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PROSECUTING INTERNATIONAL CRIMES AGAINST CHILDREN: THE LEGAL FRAMEWORK

Christine Bakker

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This paper presents an analysis of the evolving international legal norms related to the prosecution of international crimes against children, and addresses some questions on the criminal responsibility of children themselves who, in particular as child soldiers, were forced to participate in the commission of such crimes. This research paper was funded by the Government of France.

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Correspondence should be addressed to:

UNICEF Innocenti Research Centre
Piazza SS. Annunziata, 12
50122 Florence, Italy
Tel: (+39) 055 20 330
Fax: (+39) 055 2033 220
Email: florence@unicef.org

Children and Transitional Justice Working Paper Series

The Children and Transitional Justice Working Paper Series is intended to generate dialogue and consensus, and to better inform children's protection and participation in ongoing or planned transitional justice processes in diverse country situations. Based on experience, the papers document and identify challenges, dilemmas and questions for further debate and formulate recommendations to better protect the rights of children involved in transitional justice processes.

The research conducted has created broad interest and visibility, helping establish a child rights-based approach to transitional justice that addresses advocacy, policy and programme concerns within UNICEF and among partners. Key areas of focus include:

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The identification of topics and authors in this Working Paper Series was undertaken in the context of strategic partnerships with the Human Rights Program at Harvard Law School, and the International Center for Transitional Justice (ICTJ). The review of the Series was guided by a peer review oversight panel, chaired by Jaap Doek. A network of practitioners, academics, legal experts and child rights advocates participated in the peer review. The Series was initiated and overseen by Saudamini Siegrist, with the support of Ann Linnarsson.

An Expert Discussion on Children and Transitional Justice was convened by UNICEF Innocenti Research Centre (IRC) in June 2008 to provide comments to individual authors and to assess the range and coverage of the Series. A subsequent conference on Children and Transitional Justice was jointly convened by the Human Rights Program at Harvard Law School and IRC in April 2009 in Cambridge, MA USA.

UNICEF IRC's research on children and transitional justice was generously supported by the Italian Ministry of Foreign Affairs (Ministero degli Affari Esteri, Cooperazione allo Sviluppo) and by the Government of France.

This series of Working Papers supports and complements the publication *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, edited by Sharanjeet Parmar et al., published by the Human Rights Program, Harvard Law School, Cambridge, MA, March 2010.

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PROSECUTING INTERNATIONAL CRIMES AGAINST CHILDREN: THE LEGAL FRAMEWORK

Christine Bakker, Ph.D.[a]

[a] Research Fellow at the European University Institute, Florence, Italy. E-mail: Christine.Bakker@eui.eu.

Summary: States in post-conflict situations are faced with extremely difficult choices as they try to find the right balance between judicial and non-judicial means to improve accountability for crimes committed during the conflict and to contribute to national reconciliation. These choices are made on the basis of the specific circumstances of each state. Nevertheless, due consideration should be given to the duties imposed on states by international law. This paper presents a short overview 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. It also reviews international norms regarding children who may be accused of having participated in the commission of such crimes themselves – for example, as child soldiers – and identifies some outstanding questions regarding their criminal responsibility for such acts.

Children are widely affected by atrocities as victims and 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 15 years is also a crime under customary international law. The Rome Statute for the International Criminal Court also recognizes criminal responsibility for under-age recruitment. This paper examines the implications of these developments and addresses some questions raised in the Lubanga and Katanga cases before the International Criminal Court. The fact that the very first cases to be tried by that court 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 to punish their perpetrators.

Analysis of these recent developments and the evolving norms of international law and state practice show that states have a duty to prosecute persons accused of having committed international crimes if these acts occurred within their own territory. The obligations to prosecute alleged perpetrators 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 that 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 no firmly established rule of international law expressly prohibits states from granting 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 has emerged over the last 10 years of excluding application of amnesties to genocide, war crimes and crimes against humanity. This paper argues that states should reinforce these trends and refrain from adopting amnesties, in particular for crimes against children such as their recruitment in armed forces or groups. This will in turn reinforce state practice and may improve accountability and respect for the rule of law.

The paper thus focuses on how international law regulates the prosecution of adults accused of crimes against children. It acknowledges that international norms are also evolving with regard to children,

viiincluding child soldiers, who are accused of having participated in the commission of international crimes themselves. There is a consensus among states that these children should be considered primarily as victims, because they are often illegally recruited and they bear only limited, if any, responsibility if they commit such serious crimes. The paper briefly addresses the main contours of the normative framework regarding the criminal responsibility of children for their alleged participation in international crimes. It highlights some unresolved questions and points for discussion on this issue which, in a sense, represents 'the other side of the coin' of the main topic of this paper.

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

Acknowledgements: 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, it at least addresses the main issues, though further adjustments will certainly be required.

I would like to thank the UNICEF Innocenti Research Centre and its former Director, Marta Santos Pais, and Saudamini Siegrist for the opportunity to make this contribution to the Publication Series on Children and Transitional Justice. The discussions with Saudamini and her critical remarks have been extremely stimulating. I am also grateful to the International Center for Transitional Justice for its support of the Series and in particular to Marieke Wierda for her comments in the early stages of the paper's drafting.

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Contents

ABBREVIATIONS

CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
FPLC	Forces patriotiques pour la libération du Congo
HWR	Human Rights Watch
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
MACR	Minimum age for criminal responsibility
NGO	Non-governmental organization
OPAC	Optional Protocol on the involvement of children in armed conflict
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UPC	Union des Patriotes Congolais

1. INTRODUCTION

After the end of an armed conflict, the dilemmas of transitional justice arise. Governments of states in post-conflict situations are faced with many demands, ranging from public trials to revenge; from the need for truth to the affirmation of collective innocence.[1] Officials need to decide on the establishment and role of judicial and non-judicial accountability mechanisms, which can include truth commissions or local approaches to justice and reconciliation. They have to decide whether amnesties should be granted to persons who were directly involved in atrocities against the population. If children were forced to participate in the violence, they may address the issue of criminal responsibility of alleged child perpetrators. Since the end of the 1980s states and scholars have increasingly supported a more integrated approach to transitional justice; prosecution and punishment may be part of the process, albeit in combination with other structures, including truth-seeking and reconciliation mechanisms.[2]

While the policy decisions are taken at the national level, international law nevertheless frames the options. Governments and truth and reconciliation commissions (TRCs) therefore need to be informed about the status and evolution of the relevant international norms. Similarly, child protection agencies supporting governments in the process of transitional justice should be aware of recent developments in international law and state practice.

This working paper aims to contribute to this process by presenting a concise overview of the most relevant norms of international law and the main trends in state practice. In particular, it addresses 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 to try them before their national courts? Are amnesties for such crimes permissible under international law, and what is the current practice of states? Finally, the paper briefly reviews evolving international rules regarding the criminal responsibility of children themselves for their participation in acts amounting to international crimes, highlighting some unresolved questions requiring further discussion. The paper concludes with 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 Court are complementary to national judicial actions. States still have the primary responsibility for the repression of international crimes.[3]

[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.

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

States are free to decide which jurisdictional principles to apply in 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 person 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 or her, and therefore the presence of the accused on the territory is a precondition for the establishment of jurisdiction. 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 and the nationality of the victim and the perpetrator, and even irrespective of the fact that the perpetrator is in custody or present in the state.[4]

An exhaustive analysis is beyond the scope of this paper; it aims to present the main trends current in international law.

2.1. The Obligation to Prosecute Perpetrators 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 customary international law or solely based on it.
The main international conventions that contain an explicit obligation for States to prosecute are the 1948 Genocide Convention;[5] the 1949 Geneva Conventions[6] and the Additional Protocols of 1977; the 1984 Convention against Torture;[7] and the International Convention for the Protection of All Persons from Enforced Disappearance.[8] Moreover, the Statutes of the ad hoc tribunals for former Yugoslavia and Rwanda and the hybrid criminal courts and

[4] 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), no. 3, pp. 589-595.
[5] Convention on the Prevention and Punishment of Genocide, UNGA Resolution 260 A (III) of 9 December 1948, 78 UNTS 277.
[6] 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.
[7] 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.
[8] Adopted on 20 December 2006.

tribunals for Sierra Leone, Cambodia and Timor-Leste (among others, also establish a duty to prosecute international crimes. These Statutes primarily establish this duty for the relevant court or tribunal itself. As for the International Criminal Court, the Preamble of the Rome Statute explicitly confirms the pre-existing conventional obligations of states to prosecute international crimes and reinforces these obligations through its principle of complementarity.[9]

As a precondition for prosecution of such international crimes, the States Parties to these conventions are bound to incorporate the international definitions of these crimes in their national penal legislation and to establish specific penalties for these offences commensurate with their serious nature.

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 transferring children of the group to another group.'[10] However, the obligation to prosecute is limited to prosecution by a competent court in the state where the act was committed (principle of territoriality[11]) or by an international penal tribunal.[12] Two other limitations to this obligation exist: first, the duty to prosecute exists only when the specific intent of the perpetrator to destroy a particular group of people in whole or in part is established, and second, 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.[13]

It is generally accepted that the obligations of the Genocide Convention have acquired the status of customary international law, and several scholars even accept the peremptory nature of these obligations.[14] This conclusion is based on interpretations given by the International Court of Justice (ICJ) in two instances.[15] It is generally considered that states also have the

[9] *Supra*, note 10.
[10] 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.
[11] Comment added.
[12] Article VI.
[13] 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.
[14] 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.
[15] ICJ, Advisory Opinion, *Reservations to the Genocide Convention,* 1951, p.23, where it states that 'Les principes qui sont à la base de la convention sont des principes réconnus par les nations civilisées comme obligeant les Etats même 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 para. 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.

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*.[16]

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 also permits a State Party to establish and exercise its jurisdiction based on the passive nationality principle, if that State considers it appropriate.'[17] Moreover, the Convention against Torture 'does not exclude any criminal jurisdiction exercised in accordance with internal law'.[18] The Convention therefore allows States to adopt even broader legislation 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 accept the existence of a customary or even peremptory obligation to prosecute persons accused of torture.[19] In any case, the *jus cogens* status of the prohibition of torture was recognized by the International Criminal Tribunal for the former Yugoslavia in *Furundžija*[20] *and Pinochet (III).* Moreover, the adoption of a series of United Nations 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.[21]

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 or inhuman or degrading treatment or punishment is also included in the Convention on the Rights of the Child (CRC) (article 37(a)). Even though the CRC does not establish an

[16] 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.'

[17] 1984 Convention against Torture, *supra* note 10, article 5(1).

[18] *Idem*, article 5(3).

[19] 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 69th Conference of the International Law Association* (2000), p. 408.

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

[21] 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.

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 States Parties to prosecute persons accused of the crimes it defines, 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',[22] and State Parties also have the right to exercise universal jurisdiction.[23] The principle *aut dedere aut iudicare* is included in the above-mentioned Convention on Enforced Disappearence as well; on this point the same legal regime applies as that 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 article 25. The question of whether a duty to prosecute perpetrators of enforced disappearance is recognized as international custom has not been clearly resolved in legal doctrine or through judicial decisions.

2.1.4 Crimes against humanity

No international convention exists regarding crimes against humanity specifically. Moreover, as for the other international crimes considered here, there is little evidence of a general, uniform and consistent practice by states 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 perpetrators of such crimes must be criminally prosecuted and tried.[24] Moreover, a number of official declarations of states confirming this rule have been adopted in international fora.[25] According to the definition 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, particularly rape, sexual slavery, enforced prosecution, forced pregnancy or any other form of sexual violence of comparable gravity.[26] Rape and sexual slavery of girls are among the charges in the case *Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui* before the ICC.[27] Moreover, in the

[22] International Convention on the Protection of All Persons from Enforced Disappearance, Article 9(1)c.
[23] Article9(3) states: 'This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.'
[24] Rome Statute, article 7.
[25] 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. No. 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).
[26] Rome Statute, article 7(g).
[27] See *infra* note 63 and accompanying text for more details on this case.

jurisprudence of the International Criminal Tribunal for the former Yugoslavia (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 20 years) and the very young age of another (about 12 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". [28]

State practice in terms of national prosecutions for crimes against humanity is rather limited, and most examples 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 1970s.[29] Moreover, there has been a recent trend in national prosecutions for crimes against humanity, 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 occurred in Argentina and Chile.[30] Other judicial decisions applying this reasoning were adopted in Spain[31] and France.[32]

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 perpetrators of "grave breaches" of these Conventions,[33] referring to the crimes listed as such.[34] Grave breaches may include crimes

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[28] 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, *International Criminal Accountability and the Rights of Children* (Hague Academic Press, 2006) 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 para. 874, and from the Appeal Judgment, at para. 355.

[29] *Scilingo*, Audiencia Nacional, judgment 16/2005, 19 April 2005. Available at www.derechos.org/nizkor/espana.

[30] 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.

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

[32] *Cour de cassation*, *Ely Ould Dah* case, 23 October 2002, Bull. Crim. No. 195, p. 725, summarized in www.universaljurisdiction.info/index/Cases/Cases/France-Ely Ould Dah Case/Case Doc

[33] 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 (...)'.

[34] These grave breaches include willful killing, torture or inhumane treatment, including biological experiments, willfully 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, willfully 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

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, and universal jurisdiction.[35] There are two limitations to these far-reaching obligations to prosecute under the Geneva Conventions. On the one hand, these 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.[36] 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, broadly formulated as to include universal jurisdiction, only concerns 'grave breaches'. For other violations of the Geneva Conventions, including those that 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 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.[37] 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* [38] which upheld the view that the provisions of international humanitarian law should be applied in the same way to international and non-international armed conflicts,

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Geneva Convention; article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention.

[35] 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.'

[36] 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).

[37] 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 .

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

punishing their violation.[39] However, to date this view cannot be considered to have become a firm legal norm.

2.2 War Crimes against Children: Recruiting children into armed forces/groups and using them in armed conflict

Significant developments have taken place in international judicial decisions with regard to these particular war crimes. The recruitment of children by the parties to an armed conflict and the use of children 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 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 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."[40] The Rome Statute and the Statute of the Special Court for Sierra Leone (SCSL) also set this minimum age at 15 years.[41]

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 groups[42])" or "using them to participate actively in hostilities".[43] 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 18 years for compulsory recruitment by armed forces and for children's active participation 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 18 years of age to take a direct part in hostilities; compulsory recruitment is

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

[40] Article 77 (Protocol I, on international armed conflicts) and article 4 (Protocol II, on non-international armed conflicts).

[41] 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.

[42] *Idem;* the term 'and groups' is only included in article 8(e)(vii), concerning non-international armed conflicts.

[43] *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

banned below 18 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.[44]

For armed groups – not the regular army but, for example, rebel groups – States shall take measures to ensure that below the age of 18 there will be no recruitment (either compulsory or voluntary) or direct participation in hostilities.[45] The Committee on the Rights of the Child, which is also mandated to monitor 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 has also held that States Parties should establish territorial jurisdiction and extraterritorial jurisdiction based on active and passive nationality for these offences.[46]

The minimum age of 18 for forced or compulsory recruitment for use in armed conflict is also included in Convention No. 182 of the International Labour Organization 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* (emphasis added) of anyone under the age of 18. 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 of War Crimes against Children before International Criminal Courts

The Special Court for Sierra Leone (SCSL) was the first international (or 'hybrid') criminal tribunal to try persons accused of war crimes against children. The International Criminal Court (ICC) has launched the proceedings in the first case concerning war crimes and crimes against humanity against children, the *Lubanga Case*, in January 2009, while others are in their preparatory stage. Both the SCSL Trial Chamber, and the ICC Pre-Trial Chamber, which has confirmed the charges in the *Lubanga Case* before the start of the trial itself, have made an important contribution to clarifying the legal definitions of the alleged crimes against children.

2.3.1. The Special Court for Sierra Leone

In a landmark decision of May 2004, the SCSL held that the conscription, enlistment and use in hostilities of children under the age of 15 constitute crimes under customary international law. [47] The Appeals Chamber considered that there was sufficient evidence of state practice

[44]. Optional Protocol on the Involvement of Children in Armed Conflict, articles 1 to 3. To date, this Protocol has been ratified by 123 States.
[45] Idem, article 4.
[46] 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).
[47] 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

and *opinio juris* to conclude that these acts attracted individual criminal responsibility since at least November 1996, when the Special Court's temporal jurisdiction began.[48] 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 15 to take part in an armed conflict, also applies to states that have not signed or ratified the above-mentioned international instruments codifying this rule. The SCSL has convicted several persons for this crime,[49] and other cases including the same charge are under consideration.[50]

The SCSL has contributed to the interpretation of the legal term 'active participation in the hostilities', in the *Armed Forces Revolutionary Council* case,[51] 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.[52] 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".[53] As will be shown below, the ICC Pre-Trial Chamber has also adopted an extensive interpretation of this term.

2.3.2. The International Criminal Court

International recognition of the abhorrence of the crime of recruiting and using children in armed conflict, and the determination to prosecute their perpetrators, are also confirmed by the ICC. 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

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No Peace without Justice and others, of 21 January 2004. For a detailed analysis of this case see Smith, *supra*, note 45.

[48] *Hinga Norman*, paras. 52-3. *Opinio juris* ("an opinion of law") is the belief that an action was carried out because it was a legal obligation. In international law, *opinio juris* is the subjective element which is used to judge whether the practice of a state is due to a belief that it is legally obliged to do a particular act.

[49] See SCSL-04-14-T, Judgment of 2 August 2007; SCSL-2004-16-PT, Judgment of 20 June 2007.

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

[51] *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.

[52] *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.

[53] *AFRC* Judgment, *supra* note 52, at para 737; these examples also fall within the range of activities mentioned in the *Lubanga* decision, ICC-01/04-01/06, 29 January 2007, para. 261-263, available at www. Icc-cpi.int. 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).

Patriotes Congolais (UPC))[54] and using them to participate actively in hostilities (…)."[55] The Pre-Trial Chamber distinguishes between the alleged criminal responsibility for these crimes in the context of an international armed conflict 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 basis for two separate charges, with respect to different periods of time.[56]

In this decision, the Pre-Trial Chamber also clarified the terms 'conscription' and 'enlistment'. Notably, the decision refers to specific human rights instruments – including the CRC, OPAC, the above-mentioned 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".[57] This indicates a willingness to overcome the traditional reticence of legal scholars and judges to consider norms deriving from different bodies of international law, particularly international humanitarian law and human rights law, to be mutually supportive if they pursue the same ultimate goals.

The ICC Pre-Trial 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 *Lubanga* decision on confirmation of charges takes the same approach as the SCSL 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 other's 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 *Lubanga* case started on 26 January 2009. An *amicus curiae* (friend of the court) 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. Upon the request by 27 victims, ICC Trial Chamber I decided on 14 July 2009 to modify the legal characterization of facts so as to include the crimes of sexual slavery and inhuman or cruel treatment. However, on 8 December 2009 this decision was reversed by the Appeals Chamber, which highlighted that it is the responsibility of the Prosecutor – not the Trial Chamber – to investigate crimes under the Court's jurisdiction and to proffer charges against suspects. The trial resumed on 6 January 2010.

[54] Comment between brackets added.
[55] *Lubanga*, *supra* note 54, conclusion, available at www. Icc-cpi.int.
[56] 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 Prosecution had based its case solely on the alleged commission of this crime in a non-international conflict is quite controversial.
[57] *Lubanga*, *supra* note 54, at para 245.

In the case *Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui*[58] 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 15 years to participate actively in hostilities is one of the main charges in this case as well. These charges were confirmed in September 2008.[59] 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 15 years when they were used for activities amounting to such participation.[60] The charges of sexual slavery and rape were also confirmed, both as crimes against humanity and as war crimes. The Pre-Trial 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".[61] The trial of this case started on 24 November 2009.

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

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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 United Nations General Assembly calling for the prevention, termination and criminalization of unlawful recruitment of children in armed conflict;[62] and the Cape Town Principles and the Paris Principles and Commitments[63] are all evidence of an increasingly strong international consensus, and arguably of an emerging *opinio juris*, recognizing that the suppression and criminal prosecution of these crimes is indeed required.

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[58] 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).

[59] ICC-01/04-01/07, 30 September 2008, Pre-Trial Chamber I.

[60] Idem, at para. 251-2. This condition is also included in the ICC Elements of Crimes.

[61] 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.

[62] 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 and Armed conflict: Report of the Secretary-General*; SC Res. 1539 (2004); SC Res. 1612 (2005).

[63] See below, para. 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 18 years.

Other expressions of support for such an evolving consensus are the OPAC and the concluding observations of the Committee on the Rights of the Child on State Party reports. This Committee has encouraged States, on 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";[64] and has recommended States to a) adopt and implement legislation criminalizing the recruitment and involvement of children in hostilities contrary to the Optional Protocol; and 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 Party.[65] 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. However, the Concluding Observations support the principles laid down in the OPAC and may contribute to a changing practice of States on these points.

The overview in the preceding paragraphs 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 considered,[66] the duty to prosecute based on active nationality is only explicitly foreseen for grave breaches of the Geneva Conventions as well as 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; whereas 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, states' obligations regarding 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, for national prosecutors and courts to comply with these obligations under international law, the international definitions of these crimes must be 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 ensured, or not sufficiently so. Depending on each state's constitutional system for 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.

[64] Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of the Congo, CRC/C/COD/CO/2, January 2009, at para. 70.
[65] Concluding Observations: Tunisia, CRC/C/OPAC/CO/TUN/1, 29 January 2009, at para. 14.
[66] The exact obligations for the prosecution of crimes against humanity are necessarily less clear since they are solely based on customary law.

Moreover, the question arises as to the value 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 that has just stepped down after concluding a peace agreement?

2.4 Legal Enforcement of the 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 ICTY persons accused of ordering genocide at Srebrenica.[67] Apart from the limitations related to the acceptance of jurisdiction of the ICJ, however, states will be extremely reluctant to lodge a complaint against another state for its failure to prosecute individuals.

In practice, non-compliance with an international obligation to prosecute will instead 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: first through a referral by a State Party to the ICC Statute; second by a referral from the United Nations Security Council and third at the initiative of the ICC Prosecutor (*proprio motu).*[68] If an investigation and a subsequent prosecution are launched, the state where the international crime occurred is legally bound under the ICC Statute to cooperate with the Court.[69] 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).[70] As 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, the International Criminal Tribunal for Rwanda (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.

Alternatively, third states may launch their own criminal proceedings based on the principles of active or passive nationality or universal jurisdiction, as outlined above. 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

[67] ICJ, Judgment of 26 February 2007, paras. 439-451 and operative para. 6.
[68] Rome Statute, articles 13, 14 and 15. *Proprio motu* means 'by its own motion, acting with one's own initiative'. Here it refers to the competence of the ICC Prosecutor to initiate investigations and prosecutions at his own initiative.
[69] Rome Statute, articles 86-96**.**
[70] UNSC Res. 1593 of 31 March 2005.

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 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 that supports the possibilities of enforcing 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, to freedom from torture and to freedom from illegal detention – is increasingly considered to form part of the general obligation of states to guarantee and ensure the rights established under 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'.[71] 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.[72] The same view has consistently been formulated by the United Nations Human Rights Committee.[73] Thus the enforcement of rights included in human rights instruments may ultimately lead to the enforcement of obligations included in other international conventions, including those falling within the scope of international humanitarian law.

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

[71] 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.

[72] 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.

[73] 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).

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 perpetrators.[74] States have used this instrument throughout history[75] following armed conflicts, revolution or civil unrest, in order to 'heal' the wounds in society and facilitate national reconciliation.[76] 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 of granting amnesties, mostly a power conferred upon the Executive or the Legislature, is foreseen under national law. Many amnesty laws adopted in the aftermath of an international or internal armed conflict are still in force.[77] States still consider amnesties a useful instrument as part of peace negotiations and to help ensure some stability in the mostly fragile post-conflict situation. By definition, amnesties result in shielding 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 the Second World War, over 420 amnesty processes have been introduced in different parts of the world, of which 66 were initiated between January 2001 and December 2005.[78] These figures indicate that States have not been dissuaded from using this tool by 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. Even though each amnesty law is tailored to the specific situation of the state(s) concerned, and to the nature and the parties of the underlying armed conflict, some general features of different types of amnesties adopted in various regions can be distinguished.

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 (Chile, Peru, Ghana) or only after the TRC completed its work (Argentina, Timor-Leste).

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[74] Amnesties should be distinguished from pardons, which effectively cancel earlier convictions and sentences for certain acts.

[75] 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.

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

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

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

3.1.1 Self-amnesties: examples from Latin-America

Since the late 1970s several amnesty laws have been adopted in Latin American states, including Chile (1978), Argentina (1983 and 1986-1987), El Salvador (1993), Uruguay (1986) and Peru (1995). These amnesties were adopted by the ruling military regimes before initiation of a transitional period towards democratic elections, so they have been characterized as 'self-amnesties', since they generally provide for complete protection from criminal prosecution for any acts committed during a defined period.[79] This period usually corresponds to the duration of the armed conflict. Although these amnesties generally apply to crimes committed by both sides, 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 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 prosecuted and tried before their national courts.

In the well-known *Barrios Altos* case (2001)[80] the Inter-American Court of Human Rights 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 Alberto 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,[81] 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 International Convention on Civil and Political Rights (ICCPR) and the American Convention on Human Rights – to ensure the right to an effective remedy and to prosecute perpetrators of international crimes. In Chile the amnesty law is formally still in force but has not been invoked since 1999, also as a consequence of national proceedings invoking the state's obligations under international law.[82]

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 that are increasingly invoked in the other countries as well. Whereas most

[79] The 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'.
[80] IACtHR, *Barrios Altos (Chumbipumba Aguirre v Peru)*, Judgment of 14 March 2001, Ser. C, No. 75.
[81] *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.
[82] E.g. *Sandoval Rodríguez* (Chile, Santiago Appeals Court, decision of 5 January 2004).

amnesty laws in Latin America covered all acts, thus constituting 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 peace agreement brokered by the United Nations. [83]

3.1.2 Amnesties as part of a peace agreement: examples from 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 genocide, war crimes and crimes against humanity. This is the case for Burundi (Arusha Accord, 2000), Democratic Republic of the Congo (July 2008) and Central African Republic (September 2008), where the amnesty law passed by the national Parliament excludes international crimes. 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".[84] In Sierra Leone a general amnesty law was adopted; the United Nations Special Representative made a reservation to it in the Lomé Peace Agreement.[85] 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).[86] Finally, some amnesty laws adopted in African countries amount to blanket amnesties with no exceptions for crimes under international law, such as Algeria (2006) and Ghana (1992).

3.1.3 Amnesties in Asia

An amnesty regulation was recently 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. In Timor-Leste, amnesty for certain crimes has been considered, but it 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, state practices on amnesties are not uniform. The amnesty laws adopted as part of peace agreements since the end of the 1990s tend to explicitly exclude international crimes. On the other hand, some recent examples in Asia (Afghanistan and Nepal) and Africa (Algeria) show that blanket amnesties or the limitation of prosecutions to cases brought by victims do not follow this trend.

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[83] Ley de Reconciliacion 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.

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

[85] See Lydiah Bosire, 'Overpromised, Uunderdelivered: 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.

[86] Idem, p.30. Ugandan Amnesty Act, 2000, Part II (3)1.

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.[87] 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,[88] although this permission has been interpreted in a restricted way.[89]

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 through its 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 remedy.[90]

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 United Nations General Assembly Resolution on the Forced Disappearance of Persons. It states that persons who have committed or are accused of having committed the crime of forced disappearance "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction".[91]

Furthermore, the statutes of two hybrid criminal tribunals provide that amnesties granted for the crimes falling under their jurisdictions shall not be a bar to prosecution.[92] 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.[93] Finally, several resolutions adopted within the United Nations system reiterate that amnesties

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

[88] Additional Protocol II, article 6 (5).

[89] Ambos, s*upra* note 90, at 127.

[90] In particular, see General Comment no. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', (2004) § 18. See also General Comment no. 20, on 'the Prohibition of Torture' (1992), § 15.

[91] 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.

[92] 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.

[93] 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 Cour't, in 14 *EJIL*(2003),pp. 481-505.

should not be granted to persons accused of having committed international crimes against children.[94] This same principle is also confirmed in the European Union Guidelines on Children in Armed Conflict[95] as well as in the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups (2007).[96]
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 perpetrators of international crimes, as noted above regarding Latin America. Moreover, in some states exercising universal jurisdiction over crimes that were covered by an amnesty law, the amnesties were not respected. The basis for this was 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.[97] 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 that have already been the subject of a judicial decision.[98]

In conclusion, although a customary international rule prohibiting amnesties for international crimes has not yet crystallized, 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 indicates a growing acceptation that amnesties for these serious crimes, including crimes against children, must be unconditionally rejected.

If this limitation is respected, 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 are not foreclosed.[99]

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

[95] Council of the European Union, EU Guidelines on Children in Armed Conflict, 15634/03, 4 December 2003, para. 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,(…)'.

[96] Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, 6 February 2007 para. 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.'

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

[98] Spain (*Auto* of the Audiencia Nacional of 5 November 1998, *Pinochet*); UK (*Pinochet III*, Lord Browne-Wilkinson, 24 March 1999). *Ne bis in idem*, which translates literally as "not twice for the same", means that no legal action can be instituted twice for the same cause of action.

[99] 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. For a comprehensive analysis of amnesties see also Mallinder, Louise, *Amnesty, human rights and*

4. CHILDREN AND CRIMINAL RESPONSIBILITY

Many children who were recruited under the age of 18 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 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 United Nations framework.

A distinction must be made between criminal responsibility before national courts versus international courts and tribunals. The criteria for children's criminal responsibility at the national level are determined in each state's national penal legislation. 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. It 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 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".[100] 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".[101] 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.[102]

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political transitions: bridging the peace and justice divide / Louise Mallinder (Hart Pub., Oxford; Portland, OR, 2008).

[100] 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 *International Criminal Justice and Children*, No Peace Without Justice/UNICEF Innocenti Research Centre, 2002.

[101] CRC article 40(1).

[102] CRC article 40(2).

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 of whether children may be held criminally responsible for international crimes arises especially 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 15 into their armed forces; to take all feasible measures to ensure that they do not take an active part in hostilities;[103]and to promote the physical and psychological recovery and social reintegration of a child victim of armed conflict.[104] As outlined above, the OPAC sets higher standards in this regard.

Even though the determining factor in recognizing the criminal responsibility of children according to the CRC is the minimum age that 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 in the Bejing Rules (1995)[105] and most recently the Paris Commitments (2007),[106] although the 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.[107]

Several international conventions address the question of punishment of juvenile persons who were found guilty of criminal acts. The Geneva Conventions and its Additional Protocols prohibit the execution of persons for crimes committed while under the age of 18.[108] A proposal to add in Additional Protocol I a prohibition on criminal prosecution and conviction of children for offences "for which at the time of commission they were too young to understand the consequences" was rejected.[109]

Several human rights instruments also prohibit imposing the death penalty on persons under the age of 18,[110] including the CRC, which equally prohibits life imprisonment without the

[103] CRC article 38.
[104] CRC article 39.
[105] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, or Bejing Rules, UNGA Resolution 40/33 of 29 November 1985.
[106] Paris Commitments, *supra* note 96, para. 11.
[107] General Comment No.10, CRC/C/GC/10, 9 February 2007.
[108] 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)).
[109] 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 72-73.
[110] 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 18, albeit without referring to the age at which the crime was committed (article 12). The African Charter on the Rights

possibility of release.[111] Some conditions are also determined for judicial proceedings involving juveniles. The ICCPR [112] states in 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.[113]

Apart from limits on punishment of juveniles and the conditions for judicial proceedings, 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 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.[114] State practice is expressed, in particular, through ratification of international instruments, national legislation or judicial decisions.

It is well known that state practice in terms of national legislation on children's criminal responsibility for domestic crimes is far from uniform. The minimum age level ranges from as young as 7 in some states[115] to 18 in others.[116] Having considered this disparity of national laws, the European Court of Justice stated in *T.* and *V. v United Kingdom*,[117] 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".[118] In Georgia (Tblisi), this minimum age was recently lowered from 14 to 12 years.[119]

However, there is a clear trend in legal doctrine towards acceptance of other evidence of the formation of a rule of customary law, according to which state declarations, especially when expressed by a large majority of states in an international forum, may be regarded as such

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and Welfare of the Child (1990) determines that the death penalty shall not be pronounced for crimes committed by children (article 5(3)).

[111] 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'.

[112] International Covenant on Civil and Political Rights (ICCPR), 1966.

[113] See *infra.*

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

[115] 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.

[116] Spain, Belgium and Luxemburg. Labuschagne, *idem* at 199.

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

[118] *V. v United Kingdom*, para 74.

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

evidence. Resolutions and declarations adopted in the framework of the United Nations are typical examples thereof.[120]

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 developing specialized systems of juvenile justice.[121] In paragraph 4(1), the Bejing Rules state:

> "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.[122] A concrete interpretation of the CRC provisions on juvenile justice and the minimum age for criminal responsibility (MACR) can be found in General Comment No. 10 of the Committee on the Rights of the Child (2007).[123] The Committee essentially urges states, where the MACR is set below 12, to raise this age limit to at least 12 years but preferably to 14 or 16; give preference to the recognition of only one MACR and to adopt the age of 18 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 criminal responsibility are still scarce. Some specific standards were agreed in the Paris Commitments[124] and the Paris Principles on Children Associated with Armed Forces or Armed Groups. These two documents were endorsed at a conference convened by the French government and UNICEF, with ministerial-level participants from 58 countries as well as representatives of intergovernmental organizations and 30 non-governmental organizations. Even though the meeting's outcome clearly does not have the

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[120] 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*).

[121] 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 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).

[122] The Commentary recognizes a link between responsibility for delinquent or criminal behaviour 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.'

[123] *Supra*, note 110.

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

same status as a UN resolution, it indicates an 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 overestimated.

The process leading to 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 the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa.[125]

The Paris Commitments mention a minimum age of 18 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".[126]

Criminal responsibility of children under 18 years of age is not totally excluded, but such children must be primarily considered as victims. The text further recommends that children younger than 18 "should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation".[127] It reaffirms the need to seek alternatives to judicial proceedings for children and to support their involvement in truth-seeking and reconciliation mechanisms where these exist.[128] The Paris Commitments thus recommend states not to prosecute (former) child soldiers for war crimes committed while they were under the age of 18. This position follows from the main purposes of the Paris Commitments and the Paris Principles, which is to prevent and end the recruitment of children under 18 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. International and 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".[129] On the other hand, the Statute for the Special Court for Sierra Leone allows prosecution of juveniles from the

[125] Adopted in1997, the Cape Town principles were the result of a symposium organized by UNICEF and the NGO Working Group on the Convention on the Rights on the Child to develop strategies for preventing recruitment of children, demobilizing child soldiers and helping them to reintegrate into society.
[126] *Supra*, note 99, para 11.
[127] *Idem*, para 11, last sentence.
[128] *Idem*, para.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.
[129] Rome Statute, article 26.

age of 15, while respecting certain conditions specified in the Statute.[130] However, the SCSL prosecutor has declined to take criminal action against alleged 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 18. Given the large numbers of children who were directly involved in the hostilities in Sierra Leone,[131] this is an important precedent.

The Statute of the 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 were key features of the armed conflict. Similarly, the statute of the ICTR is silent on the prosecution of juveniles. Likewise there is no mention of a minimum age limit for criminal responsibility in the Extraordinary Chambers in the Courts of Cambodia, the Ad-Hoc Tribunal for Timor Leste, and the War Crimes Chamber for Bosnia and Herzegovina.

Nevertheless, the explicit minimum age level included in the ICC Statute is a clear indication of a 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 that 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. By declining to prosecute juvenile offenders, the SCSL 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 or to persons who may have participated in the commission of international crimes before having reached the age of 18, in particular as child soldiers. Here again, a

[130] 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 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.'

[131] 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.

distinction must be made between domestic crimes and crimes under international law. The emerging trend limiting the admissibility of amnesties specifically 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. It is increasingly considered that persons accused of having committed international crimes before the age of 18 should not be prosecuted and tried before international courts or tribunals. Moreover, the recognition expressed in the Paris Commitments and 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, clearly aims to discourage their prosecution before national courts as well. Indeed, these Commitments call, inter alia, for alternative accountability mechanisms for children who may be accused of such crimes, including their participation in truth and reconciliation commissions and restorative justice mechanisms, in addition to supporting their reintegration in society.

On the other hand, it could be argued that granting amnesties to children would actually 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: 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?

In this author's view, granting amnesties to children would contradict the trend that amnesties may not be granted for international crimes at all. Indeed, allowing the granting of amnesties to children would weaken this evolving norm and entails the risk of re-opening the door for amnesties also to adults who committed crimes against children, including their recruitment and use in armed conflict.

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 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 from October 2002 onwards point to a flagrant violation of existing international and national norms on juvenile justice and on the treatment of child soldiers.[132] 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 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

[132] 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).

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. At the time of this writing, the proceedings before the US military commission were still underway. In the meantime, proceedings were also launched in Canada, resulting in two court decisions in 2009 calling for Khadr's repatriation. On 29 January 2010 the Canadian Supreme Court ruled that the federal government cannot be forced to request Khadr's repatriation, but it found that Canada and the United States have violated his right to life, liberty and security under the Charter of Rights and Freedoms. The Canadian involvement in this case is based, apart from Khadr's citizenship, on his interrogation by Canadian government intelligence agents during his detention in 2003 and 2004.

It would go beyond the scope of this paper to further discuss the details of the Khadr 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 complied with, or at least not fully. Many examples could be mentioned of states violating these rules, as 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 Omar Khadr case is specifically mentioned here because it represents a flagrant violation of some basic legal norms protecting children, even those also recognized under national law of the state concerned.

4.6. Conclusions and Questions Remaining

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

- Child soldiers accused of having committed an international crime under the age of 18 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 that promote the child's reintegration into society. They also have an obligation to agree on a minimum age for criminal responsibility.

- There are signs of an evolving international consensus that 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 18 shall primarily be considered as victims and, in any case, shall not be tried by an international criminal court or tribunal. The cases of these children should be considered in their own states, where priority must be given to the demobilization and reintegration into society of these children through, in particular, education and vocational training.

- Children under the age of 18 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 Bejing Rules by the Committee on the Rights of the Child constitutes authoritative guidance for states.

- Therefore, states should be strongly encouraged to bring their national laws and practice in line with these. Doing so will reinforce the standards themselves by adding more evidence of uniform state practice and of *opinio 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.

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 in states' national legislation, important efforts are needed to achieve this goal.

With regard to the criminal responsibility of children for international crimes, standard-setting efforts are focusing on the situation of children who have been recruited by armed forces or groups or who have been used to participate in hostilities and 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 non-governmental organizations and international organizations. The OPAC has a legally binding status and has been ratified by an important number of states, but 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 United Nations 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 of adopting 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 18 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 ambivalence and legal contradictions be addressed regarding 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 15 to 18 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. CONCLUSIONS

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 perpetrators of international crimes committed abroad (based on the principles of active or passive nationality or universal jurisdiction) vary from one crime to the other. 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 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 of 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, under both conventional law and, as established by the SCSL, 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 the possible consequences of non-compliance with a state's duty to prosecute international crimes. One possible consequence is prosecution of those persons bearing the greatest responsibility 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 to do so under international law. 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 of 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 persists of the consequences indicated above from a failure to prosecute at least those bearing the greatest responsibility for atrocities.

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 violate the duty of states to prosecute and punish persons who are responsible for such acts. Indeed, consistent case law is established by regional human rights courts and supported by the authoritative Views of the UN Human Rights Committee. According to this, a failure to criminally investigate and prosecute such serious acts amounts to a violation by the state 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, to freedom from torture and to freedom from unlawful detention) or their relatives.

Moreover, a trend can be seen in the amnesties granted over the last 10 years, which increasingly exclude applicability to genocide, war crimes and crimes against humanity, including crimes against children falling under these definitions.

The paper also examines whether children may be prosecuted under international law when they are accused of having participated in the commission of international crimes before reaching the age of 18. 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.

- An international consensus is clearly evolving with regard to children accused of international crimes, in particular child soldiers. Children accused of having committed such crimes under the age of 18 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 18 should primarily be regarded as victims.

- In practice, the 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 and national norms on juvenile justice and the treatment of child soldiers.[133]

[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).

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 into 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;

- Take the necessary measures to ensure sufficient development and effectiveness of their national judicial system and institutions and the capacities required to undertake investigations; and to initiate prosecutions and conduct trials of persons responsible for these crimes;

- 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 development of 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 'upgrading' the Paris Principles and the Paris Commitments to a United Nations level, such as UN guidelines or principles.

Child protection agencies including UNICEF and non-governmental organizations 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 of 15 to 18 years, considering whether the current norms and recommendations (including the Paris Principles and Commitments) adequately address the best interests of the child;

- Regarding *amicus curiae* intervention before international courts and tribunals adjudicating international crimes against children, child protection agencies should consider whether some form of cooperation or consultation among legal experts, interested child protection agencies and UN agencies would be desirable in drafting such briefs, in order to ensure an adequate coverage of the legal issues at stake.