

THE CHALLENGES OF U.N. SECURITY COUNCIL IN THE ENFORCEMENT OF STATE COOPERATION AT THE ICC*

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Abstract

The success of the International Criminal Court is highly determined by cooperation from States. The Court lacks an enforcement mechanism and has to rely on the cooperation of State and non State-Party in the arrest and surrender of the perpetrators of crimes under its jurisdiction. It is undeniable that without State Cooperation, the Court will encounter great difficulty to conduct its proceedings. United Nations Security Council possesses specific role in the enforcement of State Cooperation, however, such role is very limited — and even ineffective, since the Court is a treaty-based International Criminal Tribunal, meaning that it is independent, and it shall not bound third State without its consent.

Finally, this article will highlight both the implementation of the responsibilities to cooperate under international law, as well as State willingness to cooperate with the Court in practice thus far, and also the power of Security Council in the enforcement of State Cooperation in the International Criminal Court.

Intisari

Keberhasilan Mahkamah Pidana Internasional bergantung pada kerjasama para Negara. Mahkamah Pidana Internasional tidak memiliki mekanisme pelaksanaan dan harus bergantung pada kerjasama para Negara dan pihak-pihak non-Negara dalam melakukan penangkapan pelaku-pelaku kejahatan di bawah yurisdiksinya. Tidak bisa disangkal bahwa tanpa kerjasama para Negara, Mahkamah Pidana Internasional akan sulit dalam menjalankan proses hukumnya. Akan tetapi, Dewan Keamanan PBB memiliki suatu fungsi spesifik dalam menjalankan kerjasama para Negara tersebut, walaupun fungsi tersebut sangat terbatas—dan bahkan tidak efektif, dikarenakan Mahkamah Pidana Internasional adalah sebuah Pengadilan Pidana Internasional yang dibangun melalui perjanjian, yang membuatnya independen dan tidak dapat mengikat negara-negara tanpa persetujuan mereka.

Pada akhirnya, artikel ini akan membahas implementasi kewajiban-kewajiban untuk bekerjasama dalam hukum internasional, dan kesediaan para Negara untuk bekerjasama dengan Mahkamah Pidana Internasional pada praktiknya, dan juga peran Dewan Keamanan PBB dalam menjalankan kerjasama dengan para Negara di Mahkamah Pidana Internasional.

Keywords: ICC, international criminal law, Security Council, state cooperation.

Kata Kunci: ICC, hukum pidana internasional, Dewan Keamanan, kerjasama negara.

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A. Introduction

The International Criminal Court ("ICC") is a treaty-based International Criminal Tribunal that was established by the Rome Statute. It began its function in July 2002, when the Rome Statute entered into force. In enforcing its jurisdiction, the ICC has to rely on the cooperation of State Parties and non-State Party of the Rome Statute in the arrest and surrender of accused persons who commit crimes within the ICC jurisdiction, without enforcement mechanism of its own to apprehend those individuals (Mutuyaba, 2012). Due to the lack of enforcement mechanism, the ICC has not been quite successful in cooperating with States, in regards to the execution of arrest warrant and surrender of the accused persons (Katz, 2003).

The basis for the obligation of States to cooperate with the ICC is a normal treaty obligation under the Rome Statute. Treaties are binding in principle only on State Parties (VCLT, 1969). For non State-Party, there is neither harm nor benefit in them (*pacta tertiis nec nocent nec prosunt*) (Zhu, 2006). ICC differs from International Criminal Tribunal for Rwanda ("ICTR") and International Criminal Tribunal for the Former Yugoslavia ("ICTY"), where States are obliged to cooperate as it is elevated from United Nations ("UN") Charter (Stroh, 2001). This, in facts, makes ICC less mobile than ICTR and ICTY that were established by UN Security Council ("SC") Resolution under Chapter VII of UN Charter.

As crucial organ of UN that is empowered to maintain international peace and security (UN Charter), SC also possesses vital role and power within the ICC. The SC may make a referral of the situation to the ICC (Rome Statute, 1998), request for cooperation from State (Rome Statute, 1998), and even handle the non-compliance for the referred situation (Rome Statute, 1998). However, the SC has not

yet done any of the action above, while it is expected that they will actively participate in assisting ICC in order to attain its object and purpose, which is to ensure that the most serious crimes do not go unpunished (Rome Statute, Preamble).

In the *Situation in Darfur*, despite the issuance of the arrest warrants against Sudanese President, Omar Al-Bashir, he remains free until now. Although the SC, through Resolutions 1593/2005 imposes a mandatory obligation on Sudan to cooperate with ICC, Sudan has not cooperated fully with the Court. Similar situation can also be found in another *Situation in Darfur* (Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, 2010), *Situation in the Republic of Kenya* (Prosecutor v. Uhuru Kenyatta, 2013), and the *Situation in Libya* (Prosecutor v. Saif Al Islam Gaddafi, 2014), where States did not cooperate with the ICC, and the SC did not conduct any measure to enforce State cooperation with the ICC. In this relation, this article will examine to what extent the SC may play a role in enforcing State cooperation in the ICC and analyze the challenges that it often faces.

B. ICC: The Issue with State Cooperation

As a treaty based tribunal, only States ratifying the Rome Statute can be bound by provisions in that Statute. In the Rome Statute, the provisions on the obligation to cooperate differ for State Parties and non State Party, but both are problematic. This is why the role of the SC is crucial in executing these cooperations.

As a starting point, the cooperation demanded by the ICC is broad in nature. It is written in Article 86 of the Rome Statute that only State Parties are obligated to fully cooperate with the ICC in its investigation and prosecution of crimes

(Rome Statute, 1998), and it is accompanied by Article 89, which emphasized the surrender of persons to the ICC (Rome Statute, 1998). Under Article 89 (1), the ICC may transmit a request for the arrest and surrender of a person, together with material supporting that request (Rome Statute, 1998), to a State on the territory of which that person may be found. The Rome Statute is clear in conveying the obligation of State Parties upon receiving such request—they must comply (Rome Statute, 1998; Oosterveld *et. al.*, 2001).

However, the issue with State cooperation is that (1) it does not bind third states, (2) some State parties are reluctant to cooperate. As for the first point, Article 34 of Vienna Convention on Law of Treaties (“VCLT”) provides that “a treaty does not create either obligations or rights for a third state without its consent.” (VCLT, 1969). Therefore, non State-Party to the Rome Statute, shall not be bound by any provisions stipulated by this latter unless the parties to the treaty intend the provision to bind a third state and that third State expressly accepts that obligation in writing (VCLT, 1969). This is supported by the SC in its resolution, expressly recognizing that non State-parties have no obligation under the Statute, therefore only encourage them to cooperate (UNSC Doc. 1593, 2005). The rationale behind this is simply political—where as some of the permanent members of the SC are not parties to the ICC. This raised concerns that the Court has become a policy tool to advance the political interests of those States represented on the Security Council (Mistry *et. al.*, 2012).

Unlike the SC itself, who has the power under Chapter VII of the UN Charter to issue resolutions binding to *all* members of UN (UN Charter). In contrast to the ICTY and ICTR that was established by

the SC Resolutions (UNSC Res. 827, 955) consequently, its Statutes were also adopted and amended by the SC, and these Resolutions did not differentiate between the obligations of different States, implying that *all* member states of UN are obliged to cooperate with both *ad hoc* tribunals. An example would be when Germany made domestic legislation to affirm their cooperation with the Tribunals, and proved to have cooperated in the arrest of Tadic in Germany.

However, when we try to view it in the light of other general principles of international criminal law in particular, cooperation with the ICC is no longer voluntary in nature, but it is instead obligatory. In legal commentary, it has been suggested that a duty to prosecute or extradite the perpetrator of international crimes nevertheless exists in customary international law; the duty would bind States regardless of whether they are parties to the relevant treaty (Cryer *et. al.*, 2010) because the duty to prosecute all international crimes in all circumstances is absolute. Therefore, while a State may not have ratified the Rome Statute, it may still be subjected to an obligation to cooperate with the ICC (Zhu, 2006). This is affirmed by scholars’ opinion (Scharf, 1996; Broomhall, 2003; Cryer, 2010), various case laws throughout the world (“The Application of the Convention on the Prevention and Punishment of the Crime of Genocide”, 2007) and instruments of international law (ILC Draft Code of Crime Against the Peace and Security of Mankind, 1996).

As for the second point, States that are parties to the ICC do not give the Court guarantee that they will cooperate in executing the arrest warrants. As shown by the practice of US, who has been seeking bilateral non – surrender agreements or “Article 98” Agreements with States

around the world (regardless of whether those States are parties to the Rome Statute). The basic idea of such agreement is to shield US citizens from the jurisdiction of ICC which receives much critics from international law experts (“US Bilateral Immunity Agreements or So-Called Article 98 Agreements”). The highlight of this phenomenon is the amount of state parties that are willing to sign such agreements. Albania, became party to the Rome Statute on 1st of May 2003, only signed an Article 98 agreement *one day* later. Similar patterns are found between the US and other states such as Congo, East Timor, Sierra Leone, Uganda (“International Criminal Court – Article 98 Agreement Research Guide”).

Another recent example would be the South African government that has threatened to quit ICC, amid controversy over Pretoria’s refusal to enforce an ICC arrest warrant against visiting Sudanese president on last June 2015 (PressReader.com, 2015). South Africa, as a party to the Rome Statute was consequently under an obligation to arrest Bashir and surrender him to the ICC (Rome Statute, 1998). The Pretoria High Court even declared that the government of South African has ignored the principles of the rule of law and its constitutional obligations by not surrendering Bashir to the ICC. However, the South African government argued that Bashir was attending a summit of the African Union, so he had immunity from arrest. Thus, it can be concluded that although States are parties to the ICC, it does not give any guarantee that they will cooperate with the ICC in executing the arrest.

C. Role of the Security Council in relation to State cooperation

To complement the third states and non-State parties, the ICC provided a

portion of power to the SC as well in the exercise of the Court’s jurisdiction. The role of the Security Council at the ICC is limited to the jurisdictional and cooperation scope that are based on the Rome Statute and the Agreement between the UN and ICC (“the Agreement”) (“Negotiated Relationship Agreement between the International Criminal Court and the United Nations”). Under the Rome Statute, the SC is empowered to refer situations in which crimes appears to have been committed to the ICC. Such referrals extend for those situations found within the territories of non-State Parties (Rome Statute, 1998). The referral in this sense, would bind the State to the Rome Statute for that particular case only. (*Prosecutor v. Bashir*, 2009). In terms of the enforcement for cooperation, the referrals to the SC is a procedure that is specifically designed for situations that were referred by the SC (Rome Statute, 1998). In this context, the Agreement provided that the Court may transmit its written decision to the SC together with relevant information regarding the case in question. At this point, the SC, through the Secretary – General, shall inform the ICC of any action taken by it under the circumstances (“Negotiated Relationship Agreement between the International Criminal Court and the United Nations”).

D. ICC: Mechanism for non-compliance and why it’s weak

Article 87 (7) of the Rome Statute states:

“State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of

States Parties (“ASP”) or, where the SC referred the matter to the Court, to the Security Council.” (Rome Statute, 1998)

Therefore, if there is a State that refuses to cooperate with the ICC, the ICC will make a judicial finding to that non-cooperation (Rome Statute, 1998). If it is evident that such non-cooperation prevents the ICC from exercising its functions and powers, the ICC may refer that non-compliance conducted by disobedient State to the ASP or to the SC. Afterwards, the ASP and the SC can take “any measure they deem appropriate.”

A concrete example is Sudan—a non State Party to the ICC, but bound by the Statute in virtue of SC Resolution 1593, which refers the situation in Darfur to the ICC (UNSC 1593, 2005). The situation in Darfur involves the Sudanese President, Omar Al – Bashir, alleged to have committed crimes against humanity and war crimes in the region of Darfur. As consequence to the Resolution, Sudan would have to comply with the Court’s cooperation requests. But after ten years since the Council makes such referral, Sudan has not yet complied with any of the Court’s cooperation requests. Perpetrators of international crimes are still at large, and Bashir is still walking freely from State to State without fear of being arrested and handed to the ICC.

Until today, the ICC has made several judicial findings of non-cooperation, and referrals to the ASP and the SC. These include Chad (2010, 2011, and 2013), Congo (2014), Djibouti (2011), Kenya (2010), Malawi (2011), and Nigeria (2013). All these referrals are related to the arrest and surrender of the Sudanese President Omar Al Bashir (Ellis, 2014). After such referrals, the President of the ASP often approaches the diplomatic agents of the disobedient State, such as its Foreign Minister, as well as its

representatives, in order to informally discuss the non-cooperation and to encourage them to fully cooperate (“Report of Bureau on non-cooperation, 2013). Yet, even judicial findings of non-cooperation triggering a formal response procedure have resulted in only a fairly timid response from the Assembly (*Prosecutor v. Bashir*, 2013). Practically speaking, the ASP did not take the non-compliance any further.

Another example of State non-cooperation can also be found in the *Situation in Libya* (*Prosecutor v. Saif Al Islam Gaddafi*, 2014). In that particular situation, the Chamber considers that Libya, while not being a State party to the Rome Statute, is under a duty to cooperate with the Court in accordance with Resolution 1970 (UNSC Res 1970, 2011), whereby the SC acting under Chapter VII of the UN Charter has explicitly decided that “*Libya shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor*” (*Prosecutor v. Saif Al Islam Gaddafi*, 2014). The Appeals Chamber in that case also confirmed that Libya has an obligation to cooperate with ICC that originates from the SC Resolution referring the situation to the ICC (“Decision on the request for suspensive effect and the request to file a consolidated reply”, 2013). Eventually, this decision leads nowhere since the SC did not do any action to urge States to cooperate with the ICC. Similar situation can be discovered in *Situation in the Republic of Kenya* when ICC issued arrest warrant for Uhuru Kenyatta (*Prosecutor v. Uhuru Kenyatta*, 2013), another *Situation in Darfur* in respect of the arrest and surrender of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (*Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, 2010).

The ICC had in the past forwarded their non-cooperation decisions one of which are the *Malawi* and *Chad Decision* to the SC, in which the Court requested the Council to take action in enforcing the two States to cooperate with the ICC in the arrest and surrender of Bashir. But no respond was issued from the UN's powerful organ. The latest request made by the Court to the SC, was for Sudan itself—a request which had not yet received a concrete response from the SC. This goes against the action of the SC itself when it issued Resolution 1593 urging Sudan to cooperate with the Court. Such absence of response from SC would also weaken the ICC in the term of bringing people to justice. It would encourage perpetrators of most serious crimes even more that they can walk freely without having to fear of being arrested and surrendered to the ICC.

It is based on this fact that the authors opine that the SC enforcement mechanism has not yet live up to its expectation, considering the fact that such approaches—through diplomatic channels or referrals to the ASP are not binding, therefore, the SC was the last chance the ICC can seek to enforce cooperation. Even though neither does the Statute or the Agreement elaborated on the types of response that may be taken by the Council. However, as the Council's role at the ICC is in virtue of acting under Chapter VII of the UN Charter as affirmed by both the Statute and Agreement, therefore the response that would be available would be those provided under Article 41 of the Charter.

E. Sanctioning by the Security Council?

The authors believe that there should be concrete provisions setting up a standard of sanctions that can be imposed by the Council and those sanctions should

come in conformity with the provisions under the UN Charter. For example, the SC may only impose sanctions under Article 41 if the Council decides that there exist a threat or breach of peace or act of aggression pursuant to Article 39—a pre requisite for Article 41. The noncompliance of Sudan to arrest and surrender Bashir may be considered as a threat to peace. According to the Black Law Dictionary, 'threat' is defined as "a communicated intent to inflict harm or loss of another or on another's property" or as "*an indication of an approaching menace.*" (Garner, 2014). While 'peace' is referred to as "*a state of public tranquility; freedom from civil disturbance or hostility*" (Garner, 2014). Therefore, threat to peace can be defined as the intention to injury, damage or endanger the freedom from public disturbance or tranquility.

The SC has also adopted Resolution 731 where SC considered that international crimes have "*a deleterious effect on international relations and jeopardize the security of States*", and therefore it constitutes as threats to international peace and security. (UNSC Res 731, 1992). This is also affirmed in *Lockerbie* case where a refusal to surrender or extradite the suspect of international crimes could pose an imminent threat to international peace (McGinley, 1992). ICC's jurisdictions *ratione materiae* are all classified as international crimes that rise to the level of *jus cogens* (Bassiouni, 1996) and therefore not prosecuting or not cooperating with international tribunal to punish the perpetrator of such crime would be constituted as threat to peace.

The terms of threat to peace can be interpreted into various kinds of situations, from military threat (Cryer, 1996) to civil wars (UNSC Res 733, 1992), lack of democracy (UNSC Res 841, 1993), anti-terrorist interventions (UNSC Res 748,

1992), and serious violations of human rights (UNSC Res 688, 1991). However it is not limited to those events. In this sense, it depends on whether a delay of justice—by way of non-cooperation by States can be regarded as threat to peace. The absence of the definition to threat of peace in Article 39 indicates that the Council is empowered with the discretion to determine which situations fall under the said article. Nevertheless, to avoid *legibus solutus*, there is a general consensus that the scope of discretion is limited by Article 24 (2) of the UN Charter in which requires the Council to act in accordance with the purposes and principles of the UN and the provisions within the Charter.

Imposing sanctions for Sudan would not be the first time for the SC. In the case of *Lockerbie*, the Council was forced to pass sanctions against Libya for its lack of cooperation. Similar resolutions were adopted when the Council obliged Sudan to extradite suspects who were allegedly involved in the assassination attempt, to Ethiopia (UNSC Res 1044, 1996). Even in the case of *Taylor*, the SC went far as to apply the use of force to execute warrants. Such application of force was after the Council determines that the use of force is needed to effectuate arrest and was considered as a last resort. In which a resolution was passed and given to the authorities to apprehend and detain Taylor to be transferred to Sierra Leone for the prosecution before the special court (UNSC Res 1638, 2005).

F. Conclusion

Finally, the authors found that the lack of an effective enforcement of cooperation in the ICC bars the Court from executing its main purpose of existence—to end impunity and uphold justice. Its principles and commitment would only be a mere vision without the aid from the SC

since the Court does not possess its own police force. The SC—being the only universal organ that is authorized to make binding decisions, has the role in “ICC’s enforcement mechanism”, however Bashir is a living proof that even the Council cannot be a decisive side to ensure the ICC’s full exercise of mandate.

An in depth authority for the SC can be sought by the Court by way of amendment of the Rome Statute, giving explicit power in terms of enforcing state cooperation. However, it must still be in line with Article 39 and 41 of the UN Charter in order for such power to be uncontested by mostly political debates.

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