II d) and e), and Rome Statute of the ICC, Article 4 d) and e).The number of ratifications, as of December 2004, was 137.

¹² Comment added

¹³ Article VI

¹⁴ The drafters of the Convention clearly intended to avoid its applicability to political opposition in their own countries. See Scharf, Michael, *The Letter of the Law*, in 59 Law and Contemporary Problems, No 4 (1996), pp. 43-61, at 45, note 23.

¹⁵ Dupuy, P.-M., *Normes internationales pénales et droit impératif* (jus cogens), in Ascensio, Decaux and Pellet, Alain, *Droit international pénal*, (Paris: Pedone, 2000), pp. 71-80, at 79.

¹⁶ ICJ, Advisory Opinion, *Reservations to the Genocide Convention*, 1951, p.23, where it states that *‘Les principes qui sont a la base de la convention sont des principes reconnus par les nations civilisées comme obligeant les Etats meme en dehors de tout lien conventionnel.’*; and in its Decision on the *Application of the Convention on the Prevention and Repression of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, ICJ 1996, at par. 31: *“...les droits et obligations consacrés par la convention sont des droits et obligations erga omnes.”* Cited by Dupuy, P.-M., *supra*, note 16, at 78,79.

¹⁷ Bassiouni, Cherif, *“Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice”*, 42 Virginia Journal of International Law (2001), pp. 81-162, at 121. The term *jus cogens* refers to a peremptory norm of general international law. According to Article 53 of the Vienna Convention on the Law of Treaties, 1969, this is *‘a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’*

¹⁸ 1984 Convention against Torture, *supra* note 10, Article 5(1)

¹⁹ *Idem*, Article 5(3)

providing for universal jurisdiction for the crime of torture. The principle *aut dedere, aut iudicare* is explicitly included in the Convention, requiring States to either extradite or try persons who may be accused of acts amounting to torture. Indeed, based on Article 5(2), States parties are obliged to establish their jurisdiction in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him. Moreover, Article 7 stipulates that the State party in the territory under whose jurisdiction a person alleged to have committed any of the acts defined in the convention is found, ‘*shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*’

Many authors do accept the existence of a customary or even peremptory obligation to prosecute persons accused of torture.²⁰ In any case, the *jus cogens* status of the prohibition of torture was recognized by the ICTY in *Furundžija*²¹ and *Pinochet (III)*. Moreover, the adoption of a series of UN resolutions specifically referring to a duty of states to *prosecute* those accused of torture, is evidence of state practice supporting such a duty under customary law.²² Although children are not specifically mentioned in the 1984 Convention against Torture, they benefit from the same protection as adults under this convention and the same obligations in terms of prosecution apply. The right of children not to be subjected to torture, inhuman or degrading treatment or punishment is also included in the Convention on the Rights of the Child (Article 37(a)). Even though this convention itself does not establish an obligation of states to prosecute persons accused of torturing a child, the nearly universal ratification of that convention confirms the commitment of states to guarantee children’s right to freedom from torture.

2.1.3 Enforced Disappearance of Persons

The *International Convention for the Protection of All Persons from Enforced Disappearance* adopted in 2006 obliges the States Parties to prosecute persons accused of the crimes defined therein, based on the principles of territoriality and active nationality. Similar to the 1984 Convention against Torture, prosecution based on passive nationality is optional, ‘*when the State Party considers it appropriate*’²³; and State Parties also have the *right* to exercise universal jurisdiction.²⁴ The principle *aut dedere aut iudicare* is included in the abovementioned Convention as well; on this point the same legal regime applies as the one described above regarding the Convention against Torture (Articles 9(2) and 11(1)). It also explicitly mentions the specific rights and best interests of children who are victims of forced disappearances, in its Article 25. The question whether a duty to prosecute perpetrators of enforced disappearance is

²⁰ Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 *Virginia Journal of International Law* (2001), pp. 81-162, at 119; Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, in *Report of the 69 th Conference of the International Law Association* (2000), p. 408.

²¹ ICTY, Judgment, *Prosecutor v. Anto Furundžija*; (IT-95-17/1-T) Trial Chamber II, 10 December 1998, at § 156.

²² See UNGA Resolutions A/55/89 of 22/2/2001; A/56/143 of 1/2/2002; A/57/200 of 18/12/2002; A/58/164 of 4/3/2004; A/59/182 of 8/3/2005.

²³ *International Convention on the Protection of All Persons from Enforced Disappearance*, Article 9(1)c

²⁴ Article 9(3) states: ‘This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.’

recognized as international custom, is not clearly resolved, neither in legal doctrine, nor through judicial decisions.

2.1.4 Crimes against Humanity

To date, no specific international convention exists regarding crimes against humanity. Moreover, as for the other international crimes considered here, there is little evidence of a general, uniform and consistent State practice supporting the existence of a customary obligation to prosecute crimes against humanity. However, the inclusion of crimes against humanity in the Rome Statute of the ICC clearly indicates the existence of a broad consensus among most states that authors of such crimes must be criminally prosecuted and tried.²⁵ Moreover, a number of official declarations of States confirming this rule have been adopted in international fora.²⁶ According to the definition included in the Rome Statute, the category of crimes against humanity covers a wide range of crimes.

Some of these crimes specifically affect children as victims, in particular rape, sexual slavery, enforced prosecution, forced pregnancy or any other form of sexual violence of comparable gravity.²⁷ Rape and sexual slavery of girls are among the charges in the case *Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui* before the ICC.²⁸ Moreover, in the jurisprudence of the ICTY, the age and sex of the victims of crimes against humanity has in some cases been specifically taken into account as an aggravating factor in the process of sentencing. In its judgment in the *Kunarac* case, the Trial Chamber considered that the relatively youthful age of one victim. (about twenty years) and the very young age of another (about twelve years) when the offences of rape and sexual enslavement were committed against them, are aggravating circumstances.’ The Trial chamber also held that ‘*The fact that his offences were committed against particularly vulnerable and defenceless girls and a woman is a matter considered in aggravation.* These considerations were confirmed on appeal. The Appeals Chamber also held that the Trial Chamber has ‘*an inherent discretion to consider the victim’s age as an aggravating factor*’.²⁹

²⁵ Rome Statute, Article 7.

²⁶ These are the Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, establishing a specific duty on States to ‘*assist each other in detecting, arresting, and bringing to trial persons suspected of having committed such crimes.*’(UNGA Resolution 3074 (XXVIII), GAOR, 28th Session, Supp. N. 30, at 78, UN Doc. A/9030 (1973)); the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, endorsed by the UN General Assembly in 1989 (ECOSOC Resolution 1989/65 of 24 May 1989); and the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in 1992 (UNGA Resolution 47/133 of 18 December 1992, Article 14).

²⁷ Rome Statute, Article 7(g).

²⁸ See *infra* note 63. and accompanying text for more details on this case.

²⁹ See David Tolbert, *Children and International Criminal Law: the Practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY)*, in Arts, Karin and Popovski, (add title!), pp. 147- 154, at p. 153. The citations are from ICTY, *Prosecutor v Kunarac et al.*, Case No. IT-96-23T and IT-96-23/1-T-, Trial Judgment, at par. 874, and from the Appeal Judgment, at par. 355.

State practice in terms of national prosecutions for crimes against humanity is rather limited, and most examples thereof are related to crimes committed during the Second World War. However, in *Scilingo*, the Spanish *Audiencia Nacional* convicted a former Argentine naval officer for crimes against humanity committed in Argentina in the 1970's.³⁰ Moreover, a recent trend in national prosecutions for crimes against humanity can be observed, whereby national courts decided not to apply amnesty laws prohibiting such prosecutions and trials. In several cases, the customary or even *jus cogens* duty to prosecute such crimes has been invoked to support such decisions. Some notable examples thereof occurred in Argentina and Chile.³¹ Other judicial decisions applying this reasoning were adopted in Spain³² and France.³³

2.1.5 War crimes

Each of the four Geneva Conventions contains a provision establishing the obligation for States Parties to search for and prosecute authors of 'grave breaches' of these Conventions,³⁴ referring to the crimes listed as such.³⁵ Grave breaches may include crimes against children, as part of the broader term 'civilians'. This obligation is so broadly formulated that it covers jurisdiction based on the principles of territoriality, active and passive nationality, as well as universal jurisdiction.³⁶ There are two limitations to these far-reaching obligations to prosecute under the Geneva Conventions. On the one hand, these far-reaching obligations only arise in the context of an *international armed conflict*. They do not concern war crimes committed during an internal armed confrontation, which includes situations ranging from a political uprising to a civil war.³⁷

³⁰ *Scilingo*, Audiencia Nacional, judgment 16/2005, 19 April 2005.

Available at www.derechos.org/nizkor/espana.

³¹ Argentine Supreme Court, *Arancibia Clavel*, Judgment of 24 August 2004; Juzgado Criminal en lo Criminal Federal y Correccional N.4, Judge Gabriel Cavallo, *Simón y Del Cerro*, Judgment of 6 March 2001 (Argentina); Argentine Supreme Court, *Simón*, Judgment of 14 June 2005.

³² *Audiencia Nacional*, Criminal Chamber, Appeal 173/98 of 5 November 1989 (affirming Spain's jurisdiction in a criminal investigation of former Chilean President Pinochet).

³³ *Cour de cassation*, *Ely Ould Dah* case, 23 October 2002, Bull. Crim. No. 195, p. 725, summarised on www.universaljurisdiction.info/index/Cases/Cases/France-Ely Ould Dah Case/Case Doc

³⁴ Article 49 (1) of the First Geneva Convention; Article 50(1) of the Second Geneva Convention; Article 129(1) of the Third Geneva Convention, and Article 146(1) of the Fourth Geneva Convention: '*The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article (...)*'.

³⁵ These grave breaches include wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity, compelling a prisoner of war to serve in the forces of the hostile Power, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, unlawful deportation or confinement of a civilian. See Article 50 of the First Geneva Convention; Article 51 of the Second Geneva Convention; Article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention.

³⁶ The text of the relevant paragraph is included in the articles mentioned *supra*, note 35: 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party provided such High Contracting Party has made out a *prima facie* case.'

³⁷ See common Article 3 of the Geneva Conventions, which addresses the obligations of States in the case of armed conflict not of an international character, as well as the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (Protocol II).

This does not mean that States are not obliged to prosecute any violations or crimes committed during an internal armed conflict; only the *scope* of this obligation (in particular its extension to include prosecution based on universal jurisdiction) is narrower than for crimes committed in the context of an international armed conflict.

The second limitation is that the obligation to prosecute, as broadly formulated as to include universal jurisdiction, only concerns ‘grave breaches’. For other violations of the Geneva Conventions, including those which occurred in a non-international armed conflict, the States Parties are required to take measures necessary for the(ir) suppression. The suppression of crimes can be understood to include the prosecution of their perpetrators, at least on the basis of territoriality.

It is generally considered that the obligation to search for, bring to trial, or extradite alleged perpetrators of grave breaches of the Geneva Conventions has turned into a rule of customary law, despite the scarce examples of effective national prosecutions.³⁸ As regards other violations of humanitarian law, including those committed in the context of a non-international conflict, the status of customary law is less clear. There are signs in the jurisprudence of the ad hoc tribunals, especially since the decision of the ICTY Appeals Chamber in *Tadić*,³⁹ upholding the view that the provisions of international humanitarian law should be applied in the same way to international and non-international armed conflicts, punishing their violation.⁴⁰ However, to date this view cannot be considered to have become a firm legal norm.

2.2 Recruitment of children into armed forces or groups or using them to actively participate in an armed conflict: two examples of war crimes against children

Since there have been some significant developments in international judicial decisions with regard to these particular war crimes, these will be discussed here in some detail. The recruitment of children by the parties to an armed conflict and the use of children to take part in hostilities are explicitly prohibited in various international conventions as war crimes. The first Additional Protocol to the Geneva Convention stipulates that: ‘*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.*’ (Article 77(2)). The same provision further states that in recruiting among those persons who have attained the age of fifteen but not the age of eighteen, the Parties to the conflict ‘*shall endeavour to give priority to those who are oldest.*’ The provision in

³⁸ Tomuschat, Christian, *La cristallisation coutumière*, in Ascensio, Decaux and Pellet (eds), *supra*, note 16, at 28, (arguing that the customary status of this obligation can be confirmed as of 1999, following the national prosecutions of war crimes committed in former Yugoslavia and the adoption of the Statutes of the ICTY and ICTR); Condorelli, Luigi, *L’obbligo generale degli stati di cooperare al rispetto del diritto umanitario e la corte penale internazionale*, in Salerno, Francesco (ed), *Diritti dell’uomo, estradizione ed espulsione*, (CEDAM, Padova), pp. 13-35, at 15-16.

³⁹ *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR 72, §§ 87- 137.

⁴⁰ See Ambos, Kai, *La parte general del derecho penal internacional*, (Montevideo: Konrad Adenauer Stiftung, 2005), at 98.

Additional Protocol II, which concerns armed conflicts not of an international character, is a bit stronger: ‘*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.*’⁴¹ The Rome Statute and the Statute of the Special Court for Sierra Leone (SCSL) also set this minimum age at fifteen⁴².

The prohibition of under-age recruitment includes both compulsory and voluntary recruitment. This distinction is explicitly made in the Statutes of the SCSL and the ICC, which speak of ‘(c)onscripting or enlisting children under the age of fifteen into armed forces (or groups⁴³)’ or ‘using them to participate actively in hostilities.’⁴⁴ Therefore, even if children were not obliged or forced to become actively involved in an armed conflict, but allegedly joined one of the parties voluntarily, this does not diminish the criminal responsibility of the adults who are responsible for their enlistment or use in hostilities.

It should be noted that several international and regional human rights instruments adopted since 1990, establish a minimum age of eighteen years for compulsory recruitment by armed forces and for the use of children to actively participate in hostilities. The CRC Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), which entered into force in 2002, distinguishes between armed forces and armed groups as follows. Armed forces may not use children below eighteen years of age to take a direct part in hostilities; compulsory recruitment is banned below eighteen years; and for voluntary recruitment States shall raise the minimum age from 15 years (as set out in the CRC, Article 38(3)) with certain specific conditions.⁴⁵ For armed groups –which are not the regular army but could for example be rebel groups-, States shall take measures to ensure that there will be no recruitment (neither compulsory nor voluntary) below the age of eighteen; and no direct participation in hostilities below that age either.⁴⁶ The Committee on the CRC, which is also mandated to monitor the implementation of the OPAC, has consistently stated in its Concluding Observations on the initial reports of States Parties, that States Parties to this Protocol should explicitly criminalize the recruitment of children and their use in armed conflicts as prohibited by the OPAC. It also held that States Parties should establish territorial jurisdiction and extraterritorial jurisdiction based on active and passive nationality for these offences.⁴⁷

⁴¹ Article 77 (Protocol I, on international armed conflicts) and Article 4 (Protocol II, on non-international armed conflicts).

⁴² Rome Statute Article 8(2)(b)(xxvi) for international armed conflicts and Article 8(2)(e)(vii) for armed conflicts not of an international character; and the Statute of the Special Court for Sierra Leone, Article 7.

⁴³ *Idem*; the term ‘and groups’ is only included in Article 8(e)(vii), concerning non-international armed conflicts.

⁴⁴ *Supra*, note 43. The same interpretation of the term ‘recruitment’ was given by the International Committee of the Red Cross on the relevant articles of the two Additional Protocols. See Smith, Alison, *Child Recruitment and the Special Court for Sierra Leone: Some Considerations*, in 2 *Journal of International Criminal Justice* (2004), pp. 1154-1162

⁴⁵ Optional Protocol on the Involvement of Children in Armed Conflict, Articles 1 to 3. To date, this Protocol has been ratified by 123 States.

⁴⁶ *Idem*, Article 4.

⁴⁷ See for example CRC/C/OPAC/BGR/CO/1, 5 October 2007, (Bulgaria), paras 7 a and b; CRC/C/OPAC/CRI/1, 15 January 2007 (Costa Rica), para 7(c).

The minimum age of eighteen for forced or compulsory recruitment for use in armed conflict is also included in Convention No. 182 of the International Labour Organization (ILO) on the Worst Forms of Child Labour, adopted in 1999. At the regional level, the 1990 African Charter on the Rights and Welfare of the Child is the first to prohibit the recruitment or direct participation in hostilities *or internal strife* of anyone under the age of eighteen. These human rights instruments thus go beyond the minimum age determined by the existing instruments of international humanitarian law, as well as the Statutes of the ICC and the SCSL.

2.3 The first cases on war crimes against children before international criminal courts:SCSL and ICC

In a landmark decision of May 2004, the Special Court for Sierra Leone (SCSL) held that the conscription, enlistment and use in hostilities of children under the age of fifteen constitute crimes under customary international law.⁴⁸ The Appeals Chamber considered that there was sufficient evidence of state practice and *opinio juris* to conclude that these acts attracted individual criminal responsibility since at least November 1996, when the Special Court's temporal jurisdiction starts.⁴⁹ By establishing the 'criminalization' of under-age recruitment and use of children in hostilities under customary law, the SCSL also confirmed the applicability of this norm to all states. This statement is of particular importance, since a rule of customary international law recognizing the criminal nature of the recruitment of children under the age of fifteen to take part in an armed conflict, also applies to states which have not signed or ratified the above mentioned international instruments codifying this rule. The SCSL has convicted several persons for this crime⁵⁰ and other cases including the same charge are still under consideration.⁵¹

The international recognition of the abhorrence of this crime, as well as the determination to prosecute its perpetrators is also confirmed by the ICC. Indeed, in the first cases to be tried by this court, under-age recruitment constitutes the principal charge.

The charges in the case *Prosecutor v. Thomas Lubanga Dyilo* were confirmed by Pre-trial Chamber I of the ICC in January 2007. The Chamber decided that 'there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is criminally responsible as co-perpetrator for the war crimes of enlisting and conscripting of children under the age of fifteen years into the FPLC, (the military wing of the Union des Patriotes Congolais (UPC))⁵² and using them to participate actively in hostilities (...).⁵³ The Pre-trial Chamber distinguishes between the alleged criminal responsibility for these crimes in the context of an international armed conflict

⁴⁸ SCSL-2004-14-AR72(E), *Hinga Norman*, Decision of the SCSL Appeals Chamber of 31 May 2004. This point was brought to the attention of the SCSL in an *Amicus brief* presented by UNICEF working together with No Peace without Justice and others, of 21 January 2004. For a detailed analysis of this case see Smith, *supra*, note 45.

⁴⁹ *Hinga Norman*, paras 52-3

⁵⁰ See SCSL-04-14-T, Judgment of 2 August 2007; SCSL-2004-16-PT, Judgment of 20 June 2007

⁵¹ SCSL-04-15, *Prosecutor v. Sankoh, Bockarie, Kallon and Gbao (the RUF Accused)*; SCSL-03-01, *Prosecutor v. Charles Taylor*.

⁵² Comment between brackets added.

⁵³ ICC-01/04-01/06, 29 January 2007, conclusion, available at www.icc-cpi.int

on the one hand, and in the context of a non-international armed conflict on the other, using the relevant article of the Statute (articles 8(2)(b)xxvi, and 8(2)(e)vii respectively) as the bases for two separate charges, with respect to different periods of time.⁵⁴

In this decision, the Pre-Trial Chamber also clarified the terms ‘conscripted’ and ‘enlistment’. Notably, the decision refers to specific human rights instruments, including the CRC; the Optional Protocol on the Involvement of Children in Armed Conflicts; the abovementioned ILO Convention and the conclusions of the Committee on the Rights of the Child, to support the conclusion that ‘a distinction can be drawn as to the very nature of the recruitment, that is to say between forcible and voluntary recruitment of children.’⁵⁵ This indicates a willingness to overcome the traditional reticence among legal scholars and judges, to consider norms deriving from different bodies of international law -in particular IHL and human rights law- to be mutually supportive if they pursue the same ultimate goals.

The Chamber also provides a detailed and rather broad interpretation of the term ‘active participation in hostilities’, which is not limited to participation in combat. The SCSL has contributed to the interpretation of these terms as well in the *Armed Forces Revolutionary Council* case,⁵⁶ the first conviction by an international criminal tribunal on crimes related to the recruitment and use of child soldiers, in June 2007. A second conviction followed a few months later, also involving the enlistment of children in an armed force or group, in the *Civil Defense Forces* case.⁵⁷ The SCSL determined that ‘(a)ny labor or support that gives effect to or helps maintain operations in a conflict constitutes active participation. Hence, carrying loads for the fighting faction, finding or acquiring (...) ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are examples of active participation as much as fighting and combat.’⁵⁸ The *Lubanga* decision on confirmation of charges takes the same approach and also mentions the examples of spying, scouting and sabotage. This broad interpretation clearly lowers the threshold for holding the accused responsible for the crime of using children to actively participate in hostilities. By referring to each others decisions, the SCSL and the Pre-Trial Chamber have effectively complemented each other in the interpretation of these legal definitions, thereby contributing to the further development of the norms themselves. After several postponements, the trial of the

⁵⁴ The charges related to an international armed conflict concern the period from early September 2002 to 2 June 2003, whereas those related to a non-international conflict concern the period from 3 June to 13 August 2003. The decision to add the charge of child recruitment in the context of an *international* armed conflict, whereas the Prosecutor had based its case solely on the alleged commission of this crime in an *non-international* conflict is quite controversial.

⁵⁵ *Lubanga*, *supra* note 54, at para 245.

⁵⁶ *Prosecutor v. Brima (AFRC)*, Case No. SCSL-2004-16-T, Judgment, SCSL Trial Chamber II, 20 June 2007, available at www.sc-sl.org/AFRC.html.

⁵⁷ *Prosecutor v. Fofana (CDF)*, Case No. SCSL-04-14-T, Judgment, SCSL Trial Chamber II, 2 August 2007, available at www.Sc-sl.org/CDF.html

⁵⁸ *AFRC* Judgment, *supra* note 60., at para 737; these examples also fall within the range of activities mentioned in the *Lubanga* decision, *supra* note 54., para 261-263. The two Chambers seem to have a different opinion on the activity of delivering food to an armed force or group; according to the SCSL this does constitute an active participation in hostilities; whereas the Pre-Trial Chamber explicitly excludes this example from the scope of this specific crime (*Lubanga*, para 262).

Lubanga case has started on 26 January 2009. It should be noted that an *Amicus curiae* brief was submitted to the ICC by the Special Representative on children in Armed Conflict, arguing that the charges against Mr Lubanga should also make specific reference to sexual violence against girls who were forced to join the armed forces or groups.

In the case *Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui*⁵⁹ before the ICC, the charges range from several crimes against humanity, including sexual enslavement of women and girls, to war crimes. The use of children under the age of fifteen years to participate actively in hostilities is among the main charges in this case as well. These charges were confirmed in September 2008.⁶⁰ The Pre-Trial Chamber confirmed its broad interpretation of the term 'active participation in hostilities' and underlined the condition that the accused knew or must have known that the children had not attained the age of fifteen years when they were used for activities amounting to such participation.⁶¹ The charges of sexual slavery and rape were also confirmed, both as crimes against humanity and as war crimes. The Chamber considers that 'sexual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors.'⁶²

Although the trials of the ICC in these cases have to be awaited, the priority given to the prosecution of these crimes against children in these first cases before the ICC confirms the principle that these crimes must be investigated and their authors be prosecuted and tried.

Even though the conscription or enlistment of children into armed forces or groups or using them to actively participate in hostilities do not fall within the legal category of grave breaches of the Geneva Conventions –which would entail the broadest obligations in terms of the prosecution of its perpetrators-, states nevertheless have an obligation to take measures necessary for the suppression of all acts contrary to the Geneva Conventions and its Additional Protocols. The inclusion of these crimes among the war crimes of the Rome Statute; the decision of the SCSL that they amount to crimes under customary international law; the numerous resolutions of the Security Council and the UN General Assembly calling for the prevention, termination and criminalization of unlawful recruitment of children in armed conflict⁶³; as well as the Cape Town Principles and the Paris Principles and Commitments⁶⁴ are all evidence of an increasingly strong

⁵⁹ Mr. Katanga, acted as the main commander of the FRPI, an armed group in the Ituri region and subsequently as a general in the armed forces of the DRC, whereas Mr Ngudjolo Chui was the highest-ranking commander of the *Front des nationalistes et intégrationnistes* (FNI).

⁶⁰ ICC-01/04-01/07, 30 September 2008, Pre-Trial Chamber I.

⁶¹ *Idem*, at para 251-2. This condition is also included in the ICC Elements of Crimes.

⁶² *Idem*, at para 431. To support this view, the decision cites the Final Report of the Special Rapporteur of the UN Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery like practices during armed conflict

⁶³ UNGA Res. A/48/157, March 1994; UNGA Document A/S-27/2, October 2002: *A World Fit for Children*; SC Res. 1261 (1999); SC Res. 1314 of 11 August 2000; SC Res. 1332 (2000); SC Res. 1341 (2001); SC Res. 1355 (2001); SC Res. 1460 (2003); UN Doc.A/58/546-S/2003/1053 (2003): *Children an Armed conflict: Report of the Secretary-General*; SC Res. 1539 (2004); SC Res. 1612 (2005).

⁶⁴ See below, par 2 for a detailed discussion of the Paris Principles and the Paris Commitments, which forcefully condemn the recruitment of children in armed conflict under the age of eighteen years.

international consensus, and arguably of an emerging *opinio juris*, recognizing that the suppression and criminal prosecution of these crimes is indeed required. Other expressions of support for such an evolving consensus are the Optional Protocol to the CRC on Children in Armed Conflict (OPAC), , as well as the concluding observations of the Committee on the Rights of the Child on State Party reports. This Committee has encouraged States, at several occasions, ‘to collaborate with the International Criminal Court (ICC) in order to seek accountability and prevent impunity for those who have committed grave violations against children’;⁶⁵ or recommended States to a) adopt and implement legislation criminalizing the recruitment and involvement of children in hostilities contrary to the Optional Protocol; and to b) establish extraterritorial jurisdiction for these crimes when they are committed by or against a person who is a citizen of or has other links with the State Party⁶⁶ Whether these Concluding Observations themselves constitute evidence of an international *opinio juris* is questionable since this committee does not necessarily represent the views of the majority of States. They do, however, support the principles laid down in the OPAC and may contribute to a changing practice of States on these points.

* * *

This overview shows that the exact scope of states’ obligations to prosecute and try (or extradite) persons accused of international crimes varies from one crime to the other, depending on the relevant international conventions and the development of customary law. In particular, the jurisdictional basis of the required criminal prosecution differs among the various international crimes. Whereas prosecution based on territoriality is legally required for all the crimes considered⁶⁷, the duty to prosecute based on active nationality is only explicitly foreseen for grave breaches of the Geneva Conventions, torture and enforced disappearance. These obligations are even more limited based on the passive nationality principle (grave breaches); states have the *right* to exercise such jurisdiction for torture and forced disappearances. Finally, a firm treaty obligation to prosecute based on universal jurisdiction exists for grave breaches of the Geneva Conventions; for torture and forced disappearances states also have a treaty-based obligation to prosecute, when the accused is found in their territory (conditional universal jurisdiction). As demonstrated above, state’s obligations regarding the prosecution for some crimes have certainly been strengthened by customary international law and such customary obligations have undoubtedly also evolved for crimes against humanity.

However, a pre-condition for national prosecutors and courts to comply with these obligations under international law, is that the international definitions of these crimes are incorporated into the domestic penal law. Even though many states have signed and ratified the conventions, their applicability in the national legal order is often not or not sufficiently ensured. Depending on the

⁶⁵ Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of the Congo, CRC/C/COD/CO/2 , January 2009, at par. 70.

⁶⁶Concluding Observations: Tunisia, CRC/C/OPAC/CO/TUN/1, 29 January 2009, at par. 14

⁶⁷ The exact obligations for the prosecution of crimes against humanity are necessarily less clear since they are solely based on customary law.

constitutional system of each state determining the applicability of international law in the national legal order, it is an obligation of the executive and legislative powers to adopt the necessary implementing legislation to enable its judiciary to initiate any prosecutions and proceedings.

Moreover, the question arises what the value is of an international obligation to prosecute in terms of enforcement. In other words, what happens if a state does not comply with its obligation to prosecute, for instance, the political and military leaders of a former regime, which has just stepped down after concluding a peace agreement?

2.4 Legal enforcement of an obligation to prosecute

In theory, one state could present a complaint to the International Court of Justice (ICJ) against another state, if the latter has not prosecuted and tried persons accused of crimes such as genocide or torture in accordance with its obligations under an international convention. Indeed, in *Bosnia and Herzegovina v Serbia and Montenegro*, the ICJ recently ruled that Serbia violated its obligations under Article VI of the Genocide Convention by failing to arrest and transfer to the International Criminal Tribunal for Former Yugoslavia (ICTY), persons accused of ordering genocide at Srebrenica.⁶⁸ Apart from the limitations related to the acceptance of jurisdiction of the ICJ, States will, however, be extremely reluctant to lodge a complaint against another state before the ICJ for its failure to prosecute individuals.

In practice, non-compliance with an international obligation to prosecute will rather give rise to either duties or rights of others to prosecute and try those accused of international crimes. This may be the ICC, if the accused and the crime fall within its jurisdiction. Prosecution by the ICC can be initiated in three ways: firstly through a referral by a State Party to the ICC Statute; secondly by a referral from the UN Security Council and thirdly at the initiative of the ICC Prosecutor (*proprio motu*).⁶⁹ If an investigation and a subsequent prosecution are launched, the state where the international crimes occurred is legally bound under the ICC Statute, to cooperate with the Court.⁷⁰ As is well known, of the first three situations taken up by the ICC, two were referred to it by the state where the alleged crimes were committed (Uganda and the Democratic Republic of Congo), and one was based on a referral by the UN Security Council (Darfur).⁷¹ As already mentioned above, the first cases to be tried by the ICC concern the unlawful recruitment of child soldiers.

Where an international or hybrid criminal tribunal is created with a view to prosecute and try those bearing the greatest responsibility for the international crimes committed in a specific conflict, such as the ICTY, ICTR or the Special Court for Sierra Leone, the Statute of the relevant court or tribunal determines the obligations of the state in terms of cooperation.

⁶⁸ ICJ, Judgment of 26 February 2007, paras 439-451 and operative par. 6.

⁶⁹ Rome Statute, Articles 13, 14 and 15.

⁷⁰ Rome Statute, Articles 86-96.

⁷¹ UNSC Res. 1593 of 31 March 2005.

Alternatively, third states may launch their own criminal proceedings based on the principles of active or passive nationality or universal jurisdiction, as outlined in the preceding paragraph. Such national prosecutions by third states, however, require specific provisions in the national legislation on criminal procedure, enabling the prosecuting authority in that state to do so. In practice, most states are rather reluctant to launch proceedings against nationals of a third state, especially if the crimes were committed outside their own territory and if the victims are nationals of a third state as well (universal jurisdiction). Nevertheless, even though only a few states may in practice be politically willing to initiate such investigations and subsequent prosecutions, this still remains a possibility, despite practical difficulties related to evidence gathering and expenses.

An interesting development supporting the possibilities to enforce the duty of states to prosecute can be seen in the jurisprudence of the regional human rights courts, as well as in the authoritative Views of the Human Rights Committee. Indeed, the duty to prosecute persons accused of serious human rights violations –such as the right to life; the right to freedom from torture and the freedom from illegal detention- is increasingly considered to form part of the general obligation of states to guarantee and ensure the rights of the relevant human rights convention. In particular, the obligation to guarantee the right to an effective remedy includes the obligation to investigate the violations and to criminally prosecute the accused perpetrators. It is considered to be a right of the victims and their relatives that those responsible for serious human rights violations be brought to justice. In this context, the Inter-American Court of Human Rights has developed the notions of the ‘right to truth’ and the ‘right to justice’.⁷² The European Court of Human Rights has also recognized that states have an obligation to investigate and prosecute those accused of serious human rights violations.⁷³ The same view has consistently been formulated by the United Nations Human Rights Committee.⁷⁴ Thus the enforcement of rights included in human rights instruments may ultimately lead to the enforcement of obligations

⁷² IACtHR, *Velasques Rodriguez*, Judgment of 29 July 1988, Ser. C, No. 4; *Paniagua Morales and others v Guatemala*, Judgment of 8 March 1998, Ser. C, No. 37; *Castillo Paez v Peru*, Judgment of 3 November 1997, Ser. C, No. 34; *Suarez Rosero v Ecuador*, Ser. C, No. 35; *Villagran Morales and others v Guatemala*, Judgment of 19 November 1999, Ser. C, No. 63; *Bamaca Velasquez v Honduras*, Judgment of 25 November 2000, Ser. C, No. 70; *Durand and Ugarte v Peru*, Judgment of 16 August 2000, Ser. C, No. 68; *Barrios Altos (Chumbipumba Aguirre v Peru)*, Judgment of 14 March 2001, Ser. C, No. 75; *Miguel Castro Castro Prison v Peru*, Judgment of 25 November 2006; *La Cantuta v Peru*, Judgment of 29 November 2006.

⁷³ ECtHR, *Kaya v Turkey*, Judgment of 19 February 1998(158/1996/777/978); *Buldan v Turkey*, Judgment of 20 April 2004 (28298/95); *Tekin v Turkey*, Judgment of 9 June 1998, (52/1997/836/1042); *Assenov and others v Bulgaria*, Judgment of 28 October 1998, Reports 1998-VIII, 3264; *Mikheyev v Russia*, Judgment Of 26 January 2006, (77617/01); *Isayeva v Russia*, Judgment of 24 February 2004 (57950/00); *Isayeva, Yusupova and Bazayeva v Russia*, Judgment of 24 February 2004 (5747/00, 5748/00 and 57949/00); *Khashiyev and Akayeva v Russia*, Judgment of 24 February 2005.

⁷⁴ UNHRC, Communication No. 52/1979 (*Sergio Ruben Lopez Burgos v Uruguay*), Views adopted on 29 July 1981, Selected Decisions, vol. 1, p.88; Views of 27 October 1995 (*Nydia Bautista de Arellana v Colombia*), Report of the Human Rights Committee, Vol. II, General Assembly Official Records, 51st session, Supp. No. 40 (A/51/40), p. 142; Views of 15 April 2002, Communication No. 859/1999 (Colombia); and Views of 29 November 2002, Communication No. 778/1997 (Colombia).

included in other international conventions, including those falling within the scope of international humanitarian law, as well.

Nevertheless, states often invoke limitations to the duty to prosecute, such as amnesties. Their permissibility under international law will now be considered.

3. ADMISSIBILITY OF AMNESTIES

Amnesties constitute an impediment to the prosecution of persons accused of international crimes. Granted by law, their objective is to extinguish the criminal nature of certain committed crimes, prohibiting the prosecution of their authors.⁷⁵ This instrument has been used throughout history⁷⁶ by States following armed conflicts, revolution or civil unrest, in order to ‘heal’ the wounds in society and facilitate national reconciliation.⁷⁷ The amnesties conferred also cover international crimes, either explicitly, or as part of a broadly defined scope of crimes.

3.1. Amnesties in practice: different approaches

In many States, the possibility to grant amnesties –mostly a power conferred upon the Executive or the Legislature- is foreseen under their national law. Many amnesty laws adopted in the aftermath of an international or internal armed conflict are still in force.⁷⁸ States still consider amnesties a useful instrument as part of a peace negotiation, and to help ensure some stability in the mostly fragile post-conflict situation. By definition, amnesties result in the shielding of persons from prosecution for crimes committed during a conflict, and this has often been their primary purpose. A recent study has shown that since the end of World War II, over 420 amnesty processes have been introduced in different parts of the world, of which 66 were initiated between January 2001 and December 2005.⁷⁹ These figures indicate that the establishment of the *ad-hoc* international and hybrid criminal tribunals and of the ICC in the second half of the 1990s and the increasing attention paid both by legal scholars and in the international political arena to the prosecution of serious crimes, have not dissuaded States to resort to this tool. Even though each amnesty law is tailored to the specific situation of the State(s) concerned and to the nature

⁷⁵ Amnesties should be distinguished from pardons, which effectively cancel earlier convictions and sentences for certain acts

⁷⁶ Delmas-Marty mentions several examples, going back to an amnesty decree adopted in Athens in 404 B.C., Delmas-Marty, Mireille, *La responsabilité pénale en échec (prescription, amnistie, immunités)*, in Cassese, Antonio and Delmas-Marty, Mireille (eds), *Juridictions nationales et crimes internationaux*, (Paris: Presses Universitaires de France, 2002), at 627.

⁷⁷ Amnesty laws have been adopted, for example, in France and Italy after the Second World War; by France after the Algerian war, also covering crimes committed in Indochina; as well as in several Latin-American States.

⁷⁸ Examples include France, Spain, Italy, Chile, Guatemala, Uruguay, Brazil, Sierra Leone, China and Russia.

⁷⁹ Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1, *International Journal of Transitional Justice* (2007), pp 208-230, at 209-10.

and the parties of the underlying armed conflict, some general features can be distinguished of different types of amnesties adopted in various regions.

The adoption of amnesties has often been combined with the establishment of a truth and reconciliation commission (TRC). Sometimes there is a direct relationship between the two, such as in South Africa, where amnesty was conditional upon truth-telling before the TRC. In other countries, the amnesty was passed before a TRC was created (*e.g.* Chile, Peru, Ghana); or only after the TRC completed its work (Argentina, Timor Leste).

3.1.1 'Self-amnesties: some examples in Latin-America

Since the late 1970s several amnesty laws were adopted in Latin-American States, including Chile (1978), Argentina (1983; then 1986-7), El Salvador (1993), Uruguay (1986), Brazil (19..) and Peru (1995). Being adopted by the ruling military regimes before initiating a transitional period towards democratic elections, these amnesties have been characterized as 'self-amnesties', since they generally provide for complete protection from criminal prosecution for any acts committed during a defined period.⁸⁰ This period usually corresponds to the duration of the armed conflict. Although these amnesties generally apply to crimes committed by both sides to the internal conflict, their primary purpose was to prevent prosecutions of those representing the dictatorial rulers. These amnesty laws have been severely criticized and condemned by regional and international human rights bodies and by other States for many years. The Inter-American Commission and later the Inter-American Court of Human Rights (IACtHR) have consistently ruled that these amnesty laws violate the rights of the victims of the serious human rights violations committed during the military regimes, in particular the right to an effective remedy; the right to a fair trial and the 'right to truth'. According to this jurisprudence, the right to an effective remedy not only covers the right to reparations, but also the right to see those responsible for the violations being prosecuted and tried before their national courts. In the well-known *Barrios Altos* case (2001)⁸¹ the IACtHR condemned the Peruvian Amnesty law as violating the American Convention on Human Rights, ordering the State to repeal this law and to initiate criminal investigations into some specific incidents of extra-judicial killings and torture. The Peruvian amnesty law has indeed been repealed –helped by the flight of President Fujimori in that same period- leading to several criminal prosecutions and trials before national courts. In Argentina, the amnesty law was annulled by the Supreme Court in 2005,⁸² following a series of cases before Argentine courts challenging this instrument based on its violation of international conventions -such as the Convention against Torture, the ICCPR and the American Convention on Human Rights- to ensure the right to an effective remedy and to prosecute authors of international crimes. In Chile the amnesty law is formally still in force but has not been invoked

⁸⁰The Argentine laws of 1986 and 1987 (Full Stop Law and Due Obedience Law) were adopted by a subsequent government and can therefore not be called 'self-amnesties'.

⁸¹IACtHR, *Barrios Altos (Chumbipumba Aguirre v Peru)*, Judgment of 14 March 2001, Ser. C, No. 75.

⁸²*Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, (Argentina, Supreme Court), causa N° 17.768, (14 June 2005) S.1767.XXXVIII. Full text in Spanish available online at www.derechos.org/nizkor/arg/doc/nulidad.html. This decision will be discussed in part II. See also Bakker, Christine, *A Full Stop to Amnesty in Argentina: the Simón Case*, in 3 JICJ (2005), 1106-1120.

since 1999, also as a consequence of national proceedings invoking the State's obligations under international law.⁸³ Although in other countries of the region the self-amnesty laws are still effectively banning criminal investigations and prosecutions relating to human rights atrocities committed during the military period, the above mentioned developments nevertheless constitute regional precedents which are increasingly invoked in the other countries as well. Whereas most amnesty laws in Latin America covered all acts and thus constituted so-called 'blanket amnesties', this was not the case in Guatemala (1996), where genocide, torture, forced disappearances and other international crimes are explicitly excluded from the amnesty which was agreed in the context of a UN brokered peace agreement.⁸⁴

3.1.2 Amnesties as part of a peace agreement: Africa

Since the 1990s, amnesties have been adopted in a number of African countries as well. In most cases, they were negotiated as part of a peace agreement between the government and rebel forces. Some of these amnesty laws explicitly exclude their application to genocide, war crimes and crimes against humanity. This is the case for Burundi (Arusha Accord, 2000); the Democratic Republic of the Congo (July 2008), and the Central African Republic, where an amnesty law was recently passed by its national Parliament, excluding its applicability to international crimes (September 2008). The amnesty agreed in Côte d'Ivoire (April 2007) does not explicitly exclude such crimes, but its President has formally declared that it would not be applied to 'crimes against human kind.'⁸⁵ In Sierra Leone, a general amnesty law was adopted, to which a reservation was made by the Special Representative of the UN Secretary General in the Lomé Peace Agreement.⁸⁶ Other amnesties are linked to the fulfilment of certain conditions, such as truth-telling before the South-African Truth and Reconciliation Commission (1995); or 'coming forward and disavowing combat' as in the case of Uganda (2000).⁸⁷ Finally, some amnesty laws adopted in the African region amount to blanket amnesties with no exceptions for crimes under international law, such as Algeria (2006) and earlier Ghana (1992).

3.1.3 Some Asian examples of amnesties

On the Asian continent, a recent amnesty regulation was passed in Afghanistan (March 2007) that prevents the state from independently prosecuting people for war crimes committed during conflicts in recent decades. The law recognizes the rights of war crimes victims to bring cases against those alleged to have committed such crimes. But in the absence of a complaint by a victim, Afghan authorities are now banned from prosecuting accused war criminals on their own.

⁸³ E.g. *Sandoval Rodríguez* (Chile, Santiago Appeals Court, decision of 5 January 2004).

⁸⁴ Ley de Reconciliación Nacional, Decreto No. 145-96 (18 Dec. 1996), cited by Tomuschat, Christian, *Clarification Commission in Guatemala*, in *Human Rights Quarterly* 23 (2001)233-258, at 243.

⁸⁵ See Amnesty International, *Report 2008, The State of the World's Human Rights*, Section Cote d'Ivoire.

⁸⁶ See Lydiah Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*, ICTJ Occasional Paper Series, July 2006, p. 29. This reservation applies to jurisdiction by the SCSL over these international crimes. Its consequences for amnesty before national courts are unclear.

⁸⁷ *Idem*, p.30. Ugandan Amnesty Act, 2000, Part II (3)1.

In Timor Leste, amnesty for certain crimes has been considered but met with resistance, including from the Judiciary.. In Nepal, amnesty provisions for gross human rights violations were included in a 2007 law drawn up with the support of a truth commission.

In sum, the picture of State practice on amnesties is not uniform. A certain trend can be seen in the amnesty laws adopted as part of a peace agreement since the end of the 1990s, whereby international crimes are explicitly excluded. On the other hand, some recent examples in Asia and Africa show that blanket amnesties or the limitation of prosecutions to cases brought by victims do not follow this trend.

3.2. Amnesties and international law

Despite the continuing adoption of amnesties in different parts of the world, the compatibility of national amnesties with international law is increasingly being challenged, both before national courts and before regional human rights mechanisms.

However, neither universal human rights treaties, nor human rights conventions of a special nature, explicitly prohibit amnesties.⁸⁸ Such a prohibition is not included in the main instruments codifying international humanitarian law either. Indeed, the 1949 Geneva Conventions and their Additional Protocols do not refer to this possibility with respect to acts committed during an international armed conflict. Amnesties are even *permitted* after the termination of a non-international conflict,⁸⁹ although this permission has been interpreted in a restricted way.⁹⁰

Nevertheless, international and regional (quasi)judicial bodies have ruled that amnesties violate the obligations of States to guarantee the right to an effective remedy, deriving from the ICCPR and from the Inter-American and European Conventions on Human Rights. As mentioned above, the Inter-American Court of Human Rights has been most explicit in this regard by adopting a consistent case-law condemning amnesty laws,. The UN Human Rights Committee has also adopted a consistent approach with respect to amnesty laws, stating that they constitute a violation of the right to an effective remedy⁹¹.

Are amnesties prohibited under international customary law? In terms of international declarations expressing an *opinio juris* to that effect, the following examples can be mentioned. An express prohibition of amnesties is included in the UN General Assembly Resolution on the Forced Disappearance of Persons, stating that persons who have committed or are accused to have committed the crime of forced disappearance, ‘*shall not benefit from any special amnesty*

⁸⁸ Ambos, Kai, *Impunidad y derecho penal internacional*, (Buenos Aires: Ad-Hoc SRL, 2nd edn, 1999), at 126; Roht Arriaza, Naomi (ed), *Impunity and Human Rights in International Law and Practice*, (New York: OUP, 1995), at 58.

⁸⁹ Additional Protocol II, Article 6 (5).

⁹⁰ Ambos, *supra* note 90, at 127

⁹¹ In particular, see General Comment n° 31 “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, (2004) § 18. See also General Comment n° 20, on “the Prohibition of Torture” (1992), § 15.

law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction’.⁹²

Furthermore, the statutes of two ‘hybrid’ criminal tribunals provide that amnesties granted for the crimes falling under the jurisdiction of these courts shall not be a bar to prosecution.⁹³ Although the Statutes of the ICTY, ICTR and ICC do not explicitly refer to amnesties, they arguably contain sufficient elements to preclude national amnesties from barring prosecution.⁹⁴ Finally, several resolutions adopted within the UN system reiterate that amnesties should not be granted to persons accused of having committed international crimes against children.⁹⁵ This same principle is also confirmed in the EU Guidelines on Children in Armed Conflict,⁹⁶ as well as in the Paris Commitments.⁹⁷

Nevertheless, as shown above, state practice in terms of national legislation and judicial decisions is far from uniform in prohibiting amnesties. However, in recent years an emerging trend can be observed in national judicial decisions, declaring amnesty laws to be in violation of the State’s obligations under international law to prosecute and try authors of international crimes. Notable examples thereof occurred in Latin America, as mentioned above. Moreover, in some states exercising universal jurisdiction over crimes committed which were covered by an amnesty law, the amnesties were not respected based on the argument that their obligation to prosecute the crimes in question, deriving either from an international convention, or from international customary law or *jus cogens* cannot be hampered by a national law adopted by another State.⁹⁸ In other cases, such amnesty laws were not respected on the ground that they are political instruments, which are not covered by the rule *ne bis in idem*, barring prosecution for acts which have already been the subject of a *judicial* decision.⁹⁹

⁹² Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Resolution 47/133, UN Doc. A/47/49 (1992), adopted on 18 December 1992, Article 18.

⁹³ Statute of the Special Court for Sierra Leone, Article 10; Cambodian Bill on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Article 40.

⁹⁴ ICTY Statute, Article 10; ICTR Statute, Article 9; ICC Statute, Articles 17, 20. See Louise Mallinder, *supra*, note 94; Darryl Robinson, *Serving the interests of justice: amnesties, truth commissions and the International Criminal Court*, in 14 EJIL(2003), pp. 481-505.

⁹⁵ E.g. A/C.3/63/L.16/Rev.1, 20 November 2008, at par. 31; A/RES/62/141, 22 February 2008, at par. 55.

⁹⁶ Council of the European Union, *EU Guidelines on Children in Armed Conflict*, 15634/03, 4 December 2003, par. 17: ‘*Making use of the various tools at its disposal, the EU will seek to ensure that specific needs of children will be taken into account in early-warning and preventive approaches as well as actual conflict situations, peace negotiations, peace agreements, ensuring that crimes committed against children be excluded from all amnesties, (...)*’.

⁹⁷ Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, 6 February 2007 par. 6: ‘*To fight against impunity, and to effectively investigate and prosecute those persons who have unlawfully recruited children into armed forces or groups, or used them to participate actively in hostilities, bearing in mind that peace or other agreements aiming to bring about an end to hostilities should not include amnesty provisions for perpetrators of crimes under international law, including those committed against children.*’

⁹⁸ Spain (*Fortunato Galtieri*, Audiencia Nacional, Order of 25 March 1997, at 7-9; *Pinochet*, Audiencia Nacional, Order of 4 November 1998, No. 1998/22604)

⁹⁹ Spain (*Auto* of the Audiencia Nacional of 5 November 1998, *Pinochet*); UK (*Pinochet III*, Lord Browne-Wilkinson, 24 March 1999)

In conclusion, although a customary international rule prohibiting amnesties for international crimes has not yet crystallised, there is an emerging practice pointing to increasing support for such a prohibition. Indeed, the emerging trend in the amnesties adopted since the late 1990s to explicitly exclude genocide, war crimes and crimes against humanity from its application indicate a growing acceptance that amnesties for these serious crimes, including crimes against children must be unconditionally rejected.

If this limitation is respected, the instrument of amnesties may arguably be considered as one tool among others in a context of transitional justice, including prosecutions and possibly truth commissions if certain other conditions are met, including democratic control and if reparation or compensation for victims is not foreclosed.¹⁰⁰

4. CHILDREN AND CRIMINAL RESPONSIBILITY: SPECIFIC NORMS

In this paragraph it will be examined what norms of international law exist or are emerging on the criminal responsibility of children for international crimes. May children who were recruited under the age of eighteen to take part in an armed conflict be held criminally responsible for their participation in acts amounting to war crimes? Is there an internationally agreed minimum age for criminal responsibility? Some answers can be found in legally binding instruments, such as the Convention on the Rights of the Child (CRC) and the Statutes of the Special Court for Sierra Leone and the ICC. An emerging international consensus is also expressed in a series of decisions, resolutions and principles adopted in international forums, in particular within the UN framework.

A distinction must be made between criminal responsibility before national courts on the one hand, and criminal responsibility before international courts and tribunals on the other. The criteria of children's criminal responsibility at the national level are determined in the national penal legislation of each individual state. International courts or international/hybrid tribunals may lay down their own criteria regarding criminal responsibility in their respective statutes. Nevertheless, if firm international legal standards exist, these may entail an obligation for states to adapt their national laws and practice accordingly.

4.1. International Conventions

The CRC, which entered into force in 1990, is the most relevant legally binding instrument in this regard. The CRC does not exclude criminal responsibility of children in general. It does, however, insist on the establishment of a minimum age for criminal responsibility and on

¹⁰⁰ See Cassel, Douglas, *Lessons from the Americas: Guidelines for international responses to amnesties for atrocities*, 59 *Law and Contemporary Problems* 4 (1996), pp. 196-230; Faustin Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (M. Nijhoff, 2007), at pp 230-1; Mallinder, *supra* note 96, at 230-1.

promoting, ‘whenever appropriate and desirable’, measures for dealing with children alleged as, accused of or recognized as having infringed the penal law, ‘*without resorting to judicial proceedings*, provided that human rights and legal safeguards are fully respected.’¹⁰¹ If criminal proceedings are nevertheless considered to be appropriate, the CRC underlines the right of every child concerned ‘to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth (...) and which takes into account the (...) desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’.¹⁰² To this end, the CRC enumerates several conditions and guarantees that must be respected in proceedings against children, including the principle of legality and fair trial requirements.¹⁰³

It should be noted that the term ‘penal law’ in these provisions primarily refers to the *national* penal law of each state, and that infringements thereof generally consist of domestic rather than international crimes. The CRC provisions may also apply to children accused of international crimes –provided that these crimes are incorporated into the national penal law-, but this is not their specific aim.

In practice, the question whether children may be held criminally responsible for international crimes especially arises in relation to child soldiers or children who were otherwise used to participate actively in the hostilities of an armed conflict. The CRC does not explicitly address this issue. It does, however, contain several provisions obliging states to refrain from recruiting children under the age of fifteen into their armed forces; to take all feasible measures to ensure that they do not take an active part in hostilities,¹⁰⁴ and to promote the physical and psychological recovery and social reintegration of a child victim of, *inter alia*, armed conflict.¹⁰⁵ As outlined above (par 1.1.f, when discussing child recruitment and related offences as war crimes), the OPAC sets higher standards in this regard.

Even though the determining factor in the recognition of criminal responsibility of children according to the CRC is the *minimum age* which needs to be established, the CRC itself does not provide any guidance as to what that age should be. Some clarification on this point is provided

¹⁰¹ CRC Article 40(3b), emphasis added. Full text of Article 40(3): ‘States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

(4). A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.’ For an overview and analysis of international legal standards for the protection of children and other questions related to justice for children who are victims of crimes under international law, see No Peace Without Justice/UNICEF Innocenti Research Centre, *International Criminal Justice and Children*, September 2002.

¹⁰² CRC Article 40(1)

¹⁰³ CRC Article 40(2).

¹⁰⁴ CRC Article 38

¹⁰⁵ CRC Article 39

in the Beijing Rules (1995)¹⁰⁶ and most recently by the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups (2007),¹⁰⁷ although this latter document is limited to very specific situations. The most important source of clarification is General Comment No 10 of the Committee on the Rights of the Child.¹⁰⁸

Several international conventions address the question of *punishment* of juvenile persons who were found guilty of criminal acts. Under the Geneva Conventions and its Additional Protocols, the execution of persons for crimes committed while under the age of eighteen is prohibited.¹⁰⁹ A proposal to add in Additional Protocol I a prohibition to criminally prosecute and convict children for offences ‘for which at the time of commission they were too young to understand the consequences’ was rejected.¹¹⁰

Several human rights instruments also prohibit imposing the death penalty on persons under the age of eighteen,¹¹¹ including the CRC, which equally prohibits life imprisonment without the possibility of release.¹¹² Some conditions are also determined for *judicial proceedings* involving juveniles. The 1966 International Convention on Civil and Political Rights (ICCPR)¹¹³ states in its Article 10(2b) and (3) that ‘(a)ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.’ It also determines that within the penitentiary system, juvenile offenders shall be ‘accorded treatment appropriate to their age and legal status.’ Also the CRC enumerates some specific conditions for such proceedings.¹¹⁴

Apart from limits on punishment on conditions for judicial proceedings involving juveniles, neither the international humanitarian law conventions, nor international and regional human rights instruments provide any specific guidance on the permissibility or limits of children’s

¹⁰⁶ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, or ‘Beijing Rules’, UNGA Resolution 40/33 of 29 November 1985

¹⁰⁷ Paris Commitments, *supra* note 96, para. 11.

¹⁰⁸ General Comment No.10, CRC/C/GC/10, 9 February 2007,.

¹⁰⁹ The Fourth Geneva Convention (1949) prohibits such execution to the extent that the offender is a ‘protected person’, that is, a civilian in an occupied territory during an international armed conflict.(Article 68(4). The two Additional Protocols to the Geneva Conventions (1977) repeat this prohibition, broadening it to a larger category of protected persons (Additional Protocol I, Art. 77(5); as well as to non-international armed conflicts (Additional Protocol II, Art. 6(5)).

¹¹⁰ See Matthew Happold, *Responsibility for crimes under international law*, in Arts, Karin and Vesselin Popovski, *International Criminal Accountability and the Rights of Children*, pp. 69-85, at 72-3.

¹¹¹ ICCPR, Article 6(5) prohibits the death penalty ‘for crimes committed by persons below eighteen years of age.’ The same formulation is laid down in the American Convention on Human Rights in its Article 4(5). The Arab Charter on Human Rights prohibits imposing the death penalty on persons under the age of eighteen, albeit without referring to the age at which the crime was committed (Article 12). The African Charter on the Rights and Welfare of the Child (1990) determines that the death penalty shall not be pronounced for crimes committed by children (Article 5(3)).

¹¹² CRC Article 37(a): ‘No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’.

¹¹³ International Covenant on Civil and Political Rights (ICCPR), 1966

¹¹⁴ See *infra*.

criminal responsibility. The question then arises whether there is a rule of customary international law imposing such a minimum age on all states.

4.2. Emerging Norms of Customary International Law?

According to the traditional concept of international customary law, the two main criteria for the existence of such a rule are state practice and *opinio juris*. As a general rule, an international custom requires duration, uniformity or consistency and generality of state practice; as well as the conviction of states that the relevant practice is required by law.¹¹⁵ State practice is expressed, in particular, through ratification of international instruments; national legislation; or judicial decisions.

It is well known that the practice of states in terms of their national legislation on children's criminal responsibility for domestic crimes is far from uniform. The minimum age level ranges from as young as seven in some states¹¹⁶, to 18 in others.¹¹⁷ Having considered this disparity of national laws, the European Court of Justice stated in *T. and V. v United Kingdom*,¹¹⁸ that it 'does not consider that there is at this stage any clear common standard amongst the Member States of the Council of Europe as to the minimum age of criminal responsibility.'¹¹⁹ In Georgia (Tbilisi), this minimum age was recently lowered from 14 to 12 years.¹²⁰

However, there is a clear trend in legal doctrine towards the acceptance of other evidence of the formation of a rule of customary law, according to which also declarations of states, especially when expressed by a large majority of states in an international forum, may be regarded as such evidence. Resolutions and Declarations adopted in the framework of the UN are typical examples thereof.¹²¹

The clearest position taken about the criminal responsibility of children is contained in the Beijing Rules, adopted by the United Nations General Assembly in the form of a resolution in 1985. These rules provide guidance to states in the development of specialized systems of juvenile justice.¹²² In their paragraph 4(1), the Beijing Rules state:

¹¹⁵ See Brownlie, Ian, *Principles of Public International Law*, 5th edition, 1998, at 4.

¹¹⁶ For example in Cyprus, Ireland, Switzerland and Liechtenstein. See Labuschagne, JMT, *Criminal responsibility of children in international human rights law*, 26 South African Yearbook of International Law, 2001, pp. 198-202, at 199.

¹¹⁷ Spain, Belgium and Luxemburg. Labuschagne, *idem* at 199.

¹¹⁸ *T.v United Kingdom*, No. 24724/94 and *V. v United Kingdom*, No. 24888/94, 30 EHRR121 (2000)

¹¹⁹ *V. v United Kingdom*, para 74.

¹²⁰ The Committee on the Rights of the Child expressed its regret about this situation on 6 June 2008.

¹²¹ See e.g. Schachter, Otto, *International Law in Theory and Practice*, (Dordrecht, M.Nijhoff, 1991), at 94 (supporting the view that Resolutions of the UN General Assembly, adopted by an overwhelming majority of States declaring or confirming a principle of law is generally of significant evidential value for the existence of an *opinio juris*).

¹²² Two complementary sets of rules governing juvenile justice were adopted in 1990: The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the United Nations Rules for the

‘In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.’

The term ‘not too low an age level’ is clarified in the commentary to the rules.¹²³ A concrete interpretation of the CRC provisions on juvenile justice and the MACR can be found in General Comment No. 10 of the Committee on the Rights of the Child (2007).¹²⁴ The Committee essentially urges states, where the MACR is set below twelve, to raise this age limit to at least twelve years, but preferably to fourteen or sixteen; to privilege the recognition of only one MACR and to adopt the age of eighteen as the upper limit for the administration of juvenile justice.

With respect to children who actively took part in an armed conflict, the internationally adopted standards on their criminal responsibility are still scarce. Some specific standards were agreed in February 2007, the *Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups* (hereafter ‘Paris’¹²⁵Commitments’), and the *Paris Principles on Children Associated with Armed Forces or Armed Groups* (‘Paris Principles’). These two documents were endorsed at a conference convened by the French government and UNICEF, with participants partly at ministerial level from 58 countries, as well as representatives of intergovernmental organizations and of 30 NGOs. Even though the outcome of this meeting clearly does not have the same status as a UN resolution, it does provide an indication on the evolving consensus about the issues concerned. It should be noted, in particular, that some of the provisions go beyond the agreed provisions of the OPAC, which is a legally binding instrument ratified by more than 120 States. The standard setting value of the Paris Commitments should therefore not be over-estimated.

The process leading to the adoption of the Paris Commitments and Principles was a follow-up to the Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into

Protection of Juveniles Deprived of their Liberty (the JDL Rules). These different sets of rules provide guidance for a three stage process: firstly, social policies to be applied to prevent and protect young people from offending (the Riyadh Guidelines); secondly, establishing a progressive justice system for young persons in conflict with the law (the Beijing Rules); and finally, safeguarding fundamental rights and establishing measures for social re-integration of young people once deprived of their liberty, whether in prison or other institutions (the JDL Rules.)

¹²³ The Commentary recognizes a link between responsibility for delinquent or criminal behavior on the one hand and other social rights and responsibilities on the other, which gives some indication as to the lowest age level. It states: ‘The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities (such as marital status, civil majority, etc.). Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.’

¹²⁴ *Supra*, note 110

¹²⁵ See *supra*, paragraph 1.2f for more details on the relevant OPAC provisions.

the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa” (“the Cape Town Principles”).¹²⁶

The Paris Commitments mention a minimum age of eighteen for recognizing criminal responsibility for international crimes. Participants agreed:

‘(t)o ensure that children under 18 years of age who are or who have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators.’¹²⁷

Criminal responsibility of children under 18 years of age is not totally excluded, but they must be *primarily* considered as victims. The text further recommends that children younger than eighteen ‘should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation.’¹²⁸ It reaffirms the need to seek alternatives to judicial proceedings for children, and to support their involvement in truth-seeking and re-conciliation mechanisms where these exist.¹²⁹ The Paris Commitments thus recommend States not to prosecute (former) child soldiers for war crimes committed while they were under the age of eighteen. This position follows from the main purposes of the Paris Commitments and the Paris Principles, namely to prevent and end the recruitment of children under eighteen years of age by armed forces or groups and their use in armed conflict, and to ensure the reintegration into society of children who are victims of these war crimes.

4.3. ICC and International or Hybrid Criminal Courts and Tribunals

The ICC Statute states that ‘(t)he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.’¹³⁰

On the other hand, the Special Court for Sierra Leone (SCSL) may, according to its statute, prosecute juveniles from the age of fifteen, while respecting certain conditions specified in the Statute.¹³¹ However, the SCSL prosecutor has declined to take criminal action against alleged

¹²⁶ Adopted in 1997, the Cape Town principles were the result of a symposium organised by UNICEF and the NGO Working Group on the Convention on the Rights of the Child to develop strategies for preventing recruitment of children, demobilising child soldiers and helping them to reintegrate into society

¹²⁷ *Supra*, note 99, para 11.

¹²⁸ *Idem*, par 11, last sentence.

¹²⁹ *Idem*, par.12: ‘In line with the Convention on the Rights of the Child and other international standards for juvenile justice, to seek alternatives to judicial proceedings wherever appropriate and desirable, and to ensure that, where truth-seeking and reconciliation mechanisms are established, the involvement of children is supported and promoted, that measures are taken to protect the rights of children throughout the process, and in particular that children’s participation is voluntary.’ These considerations are also included in the Paris Principles, in paragraphs 3.6-3.8.

¹³⁰ Rome Statute, Article 26

¹³¹ Statute of the Special Court for Sierra Leone, Article 7: 1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she

juvenile perpetrators, according to his belief that ‘children under eighteen *per se* are legally not capable of committing a crime against humanity and are not indictable for their acts at the international level.’ Moreover, according to Article 1 of its statute, the SCSL has been mandated ‘*to prosecute persons bearing the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law*’. The Prosecutor of the Special Court considered that this was not the case for children below the age of eighteen. Given the large numbers of children who were directly involved in the hostilities in Sierra Leone,¹³² this is an important precedent..

The Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) does not mention any age limit for prosecution. Although children were certainly affected by the conflict in the region, they were less involved as perpetrators of international crimes than, for example, in Sierra Leone, where the recruitment of child soldiers and their participation in the hostilities was a key feature of the armed conflict. Similarly, the statute of the International Criminal Tribunal for Rwanda (ICTR) is silent on the prosecution of juveniles, and the Extraordinary Chambers in the Courts of Cambodia; the Ad-Hoc Tribunal for Timor Leste and the War Crimes Chamber for Bosnia and Herzegovina do not mention any minimum age limit for criminal responsibility either.

Nevertheless, the explicit minimum age level included in the ICC Statute is a clear indication of an existing consensus among states that , persons should not be tried before international courts for international crimes they allegedly committed before the age of 18. Given the large number of states who have signed and ratified this statute, its provisions reflect a widely supported agreement. The ICC Statute does not by itself constitute sufficient evidence of customary law. However, together with the remaining expressions of an evolving international consensus as outlined above, Article 26 of the ICC Statute can be considered to provide evidence for the emergence of a rule of customary international law on this point. Also the practice of the SCSL, declining to prosecute juvenile offenders confirms the increasing acceptance of that standard, at least as regards international courts and tribunals.

4.4. Children and amnesty

The question also arises whether states are entitled under international law to grant amnesties to children accused or convicted of criminal behavior.. By their very nature, amnesties can only be granted if criminal responsibility exists. Here again, a distinction must be made between

shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

¹³² David Crane, prosecutor at the SCSL, *Strike Terror No More: Prosecuting the Use of Children in Times of Conflict: The West African Extreme*, in Arts and Popovski, *supra* note 112, pp. 119-132, at 121.

domestic crimes and crimes under international law. As demonstrated in paragraph 2, the emerging trend limiting the admissibility of amnesties exclusively concerns international crimes, and in particular those bearing the greatest responsibility for such crimes.

As outlined above, the evolving norms on the prosecution of children are also most advanced with respect to international crimes. Since it is increasingly considered that persons accused of having committed international crimes under the age of eighteen should not be prosecuted and tried before international courts or tribunals, the conclusion seems warranted that the question of granting amnesties does not arise in these cases. The recognition, expressed in the Paris Principles that child soldiers accused of international crimes should primarily be seen as victims of the conflict and of the crimes committed by the adults who recruited them, reinforces this conclusion. Moreover, granting amnesties to children or juveniles would contradict the trend that amnesties may *not* be granted for international crimes at all.

On the other hand, it could also be argued that granting amnesties to children would be consistent with the notion that they should primarily be seen as victims. The amnesty would result in freedom from prosecution before *national* courts, which might be considered as a solution ‘in the best interest of the child’. However, this raises a number of questions, such as: is it always in the best interest of the child not to be held accountable for acts committed, for example, at the age of adolescence? Would such amnesties also apply to accountability mechanisms within an adequate juvenile justice system? More generally: since amnesties are by definition granted by national governments, should it indeed be left to the discretion of each State whether to grant amnesties to children (or to persons accused of having committed international crimes under the age of 18), or if not, to prosecute them before their national courts?

Since no international legal norm has evolved to date on the granting of amnesties to children, further reflection and discussion of the abovementioned elements and other related questions could contribute to identifying its advantages and disadvantages.

4.5. Lack of compliance with international norms: the example of Omar Khadr

In practice the international norms, including the legally binding rules on juvenile justice, are insufficiently applied and often violated. A clear example thereof is the *Omar Khadr* case. The accused, a Canadian citizen, was charged before a US military commission with crimes committed in Afghanistan at the age of 15. The conditions under which Omar Khadr was detained at Guantanamo Bay between 2002 and 2007 point to a flagrant violation of existing international –as well as national- norms on juvenile justice and on the treatment of child soldiers.¹³³ Both US and international law allow for the detention of juveniles only as a last resort; they require educational opportunities and to be housed separately from adults, as well as

¹³³ See Human Rights Watch, *The Omar Khadr Case: A Teenager Imprisoned at Guantanamo*. June 2007, available at www.hrw.com (pointing out the US failure to implement both international and US juvenile justice standards).

a prompt determination of cases involving children. Yet, Omar Khadr was incarcerated with adults; denied educational opportunities and allegedly subjected to abusive interrogations. He was detained for two years before having access to an attorney and three years before he was charged. At a hearing held before a military commission in February 2008, the lawyers representing the US government argued that Congress has given the military commission the power to try people of any age and that prisoners at Guantanamo do not have all the rights accorded to them under international or US constitutional law. It would go beyond the scope of this paper to further discuss the details of this case, but the facts clearly show that most of the applicable legal norms as outlined in this paper are not respected.

It should be underlined that most of the international norms, including the legally binding rules set out in the first paragraphs of this paper, are not or not fully complied with. Many examples could be mentioned of States violating these rules, as is evidenced by the numerous UN resolutions calling for an end of these violations; the cases tried before international and hybrid courts; and the concluding observations of, for example, the Committee on the Rights of the Child. The reason why the *Omar Khadr* case is specifically mentioned here, is the flagrant violation of some basic legal norms protecting children, even of those which *are* also recognized under national law of the State concerned.

4.6. Some conclusions and unresolved questions

The following conclusions may be drawn from the analysis presented above.

- Child soldiers accused of having committed an international crime under the age of eighteen should primarily be regarded as victims of a war crime, namely the conscription or enlistment of children into armed forces or groups and their use to actively participate in hostilities.
- More generally, the analysis showed that there is no basis in international conventions prohibiting criminal responsibility of children in absolute terms; nor has a minimum age for criminal responsibility for domestic crimes been agreed in an international convention;
- However, based on the ICCPR and in particular the CRC, states have an obligation under international human rights law to establish and apply juvenile justice systems to children accused of having infringed the penal law, and to seek alternatives to judicial proceedings, promoting the child's reintegration in society. They also have an obligation to agree on a minimum age for criminal responsibility.
- There are signs of an evolving international consensus with regard to children who were conscripted or enlisted into armed forces or groups to actively participate in an armed conflict and who are accused of having committed *international crimes* before the age of eighteen, shall primarily be considered as victims and, in any case, shall not be tried by an international criminal court or tribunal. Their case should be considered within their

own state, where priority must be given to the demobilization of these children; their reintegration into society through, in particular, education and vocational training.

- Children under the age of eighteen who were recruited by an armed force or group and used to take part in an armed conflict and who are accused of having participated in an international crime, should benefit either from an adequate juvenile justice system, or preferably from alternative accountability mechanisms, for example in the framework of a truth-seeking and reconciliation mechanism.
- Considering the relatively scarce evidence of state practice supporting these standards, even in the form of UN resolutions, it is too early to consider them as rules of international customary law. Nevertheless, the main contours of these elements are included in the CRC, a legally binding instrument with a nearly universal ratification. Moreover, the interpretation of the relevant rules of the CRC and the Beijing Rules by the Committee of the CRC constitutes authoritative guidance for states.
- Therefore, states should be strongly encouraged to bring their national laws and practice in line with these. By doing so, they will reinforce the standards themselves by adding more evidence of uniform state practice and of *opinion juris*. The confirmation of these standards and their refinement in future resolutions will ultimately lead to the formation of binding rules of customary international law.

The examination of the international legal rules and the emerging standards on criminal responsibility of children for their alleged participation in international crimes has shown that the normative framework is far from complete. The requirement of the CRC for States to agree on a MACR still needs to be fulfilled, but considering the differences among States in their national legislation, important efforts are needed to achieve this goal.

With regard to the criminal responsibility of children for international crimes, efforts of standard-setting are focusing on the situation where children who have been recruited by armed forces or groups or who have been used to participate in hostilities, have allegedly committed war crimes themselves. The most specific recommendations in this regard are the Paris Principles and Commitments, which are not legally binding and represent the opinion of around one third of all States plus a considerable number of NGOs and international organizations. Whereas the OPAC does have a legally binding status and has been ratified by an important number of States, it focuses on the recruitment and use of children by armed forces or groups and does not specifically address the issue of criminal responsibility of the children themselves.

The recommendations of the Paris Commitments would need to be ‘upgraded’ to the UN level with a view to broadening their basis and to reinforce their status. States supporting these Commitments should therefore undertake action to discuss them in the appropriate forum with the aim to adopt them as Principles or Guidelines.

Moreover, the following points could be considered for further discussion among States and interested partners, in particular child protection agencies and NGOs:

- How can the tension present in the Paris Commitments be resolved between, on the one hand, the notion that children cannot be held responsible and prosecuted for war crimes committed under the age of eighteen since they should primarily be considered as victims, and on the other hand, the idea that they could nevertheless be held accountable at the national level through juvenile justice systems?
- At the same time, how can ethical ambivalences and legal contradictions be addressed on how courts and truth commissions balance out the evolving responsibilities of the adolescent between 15 and 18 years, with the right to protection for all children under the age of 18?. Are the standards of the CRC and other instruments related to juvenile justice really appropriate for regulating rights and responsibilities of child soldiers?
- Are the best interests of the child taken sufficiently into account in the existing instruments and evolving norms regarding the (non-) accountability of children in the above mentioned age group, and in general? What are the criteria to determine this ‘best interest’ in the particular situation of children who were recruited or used in an armed conflict?

5. CONCLUDING REMARKS

This paper examines the main sources in international law related to the obligation of states to criminally prosecute and try persons accused of international crimes. It argues that such an obligation certainly exists for states with respect to crimes committed within their own territory. The obligations to prosecute alleged authors of international crimes committed abroad (based on the principles of active or passive nationality or universal jurisdiction) vary from one crime to the other, as outlined in paragraph 1. It underlines that States can only comply with their international obligations to prosecute if they have incorporated the international definitions of crimes such as genocide, war crimes, crimes against humanity and torture into their national penal law. Only then can national prosecutors and courts initiate criminal prosecutions and proceedings against persons accused of these heinous crimes. This is especially important since the ICC and other international courts and tribunals can only take up a small number of cases against those bearing the greatest responsibility for the crimes. At the same time, national prosecutions require the existence of sufficient institutional capacity as required for investigations and criminal proceedings. Even if such capacities and institutions exist, it is practically impossible to prosecute all those who may have participated in serious crimes. Some degree of selectivity will always be required. In this regard, a combination between prosecutions, truth commissions and other accountability mechanisms could balance the need for accountability and the practical limitations of ‘prosecuting all’.

International crimes targeting children are of particular concern to the international community of states. The unlawful recruitment of children by armed forces or groups or using them to actively participate in an armed conflict constitute war crimes, both under conventional and, as established by the SCSL, also under customary international law. These crimes are also the basis of the first two indictments presented to the ICC, and of the first case to be tried by that Court,

the *Lubanga* case. This confirms the priority attached at the international level to the prosecution of the alleged perpetrators of these crimes against children.

The paper also indicates what the consequences may be of non-compliance with a state's duties in terms of prosecuting international crimes. One possible consequence is prosecution of those persons bearing the greatest responsibility for the crimes by the International Criminal Court (if the state is a party to it) or prosecution by a third state based on its duty or right under international law to do so. Moreover, victims may lodge a complaint before a regional human rights court for violation of their right to an effective remedy, which may result in a judgment requiring the state to prosecute those accused of serious human rights violations and to grant substantial reparations. A state may consider it impossible or inappropriate to initiate criminal investigations and prosecutions immediately after the end of a conflict. Reasons for such a decision may be the lack of a functioning, independent judiciary, and/or security problems. It may also consider a combination of judicial and non-judicial means of accountability, including truth commissions and local approaches to justice and reconciliation. Regardless which choices are ultimately made, those responsible for shaping the contours of the transitional justice framework in a given country, should be aware that the possibility of the consequences indicated above of a failure to prosecute at least those bearing the greatest responsibility for atrocities, persists.

On the permissibility of amnesties, the paper examines a recent trend in national and international jurisprudence. While there is no firmly established rule of international law expressly prohibiting states to grant them, amnesties for international crimes and serious human rights violations do violate the duty of states to prosecute and punish persons who are responsible for such acts. Indeed, a consistent case-law is established by regional human rights courts which is supported by the authoritative Views of the UN Human Rights Committee, according to which a failure to criminally investigate and prosecute such serious acts amounts to a violation by the state concerned of its obligations under the relevant human rights conventions. These include the obligation to guarantee an effective remedy to the victims of serious human rights violations (such as the right to life, the freedom from torture and the freedom from unlawful detention) or their relatives.

Moreover, a trend can be seen in the amnesties granted over the last ten years, which increasingly exclude their applicability to genocide, war crimes and crimes against humanity, including crimes against children falling under these definitions.

The paper also examines whether under international law, children may also be prosecuted when they are accused to have participated in the commission of international crimes before reaching the age of eighteen. It especially analyses the specific international norms related to children who were unlawfully recruited by armed forces or groups to take part in an armed conflict. It may be concluded that:

- Rather than a duty to prosecute juveniles alleged to have participated in the commission of an international crime, an increasing number of international norms -ranging from

legally binding rules to recently formulated ‘emerging standards’-, require states *not* to prosecute these juveniles, at least not according to the same procedures and in the same conditions as adults;

- Indeed, states have an obligation under international law, in particular the CRC, to establish and apply, at the domestic level, juvenile justice systems to children accused of having infringed the penal law, and to seek alternatives to judicial proceedings. They also have an obligation to agree on a minimum age for criminal responsibility (MACR). .
- An international consensus is clearly evolving with regard to children accused of *international crimes*, in particular child soldiers. Children accused to have committed such crimes under the age of eighteen shall primarily be seen as victims and, in any case, may not be tried by an international criminal court or tribunal. Their case should be considered within their own state, where they should benefit either from an adequate juvenile justice system, or preferably from alternative accountability processes. Child soldiers accused of having committed an international crime under the age of eighteen should primarily be regarded as victims;
- In practice, the existing, legally binding international norms on juvenile justice are insufficiently applied and often violated. The *Omar Khadr* case is an example of the flagrant violation of existing international –as well as national- norms on juvenile justice and the treatment of child soldiers.¹³⁴

6. RECOMMENDATIONS

States should:

- Become parties to and ratify all international instruments on international crimes against children, including the OPAC;
- Ensure that the definitions of international crimes against children as included in these international conventions and other instruments, are incorporated in their national penal law;
- Establish jurisdiction over persons who may be accused of such crimes against children at least on the basis of territoriality, but where possible also extraterritorial jurisdiction, based on active and passive nationality;

¹³⁴ See Human Rights Watch, *The Omar Khadr Case: A Teenager Imprisoned at Guantanamo*. June 2007, available at www.hrw.com (pointing out the US failure to implement both international and US juvenile justice standards).

- Take the necessary measures to ensure that their national judicial system, their institutions and the capacities required to undertake investigations; to initiate prosecutions and to conduct trials of persons responsible for these crimes are sufficiently developed and effective;
- Ensure full and unconditional cooperation with the ICC or other competent international courts or tribunals, when they undertake investigations and prosecutions of persons who may be accused of international crimes against children;
- When considering the various options in a context of transitional justice, absolutely and unconditionally refrain from granting amnesties to persons who may be responsible for international crimes against children. Even where amnesties may be considered as part of a peace negotiation, international crimes, in particular genocide, war crimes and crimes against humanity, should always be explicitly excluded from the outset;
- Contribute to further develop the international standards on a minimum age of criminal responsibility taking account of the recommendations made by the Committee on the Rights of the Child;
- Undertake action to, and participate in an ‘upgrading’ of the Paris Principles and the Paris Commitments to a United Nations level, such as UN guidelines or principles.

Child Protection Agencies, including UNICEF and NGOs should:

- Actively support the efforts of States to comply with the above mentioned recommendations, including through their field offices;
- Further reflect on and develop proposals on how the international standards on a MACR, as well as on the recruitment and use of children in armed conflict, in particular the Paris Commitments and Principles, may be improved and ‘upgraded’ to UN guidelines or principles;
- In this context, also reflect on and propose solutions for the unresolved issues identified in this paper related to the accountability of adolescents who participated in war crimes at the age between 15 and 18 years, considering whether the current norms and recommendations (including the Paris Principles and Commitments) adequately address the best interests of the child, also for this age group;
- Regarding *amicus curiae* intervention before international courts and tribunals adjudicating international crimes against children, CPAs should consider whether some form of cooperation or consultation among legal experts, interested CPAs and UN

agencies would be desirable in drafting such briefs, in order to ensure an adequate coverage of the legal issues at stake.