Abstract - This research aims to see whether the Security Council Referrals actually imposed the obligation to cooperate with the International Criminal Court to Sudan and Libya, considering their status as Non-state Parties to the Rome Statute and to describe the obstacles faced by the International Criminal Court in securing the fulfillment of its cooperation requests to Sudan and Libya. This research is conducted in normative or legal doctrinal approach and relies on the data from primary sources and secondary sources. The primary sources included are: the Rome Statute, the UN Charter, case law, and UN bodies decisions. This research also include law commentaries, journals and textbooks, as secondary sources. This research argues that while The Resolutions S/RES/1593 (2005) and S/RES/1570 (2011) does not specify the obligations imposed towards Sudan and Libya respectively, it is right to conclude that since the resolutions does not provide an alternative cooperation regime, the cooperation regime contained in Part 9 of the Rome Statute applies. Despite this, the Court does not have the power to enforce obligation Sudan and Libya. It can only issue judicial findings of non-compliance, and leaving the Security Council and international community to pressure non-compliant States. It is recommended that in future referrals, the Security Council would use a more precise language to prevent misinterpretation. Meanwhile, appropriate international response is necessary to tackle the current noncompliance issue of Sudan and Libya.

Keywords: International Criminal Court, Security Council referral, international cooperation and judicial assistance.

INTRODUCTION

International Criminal Court (ICC) marks the new era in the development of international criminal law and tribunals. Also, it is regarded as the most innovative and exciting development in international law since the creation of the United Nations.\(^1\) Unfortunately, during the course of its work, the ICC was criticised for producing few convictions and was perceived as wasting financial resources, spending about one billion dollars in the span of 13 years since the rome statute entered into force in 2001.\(^2\) There are three mechanism for the ICC to trigger investigations as stipulated in Article 13 of the Rome Statute: state party referral, Security Council referral, and through the Prosecutor’s own initiative. So far the investigations are being conducted ten countries. the The Court so far has given convictions in four cases: Bemba, Al-Mahdi, Lubanga and Katanga, all of which are


cases in the situations referred by State Parties. The Security Council, the proceedings of the cases in the situations referred by Security Council, which are: Al bashir case, Banda case, Hussein case, and Harun and Kashayb case, in Darfur, Sudan and Gaddafi case in Libya, has seen little development. This condition is causing a burden to the ICC’s budget, because despite the Security Council’s referring the situations, it does not pay for the costs of investigations.

The Court in its 2017 Budget Proposal stated that the Office of the Prosecutor has had to deprioritize the resources dedicated to the Darfur situation and dedicate its efforts to other situations and cases. The ‘hibernation’ of the cases is caused by the refusal of the governments of Sudan and Libya to surrender the defendants to the ICC, resulting Confirmation of Charges hearings of Al bashir case, Hussein case, Harun and Kashayb case and Gaddafi case as well as the Trial hearing of Banda Case to be postponed indefinitely. The postponement of the cases is detrimental to the interest of the victims. as long as the suspects are not in present in trials, the victims of the crimes attributed to the suspects are continued to deprived of their right to have justice delivered.

The governments of Sudan and Libya are not parties to the Rome Statute, and therefore they are not under obligation to cooperate with the ICC. However, the referrals of the situations to the ICC were mandated by the Security Council, and both Libya and Sudan are members of the United Nations. Apparently there no link between Article 13 of the Rome Statute, which gives the Security Council the power refer situations to the ICC, and the provisions regarding international cooperation and judicial assistance contained in Part 9 of the statute. This raises questions about whether the obligation by Sudan and Libya to cooperate with the ICC exists or not, and what are the obstacles that hamper the Court from obtain cooperation by those states in order for the cases to proceed smoothly.

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RESEARCH METHODOLOGY

1. Research Specification

This research uses normative or doctrinal legal research method,\(^5\) which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty.\(^6\)

2. Data Analysis

The Data obtained from primary and secondary sources is analyzed qualitatively answering the research question. This research does not use statistical analysis or hypothesis testing. The primary sources included are the Rome Statute of the International Criminal Court, judgements and decisions of international courts, the Charter of The United Nations, and Security Council resolutions, while the secondary source included are relevant law commentaries, journals and textbooks.

THE IMPLICATIONS OF SECURITY COUNCIL REFERRAL IN REGARDS TO THE OBLIGATION OF THE GOVERNMENTS OF SUDAN AND LIBYA TO COOPERATE WITH THE ICC

1. THE EXISTENCE OF OBLIGATION TO COOPERATE WITH THE ICC FOR SUDAN AND LIBYA

When a crime under the jurisdiction of the International Criminal Court occurs, the court does not automatically open the investigation of the said crime. The jurisdiction of the court may be triggered by one of three mechanisms, state referral, security council referral, or \textit{proprio motu} authority of the Prosecutor, as stipulated in Article 13. State referral is when a member state or a third-party state accepting the court’s jurisdiction pursuant to Article 12(3) refers a situation to the Court. Security Council referral is when the Security Council of the United Nations authorizes the Court to exercise its jurisdiction over a situation regardless whether or not the situation is within the Courts’s territorial or personal jurisdiction. In other words, the Security Council can refer situations of a state regardless of whether it is a State Party to the Rome Statute or a Non-State Party. However, the referral must fulfill the requirements stipulated in Article 13(b), which are: the existance of a situation in which one


or more of such crimes appears to have been committed, and the Security Council must be acting under Chapter VII of the Charter of the United Nations in making such referral. Proprio motu authority of the Prosecutor is the ability of the Prosecutor to initiate investigations of crimes committed in the territory of any of the State Parties to the Statute, as well as crimes committed by the nationals of any of those State Parties anywhere in the world.

It is essential that Security Council referrals of a situation involving a Non-state Party to the ICC must be accompanied with a cooperation clause. Such clause is to ensure that the state in which a referred situation occurs will provide assistance to the Court and not hamper the investigations or prosecutions. Also, it serves to the ability of The Court to exercise its function normally as if the it were investigating or prosecuting cases regarding crimes committed on the territory of, or by nationals of non-state parties. If somehow the state in question is not imposed the obligation to cooperate, it would defeat the purpose of referring the situation to the ICC as it would be significantly difficult to conduct investigation without cooperation from the state.

Because the obligations under the ICC Statute stem from the treaty between States, it resulted in three cooperation regimes:

- The first regime is applies to the Parties to the Rome Statute. State Parties are governed by the legal assistance provision under the Rome Statute, as stipulated in Article 86, “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”.

- The second regime applies to Non-state Parties when they have entered into an ad hoc arrangement or an agreement with the Court. The principle of pacta tertiis nec nocent nec prosunt contained in Article 34 of the 1969 Vienna Convention on the Law of Treaties prohibits a treaty to include obligation for a third state, therefore there is no obligation for a Non-state Party to cooperate with the ICC under the Rome Statute. However, a Non-state Parties may have a duty to provide assistance if the state voluntarily establishes a

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8 Schabas, William A. An introduction to the International Criminal Court. UK: Cambridge University Press, 2010, p. 158

legal relationship with the ICC. The Rome Statute provide two scenarios: first, The Article 12(3) provides that a nonparty state may accept the ICC's jurisdiction on an ad hoc basis. The voluntary acceptance of the ICC's jurisdiction requires a nonparty state's unconditional acceptance of all cooperation obligations under the Statute. Second, Article 87(5) provides that a nonparty state can provide assistance through ad hoc cooperation agreements with the ICC. Although the content of such future agreements is often speculative.

- The third regime applies to UN member states when the Security Council refers a situation to the ICC under Article 13(b) of the Rome Statute. In such cases, the Security Council can produce a resolution that obligates UN members to provide assistance to restore and maintain international peace and security.  

What does the referral resolutions say about the obligation to cooperate? The UNSC Resolution 1593 (2005) states:

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

The same wording was used in UNSC Resolution 1970 (2011):

*Acting* under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,

4. *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5. *Decides* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.

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From the text above, it is clear that the resolutions serve as the for basis the Court to extend the jurisdiction. While the resolution does not explicitly mention article 13(b), the situations in Darfur and Libya has been referred to the Court by the Security Council acting pursuant to article 13(b) of the Statute. As such, the cases fall within the jurisdiction of the Court despite the fact that it concerns the alleged criminal liability of nationals of a State that is not party to the Statute and for crimes which have been committed in the territory of a State that is not party to the Statute. However, in regards to the obligation to cooperate, the resolutions actually do not mention what kind of cooperation regime the Court shall apply, as it only mentions the Governments of Sudan and Libya in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor without defining the terms ‘cooperate fully’ and ‘necessary assistance’.

According to the Pre-Trial Chamber’s view, the provisions regarding cooperation under Part 9 of the Rome Statute shall be applicable towards Sudan and Libya. The Pre-Trial Chamber interpreted the resolution 1593(2005) as confining the power of the Chamber to request the cooperation of Sudan to the provisions of the Statute and its supplementary instruments, as the resolution does not provides for an autonomous legal regime for cooperation that would replace the ICC regime or represent an alternative to it.

This is a very persuasive conclusion reached by the judges. The reason is because as mentioned before, the cooperation paragraphs in the resolutions is unclear. It does not detail a new cooperation regime, nor does it explicitly applies the ICC’s cooperation regime in whole or in part. What is obvious is that the Governments of Sudan and Libya does have the obligation to cooperate with the Court, as indicated the operative word ‘shall’. This is in contrast with the word ‘urges’ that is used to point towards all states which means that states other than Sudan and Libya do not have any obligation, but only encouraged to cooperate.

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13 Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Decision on the “Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan”) ICC-02/05-03/09-169 (1 July 2011), para. 15.
In the absence of an alternative cooperation regime, the Court has to turn to the Rome Statute. This means applying the ICC’s cooperation regime in whole. This is in line with Article 1 of the Rome Statute, which stipulates that the jurisdiction and functioning of the Court shall be governed by the provisions of this Statute and Article 21(1) which lists the Statute, Elements of Crimes and Rules of Procedure and Evidence as the Court’s main sources of law. Furthermore, the Pre-Trial Chamber ruled that the sources both in Article 21(1)(b) and (c) were only applicable if there is a gap in the main sources that cannot be filled by the method of interpretation provided in 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Rome Statute. Considering the detailed provisions contained in Part 9 of the Rome Statute, there is no need for the Court to turn to other sources.

Consistant with the interpretation of the referral paragraph of the resolutions, where the term of ‘referral’ is not defined in the resolutions and must be seen in relation to Article 13(b) of the Rome Statute, the term ‘full cooperation’ must be seen in relation with Article 86 of the Rome Statute. This is in line with the customary rule of effectiveness (ut ret magis valeat quam pereat), where it is preferred for a legal provision to have effect rather than no effect at all, as long as the effect is not contrary to its object and purpose.

The Permanent Court of International Justice in the Jaworzina advisory opinion held that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it. Therefore, the authentic interpretation of Security Council Resolutions can only be given by the Security Council itself or a certain body authorized to do so by the Council. They may be given in a subsequent resolution or in some other way (e.g. a Presidential statement or a letter from the President). As an example, S/RES/970 (1995) of 12 January 1995 reaffirmed that the requirements in paragraph 12 of S/RES/820 (1993) of 17 April 1993 - that imports, exports and trans-shipments through the Serb-held areas of Croatia and Bosnia were to be permitted only with authorization from the Government of Croatia or Bosnia-applied to all shipments across the international border between Serbia and Bosnia. This authentic interpretation was apparently considered necessary because of a contrary interpretation provided by the Legal

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14 Prosecutor v. Omar Hassan Ahmad al-Bashir (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009), para. 126.
16 Delimitation of the Polish-Czechoslovakian Frontier (Advisory Opinion) [1923] PCIJ series B No. 8, para 80.
Adviser to the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia (S/l995/6, para. 6).\(^{17}\)

The fact that there has yet a resolutions passed by the Security Council containing different interpretation from what the Court has reached, signifies that the Court’s interpretation of the resolutions does not deviate from what the Security Council intended. It is still possible for the Council to give its interpretation of the resolutions in the future, but it is very unlikely as the resolutions were passed several years ago. In the current situation, it is more convenient for the Council to exercise its deferral power under Article 16 instead.

2. OBSTACLES FACED BY THE ICC IN THE FULFILLMENT OF COOPERATION REQUESTS

a) Political Stance of the Government of Sudan

Despite the obligation of Sudan and Libya to cooperate, in reality it is still difficult for the Court’s request to be fulfilled. In regards to Sudan, its Government has expressed opposition to the Security Council resolution and to ICC’s jurisdiction, and even refusing to even engage in any dialogue with the Court. It is still maintaining its position as a Non-state Party to the Rome Statute. This most likely is due to the Court’s indictment of its current president, Omar Hassan al-Bashir, which are seen as western intervention and infringement of sovereignty of Sudan.

As mentioned before, Sudan as a UN member state must nevertheless abide by the provisions of the UN Charter and obey the Security Council resolution by cooperating with the Court.\(^{18}\) Therefore, Sudan must at first consult with the Court and enact laws stipulating national procedure of all forms of cooperation with the Court, regardless of its intention to implement such laws, as a part of its obligation to cooperate. If Sudan disagrees with the Court’s jurisdiction over its nationals, or has all rights to challenge the Court’s jurisdiction in a fair trial. Unfortunately, no such actions has been take by Sudan until the writing of this thesis.

b) Power Struggles and Security Concerns within Libya

Unlike the Sudanese Government, the Libyan Government demonstrated in several respects its commitment to the Court. It acknowledged the Court’s jurisdiction and its


obligation to cooperate and also engage in the proceedings before the Court. Libya exercised its right to challenge the admissibility of the case against Saif Al-Islam Gaddafi (as well as the case against Abdullah Al-Senussi), and participated fully in the ensuing proceedings, demonstrating its acceptance of the Court’s role and activities. Libya also entered into an agreement with the Court with respect to the privileges and immunities enjoyed by the Court on Libyan territory.

However, despite of its engagement, Court’s requests for cooperation has yet to be fulfilled. The Pre-Trial Chamber still found the objective failure on the part of Libya to comply with the Court’s two requests for cooperation that are still pending and which concern obligations of extreme importance.\textsuperscript{19}

Libya’s obstacle fulfilling the Court’s request is its own internal strive. Because of the collapse of Gaddafi regime in 2011, there were competing governments and armed factions vying for territorial power in Libya. The internationally recognized government, the Government of National Accord, is having trouble securing the custody of Saif al-Islam Gaddafi which were held by a Zintani based militia. The Zintani based militia does not recognize the It is unlikely the Court’s request be implemented, at least until there is a stable government in Libya.

c) Statutory Limitation and Lack of International Enforcement

With the failures of Sudan and Libya to fulfill the Court’s request for cooperation, the Rome Statute stipulates that the Court can only enforce cooperation by Sudan and Libya as far as issuing judicial findings of non-compliance, and informing the matter to the Security Council\textsuperscript{20}, as the Pre-Trial Chamber had done as such. The Court cannot punish noncompliant states, it is the job of the Security Council and the international community to pressure the governments or to give assistance so that the request could be fulfilled.

This particular provision within the Rome Statute actually goes back to the jurisprudence of the ICTY. International tribunals cannot deliberate what sort of action that should be taken by the Security Council to guarantee the compliance of the requested state. The Appeal chamber of the ICTY ruled that a judicial finding of non-compliance must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding. The same ruling also mentions that every


\textsuperscript{20} Rome Statute, Art. 87(5)(b).
Member State of the United Nations has a legal interest in seeking compliance by any other Member State with the cooperation request, therefore each Member State of the United Nations may act upon the legal interest referred to in a form of possible unilateral action. Also, a collective response through other intergovernmental organizations may be envisaged and may take various forms, such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions. Additionally, the Security Council can include the mandate of a peacekeeping mission to apprehend and detain certain individuals and to transfer or facilitate the transfer or such persons for prosecution before international tribunals. Historically, the Council has done such action in the SCSL case of Liberian President Charles Taylor. This signifies that the politics inside the Security Council is consequential to enforce cooperation.

Because the ICC has the same cooperation enforcement regime with the ICTY and ICTR, this means the same problem the Tribunals have been facing the same kind of problems. Even in the mere months before its closure, the ICTY and the MICT had to deal with noncompliance from Serbia and Turkey. The ICTY found Serbia’s noncompliance by refusing to surrender the suspects in a contempt case, , and it decided that therefore there was no obligation for Serbia to surrender the suspects. The President of the ICTY eventually informed the Security Council to take the measures necessary to secure the compliance of Serbia. The MICT found Turkey’s noncompliance by detaining Judge Aydin Sefa Akay, who is a member of the bench of the Appeals Chamber in the case of . Judge Akay was detained in relation to allegations connected with

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22 UNSC Resolution 1638 (2005) 11 November 2005
23 The International Residual Mechanism for Criminal Tribunals (MICT) is a subsidiary organ of the Security Council established under Resolution 1966 (2010) to carry out a number of essential functions of the Tribunals, including the trial of fugitives who are among the most senior leaders suspected of being most responsible for crimes, after the closure of the Tribunals. The ICTR was closed in 31 December 2015, and the ICTY will be closed in 31 December 2017.
25 Prosecutor v. Petar Jojic, Jovo Ostojic, and Vjerica Radeta (Decision in Relation to the Cooperation of the Government of the Republic of Serbia with the Tribunal) IT-03-67-R77.5 (1 August 2016), para. 2.
26 UNSC Letter dated 1 March 2017 from the President of the International Tribunal for the Former Yugoslavia addressed to the President of the Security Council S/2017/180 2 March 2017
the coup attempt of July 2016. The MICT ordered Turkey to cease all legal proceedings against him and release him so that he could resume his judicial functions in the case.\textsuperscript{27}

Other international and regional organizations can also help in pressuring noncompliant states. The European Union was able to pressure the Government of Croatia to cooperate fully with ICTY in the case involving Croatian Military General Ante Gotovina by postponing all negotiations for Croatia’s accession into the Union.\textsuperscript{28} In the context of Sudan, however, the obstacles of the ICC is further stacked by the position of the African Union (AU), the african regional organizaton in which Sudan is a member. The AU actually supported the noncompliance of Sudan and claimed that President Bashir was entitled to head of state immunity under customary international law.\textsuperscript{29} It should be noted that even if such claim is true, it cannot justify Sudan’s noncompliance in the other three cases.

CONCLUSIONS

Libya and Sudan are under international obligation to cooperate with the International Criminal Court based Security Council Resolutions 1593 (2005) and 1970 (2011) respectively, as both States are UN Member States and bound by Article 25 and 103 of the UN Charter. The Pre-Trial Chamber had interpreted resolution correctly by applying the ICC’s cooperation regime contained in Part 9 of the Rome Statute, in light of the resolution’s lack of alternative cooperation regime.

The position held by the Sudanese Government that rejects the Court’s jurisdiction hampers the Court’s effort to pursue justice for the victims of the Darfur conflict. Meanwhile, Libyan Government was facing internal power struggles and security concerns that it was unable to fulfill the Court’s cooperation requests. The Court does not have the power to punish Sudan and Libya’s failures to fulfill the Court’s request for cooperation. The Court has the authority to issue a judicial findings of non-compliance, however the Court cannot compel the Security Council or other States to take actions towards non-compliant States, or even suggest what kind of actions the Security Council or other states should take. The Judicial finding only gives the legal basis for appropriate response to non-compliance.

\textsuperscript{27} Prosecutor v. Augustin Ngirabatware (Decision on Republic of Turkey’s Non-compliance with its Obligation to Cooperate with the Mechanism) MICT- 12-29-R (6 March 2017)
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