

## The International Criminal Court mechanism to the implementation of responsibility to protect: Darfur case model

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### Abstract:

The enormity of the crimes witnessed by the contemporary world led the international community to search for a judicial legal mechanism that would punish all those who makes intimidate humanity and threaten its security and safety. That already embodied in the establishment of a permanent international criminal justice system, which represented a balance margin between a State as an independant sovereign entity and the international community rights. However, the establishment of an international criminal court does not mean that it exercises supreme authority over the States national jurisdiction or takes precedence over it in the adjudication of international crimes within its jurisdiction. This is the matter that Darfur crisis was based on that became a human tragedy that has been contributed by many parties to intervene in the territory, so the States resorted to the term R2P (responsibility to protect) imposed by the moral duty of international community. where as the Security Council passed resolution 1593, according to which the Council referred the situation in Darfur to the International Criminal Court, which in turn showed its readiness to exercise its responsibility to protect by the Attorney General.

### Keywords:

Darfur, Genocide, Security Council, International Criminal Court, Attorney General, responsibility to Protect.

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## آلية المحكمة الجنائية الدولية لتطبيق مسؤولية الحماية: قضية دارفور أنموذجاً

### الملخص:

دفعت جسامه الجرائم التي شهدها العالم المعاصر بالمجموعة الدولية إلى البحث عن آلية قانونية قضائية تعاقب كل من يقوم بترهيب الإنسانية وتهديد أمنها وسلامتها. الأمر الذي تجسّد بالفعل في إنشاء نظام دولي دائم للعدالة الجنائية، وهو ما يضمن هامش توازن بين الدولة ككيان مستقل ذو سيادة وحقوق المجتمع الدولي. ومع ذلك، فإن إنشاء محكمة جنائية دولية لا يعني أنها تمارس السلطة العليا على الولاية الوطنية للدول أو لها الأسبقية في الفصل في الجرائم الدولية التي تدخل ضمن اختصاصها. الأمر الذي تم الاستناد إليه في أزمة دارفور التي أضحت مأساة إنسانية ساهمت فيها العديد من الأطراف بـغية التدخل في الإقليم، حيث لجأت الدول إلى مصطلح مسؤولية الحماية R2P التي يفرضها الواجب الأخلاقي على المجتمع الدولي، فأصدر مجلس الأمن القرار رقم: 1593 الذي أحال المجلس بموجبه الوضع في دارفور إلى المحكمة الجنائية الدولية التي أبدت بدورها استعدادها لممارسة حقها في مسؤولية الحماية من قبل المدعي العام.

### الكلمات المفتاحية:

دارفور، جريمة الإبادة الجماعية، مجلس الأمن، المحكمة الجنائية الدولية، المدعي العام، مسؤولية الحماية.

## Le mécanisme de la Cour pénale internationale pour la mise en œuvre de la responsabilité de protéger : le cas de Darfour

### Résumé :

La gravité des crimes dont le monde contemporain a été témoin a incité la communauté internationale à chercher un mécanisme judiciaire qui punirait tous ceux qui intimident l'humanité et menacent sa sécurité. Cela est déjà illustré par l'établissement d'un système international permanent de justice pénale, qui assure un équilibre entre l'État en tant qu'entité indépendante et souveraine et les droits de la communauté internationale. Toutefois, la création d'une cour pénale internationale ne signifie pas qu'elle exerce une autorité suprême sur la juridiction nationale des États ou qu'elle a préséance aux crimes internationaux relevant de sa juridiction.

La crise du Darfour était basée sur cela, est devenue une tragédie humaine, dans laquelle de nombreuses parties ont contribué à l'intervention dans la région, où les pays ont eu recours au terme de responsabilité de protéger R2P, qui est imposée par le devoir moral de la communauté internationale, le Conseil de sécurité a publié la résolution n° 1593 par laquelle le Conseil a renvoyé la situation au Darfour devant la Cour pénale internationale, qui a montré qu'elle était prête à exercer son droit à la responsabilité de protéger, par son procureur général.

### Mots clés:

Darfour, crime de génocide, Conseil de sécurité, Cour pénale internationale, Procureur général, responsabilité de la protection.

## Introduction

The international community has always been dreamed of establishing the (ICC), as the most serious crimes have been a source of his concern, The international community's human conscience sought to try to reduce the scope of crimes against humanity through this court, which contributing to the defense of human rights<sup>1</sup>. And giving a new dimension to humanitarian intervention, emphasis on the international status of the individual, by deciding his international responsibility to protect<sup>2</sup>.

Perhaps the Darfur crisis is one of the humanitarian disasters that led to crimes against humanity and war crimes, in which the Sudanese government, headed by President Omar Hassan Al-Bashir accused by, the court's attorney general called for issuing an arrest warrant against him after the investigations campaign started<sup>3</sup>. That was following the UN Security Council Resolution: 1593 that spent referring the situation in Darfur to the International Criminal Court (ICC), on violations of international humanitarian law and international law of human rights.

Although The Chapter VII provisions of united nation Charter do not authorize the Security Council to refer the Darfur issue, because the international peace and security threat issues due a Difference around, and politicized by the permanent members, therefore the referral decision is void, may therefore the Sudan as a member of the United Nations, be request an advisory opinion from the Court of International Justice by offering a resolution of the General Assembly<sup>4</sup>. **This makes us wonder: What is the basis of the intervention of the (ICC) in the case of Darfur?** I will answer to this question through the three following detailed points.

## Section I : the principle of international responsibility to protect

First of all, for the International Criminal Court (ICC) the referral incident was important and Unimaginable in the same time, especially as it came a few months before the United States opposed the resolution, and after the lukewarm positions of the Security Council members (China and Russia), also this referral was unexpected by the Security Council, it is blessing and a threat at the same time<sup>5</sup>.

<sup>1</sup> - Hammād auadi sanad, fikrat inchāa almahkama aljināiya ū madā musāhamatiha fi aldīfā'a an hukūk alinsān, an article published on: 27/10/2009, in : [http://www.sudaneseonline.com/ar/article\\_22608.shtml](http://www.sudaneseonline.com/ar/article_22608.shtml), Date of visit: 16 / 08/2010 At ten o'clock am.

<sup>2</sup> - Mohammed Ghazi Nasser al-Djanābī, altadakhul alinsāni fy dhaww alkānūn aldauwwli alaām, 1st ed, manshūrāt alhalabi alhukukiyya, Beirūt, Líbano, 2010, p 287.

<sup>3</sup> - Omar Kūsh, darfour min azmat dawla ila sirāa alkīwa, an article published on: <http://www.forum.arab-mms.com/t127655.html>

<sup>4</sup> - D. Essām Abdel-Fattāh Matar, almahkama aljinaiya aldauwliya, mukadimāt inchaiha, dar Al Jami'ia aljadida, Alexandria, 2010, p 221.

<sup>5</sup> - BENJAMIN N.CHIFF, Building the International Criminal Court, Cambridge University Press, New York, USA, 2008, p. 226.

**a - Blessing:** because this shows that the Court is a gain for the Security Council.

**b - Threat:** because without Sudan cooperation, and the strong and solid help of other states, the Court will face great difficulties in gathering evidence and conduct investigations<sup>6</sup>. The Security Council's referral here, therefore reflects the flexibility of the Court's system, despite its characteristics to protect human rights, which are the independence and the permanency<sup>7</sup>.

The situation conditioning in Darfur as genocide, that has to do with the responsibility to protect of the international community on this issue. Where the United Nations confirmed the need for a principle of international responsibility to protect (R2P) in the new human system. Two issues we can raise here:

☞ **Know if there is genocide?**

☞ **If an intervention is necessary, and more importantly, how is can be this intervention?**

Here we ask also on which procedure can conditioning genocide, related to the responsibility to protect in the case of Darfur? To know that, it's necessary to search for the committed acts in Darfur, is up to the genocide or no? If so, what are the consequences due for the importance of this conditioning with regard to the need of respond?<sup>8</sup>.

## 1 - Adapting what happened in Darfur

To see whether what happened in Darfur genocide or not, we must define the crime of genocide and ethnic cleansing.

### A - The definition of genocide

The genocide focused on a special form of crimes against humanity, characterized by committing acts that would destroy in total or partial, a national, ethnical, racial or religious group, The origin of this crime is to the Polish « RAFHAEL LEMKIN » 1944, that Continued to be included in crimes against humanity till it independence as a stand-alone crime by adopting the convention of the prevention and punishment of the crime of genocide after the World War2<sup>9</sup>.

### B - The definition of ethnic cleansing

The United Nations High Commissioner in her report to the Security Council in 1933 defined the ethnic cleansing that:" make an area a homogenous by using force or intimidation to uprooted persons belonging to certain groups from this region "also

<sup>6</sup> - BENJAMIN N.CHIFF, Ibid, p. 226.

<sup>7</sup> - Salvatore Zappalà, La Justicia pénale Internacional, París, Montchrestien, 2007, p. 137.

<sup>8</sup> - Proceedings of the 41 Annual Symposium of the French Society for International Law, The Responsibility to Protect and the Debate on the Qualification of Genocide, Pédone, Paris, 2008, 233-241, p. 39, an article published in: <http://www.jbjv.com/la-responsabilité-de-protéger-et.html>, Date of visit: 15/08/2010.

<sup>9</sup> - Salvatore Zappalà, op.cit, p. 40.

is defined as " the use of force or threat of using force to move people belonging to ethnic or religious group from an area"<sup>10</sup>.

### C - The situation in Darfur

The situation in Darfur since 2003 has resulted 300,000 dead people and 2.5 million displaced people that escalated the news pace on human rights violations in the region, through allegations of United States of America (USA) and Israel that genocide took place. Government of Sudan has taken the initiative to establish a fact-finding commission by order of the Sudanese President "Omar Hassan al-Bashir" in May 2004, to investigate violations that took place in Darfur, and has already formed under the chairmanship of former Justice Chief of Sudan, "Daf'a Allah Al-Haj " <sup>11</sup>.

After the investigation the Commission has reached that all the conflict parties has been involved in hazardous violations of human rights and international humanitarian law in the Darfur three provinces, that was in her report to the President of the Republic on 23 January 2005, in which it referred that what happened in Darfur Despite its gravity does not constitute genocide crime due to lack of its stipulations<sup>12</sup>.

In response to the recommendations of the President, the Minister of Justice established commission of inquiry headed by the Supreme Court judge and a number of senior legal advisers, the Committee began its investigations in the areas concerned by visiting Darfur heard the prosecution witnesses and issued arrest warrants for the suspects<sup>13</sup>. the committee made a great strides in the cases of "Delj" and "Chtaya" in West Darfur and referred a number of communications to the Court, including the charges of "Ali Kushayb" after his responsibility for the disappearance and killing some people, burning villages, the court opened its proceedings, also the committee is still on its investigation of other communications, the court issued death

<sup>10</sup> - D. Omar Sa'd Allah, mu'jam alkanūn aldawli almu'asar, i 2, diwān almatbū'at aljami'iya , Algeria, 2007, p 126.

<sup>11</sup> - D. Omar al Makhzumī, alkanūn aldawli alinsānī fi dhaūa almahkama aljinaiya al dauwliya , 1st ed, dar altakafa linnashar, Amman, Jordania, 2008, p 381.

<sup>12</sup> - zawī samia, daūar majlis alamn fy tatbik alkanūn aldawwli alinsānī, Memorandum of Magister of the Faculty of Law, University of Annaba, 2008-2009, p 254.

- Through the First Pre-Trial Chamber's decision containing the warrant arrest of al-Bashir issued on March 04, 2009, based on individual criminal responsibility under Article 25 (3a) of the Rome Statute, there are 05 counts related to crimes against humanity which are:

Murder according to the Article 7 (1a), extermination under Article 7 (1b) - wich differs from the genocide crimes mentioned in the Article 06 - forced transfer under Article 7 (1- d), torture under Article 7 (1- F) and Rape under Article 7 (1- g).

besides to two charges related to war crimes: attacks directing against civilians or against those who not taking part in hostilities under Article 8 (2-e-1), and pillaging according to Article 8 (2-e-5).

for the crime of genocide, most Pre-Trial Chamber I judges said that there are no reasonable reasons to believe that the sudanese government has acted with a special criminal intent, to completely or partially destroy the Fur, Masalit and Zaghawa groups, unless additional evidence is collected, the arrest warrant in this case is amended to include the crime of genocide .

<sup>13</sup> - D. Essām Abdel-Fattāh matar, op.cit, p 223.

sentenced for some of individual events accused committed in the Darfur states, including members of Sudan armed forces, so the Sudan met the requirements of complementarity principle between the ICC and national courts<sup>14</sup>.

There are two elements in genocide crime: a material element and moral element.

## 1 - Material element: concerned with two issues

### - Prohibited conduct which is:

- \* killing a group or
- \* Serious bodily or mental harm
- \* Deliberately subjecting them to living conditions intended for their physical destruction or
- \* Imposing measures aimed at preventing births within or
- \* Forcibly transferring her children to another group.

- **Target Group:** It is an ethnic, national or religious group.<sup>15</sup>

Thus, the act of extermination becomes the perpetration of all the above-mentioned conduct against any of these groups.

## 2 - The moral element

It is the intention of genocide or the criminal intent required to commit total or partial destruction by one of the prohibited methods against the above-mentioned groups<sup>16</sup>. Extrapolating the situation in Darfur, it is a tribal dispute over natural resources that have turned into an international conflict that has caused crimes against humanity and war crimes, as the International Commission of Inquiry has said.

## D - International Commission of Inquiry

The Secretary-General of UN has established an international Commission of inquiry under paragraph 12 of Security Council resolution No 1564 issued in 2004, in order to report on the parties to the conflict violations of international human rights and humanitarian law in Darfur, and to prove or deny the existence of genocide. The Sudanese government approved the committee, which began its work on: 25/10/2004, and transmitted its report to the Secretary-General of the UN, who referred it to the Security Council in: January 31, 2005<sup>17</sup>.

The Secretary-General pointed that the Sudanese government and the Janjaweed militia were responsible for several violations, such as the attack on villages, the killing of civilians, displacement.....etc. but they did not use the policy of genocide,

<sup>14</sup> - D. Essām Abdel-Fattāh, matar, ibid, p 223.

<sup>15</sup> - Convention on the Prevention of Crime and Punishment of Genocide, adopted and opened for signature, ratification or accession by General Assembly resolution of the UN: 260 D-3, published on December 9, 1948, entered into force on 12 January 1951, in accordance with the provisions of Article 13, item number: 02.

<sup>16</sup> - Kamāl Al-Din el Genzulī Alwada'a fy darfour, Cairo, march 2006, p 162.

<sup>17</sup> - D. Omar el Makhzūmi, op.cit, p 383.

but he said that crimes against humanity and war crimes were no less serious than the crime of genocide<sup>18</sup>. While Argentinian Judge "Luis Moreno Ocampo", in his periodic report in front of an open session of the Security Council on 13/12/2005, revealed that the cooperation of the Sudanese Government with him during the past period was good, it had agreed to receive a representative from his office in February 2006 to see the national courts progress, with its conformity with international standards and the Rome Statute, he said that he looked forward to further positive cooperation<sup>19</sup>. Especially the text of Article: 98 of the Rome Statute provides for judicial assistance, the cooperation with the Court and the bringing to justice<sup>20</sup>.

The International Commission of Inquiry is the political instrument for the effective execution of article 13/b of the Rome Statute related to the referral System<sup>21</sup>. However, the Attorney General quickly withdrew his speech regarding Sudan's cooperation with the court. The Sudanese Minister of Justice hurried, by assuring him that the Sudanese government is ready to cooperate with the Attorney General's envoys and convince them of the steps taken regarding the trials<sup>22</sup>. The prosecutor justified the arrest warrant by the Sudan's unwillingness and inability to prosecute the violators.

He said that his intervention in Darfur case was based on the referral of the Security Council, the body concerned to keeping international peace and security in the UN, and that 2.5 million people in Darfur need the court. His intervention also justified in fact that not by the control of the major powers by saying that China and the United States were against the court's assignment to the case, however, the court operates independently<sup>23</sup>. Perhaps Ocampo's position is justified by Sudan's refusal to conduct an investigation with the accused "Ali Kushayb " during the visit of the prosecutor's delegation to Sudan in February 2007 because this is an investigation, and it is illegal to conduct two investigations at the same time by two different judicial bodies with the same person!

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<sup>18</sup> - Florian AUMOND, The Situation in Darfur refer to the CPI-, back on a resolution "Historic" Security Council, General Review of Public International Law, Tom CXII, Pedone, 2008, pp 115. 116.

<sup>19</sup> - Kamal Al-Din Awad el Genzoulī, Darfur and the International Criminal Court, Cairo, 2006, pp 87,88.

<sup>20</sup> - CARMEN QUESADA-ALCALA, obstacles to the International Criminal Court: impediments to the enforcement of International Humanitarian Law, in: The new challenges of humanitarian law in armed conflict, edited by PABLO ANTONIO FERNANDEZ-SANCHEZ, Vol.12, Martinus Nijhoff Publishers, Leiden, Boston, 2005, p.302.

<sup>21</sup> - D. Essām Abdel-Fattāh, matar, op.cit, p 221.

<sup>22</sup> - Kamāl Al-Din Awad elGenzulī, Darfur wa almahkama aljinaiya aldawliya, Cairo, 2006, p 91.

<sup>23</sup> - altalfaza alkataria, Abdelrahman Fakra barnāmej min washington, guests at the seminar (Luis Moreno Ocampo, Abdel Mahmoud Abdel Haleem Sudan's ambassador to the UN, Mahmoud Cherif Bassiouni, professor of international criminal law), the International Criminal Court and Bashir, Al Jazeera , Qatar, the date of incident: 04/08/2010 published on: 28/12/2010 at: <http://www.sudanjem.com/2009/archives/32878/ar/> Date of visit: 17/08/2010 at time: half past ten.

Resulting that Sudanese Foreign Ministry notified the Attorney General Office by writing in February 2007, that the Sudan judicial authorities have initiated the investigation and prosecution of crimes alleged in Darfur. This measure is considered as prevention ICC to exercise its jurisdiction over the situation in Darfur. However the Attorney General referred the file to the Pre-Trial Chamber he said that this does not affect the principle of complementarity in spite he know that the Sudanese committee of Inquiry had started the investigation since November 2006<sup>24</sup>.

Although one of the reasons why the Court does not accept the case, is when the investigation or prosecution of the case is conducted by a State with jurisdiction priority over national legal systems in accordance with the principle of complementarity, Unless the State is unable or unwilling to fulfill its obligations to investigate or trial<sup>25</sup>. Whereas the inability or unwillingness question is not possible, because once the investigation was started the case was hijacked off its hands!

## **Section II: The Attorney General issued an arrest warrant against the President Omar Hassan al-Bashir**

Following the Security Council's referral of the situation in Darfur to ICC by resolution 1593, the prosecutor transfer the file into the Pre-Trial Chamber, asked for the approval of an arrest warrant for Sudanese President Omar Hassan al-Bashir, and already the Pre-Trial Chamber issued an arrest warrant on March 04, 2009<sup>26</sup>.

The court's prosecutor, Luis Moreno Ocampo, has sent a report to the Security Council in which he identified serious incidents such as the existence of a high number of dead, rape and other acts of violence falling within the court's jurisdiction<sup>27</sup>. In his 2007 report, Moreno-Ocampo wrote that Hamid al-Douai, the leader of a Janjaweed militia and the prince of an Arab tribe, committed violations in al-Janina in July 2003, accompanied by Musa Hilal, then left the area aboard a government helicopter with the head of the Darfur Security office and State Minister Ahmed Haroun. Al-Douai is also responsible for killing 460 civilians from august 2003 till April 2004, and this work of the Janjaweed and government assistants is related to President Al-Bashir, when he warned in January 2003, saying: "We will use weapons, police, mujahideen, and cavalry (Al-Khayala) to stop rebellion"<sup>28</sup>. That

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<sup>24</sup> - The Republic of Sudan, Ministry of Foreign Affairs, the same site.

<sup>25</sup> - D. Abdelkader el Bokayrat, *al'adala aljinaiyya aldauwwliyya, muhakamat murtakibi aljaraim dhid alinsaniyya*, i 1, diwan almatbuaat aljamiyya, Algeria, 2007, p 232.

<sup>26</sup>-An arrest warrant issued on March 4, 2009 at:

<http://www.icc-cpi.int/iccdocs/doc/doc639093.pdf>

Date of visit: 17/08/2010 at time: seven in the evening.

<sup>27</sup> - RALPH Henham, PABLO Behrens, *Criminal Law of Genocide*, International compared the contextual aspects, ASH GATE, England, USA, 2007, p.40.

<sup>28</sup> - Kelly Dawn ASKIN, *prosecuting gender crimes committed in Darfur: holding leaders accountable for sexual violence in genocide: Darfur, research, Atrocities in the Sudan*, edited by Samuel Totten and Markusen ERIC, Routledge, New York, 2006, p . 142.



makes us pause on the question of investigation without set his foot in Darfur, and this is what make doubts the fairness of the court!

On 14/07/2008 the Attorney General applied a request to the Pre-Trial Chamber to issue an arrest warrant against Sudanese President Omar Hassan al-Bashir, after that , on the same day Moreno-Ocampo held a press conference in which he discuss that "Al-Bashir committed extermination crime, crimes against humanity and war crimes in Darfur"<sup>29</sup>.

In his words, he said that al-Bashir organized and implemented a plan to destroy an essential part of the Fur, Masalit and Zaghawa, thus he committed extermination crime<sup>30</sup>.

## 1 - Legal reading of the arrest warrant

The international criminal responsibility of those involved in violations of international humanitarian and human rights law is not easy, especially when it comes to the follow-up of the Head of State, to whom traditional international law grants special privilege and immunity<sup>31</sup>. Under his legal status in general international law the Head of State enjoys immunity prevent his trial before the national jurisdiction of any State, whether for ordinary crimes or international crimes<sup>32</sup>.

The efforts of the international community to combat major international criminals had been consolidated with the signing of the Rome Convention of 17 July 1998 establishing the International Criminal Court<sup>33</sup>. The full immunity of the Head of State before the criminal justice of foreign States must therefore not be confused with another matter, which is the responsibility of the Head of State for international crimes committed by him<sup>34</sup>. However, in order to trigger the ICC action against the Head of State, some conditions which set by the article N°13 of the Rome Statute must be:

-If, in accordance with article N° 14 of the same statute, a State Party has referred to the Prosecutor a situation where it appears that one or more of the crimes listed in article N° 05 have been committed.

-If the Security Council, acting under Chapter VII, referred a case to the Prosecutor, it would appear that one or more of these crimes had been committed.

-If the Prosecutor has initiated an investigation into an offense under article 15<sup>35</sup>.

<sup>29</sup> - David Lanz, Conflict Management and opportunity cost: The international response to the crisis in Darfur, FRIDE, 2008, Madrid, p.01.

<sup>30</sup> - David Lanz, Ibi, p.01.

<sup>31</sup> - D. tājar Mohammed " kirāaa kanūnia fy mudhakhirat itikāl alraīys alsūdānī », Omar Hassan al-Bashīr, al majala aljazāiriyya lilolum alkānūnia u siassia, vol 03, Faculty of Law, Algeria, 2009, p 235.

<sup>32</sup> - D. Muhammad Abd al-Muttalib alkhechen, alwadha' alkānūnī liraīss aldawla fy alkānun aldawli alaām, dār aljami'a aljadida li anashr, Alexandria, 2005, p 318.

<sup>33</sup> - D. tājar Mohammed, the previous article, p 236.

<sup>34</sup> - D. Muhammad Abd al-Muttalib alkhechen, op.cit, p 308.

<sup>35</sup> - See: 13 of the Statute of Rome signed in 1998, which came into force in 2002.

Since the Sudan is not a party to the Rome Statute, the basis upon which ICC has relied is a referral from the Security Council, but in accordance with the principle of complementarity, the priority is for national justice, as the International Criminal Court may decide that the case is inadmissible *inter alia*, such as:

-Whether the investigation or prosecution of the case is conducted by a State with jurisdiction, unless the State is truly unwilling or unable to carry out an investigation or prosecution, the criterion of desire shall be determined by the Court in accordance with the criteria of:

\* if a national decision is taken to protect the person concerned from criminal responsibility for crimes within the jurisdiction of the court.

\*If there is an undue delay in the proceedings in contravention of the intent to bring a person to trial.

This is why the court relied on it, accusing the Sudanese government of being unwilling to prosecute officials, and therefore stirring up the case in accordance with this reason, in addition to the inability of the Sudanese judicial system to do so, according to ICC' findings. Although at the beginning of the case, the prosecutor said that the capacity and integrity of the Sudanese judicial system is not in doubt, this undermines the basis for referral from the Security Council originally, as reached by the international investigation committee headed by the Italian "Anthony Cassese"<sup>36</sup>. It also blows up his issuance of the arrest warrant!

On 06 June 2005, the Attorney General decided to open an official investigation into the situation in Darfur, where he filed a petition with the judges of the court in: 14/07/2008 for the purpose of issuing an arrest warrant, but the Pre-Trial Chamber asked him to provide additional elements to support his request in: 16/10/2008, which leading to the issuance of an arrest warrant in: 04 March 2009, which accuse the Sudanese president, the responsibility for the crimes attributed to him came as an indirect responsibility through his orders to the army and the Janjawid<sup>37</sup>.

## 2 - Sudanese president's responsibility for Darfur violations

The responsibility of the State is represented by its President for "all acts committed by persons forming part of its armed forces" mentioned in the text of article N°. 03 of the 1907 Hague Convention, concerning respect for the laws and customs of land war, the four Geneva Conventions of 1949 and article N° 91 of Additional Protocol I. In addition to the responsibility of prosecuting them for serious violations<sup>38</sup>. Consequently, the arrest warrant states that the President is responsible in accordance with article No. 25/3(a) of the Rome Statute, as an indirect perpetrator or co-perpetrator of attacks against the population, looting, murder and extermination as a crime against humanity, forced transfer, torture and rape<sup>39</sup>.

<sup>36</sup> - D. Essām Abdel-Fattāh matar, *op.cit*, p 224.

<sup>37</sup> - D. tājir Mohammed, the previous article, pp 246 247.

<sup>38</sup> - D. Najāt Ahmed Ahmed Ibrāhim, *almasuliyya al dawliyya aan alkānūn aldawli alinsāni, manshurāt alma'arif*, Alexandria, 2009, pp 291 293.

<sup>39</sup> - The text of the warrant issued on March 4, 2009, the previous site.

On the basis of this, Pre-Trial Chamber held “Omar al-Bashir” criminal responsibility under the paragraph 3 a of Article 25, of the Rome Statute, as an indirect perpetrator or an indirect partner in war crimes and crimes against humanity, but the Pre-Trial Chamber I dropped the crime of genocide from the scope of Crimes attributed to President Omar al-Bashir, due to lack of evidence<sup>40</sup> (The Pre-Trial Chamber’s decision stated the following: " ... The prosecution emphasizes that it is based solely on evidence regarding Omar Al-Bashir's responsibility for genocide. In particular, the claim is based on inference to prove that Omar Al-Bashir had a special intention to decimate Al-Fur groups, the Zaghawa and the Masalit. The Pre-Trial Chamber has indicated the standard of proof that should be applied in such case as follows: The majority agrees with the claim that this criterion is not fulfilled when applying the Evidence Law by inferring the standard of proof stipulated in the Article 58 of the rome statute regarding the availability of the intent of genocide to the Sudan government , unless the material provided by the prosecution in support of its request shows that the only reasonable conclusion that can be drawn from, it is that there are reasonable conclusion to believe that there is a special intent of the sudan government to completely or Partially destroy the Fur, Masalit and Zaghawa groups . Accordingly, the majority believes that if the intention of the genocide is available to the sudan Government as one only of several reasonable conclusions, it can be drawn from what the prosecution presented, then the prosecution request must be rejected in relation to genocide because the standard of proof stipulated in the article 58 of the statute was not fulfilled)<sup>41</sup>.

The State also has responsibility for violations committed by persons or groups that actually operate on the instructions of their officials or under their supervision or control, as described in judicial practices like "Tadic" case, where the International Tribunal for the former Yugoslavia decided that the behavior of an individual or group that is not organized in a military manner attributed to the State only if the latter gives specific instructions regarding that conduct, However, it the State is responsible for the conduct of an armed or militia force if it has total control over it<sup>42</sup>.

This applies to the Sudanese government which, after the attack on El Fasher airport in April 2003, called to mobilize the Janjaweed militia in response to SLMA and JEM activities, alt also engaged with it in counter-insurgency campaigns that continued until the prosecution's request was filed on 14/07/2008<sup>43</sup>. However, at the

<sup>40</sup> - Alain-Guy Tachou Sipowo : «Chef d’Etat à KHARTOUM et criminel de guerre au DARFOUR .La responsabilité pénale du fait d’un intermédiaire en droit pénal international :Le cas HASSAN OMAR AL BASHIR devant la Cour pénale internationale », *R.Q.D.I*, N°24.2,2011,p.204.

<sup>41</sup> - see the Public Document of Pre-Trial Chamber I, included the "Order to Arrest Omar Hassan Ahmad al-Bashir," op cit, p. 06.07.

<sup>42</sup> - D. Najat Ahmed Ahmed Ibrāhim, op.cit, p 297.

<sup>43</sup> - The text command of the detention, March 4, 2009, the previous site, p 04.

beginning of the investigation, the prosecutor asked the Sudanese government to cooperate with him and he praised that.

The Sudanese Government has instituted measures counter the development of the situation of issuing the arrest warrants for the accused:

-Establishment of a national committee of experts of competent jurists to deal with the International Criminal Court.

-Consideration of the contracting of a State law office to take over the task of defense under the auspices of the National Committee of Experts.

– The Judicial Commission of Inquiry continues its work.

- The admissibility decision of the Prosecutor must be countered.

- To proceed with the preparation of the application study to the General Assembly of the United Nations, by requesting the advisory opinion of the International Court of Justice, on the legal basis on which the Security Council referred the case to the International Criminal Court under Chapter VII.

– To consider the possibility and feasibility of moving the Sudanese native administration system in general and the native administration system in Darfur in particular, to address the International Criminal Court by abandoning Darfur cases to settle them according to the Sudanese law and the customary system known in Darfur<sup>44</sup>.

The African Union also asked the Security Council on 02/02/2011 for the International Criminal Court to abandon its investigation into Darfur cases.

### 3 - The position of the Sudanese Government on the arrest warrant

Following the release of the list of Darfur crimes suspects, the Sudanese Foreign Ministry summoned the ambassadors of the permanent member states in the Security Council, in addition to the EU representative and the African Union representative, and the ambassadors of the Arab, African and Asian countries to denounce this step and its negative effects that affect regional stability and security.<sup>45</sup>

"Khartoum will do its best to obstruct the work of the International Criminal Court in the case of accusing the president of committing a war crime and crimes against humanity," announce Ghazi Salahuddin, senior adviser to the Sudanese president<sup>46</sup>. Meanwhile, Minister of State in the Sudanese Ministry of Information and Communications Kamal Ubaid considered the timing of the prosecutor's announcement on the list of suspects confirms the political court's basis<sup>47</sup>. The president's advisor said the memo was designed to generate hostility between tribal groups in Darfur region, as well as Sudanese vice-president "Ali Osman Mohamed

<sup>44</sup> - D. Essām Abdel-Fattāh matar, op.cit, pp 229 230.

<sup>45</sup> - Boumaaza Mona, dawr alkadhaa aldawli aljinai fy tatbik alkanun aldawli alinsani, Magister Memorandum, Faculty of Law, Annaba, Algeria, 2008-2009, p 110.

<sup>46</sup> - D. Amir faraj Yusuf, almahkama aljinaiyya al dawliyya u mushkilat darfour, DT, Dar almatbu'at aljamiyya, Alexandria, 2009, p 91.

<sup>47</sup> - Bouma'za Mona, The previous Memorandum, p 110.

Taha", as he stated that the court's move is political, because the conflict in Darfur started before Al-Bashir took office<sup>48</sup>.

### Section III: Issue a second arrest warrant

The Public Prosecutor of International Criminal Court (ICC), may shed light on Darfur by issuing an arrest warrant for President Omar Hassan al-Bashir concerning the new humanity system, where he established his claim on one side of which is that what happened in Darfur, is a "Holocaust" before al-Bashir took office and attributed to him many of the responsibilities for the killings, with all ignorance of history, because the differences in identity in Darfur dates back to the era of British colonialism, as a reason of creation two groups: the first, Arabic and the second is African, therefore the prosecutor was wrong that the ratios of ethnic difference in Darfur conflict to Bashir, as it concluded that there is ethnic cleansing and atrocities in the camps, here we note the line of confusion between politics and law in the issue of President innocence all under the weight of the new humanity system after the terrorism war where we find that the responsibility to protect through International community authorization to Security Council justifies their humanitarian intervention, which was originally rejected<sup>49</sup>.

On 12/07/2010 the Pre-Trial Chamber issued a second arrest warrant for the Sudanese president, this time adding to him the crime of extermination in three different forms:

- Genocide by murder.
- Genocide by causing serious bodily or mental harm.
- Genocide by the imposition of living conditions intended to intentionally cause material destruction<sup>50</sup>.

According to the Prosecutor, since the Pre-Trial Chamber adopted the wrong standard of proof by not mentioning the crime of genocide in the first order, It is now in the second arrest warrant convinced that there are reasonable grounds for believing that al-Bashir committed genocide<sup>51</sup>.

Ocampo has accused Al-Bashir of being the mastermind of an attempt to exterminate African tribes in Darfur region, and leads a campaign of murder, rape and displacement. As for Sudan Liberation Movement, it welcomed the Attorney General's request and considered it a right decision as Abdul Wahed Nour said: «This

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<sup>48</sup> - D. Amir faraj Yusuf, op.cit, pp 91,92.

<sup>49</sup> - Mahmūd Mamdanī, Darfur, the ICC and the New Humanitarian Order, How the ICC "responsibility to protect 'is becoming Affirmation of neocolonial domination, 17/09, 2008, in: [http://www.pambazuka.org/en / category/features/50568](http://www.pambazuka.org/en/category/features/50568) ,Date of visit: 17/08/2010 at time: quarter past ten.

<sup>50</sup> - An arrest warrant issued on: 12/07/2010, published in the following website:

<http://www.icc-cpi.int/iccdocs/doc/doc907192.pdf>

Date of visit: 17/08/2010 at time: seven in the evening.

<sup>51</sup> - An arrest warrant issued on: 12/07/2010, the previous site, p 04.

would facilitate the peace process"<sup>52</sup>. This is, of course a call for the concession to realize the rebels' demands, as happened in the South negotiations.

## **1 - Final official position of the Sudanese government toward the International Criminal Court**

Sudanese persons who are subject to follow-up by the International Criminal Court can be grouped into two groups, one of which includes non-official figures who do not represent and work for the State, but rather represent the wing opposing the the Sudanese regime. Unlike those who consider that the court has only brought charges against the Sudanese Government officials only, without including the other parties of the conflict, with regard to the following persons:

-Mr. "Bahr Idris Abu Qardah," President of the United Front for Resistance and General Coordinator of its military operations.

- Mr. "Abdullah Banda Abaker Nurin," the supreme leader of the Justice and Equality Movement<sup>53</sup>.

- Mr. Muhammad Salih Jerbo Jamus, one of leaders of the Justice and Equality Movement<sup>54</sup>.

The other group includes the official persons, those who represent and work for the state; the concerned personalities are the following:

- Mr. Ahmed Muhammad Haroon, the previous Minister of Interior and Minister of State for Humanitarian Affairs, holds the position of Governor of "South Kordofan"

-Mr. Ali Muhammad Ali Abd al-Rahman, called Ali Kushayb, a tribal leader and member of the Popular Defense Forces, and a senior leader of the Janjaweed militia.

What should be mentioned about these militias is that the soudanese government used them as a proxy fighting forces, which provided the government with the ability to deny, as it claims that it cannot control these militias. However, there is no evidence that it actually tried to control it, while there is a lot of evidence wich show that these militias are still obtaining financing and weapons, with the help and management of the military intelligence elements of the army and other officials.

- Mr. Abd al-Rahim Muhammad Husayn, who holds the position of Minister of Defense, held the position of Minister of Interior and the Special Representative of the Sudanese President in Darfur.

- Mr. Omar Hassan Ahmad Al-Bashir, is the President of the Republic of Sudan and Commander-in-Chief of the Sudanese Armed Forces: The Pre-Trial Chamber considered that the current position of Omar Al-Bashir as head of a state that is not a

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<sup>52</sup> - D. Amir faraj Yusuf, op.cit, p 94.

<sup>53</sup> - Isam Bara, the prosecution of Sudanese leaders, in front of the International Criminal Court, Ph.D. in Public Law, Faculty of Law and political Sciences, University of Badji Mokhtar, Annaba, 2016-2017,p 104.

<sup>54</sup> - See, the Arrest warrant wich issued against him on August 27, 2009 and he was not announced until June 15, 2010, the Trial Chamber has ended the judicial procedures against him on October 04, 2013 after recieving Mr. Jerbo's death reports , without prejudice to the possibility of resuming proceedings if there is information that he is alive.

party to the Rome Statute, has no effect on the court's jurisdiction to decide. In this case<sup>55</sup>.

However, Sudan decided that never to deal with the International Criminal Court (ICC)<sup>56</sup>. It could therefore adhere to the principle of complementarity in order to prevent its jurisdiction, but its ability to punish violators must be proven to the prosecutor, not only its willingness<sup>57</sup>. The Sudan could also make a declaration postponing the acceptance of the court's jurisdiction for 07 years from the entry into force of the statute, when there was an allegation of war crimes committed by some nationals of that State in its territory<sup>58</sup>.

## **2 – The legality of (ICC) International Criminal Court's intervention in Darfur case:**

It seems that the court's implementation of the principle of responsibility to protect in Darfur has no legitimate justification, for the following reasons:

### **A - There is an exaggeration in adapting the situation in Darfur as a crime of genocide.**

The Sudanese Commission of Inquiry and even the International Commission of Inquiry have concluded that there are crimes that do not amount to genocide<sup>59</sup>.

### **B - The influence of the Security Council on the independence of the Court**

This is mainly contained in paragraph 06 of resolution N° 1593, which prevents it to open investigations against persons mentioned in paragraph No. 06, which is specifically and implicitly intended for citizens of the United States of America<sup>60</sup>.

A spokesman for Amnesty International described the decision of excluding the American citizens as "totally unacceptable" and added "the decision is an example of the double standards of justice, and contradicts with the UN Charter and Rome treaty. As USA was against the resolution. However, it agreed to it when it was granted a guarantee that its citizens would be tried only through its national judiciary, under the paragraph N° 06 of the above-mentioned resolution<sup>61</sup>.

<sup>55</sup> - Isam Bara, op cit, pp 104, 105.

<sup>56</sup> - D. Essām Abdel-Fattāh matar, op.cit, p 230.

<sup>57</sup> - D. Essām Abdel-Fattāh matar, ibid, pp 233 234.

<sup>58</sup> - See item number: 124 of the Rome Statute.

<sup>59</sup> - Report of the International Commission of Inquiry, established by Resolution No: 1564-1512, published in 2004, and the report of the Commission of Inquiry set up by the President of Sudan, the Republic of Sudan in May 2004.

<sup>60</sup> - D. Abdullāh al Ash'al, azmat darfour bayna muhawalāt altadwil wa juhūd altasswiya, I 1, dār nasr Liḥibā'h Wālnashr, Cairo, 2007, p 40.

<sup>61</sup> - Abdul Wahid Otman Ismā'il, al jaraim dhid alinsānia, Master's Thesis, University of Naif security relations, 2006, p 203.

## C - The Court's failure to respect the principle of complementarity

There is no evidence that Sudan has failed to prosecute State Minister Ahmed Haroun if there are convincing reasons for doing so, and the Prosecutor has explicitly acknowledged in all reports to the Security Council, that he did not go to Darfur when investigating the situation there. Accordingly, the data collected and relied upon, in his request to the Pre-Trial Chamber are affected by political Suits<sup>62</sup>.

The matter of the court independence was worrying the jurists, since it was difficult for the court to be impartial, and possibly dependant to the Security Council, in certain circumstances covered by Chapter VII of the Charter<sup>63</sup>. This made me talk about her intervention within the United Nations. Its lack of independence also elicits from the relationship between the Court itself and the UN, following the fact that the UN International Law Commission has developed its statute. Although the preamble to the Rome Statute provided for the independence of the Court, despite the existence of a relationship between it and UN<sup>64</sup>. The relationship between them is also justified primarily by their relationship with the Security Council, and therefore the political nature will inevitably prevail over the legal character, and the role of the Security Council in this relationship is recognized in the text of article N° 13 of the Rome Statute, that the Security Council is expanding the jurisdiction of the Court and is therefore an intervention and amendment to the legal system of an independant judicial body, because that role of the Security Council is limited only to the United Nations legal framework<sup>65</sup>. Thus, the evidence of selectivity and the interference of political considerations is the court's acceptance of the case referred to, which include the paragraph N° 06 of resolution N° 1593, which provides an opportunity for the impunity of non-Sudanese criminals<sup>66</sup>.

## D - The Court's use of double standards in international justice

Although Sudan is not a party to the ICC system, its nationals are following up in front of the court for crimes committed in Darfur by referral from the United Nations Security Council, at that time, before the court prosecutor issued an arrest warrant against the perpetrators of such crimes, The Sudan established a special court to follow up the persons themselves, here it's the beginning of two lawsuits, the first is national and the second is international, the most important reason for the prosecutor's foundation of the warrant for the intervention of the court jurisdiction is the incapacity of the competent state (Sudan) to act against those who are accused of committing crimes<sup>67</sup>. Why is the Court forced to do so, while it has done nothing against violations of Gaza and Iraq?

<sup>62</sup> - D. Essām Abdel-Fattāh matar, op.cit, p 226.

<sup>63</sup> - D. Abdelkāder el Bokairāt, op.cit, pp 234 235.

<sup>64</sup> - See Article No: 02 of the Rome Statute.

<sup>65</sup> - D. hammād kayda Najeeb, almahkama aljināiyya al dawliyya nahwa al'adāla aldawliyya, i 1, manshurāt alhalabi alhukūkia, Beirut, 2006, pp 103 104.

<sup>66</sup> - D. Omar el Makhzūmī, op.cit, p 388.

<sup>67</sup> - JEAN PIERRE Fofe, DJOFIA Malewa, op.cit, pp 137, 138.



Although international humanitarian law punish those responsible for serious violations in particular, in the beginning has not been concerned with the creation of judicial bodies for the prosecution of criminals, since it was not included in the Hague Conventions of 1907 or the Geneva Conventions of 1949, New provisions on individual criminal responsibility were adopted in Security Council resolutions establishing interim courts following violations of humanitarian law<sup>68</sup>. Then, with the advent of ICC, individual criminal responsibility has evolved, but what questions the court's credibility is its reliance on double judicial standards, it portrayed the matter in Darfur as genocide. Meanwhile, there was no action in Iraq and Gaza, despite the fact that the Rome Statute allows the prosecutor to open the investigation on his own.

Iraq's population was about 02 million, and the rate of death before the aggression on Iraq was 5.5 per thousand per year, a very low rate of 01% due to violence, but after studies conducted after the aggression, the rate rose to more than 13% regularly. It may reach 20% during the last years of aggression; in the range of 650,000 dead, 2.5% of them were civilians<sup>69</sup>. While the Court does not intervene, it shows that humanitarian intervention and the responsibility to protect (R2P) carries political not humanitarian meanings, under their wings, politicized humanity and alleged democratic.

After September 11, 2001, the US set up a counter-ICC program to protect American soldiers, which was the biggest challenge to the international community that wanted the court to advance without (USA) involvement<sup>70</sup>. Which made bilateral agreements on protecting its soldiers to avoid from ICC, which made it refuse the court until it got concessions for it<sup>71</sup>.

There is also a reason why the United States' position with regard to the ICC is clear, as the U.S chief Commissioner in Rome in defense of the United States' position said: "the USA has special responsibilities and is directed to political discussions, especially in our activity". "We are sometimes authorized to act with a risk that is more than any other nation, and this is the reality of the international system" but this statement terrified other countries. Certainly, USA has a special responsibility as a permanent member of the Security Council. The view of « Scheffer » is wrong, because this responsibility is shared with other permanent members, 03 of whom accepted the Rome Statute, and hence the « Scheffer » decision is political decision, because there are signs that the US is playing the role of

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<sup>68</sup> - Jean-François FLAUX, *Les Nouvelles Frontières du Droit International Humanitaire*, Bruselas, 2003, pp 89.90.

<sup>69</sup> - Nils Andersson, Daniel I. AGOLNITZER et Vincent RIVASSEAU, *Justice Internacionale et Impunité, Le cas des Etats-Unis*, L'Harmattan, Paris, 2007, p. 73.

<sup>70</sup> - GEORGE Nolte, *Le Droit International Face au Défi Américain*, Institut des Hautes Études Internationales de Paris, Paris, 2003, p. 77.

<sup>71</sup> - Mahmūd Mamdani, *Saviors and Survivors Darfur, politics, war and terror*, HSRC Press, South Africa, 2009, pp.282, 283.

- GEORGE Nolte, *Op.cit*, p. 77.

global police<sup>72</sup>. And it does not worry itself, as long as the Security Council in its disposal!

The ICC's impact on humanitarian law cannot be refuted. It is a great step for international humanitarian law and the last step in the development of international criminal justice, and thus contributes to the protection of international humanitarian law<sup>73</sup>. But, the Security Council's authority in the referral, especially what Darfur case had proved, has become skeptical about the court's credibility. As we find selectivity in the ICC's work, it investigates only anti-USA ignores its allies which are unpunished<sup>74</sup>. Moreover, in the referral a case of a State not a party, the Security Council is based on Chapter VII of the Charter, which provides an opportunity for the Council to abuse its right<sup>75</sup>. Especially in expanding the question of international peace and security.

The Security Council's referral of such case to ICC would be an assault on the national jurisdiction, even if it had jurisdiction to consider it<sup>76</sup>. This inevitably confirms the politicization of the Court's opinion. The Security Council's decision to refer the situation in Darfur to ICC has also put the vision clear in the shadow zone that exists regarding to the relationship with the court, for example, the basis of the referral is the text of Article N° 41 of the Charter<sup>77</sup>, by taking what it considers appropriate without using military solutions to maintain international peace and security, especially since it adapted the situation in Darfur as a threat to international peace and security<sup>78</sup>.

## Conclusion

There is a link between the ICC and the Security Council which is a cooperative relationship with various forms that will support the work of the court, thus laying the international criminal justice Permanent and devote its effectiveness in the prevention of impunity. The legal basis that governs the relationship between the Council and the court is necessary for the Council to do not deviate from the limits of what drawing in the Charter and the Rome Statute, also to achieve unwavering balance of international justice. In addition to the Council's role in the referral in order to activate the jurisdiction of the court as a result of the role played by the Council on

<sup>72</sup> - GEORGE Nolte, *Ibid*, p. 77.

<sup>73</sup> - CARMEN QUESADA-ALCALA, obstacles to the International Criminal Court: impediments to the enforcement of International Humanitarian Law, in: *The new challenges of humanitarian law in armed conflict*, edited by PABLO ANTONIO FERNANDEZ-SANCHEZ, Vol.12, Martinus Nijhoff Publishers, Leiden, Boston, 2005, p.295.

<sup>74</sup> - Mahmūd Mamdanī, *Saviors and Survivors*, op.cit, pp.282, 283.

<sup>75</sup> - D. Dhāri khalil mahmūd, Bāsil youssef, *almahkama aljinaiyya al dawliyya, haymanat alkanūn am kanūn alhaymana, munchaaat alma'arif*, Alexandria, 2008, p 241.

<sup>76</sup> - D. Dhāri khalil mahmūd, Bāsil youssef, *ibid*, p 242.

<sup>77</sup> - Florian AUMOND, *The Situation in Darfur refer to a CPI-*, back on a resolution "Histórico" Security Council, *General Review of Public International Law*, Tom CXII, Pedone, 2008, p.123.

<sup>78</sup> - See Article number: 41 of the United Nations Charter.

the international scene. Otherwise it's preferably, the inclusion of the General Assembly of the United Nations parallel with the the Council In the service of the international justice, especially with the possibility of paralysis of the Council in the face of some of issues brought before it.

For the international cooperation with the court it is very important to facilitate their work, The Statute of the Court is rightly drawn up the text on the role of the Security Council in the work of the Court in this regard, in order to achieve a balance between the international justice requirements and the requirements of what is happening on the international scene. We can see in the conclusion, that no matter how varied mechanisms of the Security Council in the application of international criminal law, its success will be only through the abandonment of selectivity policy in dealing with any situation , to achieve more effective. Regarding the situation in Darfur we can draw the following conclusions:

1 - The International Criminal Court is lacking for permanent executive authority on the implementation of its decisions, it is less effectiveness.

2 - The authority granted to the Security Council to refer the case to the International Criminal Court has pros and cons, his advantages are: its contribution to ending impunity in the referral issue on the Court by the State or the Attorney General for any reason. The disadvantages that this power is an important mechanism in the hands of major powers to punish anyone who is against their policy, it is also very dangerous mechanism especially since it represents humanitarian intervention and protection of human rights (R2P).

3 - The use of the International Criminal court for the responsibility to protect is a remarkable development and unprecedented system of new humanity system and humanitarian intervention.

4- Sudanese President Omar Hassan Al-Bashir defied arrest warrants which issued against him, where he had undertook many official visits to states parties and non-parties to the Rome Statute, and was not arrested and submitted to the court, due to the failure of the states parties who visit it for comply to the court's requests according to the paragraph 1 of Article 89 of the Rome Statute. About non-party states, although they not binding towards the court, which was confirmed by Resolution 1593 issued in 2005, however this provision does not apply to the Sudan State because it is legally obliged to cooperate with the International Criminal Court, because the referral decision is the legal basis for this Commitment.

About the non-cooperation, the International Criminal Court was issuing each time some decisions regarding non-compliance by these countries to the requests for cooperation issued by the court in relation to the arrest and submission of Omar al-Bashir, and then it referred it to the States Parties Assembly and the International Security Council as the referral holder pursuant to paragraphs 5 and 7 of Article 87 of the Rome Statute, however, the Security Council never seemed any attention to this issue, and did not take any effective concrete measures, that would compel states to comply with the the Court decisions , due to the lack of consensus within the Council regarding these issue, especially China was from non-parties to the Rome Statute, that Al-Bashir has visited more than once, which prompted the Prosecutor to

reduce the amount of expenditures for the investigations in the case of Darfur, many states have justified their lack of cooperation with the Court concerning the implementation of the orders related to the arrest and submission of Omar al-Bashir, by commitment to the African Union Organization decisions in this regard. The latter had been denounced on many occasions through successive summits of state and government heads, to target the Court to African leaders, to call on member states and parties to the Rome Statute do not cooperate with the Court by implementing the paragraph 1 of Article 98 of the Statute<sup>79</sup>. On June 14, 2015, South Africa issued an order to temporarily ban al-Bashir from leaving to Sudan pending consideration of the charges against him by the International Criminal Court, but he returned to his homeland without arrest, while Jordan in 2017 did not cooperate with the court to extradite him. But Al-Bashir was ousted on April 11, 2019, as popular Demonstrations demanding the fall of the regime began on December 19, 2018.

Finally we can make some recommendations:

- 01 - The necessity to limit the dominance of the Security Council on the Court activity.
- 02 - The expand of the right to refer the cases to the court especially the liberation movements and the General Assembly of the United Nations.
- 03 - The authority of Security Council referral must be in order to serve humanity away from duplication.
- 04 - The need to establish an executive organ of the court or the formation of an international police tasked with the implementation of what comes out of the International Criminal Court decisions, the fact that it is necessary to prosecute the criminals and bring them to justice, in order to activate its work.

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<sup>79</sup> - Isam Bara, op cit, p 320.