

ICC's Involvement in Darfur Conflict: Possibility and Prospect

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ABSTRACT

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The fall of President Al-Bashir in 2019 was a turning point in the Darfur conflict that happened for more than 17 years in Sudan. The conflict has forced 2.5 million people away from homes and killed at least 500,000 people. The humanitarian conflict and crisis are motivated by the inter-ethnic conflict in Sudan. With orders from the U.N. Security Council, on March 4, 2009, at The Hague, the International Criminal Court (ICC) issued an arrest warrant for President of Sudan, Omar Hassan Al-Bashir, on charges of war crimes and crimes against humanity in Darfur. The purposes of the study are to understand the factors behind the Darfur conflict, to understand how effective the Sudanese national judicial system is, and the jurisdiction of ICC in resolving Darfur conflict. The study is normative legal research through literature review with the existing books and journals. Two approaches of normative legal research were used, namely statutory approach and case approach. The result shows that Sudan National Court is ineffective in resolving the conflict and has no willingness to settle the conflict. Furthermore, ICC has jurisdiction to settle the Darfur conflict by order of United Nation Security.

1. INTRODUCTION

Darfur is located in the western part of Sudan, which populated around 6 million persons and consists of approximately 250.000 square kilometres. Darfur is neighbouring Chad, the Central African Republic, and Libya.¹ Darfur region is divided into three states are South, North and West Darfur, since 1994. The main urban centres consist of the capitals of the three Darfur states are El Fashir in North Darfur, El Geneina in West Darfur, and Nyala in South Darfur. The majority economy of the three states of Darfur mainly based on industrial farming and cattle grazing. The land problem has become a political matter for a long period in Darfur since Darfur has been applied communal land-ownership. It provides a historical claim to the tribes for the division of land, which began on the 20th century when Sultan Ali Dinar, the last sultan of Darfur, established the

¹ S. Totten, *An Oral and Documentary History of the Darfur Genocide*. Santa Barbara (California: Praeger Security International, 2011).

division that was accepted by all tribes. However, the distribution of land is not geographically restricted in the appropriate manner.

The way to solve the differences among the Darfur tribes is through traditional law, especially for the disputes that occur between the origin tribes and nomadic tribes, such as murders, cattle theft which become the existence of inter-tribal conflict. The disputes that occur between the members of tribes could be settled by the head of tribes that would achieve an acceptable solution. Previously, the State was regarded as a neutral mediator.² Nevertheless, President Nimeiri abolished the tribal system and established a new local administration structure system. The new system gives executive and judicial powers to the administrators.³ The leaders appointed based on their political loyalty to the regime, regardless of their position in society.

Since the late 1980s, various types of conflicts have occurred in Darfur, including inter-community violence, the Chadian militias using the region as a springboard for their national ambitions, banditry activities and the Sudanese armed forces counterinsurgency activities. Given that the area lacks any effective governance for a longer period of time, and every community there has purchased small arms, various forms of violence have merged.⁴

Non-international armed conflicts occurred in Sudan, especially in Darfur, which began when the rebels conducted an uprising to protest the Sudanese Government because of the ignorance of the western region and the non-Arab inhabitant. Thus, the government-supported Arab militias and equipped them. Then it known as Janjaweed, they fight against the rebels in Darfur, namely the Sudan People's Liberation Army (SPLA) and the Justice and Equality Movement (JEM) that have been caused a humanitarian crisis with thousands of victims and millions of people have been displaced.

A humanitarian crisis has begun by conflicts that have occurred in Darfur in late 2000 and at the beginning of 2003 after the rebel movements began the first military activities attacking government facilities such as local police officers and seize the Government property and weapons. They presumed that the Sudanese Government pressured African groups for the benefit of Arab citizens. At first, the Government does not regard the rebellion as a serious military problem. The rebels attacked Government installations in Kutum, Tine, and El Fashir, where the rebels devastated several military aircraft and killed many soldiers.⁵

Many efforts to end the civil war in southern Sudan, but it was failed, including efforts by Kenya, Ethiopia, Nigeria, former President Jimmy Carter, and the United

² Totten, *An Oral and Documentary History of the Darfur Genocide*. Santa Barbara, 206.

³ Tubiana, J., Tanner, V., & Abdul-Jalil, M. A. *Traditional Authorities' Peacemaking Role in Darfur* (Washington: US Institute of Peace, 2012), 10.

⁴ Alex De Waal, "Briefing: Darfur, Sudan: Prospects for Peace," *African Affairs* 104, no. 414 (2005): 127–35.

⁵ Totten, *An Oral and Documentary History of the Darfur Genocide*. Santa Barbara.

States. Therefore, a mediation committee under the protection of the Inter-Governmental Authority for Development (IGAD) established by the head of State from Uganda, Ethiopia, Eritrea, and Kenya by the first negotiations held in March 1994.⁶ Furthermore, the fact that Government does not appear to have adequate military resources, such as many of the militaries still in the South. In fact, the Government cannot restrain the rural areas where the rebels were based since they attacked the rural police. Thus, the Government decided to displace the police in the centre of cities.

Facing the attacks from the two rebel movements in Darfur, the Sudanese Government mobilized local tribes to fight against the rebels. The Government paid salaries to some of the Popular Defence Forces (PDF) staff through the tribal leaders. The Government was also willing to recruit Libya, Chad and other states. In August 2003, the meeting held by the President of Chad between representatives of the Government and the rebel movements in Abeche to find a political solution to the conflict. Furthermore, the parties considered unable to resolve the disputes and find the solution to the conflict.⁷

The UN-AU peacekeeping mission (UNAMID) authorized to replace the African Union mission by the U.N. Security Council on July 31, 2007, even though the placement of UNAMID troops did not function until 2008.⁸ In July 2008, Al-Bashir, as the President of Sudan, accused of having criminal responsibility of the crisis in Darfur concerning war crimes, genocide, and crimes against humanity in Darfur and ask an arrest warrant by the International Criminal Court (ICC) prosecutor. However, the Sudanese Government has denied the allegations and pleaded that President El-Bashir was not guilty.⁹

Under the power of President Al-Bashir, Sudan signed the Rome Statute on September 8, 2000, but it has not ratified yet. Based on that, on the grounds that Sudan is not a signatory of the Rome Statute, the Sudanese Government refuses to accept the jurisdiction of the International Criminal Court. The Sudanese Government has its own jurisdiction over crimes in Darfur and is qualified to try people accused of any violations committed in Darfur. However, only in the traditional legal system, or to be called *Judiya*.¹⁰ Some observers consider the involvement of such a third party consider as violating the principle of national sovereignty because Sudan has not ratified the Rome Statute yet.¹¹ Based on this legal phenomenon, the researchers formulate two research problems that would be discussed, which are the ability of the Darfur National Court in adjudicating conflicts and the jurisdiction of ICC in resolving conflicts in Darfur.

⁶ Ted Dagne, *Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and US Policy* (Washington DC: Library of Congress Washington DC Congressional Research Service, 2002).

⁷ Totten, *An Oral and Documentary History of the Darfur Genocide*. Santa Barbara.

⁸ Antonio Cassese, *International Criminal Law* (United States: Oxford University Press, 2011).

⁹ Collins Roberts O and Mohy el Din Sabr, "Sudan," *Encyclopædia Britannica*, 2020.

¹⁰ Tubiana, J., Tanner, V., & Abdul-Jalil, M. A. *Washington*, 87.

¹¹ Ayad Derbal, "The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace" (Indiana, 2008).

2. RESEARCH METHOD

In the research, the authors used normative legal research, a method of legal research conducted by reviewing applicable laws or research on specific legal issues. Normative research is usually called doctrine research, in which the objects of research are legal documents and documents. This research adopts the statutory method and case method. The legal approach is implemented by focusing on certain regulations related to these issues. The case method is carried out by highlighting cases related to the problem.

The authors examine the role of the United Nations (U.N.) and the African Union (A.U.) in resolving non-international armed conflicts that occur in Darfur-Sudan. By examining the role of the United Nations and African Union (A.U.), it is expected to know the steps are taken by the United Nations and African Union in dealing with armed conflict that occurred in Darfur-Sudan.

The data of research is secondary data which consist of primary and secondary legal materials. The secondary data means that sources of data are collected from books, news, journal, or other references. Primary legal material is legal materials that have binding legal force, such as the UN Charter, Rome Statute 1998, Geneva Convention 1949, Charter of the Organization of African Unity, and Constitutive Act of the African Union. Secondary legal material is the data that explains the legal substance of primary data, such as books, journals, news, legal and non-legal documents, internet articles, and expert opinions which are related to the research.

The data of research used the library research, which means the author reading, understanding, and finally writing conclusions from legislation, court decision, book, journal, news, and articles related to the issue of international law. The method of data analysis using juridical qualitative which comparing the data obtained by the rule of law, convention, and other related regulations for interpreting the issues.

3. RESULTS AND DISCUSSION

3.1. The Failure of the National Court System of Sudan

The Government of Sudan has failed to prosecute the perpetrators of crimes that occur in Darfur in Sudanese national courts. The Rome Statute reminds states to fulfil their obligation to execute the arrest warrants and hand over a suspect who responsible for having committed crimes against humanity, genocide, and war crimes. The case is unacceptable in Court if the national courts have the ability and willingness to prosecute and investigate the crimes. Therefore, if Sudan conducted the main responsibility to exercise prosecution and investigation of international crimes committed in the territory of Sudan by competent courts, it would prevent the ICC from implementing the jurisdiction. Further, Sudan claims to investigate and prosecute the perpetrators and has opposed the jurisdiction of ICC. Therefore, the question is whether Sudan is willing and able to investigate and prosecute the crimes in Darfur.

The Sudanese judicial system does not go through failure as a whole. Some jurists indicate that the Sudanese judicial system is in a state of near failure and that it is unable to attain shreds of evidence and testimonies. The Sudanese Government claims that the effectiveness of the judiciary in Darfur has weakened by rebel activities. However, the Government persists that the judiciary remains willing and able to identify and bring the perpetrators to justice.

A partial failure of the national judicial system could occur. However, the State may still be able to enforce the law in various other regions of the country. Most courts in Darfur considered functional, although sometimes with difficulty. The Sudanese Government has established a number of Special Courts for Darfur, *ad hoc* committees, committees against rape, and a national commission of inquiry. These bodies, despite various criticisms for their role, remain functional and cannot be designated as in a state of failure miserably.¹² Some Special Courts, Commissions, Committees and other institutions were established by the Government of Sudan to investigate and prosecute crimes in Darfur. However, these institutions and courts have not yet initiated meaningful criminal justice. What is important is that every step taken is not only a response to the investigation of the International Chamber of Commerce in Darfur, but also to solve the shortcomings and practical problems in the work of the entire Sudanese criminal justice system.

The Commission to investigate reports of infringement of international humanitarian law and human rights law in Darfur established by the U.N. Secretary-General, to decide if massacre wrongdoing has happened and furthermore to recognize the culprits of the violations, in this manner it guarantees that those are liable for the carried out act. It found that there were 1.65 million individuals dislodged in Darfur and in excess of 200,000 outcasts from Darfur in adjoining Chad. There has been monstrous demolition of towns all through the three states of Darfur.¹³

The case fire signed in 2004 did not end the conflict, which has killed at least 50,000 people (although the death toll may be close to 200,000). The fighting is characterized by the brutal treatment of civilians, rape, robbery, property destruction, torture (including party skinning), forced displacement by the Government or Janjaweed, and, to a lesser extent, the robbery and use of child soldiers by the rebels.¹⁴

The Government of Sudan and the Janjaweed are liable for grave infringement of international human rights and humanitarian law, which classified under international crimes as specified by the Commission in the examination. The Commission tracked

¹² Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (London: Routledge, 2016).

¹³ International Criminal Court, "Darfur, Sudan," 2005.

¹⁴ Robert Cryer, "Sudan, Resolution 1593 and International Criminal Justice," *Leiden Journal of International Law* 19, no. 1 (2006): 5.

down that the Government powers and local armies led unpredictable assaults to the regular people, including murder, obliteration of towns, torment, ravaging and constrained uprooting, assault and different types of sexual savagery and other brutality that happened around there¹⁵ These crimes were conducted widely and systematically, thus it might be considered crimes against humanity.

In South Darfur, the judicial system was considered functional. The 28 appointed judges distributed between three appellate courts and several district court by the National Chief Justice. South Darfur has 95 functional town courts. In Tama and Hamada (South Darfur), there have been reports of investigations into crimes that have occurred. Two army soldiers have convicted and sentenced to death in Sudan's Special Court for crimes that occurred in Darfur for torturing and killing a civilian in Nyala.¹⁶

As there is a general lack of financial resources, the Sudanese judicial system indicates a number of deficiencies relating to the factual condition of the judicial system. In 2005, the Government of Sudan stated that around 160 perpetrators were identified for investigation and prosecution of crimes committed in Darfur. However, in the middle of 2006, the first Special Court conducted only six hearings out of a total of 13 cases. According to the Rome Statute's criteria, they do affect the quality of justice and hence may constitute violations of the obligation to respect due process under the Statute and international law.¹⁷

The existence of the basic requirement for inability in relation to a substantial or total collapse of the system will make this case acceptable. The Sudanese judicial system is able to acquire the accused or the evidence and testimony that is needed, or otherwise, it will be unable to exercise proceedings. However, there are some issues that need to be discussed. The Sudanese judiciary did not accuse any of the possible major perpetrators listed by the U.N. Commission of Inquiry. Even if the judiciary wanted to obtain the suspects or the accused, the courts remain unable to do so. That is not because of the substantial or total collapse, but because of the complicity of the Sudanese law enforcement bodies in committing crimes in Darfur. In the case of Harun and Kushayb, the Sudanese authorities are able to arrest the suspects. However, in fact, the execution of the arrest warrant is pending. Kushayb then released in September, whereas the warrant of arrest was issued in April 2007. Harun was later appointed state minister for humanitarian affairs. The Court did not view the national investigation and release Kushayb as a genuine criminal investigation against the suspect.¹⁸

¹⁵ Noelle Quenivet, "The Report of the International Commission of Inquiry on Darfur: The Question of Genocide," *Human Rights Review* 7, no. 4 (2006): 38–68.

¹⁶ Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*.

¹⁷ Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court* (London: The Redress Trust, 2007).

¹⁸ Ahmad Muhammad Harun and Ali Muhammad Ali Abd Al Rahman, "Alleged Crimes (Non-Exhaustive List)," International Criminal Court, 2007.

Furthermore, even if the judiciary wanted to obtain the victim or the suspect without the assist of the law enforcement agencies, it will be very difficult. The Sudanese Government adopted laws that gave extensive powers to the executive, which resulted in the ineffective of the judiciary. For example, the amended Law of Criminal Procedure 1991 added additional powers to law enforcement bodies to investigate, arrest, interrogate as lawfully required to guarantee the rights of persons in contact with the law. As a result, the enforcement bodies have surpassed the power of the judiciary. The police and security forces have acted in impunity and lack of accountability, ruin the effectiveness of the judiciary in getting suspects and defendants despite the fact that the suspect was known by Sudanese authorities who refrained from taking any action against them.

In terms of inability to obtain the necessary evidence and testimony, some courts in Darfur suffered from serious regression due to the ongoing conflict.¹⁹ There is reliable accusation that the Sudanese Government has attempted to preclude justice at the national and international level. It could be presumed from political interference in accountability efforts, intimidation and arrest of victims and witnesses, and confiscation or destruction of materials deemed to support such efforts. The Sudanese legal system is an ongoing process in dealing with serious crimes committed in Darfur since the ICC Prosecutor is not obliged to inform the investigations, hence it will be for the State that has jurisdiction (Sudan) or the concerned party to refuse the acceptance of the case before or at the beginning of the trial. The National Commission of Inquiry cannot initiate criminal investigations without clear permission from the Attorney General.

The Government of Sudan shall be responsible for responding to these crimes. In addition, the need for law reform by the Government must be conducted immediately in order to avoid the violations of international crimes that is corresponding with Sudan's international obligations. The legal obligation applies to Sudan even if Sudan has not ratified the International Criminal Court without a treaty or by customary international law. Therefore, the Government of Sudan shall establish the procedures that needed in order to ensure that these international crimes as a serious matter that have been committed in Darfur then could be effectively investigated and prosecuted.²⁰

There is nothing wrong with trying to protect the judiciary from political interference, but it is very dangerous to set it up as a battle against politics. It blinds us to the ICC's own policy. Depending on the political interpretation, there are many ways in which the ICC is closely related to politics.²¹

¹⁹ Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*.

²⁰ Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court*.

²¹ Sarah MH Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21, no. 4 (2010): 941–65.

John Alder said the judiciary oversees administrative activities and acknowledges its intention to ignore facial expressions that threaten human rights or the rule of law and take responsibility for law enforcement.²²

Prof. Miriam Budiardjo also stated that the judiciary must be free from interference from the executive and legislative bodies. This is so that the judiciary can function properly to uphold law and justice and guarantee human rights. It is hoped that with the absence of interference from these two institutions (executive and legislative), it can make decisions made by the judiciary impartially and not be biased and be guided by the norms of law and justice.²³ Raharjo Satjipto argues that if we look at the political sub-system and the legal sub-system, it appears that politics has greater concentration energy, so the law is always in a weak position. According to the opinion of Nuno Garoupa and Tom Ginsburg, the image of the Court can improve if the decisions issued can fulfil legal justice in society and avoid political interference and political manipulation.²⁴

Based on some of the expert opinions above, it can be concluded that the judicial power or the national Court must be independent and free from political intervention. When there is political intervention, the law will collapse and not be properly implemented or enforced. This political intervention will influence the judge's decision in resolving a dispute and will lead to failure of dispute resolution that upholds justice and, of course, violates human rights.

3.2. Legal Obstacles

On June 7, 2005, Sudan has been established the Special Criminal Court in purpose to the tried perpetrator of criminal action in Darfur and as a declaration that the Government of Sudan has the capability to handle the prosecutions domestically. The Government is able to handle prosecutions domestically. The Court led by a judge, a member of the military and a member of the police. On 18 June 2005, the Sudanese Special Court received a report on the alleged criminal case in Darfur. The case involved 160 people who said the Sudanese Government would be brought to justice. However, after the judge sentenced only six prisoners, the courts were replaced by three special courts in the three Darfur regions.²⁵ In September 2008, none of the various cases involving high-level official offenders, but only crimes by low-ranking officials and individual perpetrators that could be resolved in a public court of Sudan.²⁶

²² Stephen B. Burbank and Friedman Barry, *Judicial Independence at the Crossroads. An interdisciplinary Approach*, (California: Sage, 2002), 4-7.

²³ Meirina Fajarwati, "Intervensi Politik dalam Putusan Mahkamah Konstitusi", *RechtsVinding Online*, (2016): 5

²⁴ Meirina Fajarwati, 3.

²⁵ Irin, "Sudan: Judiciary Challenges ICC over Darfur Cases," 2005.

²⁶ Irin.

There are several obstacles that prevent the Sudanese judicial system from operating and functioning properly in the Darfur case²⁷; *First*, the Government of Sudan in 1991 formed the Criminal Code, which prefers Sharia Law. Inside the Code, in particular Article 14, contains only crimes related to human life and health and does not deal with genocide, crimes against humanity, or human rights abuses under international humanitarian law.²⁸ Due to the absence of a specific statutory basis, which provides the elements of the crimes in domestic statutes causes an obstacle; the criminal justice system considers not responsible for the serious violation that occurs in Darfur, then Sudanese Government can be prosecuted appropriately. Even the SCCED established also applied international humanitarian law, and many shreds of evidence of the cases did not support the preliminary indictment brought under the Rome Statute. The Special Criminal Court cases in the first year only resolved cases based on this law and have not attempted to use “international humanitarian law.”

Second, Sudanese laws themselves prefer to protect law enforcement officials from criminal prosecution when officials commit any crime related to their official work.²⁹ Based on Article 11 states that:

“No act shall be deemed an offence if done by a person who is bound, or authorized to do it by law, or by a legal order issued from a competent authority, or who believes in good faith that he is bound or authorized so to do.”

Here, the Criminal Code try to protect the immunity of subordinates. The President of Sudan issued a temporary decree on August 4, 2005, attempting to expand the immunity of the armed forces through the following amendments to the People’s Armed Forces Act:

“There shall not be taken any procedures against any officer, ranker [sic] or soldier who committed an act that may constitute a crime done during or for the reason of the execution of his duties or any lawful order made to him in this capacity and he shall not be tried except by the permission of the General Commander or whoever authorized by him.”

On January 25, 2004, the United Nations Commission of Investigation (UNCI) discovered that the Sudanese Armed Forces had launched a large-scale attack on civilians in the village of Daftur. It pointed out that many so-called “crimes committed directly or through alternative armed groups” have existed extensively and systematically, and therefore constitute “serious violations of human rights and humanitarian law. The United

²⁷ Irin.

²⁸ International Labour Organization, “Sudanese Criminal Code of 1991, Arabic Script,” 1991.

²⁹ United Nations, “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General” (United Nations, 2005).

Nations International Army established "two incontrovertible facts about the situation in Darfur".³⁰

The status of the Sudanese Laws and Presidential Decree creates "a climate of impunity" whereas defence of perpetrators armed forces and official crime become unlawful, making it difficult to hold accountable for these officials' criminal actions. These regulations violate international law, which stipulates that official orders are not exceptions to crimes against humanity and genocide.³¹

Third, Criminal law in Sudan does not allow for applying the command responsibility theory, which was a liability of command that will not have been the direct perpetrators, and It may be required that the state or national leaders be responsible for participating in crime plans and/or sanctions. The lack of prosecution has been remarked based on the U.N. official. The list of criminals only includes 15 police and army officials who were tried for crimes between 1991 and 2003. This means, from this report, the courts in Darfur does not demand whoever is the main authority, and this indicates that the authority will continue.³² Consequently, prosecutions of commanders for crimes committed by subordinates under the commands would be problematic.

Aside from the above three problems, the other obstacle is the problem of the legal framework in Sudan. Based on a report from the International Commission of Inquiry in January 2005 that there are weaknesses in the legal system in Sudan. These make Sudan unable to follow up on violations in Darfur, while SCCED is also unable to overcome this condition. Sudan has a lack of transparency in the legal system. Causes by the use of State Emergency Act were the Chief of Justice, or state governor can issue their own decree without intervention, it is difficult to know what law that applied by the courts since the chief allowed to create another procedure for prosecution.³³ Lack of Judicial Independence in Sudan is another issue that supports the problem to be worst.

Since 1958, Sudan's several military governments have already intervened concerning the judicial process. In July 1989, Decree No. 3 was issued by, the RCC-NS (The Revolutionary Command Council for National Salvation), giving the president the power to appoint and remove all judges³⁴ Under the decree, Bashir used this power to terminate judges who refused to take over from the Government. From above, the National Judicial System was submissive to the government regime, although the constitution and laws provide an independent judicial institution. The government attempt

³⁰ Nsongurua J. Udombana, "Pay Back Time In Sudan-Darfur in the International Criminal Court," *Tulsa Journal of Comparative and International Law* 13, no. 1 (2005).

³¹ International Criminal Court, "Joining the International Criminal Court: Why Does It Matter?," n.d.

³² Noel King, "UN Envoy Urges Darfur War Crimes Prosecution," *Voice of America News*, 2006.

³³ A Human Rights Watch Briefing Paper, "Lack of Conviction, the Special Criminal Court on the Events in Darfur," 17, 2006.

³⁴ A Human Rights Watch Briefing Paper.

to disturb the capability of the National Judicial System to execute independently. Therefore, the question is how they are willing to take effective action against officials in the practice of independent judges.

There were many factors that detain investigation and prosecution of the solemn crimes. The Criminal Laws of Sudan does not recognize the genocide, war crimes, and crimes against humanity as an international crime. In fact, the most important factors in the form of international crimes mean that the offender can only be prosecuted for other crimes that were not caused by the seriousness of the action. Furthermore, the officials enjoy immunity from prosecution. Even when officials are held responsible for the solemn crimes, they could continue the job without sanctions. It means that the laws and the institutions need to be changed.

The Comprehensive Peace Agreement 2005 between the Government of Sudan, the Darfur Peace Agreement 2006 and the Sudan People's Liberation Army (SPLA) recognizes the need. One of the important steps is the adoption of the National Interim Constitution in 2005, especially with the acknowledgement of international human rights for the people of Sudan. However, little effort has been made by the Government of Sudan to establish the Peace Agreement.³⁵ Since the system has been greatly weakened, the Sudanese justice system believes that it is unable and reluctant to deal with the chaotic situation in Darfur. Because restrictive laws provide executives with extensive powers, executives make the judiciary powerless. In addition, many of the laws that apply in Sudan contradict human rights standards. International crimes that include the crimes against humanity that happened in Darfur does not adequately prohibit by Sudanese criminal law. Furthermore, the Commission is anxious relating to the justice of the Sudanese judicial system and The ability to bring to justice the perpetrators of international crimes committed in Darfur.³⁶ The last indication of factors that obstruct investigation and prosecution is the lack of political will of the Government.

The President of the SCCED in 2005 stated that witnesses of serious crimes in Sudan were reluctant to give evidence, so witnesses were not responsible for the evidence. It because the Court disables the sentence of the offender.³⁷ Representatives from the Sudanese Government stated that because witnesses refuse to identify the perpetrators, therefore the Sudanese Government cannot investigate or prosecute the person who is responsible for crimes that occur in Darfur.³⁸ The issue whether the Government ignore

³⁵ Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court*.

³⁶ Mauro Politi and Federica Gioia, *The International Criminal Court and National Jurisdictions* (United Kingdom: Ashgate Publishing, 2018).

³⁷ Soat Sudan Org, "SOAT – Sudan Organisation Against Torture," 2006.

³⁸ A Human Rights Watch Briefing Paper, "Lack of Conviction, the Special Criminal Court on the Events in Darfur."

the process of fair trial and legal certainty better than give guarantee and protection to the witnesses to gain trust from them within the fair and transparent procedure.

The ICC does not have an office in Darfur because the Darfur's condition is very dangerous. The Prosecutors cannot guarantee the safety of victims and witnesses if conducting an investigation in the conflict area in Darfur. Therefore, the ICC is actively seeking information in about 17 different countries and investigate more than one hundred witnesses and victims. However, ICC claims that the office is able to run an effective investigation over the Darfur conflict, even though conducted outside Darfur.

3.3. The Jurisdiction of International Criminal Court

International Criminal Court is a permanent international judicial institution created by diplomatic convention to try crimes relating to war, crimes against humanity, and genocides.³⁹ The Statute of ICC, namely the Rome Statute, was adopted on July 17, 1998, and entered into force effectively on July 1, 2002. It started operating in 2003.⁴⁰

Peace and justice are once in a while inconsistent objective. In order to end international or internal conflicts, it is regularly important to haggle with pioneers answerable for war crimes and crimes against humanity.⁴¹ The establishment of ICC creates the problem of coordination between the International and National Court. This problem arises when international and national courts have a role in prosecuting similar crime. Difficult questions about sovereignty and international relations will arise when deciding which Court comes first.⁴² In order to answer the problem, there is a principle of complementarity in International Law which provides clear guidance to resolve the intricate problem of which the Court will take priority in a given case.⁴³

The ICC may exercise its jurisdiction in three ways. First, the parties can refer the suspected crime to the prosecutor of the International Criminal Court. Second, the U.N. Security Council can transfer suspected crimes to the prosecutors of the International Criminal Court. Third, the prosecutor of the International Chamber of Commerce can investigate suspected crimes. If the nationality of the country or the defendant of the territorial execution is a party to the Rome Statute, the International Criminal Court can only use jurisdiction over the first and third methods mentioned above.⁴⁴

The ICC jurisdiction is limited by the concept of complementarity. Under the complementarity principle, the ICC is forbidden from declaring jurisdiction when a

³⁹ Malcolm N Shaw, *International Law*, 8th ed. (United Kingdom: Cambridge University Press, 2017).

⁴⁰ International Criminal Court, "Joining the International Criminal Court: Why Does It Matter?"

⁴¹ Michael P. Scharft, "The Amnesty Exception to the Jurisdiction of the International Criminal Court," *Cornell International Law Journal* 32 (1999): 507.

⁴² G. Taylor Stout, "General Principles of International Law: Complementarity," International Judicial Academy, Washington, D.C., 2010.

⁴³ Stout.

⁴⁴ Stout.

national court uses its jurisdiction to investigate and prosecute that crime. However, under the complementarity principle, the ICC may assert jurisdiction even if the case regarding the crime is ongoing before the national Court with two requirements has to be fulfilled. First, the ICC may exercise its jurisdiction where the State shows that its national judicial system unable or unwilling to conduct an investigation or prosecution on the case. Second, the case should have enough gravity to justify the implementation of the jurisdiction of the ICC.⁴⁵

3.3.1. *The Investigation of ICC in Darfur*

The Darfur conflict is already included in the International issue, which is the issue of Human Rights that caused so many victims. Based on Paragraph 30 of the 1993 U.N. Vienna Declaration and Program of Action, torture and other cruel, inhuman and degrading treatment, arbitrary execution and detention, racial discrimination, religious intolerance, terrorism, poverty, hunger and other denials of economic, social and cultural rights, and a lack of the rule of law, is considered a gross violation of human rights.

The Sudanese regime and the state institutions it controls are accused of being responsible for the so-called Darfur massacre. In the reports of non-governmental organizations and the assessments made by the International Criminal Court, the president is usually determined to be the culprit, which is consistent with the Court's definition of the personal responsibility of the head of State for war crimes. First of all, Omar al-Bashir and his ruling elite have complete control over state institutions. This first leads to the handling of conflicts, mainly based on the threat of sanctions. Unless the violence is stopped by the same state institution, this is the most important thing. In the following section, the conflict's "genocide" eligibility and "rogue" state labels will be examined to determine how they affect the dispatch of peacekeepers to the area and their referral to the International Criminal Court.⁴⁶ Various efforts to create peace are pursued by law enforcement and international justice parties. As the starting of the dissension in Darfur in the late of 2002, and especially alongside 2003 and 2004, many reports of brutality occurred in Darfur, such as offensive on villages, mass rapes, slaughters, and large numbers of refugees from Darfur alerted people around the world.⁴⁷

The problem of Human Rights and genocide is a type of problem that can be categorized into transnational problems, meaning that courts and efforts to resolve these problems can be highlighted by the international community without looking at territorial territory and are not limited by the jurisdiction of a country. However, in an increasingly

⁴⁵ Stout.

⁴⁶ Maria Gabrielsen Jumbert, "How Sudan's 'Rogue' State Label Shaped US Responses to the Darfur Conflict: What's the Problem and Who's in Charge?," *Third World Quarterly* 35, no. 2 (2014): 284–99.

⁴⁷ Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court*.

chaotic area, the rebel groups or the Sudanese Government do not value peace, and the persistence of justice does not constitute an obstacle to peace in itself.⁴⁸ In the Darfur conflict, gross violations such as attacks on villages, mass rapes, massacres have occurred, which can be categorized as genocide. Meanwhile, based on Article 5 of the Rome Statute, the ICC has the authority to try the four most serious crimes, namely the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. So it can be concluded that the ICC has the authority and jurisdiction over the genocide that occurred in Darfur.

3.3.2. *The International Commission of Inquiry in Darfur*

The United Nations Security Council shall take action as soon as possible. In September 2004, U.N. Security Council possessed a resolution stating that the U.N. Secretary-General have to form an International Commission of Inquiry with the intent to find out reports concerning violations of a human rights issue that occur in Darfur by all parties,⁴⁹ also to ensure the occurrence of the crime of genocides, and to hold the perpetrators responsible.⁵⁰ By agreeing to let the International Commission check whether genocide has occurred, the Security Council proved that it is ready to use the term "genocide" and no longer hide anything behind the term "ethnic cleansing."⁵¹ In October 2004, the establishment of the International Commission was started when five members body are appointed by Secretary-General and as the results, Mr Cassese is appointed as its Chairman.⁵² The Commission shall report to Secretary-General within three months, and the Commission's staff also shall be devoted by the High Commissioner Office for Human Rights.⁵³

The U.N. released a report stating that "the Government of Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law" have been committed.⁵⁴ The International Commission of Inquiry inspected the replication by the Sudanese Government and discovered that:

⁴⁸ Awol Kassim Allo, "Mayhem in Darfur: The Accountability, Peace and Immunity Debate," *Mizan Law Review* 3, no. 1 (2009): 70–104.

⁴⁹ United States Government Accountability Office, *Darfur Crisis: Progress in Aid & Peace Monitoring Threatened by Ongoing Violence & Operational Challenges* (United States: Create Space Independent Publishing Platform, 2017).

⁵⁰ Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court*.

⁵¹ Quenivet, "The Report of the International Commission of Inquiry on Darfur: The Question of Genocide."

⁵² William A. Schabas, *An Introduction to the International Court* (United States: Cambridge University Press, 2011).

⁵³ Philip Alston and Ryan Goodman, *International Human Rights* (Oxford: OUP Oxford, 2013).

⁵⁴ United Nations, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General."

*“The measures taken so far by the Government to address the crisis have been grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.”*⁵⁵

The Commission deduced that the preferential preference was to submit the Darfur conflict to the ICC for several reasons, namely the Court is the preeminent place to settle the crimes which endanger peace and security, the only international criminal justice institution which may handle the conflict in Darfur, the only procedure supported by the United Nations Security Council that can force the Government of Sudan and head of the rebel to hand over the dispute to criminal investigations and proceedings.⁵⁶

For the aim of identifying the perpetrators, the Commission agreed that it would interview witnesses, government officials, and others who are holding authority position, crimes were reported to have been committed in Darfur.⁵⁷ For the fulfilment of the Commission’s task, the preliminary assessment is necessary to know the extent to which the National Criminal Justice of Sudan has been able and willing to prosecute and bring the crimes in Darfur to trial, then examine several available international mechanisms. With the consideration of these evaluations, it has made prescriptions on the most appropriate measures.⁵⁸

The Commission also recommends the formation of an International Compensation Commission so that victims of crime in Darfur are funded by the Sudanese Government and the establishment of a Trust Fund.⁵⁹ The Darfur Commission marks another watershed in prosecution-oriented fact-finding. It can represent the guidelines and regulations drafted by the model for future adoption in similar situations.⁶⁰

3.3.3. The Referral of the Security Council on Darfur Conflict to the ICC

Sudan is not a State Party to the Rome Statute.⁶¹ Sudan already signed the Rome Statute in 2000 but has not ratified it yet.⁶² However, based on the references of the International Commission of Inquiry, the U.N. Security Council submit the conflict in Darfur to the ICC.⁶³ Therefore, the ICC may execute its jurisdiction over crimes committed in the territory of Darfur, Sudan.

⁵⁵ Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court*.

⁵⁶ Redress.

⁵⁷ Alston and Goodman, *International Human Rights*.

⁵⁸ Alston and Goodman.

⁵⁹ Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court*.

⁶⁰ International Criminal Court, “Darfur, Sudan.”

⁶¹ International Criminal Court.

⁶² Redress, *Accountability and Justice for International Crimes in Sudan: A Guide on the Role of the International Criminal Court*.

⁶³ John Stompor, “The Darfur Dilemma-US Policy toward the ICC,” *Georgetown Journal of International Affairs* 7, no. 1 (2006).

U.N. Security passed Resolution 1593 in 2005 and officially asked the Prosecutor of ICC to consider opening an examination into international crime in Darfur.

“The human tragedy in Darfur is a serious concern for us, Africa and the international community. In this regard, for the sake of justice and accountability, we believe that further delaying an agreement in order to achieve a more desirable result will not help. The need for justice or the demands of the people of Darfur for peace, justice and reconciliation... We are gratified that the Security Council finally took action on this matter... We firmly believe that, according to the recommendations of the Commission of Inquiry, the [International Criminal] Court is dealing with Darfur The most appropriate international institution for the situation.”-Tanzania, voted for Security Council Resolution 1593.⁶⁴

The ICC investigation has generated several cases with the suspect from Government Officials of Sudan, Militia/Janjaweed leaders, and Resistance Front leaders. They were charged with crimes of genocide, crimes against humanity and war crimes. The investigation is the first that dealing with presumptions of the crime of genocide. The ICC review report was prepared by an independent agency, interviewed several government officials and victims of the Darfur atrocities, and evaluated the accounts of the Sudanese government and insurgent groups.⁶⁵

As far as the actions were taken by the ICC in resolving Sudan, the ICC pre-Trial Chamber had released the arrest warrant for some Sudanese officials. However, the Sudanese Government, under Al-Bashir, has rejected the exercise of jurisdiction in Sudan by ICC prosecutors. Sudanese Government opine that U.N. Security Council and the ICC violate the sovereignty of Sudan. On June 6, 2005, Mr Moreno-Ocampo (Prosecutor of the International Criminal Court) announced the start of an investigation in Darfur. In 2007, ICC issued arrest warrants to two Government of Sudanese officials - Ahmed Mohamed Harun as a Sudanese Humanitarian Affairs Minister and Mohamed Abdel Rahman Kushayb as a leader of Janjaweed.⁶⁶ They were charged with attacks against civilians such as murder, torture, inhumane, forced displacement of civilians, etc. In 2010, the pre-Trial Chamber issued an arrest warrant for the President of Sudan, Al - Bashir, for crimes against humanity, war crimes and genocides.⁶⁷ However, the Government of Sudan refused to extradite them.⁶⁸

⁶⁴ Stompor.

⁶⁵ Ademola Abass, “Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur,” *Fordham International Law Journal* 31 (2007): 873.

⁶⁶ Harun and Rahman, “Alleged Crimes (Non-Exhaustive List).”

⁶⁷ Omar Hassan Ahmad Al Bashir, “Al Bashir Case,” International Criminal Court, 2009.

⁶⁸ Totten, *An Oral and Documentary History of the Darfur Genocide*. Santa Barbara.

4. CONCLUSION

The Government of Sudan already established the National Judicial System to investigate and prosecute crimes in Darfur. However, it does not bring meaningful criminal justice. The Sudanese judiciary did not accuse any of the possible major perpetrators listed by the U.N. Commission of Inquiry. The courts remain unable to obtain the suspects or the accused due to the complicity of the Sudanese law enforcement bodies in committing crimes in Darfur. The involvement of the ICC is limited since Sudan has not ratified the Rome Statute yet. However, the ICC, based on the order of the U.N. Security Council, issued the arrest warrant to the President of Sudan, El-Bashir, that accused of having committed crimes against human rights. Thus, the prosecutor of ICC shall conduct an investigation and continue to settle the conflict.

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