



Swiss Association against Impunity

Submission to the Human Rights Committee

regarding the consideration of the State report submitted
by the

SUDAN

June 2007

In advance of the 90th session of the Human Rights Committee, TRIAL respectfully submits for the attention of the Committee the view that

the Sudan is obliged, by virtue of art. 2 para. 3(a) of the International Covenant on Civil and Political Rights, to cooperate with the International Criminal Court.

TRIAL would like to present to the Committee the arguments which led to this conclusion, and invite the Committee to consider them in the phrasing of the Concluding Observations on the State report submitted by the Sudan.

I. The Problem Situation

For years, government and government-supported troops have been committing horrendous abuses in the Darfur region of the Sudan which amount to crimes under international law. The Commission of Inquiry on Darfur set up pursuant to UN Security Council resolution 1564 (2004) concluded that with regard to Darfur, 'a body of reliable information indicates that war crimes may have been committed on a large-scale, at times even as part of a plan or a policy. There is also a wealth of credible material which suggests that criminal acts which constitute widespread or systematic attacks directed against the civilian population were committed with knowledge of the attacks. These may amount to crimes against humanity.'¹

By virtue of resolution 1593 (2005), the UN Security Council referred the situation in Darfur to the Prosecutor of the International Criminal Court (ICC),² thus enabling the ICC, in accordance with art. 13(b) of the Rome Statute, to exercise its jurisdiction over a situation in the Sudan, a non-member State. By the same resolution, the Sudan was obliged to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'.³

Despite being obliged to cooperate with the ICC, the Sudan has since refused to cooperate fully with the Court. In early June 2007, the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, told the UN Security Council that only a 'degree of cooperation' had been forthcoming, that requests for assistance remained outstanding, and that the Sudan had refused to allow the questioning of the suspects.⁴

II. The duty to investigate and prosecute under art. 2 para. 3(a) ICCPR

Since the beginning of its considerations of individual communications under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Committee has developed a constant jurisprudence that in cases involving violations of the most basic Covenant rights, there is a duty upon the State party to investigate the conduct at issue.⁵ In addition, the Committee has constantly stated that the persons responsible for violations of the most basic rights have to be tried, and – if found guilty – punished.⁶ It has located these obligations in art. 2 para. 3(a) of the ICCPR which provides that any person whose rights or freedoms recognized in the ICCPR are violated shall have an 'effective remedy'. In its General Comment no. 31, the Committee has specified that the obligation to prosecute presumed perpetrators arises 'notably in respect of those violations recognized as criminal under either domestic or international law', and that the failure either to investigate or prosecute could in and of itself give rise to separate breaches of the Covenant.⁷

¹ International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General - Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 585.

² UN Security Council resolution 1593 (2005), para. 1.

³ *Ibid.*, para. 2.

⁴ Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005), page 6 *et seq.*, available at http://www.icc-cpi.int/library/organs/otp/LMO_20070607_en.pdf.

⁵ See only these recent views adopted by the Committee: *Shukurova v. Tajikistan*, Communication 1044/2002, Views of 26 April 2006, para. 8.2; *Kouidis v. Greece*, Communication 1070/2002, Views of 26 April 2006, para. 9; *Agabekova v. Uzbekistan*, Communication 1071/2002, Views of 3 April 2007, para. 7.2; *Karimov and Nursatov v. Tajikistan*, Communications 1108/2002 and 1121/2002, Views of 3 April 2007, para. 7.2.

⁶ See only these recent Views adopted by the Committee: *Boucherf v. Algeria*, Communication 1196/2003, Views of 27 April 2006, para. 11; *Bousroual v. Algeria*, Communication 992/2001, Views of 24 April 2006, para. 11; *Celal v. Greece*, Communication 1235/2003, Views of 11 November 2004, para. 11; *Rajapakse v. Sri Lanka*, Communication 1250/2004, Views of 5 September 2006, para. 9.3; *Mulezi v. Democratic Republic of the Congo*, Communication 962/2001, Views of 23 July 2004, para. 7; *Sarma v. Sri Lanka*, Communication 950/2000, Views of 31 July 2003, para. 11.

⁷ Human Rights Committee, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', paras 15 and 18.

III. *An international dimension to investigation and prosecution*

Although States may be responsible for human rights violations committed within their jurisdiction only, it may nevertheless be necessary to cooperate with other States in the discharge of the obligations to investigate and prosecute. Such is for instance the case if a presumed perpetrator has fled the country responsible for his or her prosecution.

In recent judgments, the Inter-American Court of Human Rights (IACtHR) has held that in the context of crimes under international law, the necessity to eradicate impunity translates into an obligation of inter-state cooperation to this end.⁸ According to the Court, '[a]ccess to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so.'⁹ If need be, the Court held, States must therefore undertake the necessary diplomatic steps, including extradition requests, to honour their obligations under art. 1(1) of the American Convention on Human Rights to investigate and prosecute perpetrators of grave human rights violations.¹⁰

This jurisprudence is in line with established UN Principles concerning international cooperation for the purposes of bringing persons responsible for war crimes and crimes against humanity to justice. By means of a 1971 UN General Assembly resolution, States Parties were urged to take all necessary steps to ensure the punishment of persons guilty of these crimes. The resolution also urged States to cooperate in 'the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment' of such persons and affirmed that the refusal to do so was 'contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law'.¹¹ The 1973 'Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity' reiterate the same principle of inter-state cooperation with nuances, in that 'States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.'¹²

Treaty provisions requiring States to afford one another assistance in connection with criminal proceedings brought in respect of war crimes can be found in a variety of instruments.¹³ In addition, according to the ICRC's study on customary international humanitarian law, there is sufficient State practice to conclude that there is a customary-law rule which provides that 'States must take every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.'¹⁴

⁸ IACtHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, para. 160.

⁹ IACtHR, *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, para. 131.

¹⁰ *Ibid.*, para. 166; IACtHR, *supra* note 8, para. 227.

¹¹ UN General Assembly resolution 2840 (XXVI), 'Question of the punishment of war criminals and of persons who have committed crimes against humanity', 18 December 1971, paras 1, 2, and 4.

¹² UN General Assembly resolution 3074 (XXVIII), 'Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity', 3 December 1973, para. 4.

¹³ See art. 88 of the First Protocol additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts, 8 June 1977, 1125 UNTS 3; art. 19 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, UNESCO Doc. HC/1999/7; art. 10 of the Organization of African Unity Convention for the Elimination of Mercenarism in Africa, 3 July 1977, CM/817 (XXIX), Annex II Rev.3; art. 13 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 29 I.L.M. 91 (1990). See also art. 1(1) of the European Convention on Mutual Assistance in Criminal Matters, 20 April 1959, ETS no. 030.

¹⁴ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge 2005, Rule 161, page 618 *et seq.*

In the field of human rights, newer instruments embrace international cooperation as a necessary component. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict¹⁵ in art. 7(1) provides that 'States Parties shall cooperate in the implementation of the present Protocol'. An important element of implementation is the criminalisation of the recruitment of child soldiers under art. 4(2) of the Protocol, and arguably the prosecution of perpetrators, as a necessary 'legal measure' under art. 6(1) 'to ensure the effective implementation and enforcement' of the Protocol. Art. 10(1) of the Optional Protocol on the sale of children, child prostitution and child pornography¹⁶ requires States Parties to 'strengthen international cooperation ... for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism', and to 'promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.'

IV. *Beyond inter-State cooperation*

Whereas the above-mentioned jurisprudence of the IACtHR, the UN Principles, and treaty law focus almost exclusively on inter-State cooperation, the duty to cooperate must, it is submitted, extend beyond the ranks of States to include international organisations. As the IACtHR stated, 'the need to eliminate impunity establishes an obligation *for the international community*' to ensure cooperation to this end.¹⁷ This is in compliance with the nature of peremptory norms of international law and their *erga omnes* nature, as they bind, and extend to, any subject of international law. According to art. 4 para. 1 of the Rome Statute, the ICC is a subject of international law with distinct legal personality. It is thus a member of the international community, to whom States have to extend their efforts at international cooperation in the fight against impunity.

V. *International cooperation as an obligation under art. 2 para. 3(a) ICCPR*

Unlike the International Covenant on Economic, Social and Cultural Rights, the ICCPR does not contain a provision which specifically calls for international cooperation in the implementation of the rights recognized. However, a contemporary interpretation of art. 2 para. 3(a) ICCPR and the duty to investigate and prosecute has to take into account, it is submitted, the existence of the ICC. Such an approach would support the conclusion that States are bound under the ICCPR to cooperate with the Court, where both the Court and the States in question have jurisdiction, even if the latter are not signatories to the Rome Statute. This interpretation is also in compliance with the teleological approach which gives preference to that mode of interpretation which gives best useful effect to a treaty (principle of effectiveness; '*effet utile*'): In fact, the remedy which States have to provide under art. 2 para. 3(a) of the ICCPR has to be 'effective'. In some cases, the ICC might indeed constitute the more effective alternative than the domestic penal system in question. This is particularly true for the Sudan. As has been stated by the UN Commission of Inquiry on Darfur:

'The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to

¹⁵ Adopted 25 May 2000, see UN General Assembly resolution 54/263.

¹⁶ Adopted 25 May 2000, see UN General Assembly resolution 54/263.

¹⁷ IACtHR, *supra* note 9, para. 131, italics added.

bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many feared reprisals if they resorted to the national justice system.¹⁸

In different contexts, the Human Rights Committee has already ventured into the realm of international cooperation for the aims of implementing the ICCPR. In its General Comment 5 on equality between the sexes, it considered that States should make more use of international cooperation to improve implementation of the respective obligations.¹⁹ In General Comment 17, on the rights of the child, it stated that States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he or she is born.²⁰ In General Comment 19, the Committee held that States must cooperate internationally to ensure the unity or reunification of families.²¹ In the context of international cooperation in matters of justice, the Committee has recognized in a side note that '[e]xtradition is an important instrument of cooperation in the administration of justice, which requires that safe havens should not be provided for those who seek to evade fair trial for criminal offences'.²²

Whereas the Sudan is already obliged to cooperate with the ICC by virtue of UN Security Council resolution 1593 (2005), this interpretation will have effects on other States which are members to the ICCPR, but not the Rome Statute. Under art. 12 para. 2(a) of the Rome Statute, the conduct of nationals of non-member States may trigger the ICC's jurisdiction, as long as the State on whose territory the conduct occurs is a member. The non-member States whose nationals have committed possible crimes on the territory of a member State, are most likely to have extraterritorial criminal jurisdiction over their nationals by virtue of the active personality principle. However, the obligations under arts 86 *et seq.* of the Rome Statute to cooperate with the ICC extend to member States only. The suggested interpretation of art. 2 para. 3(a) ICCPR would therefore help to close a *lacuna* in the legal framework which serves to ensure that the most heinous crimes do not go unpunished.

VI. Conclusion

In conclusion, it is therefore submitted that today, a necessary and logical extension of the duty to investigate and prosecute under art. 2 para. 3(a) ICCPR is the cooperation with the ICC, where both it and the States concerned have jurisdiction over the conduct in question.

TRIAL respectfully suggests to the Committee to consider in its Concluding Observations on the State report submitted by the Sudan, that the Sudan is obliged, by virtue of art. 2 para. 3(a) of the ICCPR, to cooperate with the ICC, and to recommend that the Government immediately take up full cooperation with the Court and its Prosecutor.

¹⁸ International Commission of Inquiry on Darfur, *supra* note 1, para. 586.

¹⁹ Human Rights Committee, General Comment no. 5, 'Equality between the sexes', para. 5.

²⁰ Human Rights Committee, General Comment no. 17, 'Rights of the child (Art. 24)', para. 8.

²¹ Human Rights Committee, General Comment no. 19, 'Protection of the family, the right to marriage and equality of the spouses (Art. 23)', para. 5.

²² Human Rights Committee, *Cox v. Canada*, Communication 539/1993, Views of 9 December 1994, para. 10.3.