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Committee for the Rights of the Child
Office of the United Nations High
Commissioner for Human Rights
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Geneva, 10 January 2006

**Written Submission to the Committee for the Rights of the Child –
Follow-up after the dialogue with Switzerland of 9 January 2006 on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-AC)**

Dear Sir, Dear Madam

During the dialogue with Switzerland on the implementation of the OP-AC on 9 January 2006, the Swiss delegation posed the Committee for the Rights of the Child a question, the gist of which was:

> **"Is the exercise of universal jurisdiction a measure to be taken by States Parties under articles 4(2) and 6(1) of the OP-AC?"**

We respectfully submit that the answer to this question is a clear "yes", and would like to present to the Committee for the Rights of the Child the arguments which lead us to this conclusion. We invite the Committee to consider these arguments in the phrasing of a reply, if deemed appropriate, to the Swiss delegation's question.

I. The principle of effectiveness warrants the exercise of universal jurisdiction under the OP-AC

The principle of effectiveness (*ut res magis valeat quam pereat*) is a maxim of treaty interpretation which is not mentioned in the Vienna Convention on the Law of Treaties. It has been recognized however by the Permanent Court of Justice[1] and has been further applied by the International Court of Justice, for instance in the South African Cases.[2]

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[1] Permanent Court of International Justice, *Case Concerning the Factory at Chorzów*, (1927) PCIJ Series A, Vol 2, no. 8, 2.
[2] International Court of Justice, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment of 21 December 1962 (Preliminary Objections), 1962 ICJ 319, 582 (Dissenting Opinion of Judge Van Wyk).

The principle states that if a treaty is open to several possible interpretations, the one which best gives useful effect ("*effet utile*") to the objects and purposes of the treaty should be preferred over that which undermines such objects and purposes.

The object of the OP-AC is to grant children the best possible protection, also by means of the criminal law, against their enrolment or use in hostilities. Therefore, the term "jurisdiction" in art. 6(1) OP-AC has to be interpreted in a manner which confers on Swiss authorities the widest reaching jurisdiction in criminal matters, which is universal jurisdiction.

It should not be forgotten that the recruitment of children is non-existant in Switzerland, but virulent in many conflict regions abroad. By only prosecuting presumed war criminals with a close link to Switzerland or on the basis of the principle of active personality, Switzerland is not effectively contributing to the criminal sanctioning of these practises.

II. The wording of art. 4 OP-AC warrants the exercise of universal jurisdiction under the OP-AC

Art. 4 OP-AC provides that "[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years."

The Swiss delegation, unfortunately limiting the discussion of this provision to the statement that there were no armed groups in Switzerland, seemed to imply that this provision concerns only armed groups on the territory of a State Party.

The wording of art. 4 OP-AC, however, does not support this narrow reading. First, the provision is free of any geographical limitations. Secondly, the drafters of the provision did not use the terminology of "State Party" (which would read "… distinct from the armed forces of the State Party …"), as they did consistently in all other provisions aiming at the member States. Instead, they chose the phrase "a State", which refers, it is submitted, to any State. In other words, all armed groups are envisaged by art. 4, be they located on the territory of a member State or not. Together with the other arguments laid out in this submission, this warrants for the exercise of universal jurisdiction under the OP-AC.

III. The concern for consistency between International Humanitarian Law and the OP-AC warrants for the exercise of universal jurisdiction under the OP-AC

The OP-AC should be interpreted in close consideration of International Humanitarian Law (IHL). Not only does the common prohibition of child recruitment in IHL and under the OP-AC suggest this, the two bodies of law are even interlocked: Art. 38(1) of the Convention on the Rights of the Child reiterates and reaffirms member States' obligation to abide by IHL. The same obligation is recalled in paragraph 13 of the preamble of the OP-AC.

This close interconnection between IHL and the OP-AC calls for a great degree of consistency in their application. In order to achieve the greatest possible consistency between the two bodies of law, the protection granted in criminal-law matters under the OP-AC cannot be seen as lagging behind the one granted by IHL. As IHL grants universal jurisdiction over the war crime of conscripting or enlisting children under the age of fifteen or using them to participate actively in hostilities, the OP-AC has to be read as equally conferring universal jurisdiction on member States.

IV. To prevent a "deluge" of politically motivated criminal complaints in Switzerland, the "close link"-requirement is obsolete

As the Swiss delegation correctly pointed out, the "close link"-requirement was introduced in December 2003 as a reaction to the political pressure that Belgium had attracted by means of a statute which conferred on Belgium authorities a far-reaching version of universal jurisdiction. The motivation that drove Swiss parliament was thus the fear that Switzerland would face a "deluge" of criminal complaints, filed essentially against incumbent foreign heads of States and other high ranking officials, or officials and diplomats accredited at the United Nations in Geneva. These complaints would, such was the fear, bring about foreign political pressure on Switzerland or risk the existence of Geneva as a UN capitol.

However, it emerges from the minutes of the parliamentary discussion, that when the "close link"-requirement was introduced, the Swiss law-makers completely ignored two important factors. These factors did not come into play in Belgium, but in Switzerland virtually render impossible any "problematic" criminal complaints in the sense described above.

First, it has to be noted, that other than the Belgium law at the time, Swiss law requires the **presence of a presumed war criminal on Swiss territory** for him or her to be prosecuted.[3] All the controversial "Belgian" cases actually involved persons absent from Belgian territory.

Furthermore, art. 5(3) of the Belgian law at the time **expressly disregarded the international law of immunities**.[4] The law of immunities further prevents "problematic" criminal complaints: The institution of personal immunity, which serves to facilitate the smooth operation of international relations, protects officials of a State or those accredited to international Organisations, as long as they are in office.

Protected are heads of States and other high-ranking members of governments,[5] diplomats,[6] consuls,[7] envoys on special missions[8] or to international conferences. In addition, officials of the United Nations are in general protected by the immunities Convention[9] and relevant headquarters agreements.[10] Swiss authorities have applied the law of immunities consistently so far. A criminal complaint against the incumbent president and other high-ranking officials of the United States, for instance, has not been given suit because of their personal immunity. The requirement of the "close link" was not yet in force, yet a "problematic" criminal procedure was avoided.

As a conclusion, the "presence"-requirement, together with the international law of immunities provides for sufficient protection against a "deluge" of "problematic" criminal complaints in Switzerland. The "close link"-requirement does in fact not prevent "problematic" criminal complaints in Switzerland. In the case of an incumbent foreign head of State who seeks stationary medical treatment or possesses real estate in Switzerland,

[3] Art. 9 al. 1bis of the Military Penal Code.

[4] *Loi relative à la répression des violations graves du droit international humanitaire* of 16 June 1993 (*Moniteur Belge* of 5 August 1993, 17751-17755); modified on 10 February 1999 (*Moniteur Belge* of 23 March 1999, 9286-9287); english version reprinted in 38 ILM 921 (1999).

[5] Protected by customary law, as discussed in the *Arrest Warrant Case*: International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, judgment of 14 February 2002, 2002 ICJ 121.

[6] Protected by virtue of the 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95.

[7] Protected by virtue of the 1963 Vienna Convention on Consular Relations, 596 UNTS 262.

[8] Protected by virtue of the 1969 Convention on Special Missions, 1440 UNTS 231.

[9] The 1946 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15.

[10] See e.g. the agreement on the Privileges and Immunities of the United Nations Organisation between the Swiss Federal Council and the Secretary General of the United Nations of 1 July 1946, SR 0.192.120.1.

the “close link” does nothing to prevent a “problematic” complaint. On the contrary, such a complaint would in this case be blocked by the international law of immunities.

However, other than the international law of immunities, the “close link”-requirement also protects small-calibre war criminals, and especially non-state actors from prosecution in Switzerland. The UN Secretary-General, on his latest list of parties that recruit or use children in situations of armed conflict, mentions numerous non-state parties who engage in this war crime.[11] All these non-state actors are protected by the “close link”-requirement, although their prosecution in Switzerland would not be politically problematic.

We hope the distinguished members of the Committee for the Rights of the Child will find these arguments convincing and will consider them in the clarification of this important interpretational question.

Yours sincerely,

Dr. iur. Philip Grant, President

[11] UN doc. S/2005/72, p. 36.