Applying the Conditions Required for the Complementary Role of the International Criminal Court on the Case of Sudan

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Abstract

This paper delves into the necessary conditions for the International Criminal Court (ICC) to serve a complementary role in cases where a state is unable or unwilling to prosecute. It assesses the criteria for determining the applicability of these cases to the situation in Sudan before the International Criminal Court. The paper examines the evolution of international criminal law and its connection to individuals under public international law. It also evaluates the issue of inability by analysing Sudan's legal system in terms of legislative competence, the professional competence of legal professionals, and the impartiality of the judiciary. In addition, the paper addresses the issue of unwillingness by examining the circumstantial evidence presented in the behaviour before, during, and after the events leading to the referral of the lawsuit to the International Criminal Court Prosecutor.

Keywords: International Criminal Law, Jurisdiction of International Criminal Court, Sudan, Inability, Unwillingness**.**

تطبيق الحالات المطلوبة للدور التكميلي للمحكمة الجنائية الدولية على قضية السودان.

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الملخص

تناولت هذه الورقة العلمية الحالات المطلوبة لنشوء الدور التكميلي – وبالتالي الاختصاص- للقضاء الجنائي الدولي والمتمثلة في حالتي عدم القدرة وعدم الرغبة، وذلك بدراسة مطلوبات التحقق من انطباق كلا الحالتين على حالة السودان امام المحكمة الجنائية الدولية. استعرضت الورقة تطور القانون الجنائي الدولي وعلاقة ذلك بمركز الفرد في القانون الدولي العام، ثم تناولت حالة عدم القدرة من واقع تحليل النظام القانوني في السودان من حيث الكفاية التشريعية، الكفاءة المهنية للعاملين في النظام القانوني الداخلي، استقلالية القضاء. كما تناولت الورقة حالة عدم الرغبة من واقع البينات الظرفية المتمثلة في السلوك المصاحب واللاحق لحدوث أسباب الدعوى وحتى احالتها الى المدعي العام للمحكمة الجنائية الدولية.

الكلمات المفتاحية: القانون الجنائي الدولي، اختصاص المحكمة الجنائية الدولية، السودان، عدم القدرة، عدم الرغبة.

1. Introduction

International criminal law passed through several stages until our contemporary time. It is not possible to talk about International Criminal Law before the first world war due to the absence of substantive rules criminalizing acts that constitute a breach of international public order and human rights, as well as the absence of any procedural rules for organizing an international court to try those accused of international crime(1).

After second world war, Talks began about the idea of international punishment, criminal liability(2). But the efforts to establish an international criminal court failed, due to several factors, including the objection of the United States(3), and the ambiguity of the texts of international law on the issue of criminalizing war and the actions resulting from it(4).In addition to the allies' lack of seriousness in achieving international criminal justice(5).

The period following the Second World War; two courts were established (Nuremberg and Tokyo); they were not international criminal courts in the technical sense, but rather they were special military ones whose purpose was to try war criminals in World War II(6), Where the rules of equality are not applied(7). In terms of the procedures applied by these Courts during the trials, they are not international criminal procedures, but rather a mixture of the national criminal procedures of the four countries (Britain - France - the Soviet

(1) M. Bachat, Reciprocity in International Criminal Law, Reprisals and the Idea of Punishment, General Authority for Amiri Press Affairs, Cairo, 1974., p. 56.

(2) Abdelwahid Alfar, International crimes and the power to punish them, Dar Al-Nahda Al-Arabiya, Cairo, 1996, p.71- 72.

(3) Abdelrahman Sidgi, International Criminal Law, Cairo, 1986, p. 13.

(4) Abdelwahid Alfar, International crimes and the power to punish them, Dar Al-Nahda Al-Arabiya, Cairo, 1996, p.79.

(5) Abdelwahid Alfar, International crimes and the power to punish them, Dar Al-Nahda Al-Arabiya, Cairo, 1996, p.80

(6) Roger Clark ،The Development of International Criminal Law ،٢٠٠٠ ،p.3. http: // www. cam law rutgers. Edu/ faculty/ occasional/ 5 – clark. Htm.

(7) A. Alkhlaify, International Criminal Law from Temporary Courts to Permanent Courts, Islamic Unity Journal, No. 16, Second Year, March 2003, p. 2.

Union and the United States)[1], those procedures were not familiar to the defense[2]. In terms of the source of the criminal rules applied by the two courts, as they were not based on an international will, such as international agreements and conventions, but rather the will of the victorious countries that drew up the list of the two courts and specified the crimes for which the accused should be tried.[3]. Moreover, the two courts violated the most important principle of criminal principles that are the basis of criminal law -internal and international- which are the principles of (the legality of crimes and penalties and the non-retroactivity of criminal laws)[4].

Based on the principle of sovereignty on which the Classical International Law stands, Classical International Law did not offer the individual any legal status within it. Another reason for excluding an individual from the scope of the Public International Law is the nature of the relationships governed by this law which requires equality between its persons, and this is not available in the case of individual persons.[5]

International law expressed its official concern for the individual through expressing in the League of Nations Covenant that member states are keen to provide the appropriate conditions that ensure that

(1) M. Basyoni, The International Criminal Court, its inception and its statute with a study of the history of the international investigation committees and the Seventh International Criminal Courts, Judges Club, Cairo, third edition, 2002, p.26.

(2) Gerhard van Glan, Law Among Nations, Part III, New Horizons House, Beirut, 1970, p. 212.

(3) Ali Abdel Qader Al-Qahwaji, International Criminal Law, The Most Important International Crimes, Al-Halabi Human Rights Publications, Beirut, first edition, 2001, p. 250.

(4) Dr. Murshid al-Sayed and Ahmad Ghazi al-Harmazi, International Criminal Judiciary, Analytical Study of the International Criminal Tribunal for Yugoslavia in comparison with the Nuremberg, Tokyo and Rwanda Courts, International Scientific House for Publishing and Distribution and House of Culture for Publishing and Distribution, Amman, first edition, 2002, p. 52. Also review: Al-Taher Mukhtar Ali Saad, International Criminal Law, International Sanctions, United New Book House, Beirut, first edition 2001, p.139.

(5) Andrea Bianchi, State Responsibility and Criminal Liability of Individuals. The oxford Companion to International Criminal Justice, Oxford University Press, 2009, P. 17.

individuals - including minorities - enjoy the basic rights that guarantee them a decent human life(1). Then the Charter of the United Nations came to affirm that one of the main purposes that the organization seeks to achieve, is to promote, enhance and encourage respect for human rights and fundamental freedoms(2). In addition, it adopts human rights covenants and declarations, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and others.

In the light of this situation, the question has become about whether the individual has a legal status within the framework of Public International Law, as this law gives the individual rights and obliges him with duties. There are many conventions that aim to provide international protection for the individual, such as the anti-trafficking agreements, the convention on the prevention of genocide, and the conventions on human rights, where these agreements determine a set of rights for individuals, but through the commitment of states to guarantee these rights through their national legislations.(3)

It is well known that the international criminal justice plays an integrative role, as it fills the shortfall that can occur in the national judiciary, to guarantee the achievement of justice and prevent impunity and escape to prevent the consequences of actions. So, jurisdiction originally falls to the national law and judiciary, but it turns to international law and judiciary when the national judiciary becomes unable or unwilling to exercise its duties.

This research paper comes to discuss the jurisdiction of the International Criminal Court in dealing with the case of Sudan in accordance with the provisions of Public International Law and the Rome Statute, to analyze the status of the Sudanese legal system from 2003 until the date of referral to the International Criminal Court, to find results related to the fulfillment of the conditions of the complementary jurisdiction of the international court.

(1) Article 22, 23 of the League of Nations Covenant.

(2) Article 1/3 and article 56 of the UN Charter.

(3) Alqasmi, Mohammed, The Individual's Status in the International Law, Law Journal, Vol. 1, p. 217.

1.1 Research Significance

The research is of scientific significance in terms of dealing with one of the important issues in the international law, which is the issue of the complementary role of the international criminal judiciary - An analysis of the Sudanese legal system. This research is also considered an addition to the legal library as specialized research in the International Criminal Law.

1.2 Research Problem

The research problem is to answer the main research question, which is:

Are the conditions required for the complementary role of international criminal justice in the case of the Sudan are fulfilled?

Several sub-questions arise from this question:

- Is the Sudanese legal system capable and willing?
- What are the indicators of the presence of ability and desire?

1.3 Research methodology

To deal with the research problem, the researcher uses the descriptive and historical approach, to review and describe the development of international criminal justice and the development of the individual's status in international law, in addition to the analytical approach to discuss the reality of the legal system in Sudan to answer the research questions.

1.4 Sudan Case before the ICC (Referral of Criminal Cases concerning Darfur Conflict to the ICC by the SC)[(1)]

The attention of the Security Council to the effects of the conflict in the Darfur region, Sudan, has reached the point that on 31st March 2005 the Council used its powers acting under Chapter VII to refer the case to the Prosecutor of the International Criminal Court[(2)], as it is according to the statute of the International Criminal Court, the UN Security Council has the power to refer any case to the Prosecutor of

(1) For details and background of the. Situation in Sudan, see Alex de Waal and Gregory H. Stanton, Should President Omar al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court? An Exchange of Views, Volume 4 Issue 3, December 2009, pp. 329-353, DOI: 10.3138/gsp.4.3.329

(2) S/RES/1593 on 31 March 2005.

the International Criminal Court when It appears that one or more of the crimes within the jurisdiction of the court have occurred.(1)

It is well known that the Security Council takes decisions acting under the provisions of Chapter VII in only two cases, namely the case of an aggression, or its assessment that the situation before it represents a threat to international peace and security (2). This is exactly where the danger lies, as both cases have some degree of indiscipline, as the United Nations Charter has not defined what ''aggression'' is, while jurisprudence differed in its definition, and the case of the threat to international peace and security, is always subjecting to the discretionary power of the Security Council, which It is largely controlled by political interests.(3)

It should be noted here that the resolution of the United Nations General Assembly No 3314, as well as Article 8 of the Rome Statute, define aggression, but we point out here that these definitions do not oblige the Security Council when exercising its jurisdiction under Chapter VII.

There is an issue that must be discussed in this regard, related to the relationship between the Security Council and the International Criminal Court on the one hand, and between the International Criminal Court and the referring state on another hand, and between the Security Council and the referring state on a third hand, as the Security Council is competent to consider all issues that threaten international security and peace according to the Charter(4). Consequently, the Security Council is competent to consider all matters related to international peace and security in all countries according to its discretion, and therefore accepting its jurisdiction in this case is compulsory acceptance from all states, and if we read that with the jurisdiction of the International Criminal Court which is essentially optional, We find that the matter is difficult to uphold, as the Rome Statute provides that the jurisdiction of the International Criminal Court is an optional mandate that requires the state's

(1) Article 13 / b of the Rome Statute.

(2) Article 39 of the Charter of the United Nations.

(3) Madeline Morris, High Crimes and misconception: The ICC and the non- party states, p 219- 279, https://doi.org/10.1163/9789004479746_021.

(4) Article 24 of the Charter of the United Nations.

accession to the statute and consequently its approval of the court's jurisdiction, which loses its meaning in the event that the matter is referred to the court by the Security Council against the will of the state, and of course such a problem cannot arise if the Security Council takes its decisions based on pure legal criteria. From a pure legal point of view which is not limited only to this case, we do believe that this is a legal complication that need to be solved in a way which balances the need to serve the victims' rights in holding offenders accountable and enhancing no impunity, and the optional jurisdiction of the court.

Concerning the situation in Sudan, the case was referred to the ICC Prosecutor by the Security Council under Chapter VII of the Charter, and the question here is about the legality of the referral. To determine the court's jurisdiction in this case, the jurisdiction of the International Criminal Court is according to one of the three ways mentioned before, putting in consideration that Sudan has signed the Rome Statute of the International Criminal Court, but not ratified by it, and therefore the statute is not binding to it, and therefore this path is excluded. Likewise, Sudan did not ask the court to take up this case according to the second way, and therefore this way is also excluded, so accordingly, the case was referred by the Security Council pursuant to the provisions of Chapter Seven, but the question is: How legitimate is this decision?

Another condition that the Security Council must take into account when making the decision to refer a specific case to the Prosecutor of the International Criminal Court, is taking into account the complementary character of the International Criminal Court, as we have already mentioned, the International Criminal Court is not authorizes to consider any case before it as long as the national judiciary is capable to handle its responsibilities in initiating this case from investigation to trial, and at the same time willing to play this role, that means, the Security Council when deciding that the case before it must be referred to the International Criminal Court, must decide on the Ability and desire of the national judiciary of the state concerned to carry out its duties[(1)]. Whether it is about a country that is a member of the organization or not, considering that maintaining

(1) The sixth paragraph of the preambular of the Rome Statute.

international peace and security is a general duty that all members of the international community are committed to achieve regardless of their membership in the organization(1).

2. Issues of Admissibility Before the ICC

It is known that one of the pillars on which Public International Law is based; is the principle of sovereignty, and one of the manifestations of sovereignty is the jurisdiction of the national judiciary to consider cases that fall within the scope of the state's territory. Putting the principle of state sovereignty in consideration, international judiciary in general is optional, requiring the state's consent. In this case, it is important to state here that, Sudan is not a member of Rome Statute since it has not ratified by it.

This means that the international criminal court (ICC) is not authorized, to consider cases except regarding the member states(2). But the statute stated a condition which offers the ICC the jurisdiction to consider cases referred to it by the Security Council under Chapter VII of the Charter of the United Nations, regardless of the membership of the state.(3)

Here we will discuss the cases when the court becomes authorized; and apply them on the case of Sudan.

The key words in this regard are (Unwillingness and inability); therefore, it should be verified that the state is either has no will or unable to handle the case in the matter of investigation and prosecution(4); or the unwillingness resulted in deciding not to accuse the concerned person(5); or where the case is res-judicata but the proceedings were either for the purpose of immunizing the person concerned or not matching the rules of independence, justice and the customs of the International Law(6). Another case verifies the

(1) Article 2/6 of the Charter of the United Nations.
(2) See Article 12 of Rome Statute.
(3) See Article 13/b of Rome Statute.
(4) See Article 17/1/a of Rome Statute.
(5) See Article 17/2/a of Rome Statute.
(6) See Article 17/1/c of Rome Statute. Also see Article 20/3 of the same statute.

existence of Unwillingness, is the case of unjustified delay in the proceedings(1).

To verify whether (inability) is found, the court needs to see the existence and availability of the national judicial system, and to confirm that there is effective total or substantial collapse in it, that effect shall cause the State inability to obtain the accused or the necessary evidence and testimony or otherwise unable to conduct its proceedings.(2)

To apply the abovementioned conditions on our case, we need to answer the following question to determine the inability of the state: Is there any effective total or substantial collapse in the national judicial system?

We also need to answer the following questions to verify the unwillingness of the state:

Was there any unjustified delay in the proceedings?

Were the proceedings conducted in a manner that do not match the rules of independence, justice, or the customs of the International Law?

Are the proceedings or the national decisions was taken to protect the person concerned?

2.1 Is There Any Effective Total or Substantial Collapse in the National Judicial System?

The existence or collapse of the national judicial system can be clarified by reviewing national legislation and exploring the extent of its coverage of the elements of crimes that fall within the jurisdiction of the court, in addition to the extent of the academic qualification and experience required for practitioners of the judiciary profession in the country concerned, and the extent of the independence of the judiciary from the political and executive authorities.

2.2 Sudanese Criminal Legislations

As most of Criminal Acts worldwide, the Sudanese Criminal Code of 1991 criminalized most acts that were proven to be committed in the conflict in Darfur, Sudan, as the Sudanese Criminal Law

(1) See Article 17/2/b of Rome Statute.
(2) See Article 17/3 of Rome Statute.

criminalized murder(1), terrorism(2), serious harm(3), unlawful detention(4), rape(5), abortion(6), polluting water sources(7), polluting the environment(8), Use of criminal force(9), kidnapping(10), looting(11), criminal destruction(12). But the question: Is the accurate description of what was committed in this conflict could be covered by these mentioned crimes?

From our point of view, the criminalization of the aforementioned acts falls within the premise of committing one or some of these crimes individually or within the ordinary circumstances, but the accusation against the various parties in light of this conflict indicates that these acts were not committed as individual cases and in ordinary circumstances, but rather were committed as the accusation also indicates in a systematic way that the aforementioned criminal texts fail to describe it accurately. This is exactly what the legislator looked at in Sudan, where he noticed this legislative deficiency, which prompted him in the year 2009 to make an amendment to the criminal law to include criminalization of several acts that were not criminal in the past before this amendment.

First time to criminalize crimes against humanity was according to the amendments of 2009, when stated that "Whoever commits himself or in association with others or encourages or supports any large-scale or systematic attack directed against any group of the civilian population who is aware of that attack and in the same context;

(1) Article 130 of the Sudanese Criminal Code 1991.
(2) Article 144 of the Sudanese Criminal Code 1991.
(3) Article 138 of the Sudanese Criminal Code 1991.
(4) Article 165 of the Sudanese Criminal Code 1991.
(5) Article 149 of the Sudanese Criminal Code 1991.
(6) Article 135 of the Sudanese Criminal Code 1991.
(7) Article 70 of the Sudanese Criminal Code 1991.
(8) Article 71 of the Sudanese Criminal Code 1991.
(9) Article 143 of the Sudanese Criminal Code 1991.
(10) Article 162 of the Sudanese Criminal Code 1991.
(11) Article 175 of the Sudanese Criminal Code 1991.
(12) Article 182 of the Sudanese Criminal Code 1991.

performs any of the following acts shall be punished by death, life imprisonment, or any lesser punishment…..etc."[1]

It also criminalized Genocide by stating "Anyone who commits, legitimizes or incites the commission of a crime or murders of members of a national, ethnic, racial or religious group as such with the intent to destroy it or partially or completely destroy it in the context of a broad systematic behavior directed against that group in the same context, he performs any of the following actions… etc."[2]

As well as criminalization of war crimes against people by stating "Whoever commits in the context of an international or non-international armed conflict and is associated with it, knowing this, shall be punished with the death penalty, life imprisonment, or any lesser punishment, and in the same context shall perform any of the following acts…. etc."[3]

The 2009 amendment also criminalized war crimes against property and other rights[4], war crimes against humanitarian operations[5], war crimes of prohibited fighting methods[6] and war crimes related to the use of prohibited means and weapons[7].

It appears from the above presentation that Sudanese criminal legislations did not contain the actual descriptions of the acts committed in the conflict in Darfur until the date the Security Council referred the conflict to the Prosecutor of the International Criminal Court, putting in consideration that the attempts to criminalize acts according to their real legal nature, which matches the international standards has occurred only in 2009 after the referral process.

It is notable that, even with the amendments of 2009, Sudanese criminal legislation does not criminalize people based on leadership liability in the event of knowledge of crimes, with the failure to take appropriate measures to stop these crimes and punish those liable.

(1) Article 186 of the Sudanese Criminal Code amending 2009.
(2) Article 187 of the Sudanese Criminal Code amending 2009.
(3) Article 188 of the Sudanese Criminal Code amending 2009.
(4) Article 189 of the Sudanese Criminal Code amending 2009.
(5) Article 190 of the Sudanese Criminal Code amending 2009.
(6) Article 191 of the Sudanese Criminal Code amending 2009.
(7) Article 192 of the Sudanese Criminal Code amending 2009.

2.3 Qualification and experience required for practitioners of the judiciary profession in Sudan

Joining the legal profession -including judiciary- in Sudan subjects to the provisions of the Regulation of Legal profession Act 1966, in which the board of regulation of the legal profession is authorized to review in order to make sure that all legal practitioners are holding a high level of professional ability, and for this purpose, it has the authority to estimate the minimum academic and professional levels necessary to join the legal profession by holding the exams stated in this law(1). The council holds examinations covers all branches of law at least twice a year for those who are willing to join the legal profession among law graduators(2).

So, according to the Sudanese legislations all legal practitioners have the academic qualifications needed for this profession. In addition to that the Judicial Authority Act and the Attorney General's Act regulate standards for promotion within the judiciary and the prosecution(3).

By reviewing many volumes of the Sudanese Judicial Rulings Journal(4), Sudanese judges have a unique professional experience they inherited from the English judicial system adopted by Sudanese law, which produced judges with high-value juristic contributions in establishing many legal principles and adapting the facts according to them.

So, we find it easy to say that the Sudanese judge lacks neither the academic qualification nor the practical experience that enables him to deal with crimes considered by the International Criminal Court. Despite this, the question: Is this adequate? Because of many other factors which may affect the ability and willingness of the criminal justice system. The most important of which is the amount of independence the judicial system has.

(1) Article 6 of the Sudanese Regulation of Legal Profession Act 1966.

(2) Article 7 of the Sudanese Regulation of Legal Profession Act 1966.

(3) For additional information review the Sudanese Judicial Authority Act 1986 and and the Attorney General's Act 2017.

(4) A periodical issued by the technical office of the Supreme Court in Sudan.

2.3.1 Was There Any Unjustified Delay in the Proceedings?

The conflict in Darfur, Sudan began in the year 2003, and many civilians were affected due to. There are more serious crimes committed in the region that constitute a threat to regional and international peace and security

The ICC reports show that since March 2005, many crimes didn't subject to investigation procedures by the national authorities, also these reports claim no information about any warrant of arrest issued by the national authorities relating to these crimes especially against the basic accused persons. Also, the ICC reports claim that the cases presented by the national authorities as cases with final rulings are selective from the normal court's files.(1)

In addition to circumstantial evidence that can be extracted from the state's behavior in dealing with the situation, whether there were productive measures that have been taken, or what has been taken are merely formal measures that have not produced any effects for a relatively long period compared to the seriousness of these crimes.

2.3.2 Were the Proceedings Conducted in a manner that Don't Match the Rules of Independence, Justice, or the Customs of the International Law?

Theoretically, there are many criteria to guarantee the independence of the judiciary. Some of these are about the criteria of joining the judiciary(2), and some represent guarantees in the judge's career(3) and many other guarantees.

Without underestimating the importance of legal guarantees for the independence of the judiciary, the fortification of this independence also depends on a breach on the cultural level in this field. This breach is supposed to make efforts at many levels, social, media, research and judicial. This means that there must be a supportive social movement

(1) 10th Report of the ICC Prosecutor to the SC, P. 9- 13.
https://www.icccpi.int/sites/default/files/NR/rdonlyres/CFB1D211-3C1C-49A1-99E0- 7B42A0162EDE/281339/10thUNSCReportARB1.pdf

(2) Mehna, Meriam, A guide on the criteria for the independence of the judiciary, Legal Agenda, Edition 1, Tunisia, P. 45-47.

(3) Mehna, Meriam, A guide on the criteria for the independence of the judiciary, Legal Agenda, Edition 1, Tunisia, P. 52-62.

from many sides, such as civil activists or unions. The media coverage of judicial affairs and actions also plays a significant role in promoting judicial independence.(1)

Verifying whether the judiciary is independent or not is difficult and may lead to unrealistic results if it is done on the basis of purely theoretical criteria, because all regimes, whether democratic or authoritarian, are keen to highlight this independence in their constitutions and legislation, but in several times, the practical reality does not match the texts included in these legislations.

Since the judiciary is the organ to which the parties of a conflict resort to settling their dispute, the mere accusation or suspicion makes it unsure for the victims to resort to it. Many suspicions and charges were raised against the Sudanese judiciary from 1989 to 2019. These charges are related to interference of the executive authority and the governing political party in the judiciary's affairs, appointing only members of the governing party, firing judges from the opposition or those not joining the governing party…etc.

Circumstantial evidences also stand against the independence of the Sudanese Judiciary in this period, especially after the revolution of December 2019. The judicial system has charged or convicted many of the members of the executive authority or the governing party including the ex-president. The question is: was it possible to charge or convict them before the revolution? If yes, then why the judicial system didn't play this role only after the revolution, considering that these crimes been committed for thirty years.

The state in Sudan has appointed a special prosecutor and formed truth-finding committees and special courts, and other procedures, but the question which should be asked is whether these efforts have produced and served the purpose they are intended to do?

We also didn't find any convincing results demonstrate the productivity of these procedures taken by the national authorities. It is obvious that all those efforts were not productive.

(1) Mehna, Meriam, A guide on the criteria for the independence of the judiciary, Legal Agenda, Edition 1, Tunisia, P. 111

2.3.3 Are the Proceedings or the National Decisions Was Taken to Protect the Person(s) Concerned?

It is hard to answer this question without considering the answers given for the above questions; putting in consideration that the answer stands only on circumstantial evidence, because it is hard to find material evidence to demonstrate that the proceedings or the national decisions was taken to protect the person(s) concerned. An exclamation rises here since one of the basic jobs of any state is to guarantee justice for the victims, and since there is no justification for delay since 2003.

The ICC reports indicate that witnesses who have facts related to these crimes been threatened by the security forces(1). It is easy to extract from this behavior that the incentive is to protect the person(s) concerned.

In addition to that, in public statements dated June 2007, May 2008 and March 2009, the President Al-Bashir refused to take any procedures to investigate with Minister of Interior Ahmed Haroun, saying that Haroun may continue to carry out his duties. And in March 2009, when the Special Prosecutor for Darfur (Nimr Ibrahim Mohamed) suggested that Haroun might subject to national investigation, he, and the Minister of Justice Abd al-Basit Sabdarat were accused of taking positions that "do not conform to the position of the state refusing to deal with the International Criminal Court". On March 22, 2009, Sabdarat announced that there were no charges against Minister Haroun.(2)

3. Conclusion

The settlement of disputes is the original jurisdiction of the national judiciary, as it is one of the manifestations of the principle of sovereignty upon which the rules of Public International Law are based.

Originally, the protection of individual's rights is the primary function of internal legal system, and therefore of national judiciary. The Public International law and international judiciary have nothing to do with it, but history has proven that the necessity may arise to

(1) 10th Report of the ICC Prosecutor to the SC, P. 9- 13.
(2) 10th Report of the ICC Prosecutor to the SC, P. 3.

protect these rights, and therefore rules arose within the framework of international law to protect these rights.

This necessity is that the internal legal system does not play the role it ought to play, either because of Inability or because of unwillingness. Therefore, the conditions for the protection of individual rights under international law are the Inability or unwillingness of the internal legal system to offer such protection.

To apply these two conditions to the case of Sudan before the International Criminal Court, it was necessary to identify the elements of the first condition (inability), which is the inclusion of the internal legislative system to criminalize acts, the academic and professional qualification of legal practitioners and their practical experience, and the independence of the judiciary.

Through the discussion of these elements, it was found that there is a legislative deficiency in the internal legal system, as its rules did not include the crimes for which the International Criminal Court is held accountable, and no attempts were made to fill this deficiency until 2009, when amendments were made to the 1991 Criminal Code.

With regard to the professional and academic qualification and experience of the legal practitioners in Sudan, and through a review of the Regulation of the Legal Profession Practice Act, the Judiciary Act and the Attorney General Act, it was found that legal practitioners in Sudan do not lack academic or professional qualification, By examining samples of their work through perusal of judicial rulings journals, it became clear that they had a high level of experience in their field of work.

Based on the foregoing, it was found that the legal system in Sudan, despite the academic and professional qualifications and experience, was not able to deal with the legal issues resulting from the crisis in Darfur due to the legislative deficiency.

Concerning the independence of the judiciary, and this is an issue that is difficult to verify and reach a definitive conclusion on it through legal texts, as the legislative texts of different countries guarantee this independence, and despite that, the application of these texts becomes a real problem. In the case of Sudan, several questions were raised about the interference of the executive authority in the

Jurisdiction of the judiciary and the public prosecution through appointment and dismissal. The reality also confirms that the same legal system is working on criminal cases after the previous political regime was overthrown by a popular revolution in 2019, these lawsuits are based on facts prior to the year 2019, which raises the question: Why were these lawsuits not worked on until after the previous political regime was overthrown? Of course, the answer to this question is not a conclusive indication of the independence of the judiciary, but merely raising doubts about this independence is undesirable, as judiciary and the attorney general are assumed have the confidence of litigants.

Regarding the second condition (unwillingness), and since desire is something related to moral matters, its verification could be by drawing conclusions from the surrounding circumstances, by following the behavior of the legal system in dealing with the case. Since the reports issued by the Prosecutor of the International Criminal Court made it clear that the measures taken by Sudan in relation to the crimes committed in Darfur were unproductive, and since we did not find any evidence that these measures resulted in real accountability, and since there is nothing to prevent the state from taking these productive measures, unwillingness is the only logical conclusion that we can conclude.

Based on the foregoing, the conditions required for the complementary role of international criminal justice have been fulfilled in the case of Sudan.

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