

## South Africa's Recall as The Member of International Criminal Court (ICC)

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### **Abstract**

*This study aimed at analyzing South Africa's decision to recall membership of International Criminal Court (ICC). It used reference study method supported by topic-relevant secondary data. Data were analyzed descriptively qualitative. The results showed that South Africa's decision to recall ICC membership was underlied by discriminative practice of ICC towards Africa. ICC has accused African head of states and people as international crime perpetrators. Meanwhile, ICC did not take any action to those non-African head of states who were committed in international crime. According to South Africa's perspective, this accusation was considered threatening peace and unity of African Union (AU). As one of the influential countries in AU, South Africa opts for keeping peace and security in Africa rather than cooperating with international regime such as ICC. This priority is inline with South Africa's attempt to attain their national interest. Consequently, they decided to recall membership of ICC.*

**Keywords:** *ICC, decision, South Africa, discrimination.*

### **I. INTRODUCTION**

International Criminal Court (ICC) is a permanent and independent international criminal court established based on Rome Statutes, July 17<sup>th</sup>, 1998. The objective of ICC establishment is for law enforcement towards international crime perpetrators all around the world (ICC, 2016). ICC is entrusted to be capable of adjudicating individuals who are responsible for war crime, humanitarian crime, aggression crime, and genocide all around the world. As an independent court institution, ICC is expected to hold the power of law to call for responsibility of individuals or tyrants who have impunity before the law (Sefriani, 2007:5).

South Africa has been a party in ICC since ratifying Rome Statutes in 1998. Rome Statutes has been adopted into South Africa's national law as an act. The decision reflected their commitment to cooperate with ICC for tackling down impunity of individuals who are committed in international crime. One of obligations which must be carried out by South Africa is to facilitate ICC's trial process, such as cooperating in submission of the alleged international crime perpetrators to ICC.

In the arrest of Sudan President, Omar Al-Bashir, ICC asked for the assistance of South Africa. ICC enjoined South Africa as the party to arrest Omar Al-Bashir who visited South Africa on June 14<sup>th</sup>, 2015 to attend 25<sup>th</sup> African Union (AU) Summit (Melvin dan McLaughlin, 2015). Omar Al-Bashir was the ICC's first alleged who still served the head of state and government from the non-ICC party (The Guardian, 2009). ICC accused Omar Al-Bashir committed in crime against humanity, war crime and genocide in Darfur, Sudan. ICC could not arrest Omar Al-Bashir because of an absence of jurisdiction towards the territory where the accused was residing (Arifiani, 2015).

The command for arresting Omar Al-Bashir was declined by South Africa. The government decided not to give Omar Al-Bashir up to ICC. As a result, many parties censured what South Africa had decided. According to UN General Secretary, Ban Ki Moon, South Africa must abide by ICC authority and execute its decision since they have signed and ratified Rome Statutes as the fundamental of ICC establishment (Wahyudi, 2015). South Africa's decision urged ICC to institute a court in order to determine a resolution for South Africa that refused to cooperate with ICC regarding the arrest of Omar Al-Bashir (Hunter, 2015).

Due to this misunderstanding, South Africa eventually recalled membership of ICC on October 19<sup>th</sup>, 2016 in the midst of the ongoing trial (Laing, 2015). The recall instrument was signed by South African Minister of International Relations and Cooperation, Maite Nkoana Mashabane. This instrument has been delivered and accepted by UN General Secretary according to Article 127 (1) Rome Statutes (UN, 2016). It was the first decision of membership recall made by the party of ICC.

This case is worth examining because of South Africa's position as one of the main promoters of ICC in Africa. Therefore, the current study particularly focuses on analyzing the rationale of their decision to recall membership of ICC.

## II. CONCEPTUAL FRAMEWORK

### ***A. Neo-Realism Theory***

Kenneth Waltz is a prominent-contemporary neo-realism figure. He derived several elements of classic and neo-classic realism so as to develop some of his assumptions and notions. Waltz in particular emphasized on state actor in which state's principle concern is security and survival (Jackson dan Sorensen 2005:112). He assumed that neo-realism emphasizes on the role of international regime for assisting states to build common interest. Neo-realism elucidates that it is essential for a state to join institution in order to keep its security. In this regard, power and interaction become elements that a state must take into consideration when establishing international relations. The act of state is basically predisposed by distribution of power and state interests (Jackson dan Sorensen 2005:113).

There are five basic assumptions of neo-realism. First, states do not only concern about absolute gains, but relative gains as well. According to Barkin, relative gains are gains which are relatively valued and dependent on each individual or actor. Neo-realism states that relative gains are essential because a state occasionally obtains relative gains instead of absolute gains. Second, international system comprises sovereign states which are selfish and differentiated by their power capability. Neo-realism assumes that there is various national interest in a regime. Third, states are merely interested in attempts to enhance their power because, based on neo-realism approach, power is necessary prerequisite for states to achieve their national interest. Fourth, the world is zero sum meaning that there must be both the winner and the looser in the world. Consequently, there will be states which successfully dominate the others (the dominated states). Fifth, based on this approach, international system is anarchical (Hennida, 2015: 89).

In the anarchical world, states are so rational that they will cooperate to achieve their national interest. States must thoroughly calculate gains and losses as joining international organization regime so as states are able to focus on the objectives that they want to achieve. This must be considered to look into the exigence of joining an international organization. States cannot rely on other states for their security because other states can be potential threat for themselves. Self-help is required to keep state's security and defense individually since states in international system will strive for upgrading their power. Based on the logic of relative power, states will seek possibility to obtain advantages from other states and prevent other states from taking advantages from them. In sum, states will act offensively and defensively.

### ***B. Concept of National Interest***

States' behavior as rational actor in determining foreign policy can be elaborated by using concept of national interest (Mansbach dan Raferty, 2012: 412). Hans J. Morgenthau defined national interest as permanent condition providing national guidance for policy makers to act rationally when carrying out foreign policy (Burchill dan Linklater, 1996: 104). Furthermore, Morgenthau, as cited by Perwita dan Yani (2005: 52), divided national interest into several types as follows: 1) Core/basic/vital interest is so highly valuable interest that a state is willing to war in achieving its interest. For instance, a state will keep and preserve living values embraced by its people or protect its territory; 2) Secondary interest is the objectives that each state will achieve by means of possibilities other than war, such as negotiation.

South Africa's decision on membership recall from ICC was integrated in national interest that they aspire to achieve. Peace and security regarding the interest of African people are vital and primary interest for which South Africa want to strive. However, their attempt to bring about their national interest has been confronted by regional reality and global politic. For that reason, South Africa considered to recall its membership of ICC so that their objective to promote peace resolution in Africa can be achieved.

## III. RESULTS AND DISCUSSION

Africa is a regional territory with 34 countries being the parties of ICC. African people are determined to achieve peace and reconciliation through justice and accountability. Human rights violation taking place in some African countries, apartheid system in South Africa, civil war in Sierra Leone, genocide in Rwanda, and other conflicts have inflicted suffering for African people. This circumstances urged them, including South Africa, to approve a global consensus on the establishment of independent court for averting repetition of those crimes.

South Africa involvement in ICC was not purposeless. Complementary principle of Rome Statutes is considered capable of ensuring ICC to operate as the standard supporting court system of parties in national level. Thereby, they aspire that their participation will position South Africa as a part of larger system of international criminal

court. South Africa did not have domestic law concerning war crime, genocide, and crime against humanity before joining ICC (Plessis, 2008).

According to the principle of international law, the state having declared to be bound by an international agreement is mandatory to implement its entire conditions. ICC obligate all parties to cooperate with it in order to execute its role for adjudicating individuals accused as international crime perpetrator with no term. One of primary obligations of the parties is to cooperate in the arrest and submission of these individuals. The parties' commitment is highly required by ICC to implement this function. In addition, ICC has a cooperation with UN Security Council with regard to some authorities in the investigation. UN Security Council can call for an investigation towards certain situation if it is considered threatening world peace and security. ICC also grants UN Security Council authority to postpone an investigation for 12 months by a resolution regulated in Article 16 Rome Statutes. This article is so highly sensitive that it compromises ICC credibility as an independent institution.

With regard to the arrest and submission of President of Sudan, Omar Al-Bashir, ICC requested South Africa to be cooperative. ICC released two warrants of arrest for Omar Al-Bashir on March 4<sup>th</sup>, 2009 and July 12<sup>th</sup>, 2010. ICC prompted South Africa to apply consultation mechanism if they are impeded in executing their obligation to ICC. South Africa then took an action based on their commitment to abide by rule of law. They applied consultation mechanism on June 12<sup>th</sup>, 2015 to respond ICC insistence anticipating the arrival of Omar Al-Bashir in 25<sup>th</sup> AU Summit. However, they found it unclear because ICC had decided an order of arrest and submission for Omar Al-Bashir without any settlement for issues found by South Africa.

As a result, South Africa considered the arrest of Omar Al-Bashir, in the absence of appropriate law mechanism, could compromise their diplomacy towards the other African countries. They found law discrepancy regarding impunity for head of state and government in Article 27 against the parties' obligation of cooperation based on Article 98 Rome Statutes. This reason was underlied by conditions regulating the limit of ICC jurisdiction that ICC cannot prompt a country to carry out a submission of individual to ICC. ICC cannot proceed a request of submission or assistance allowing a country not to be consistent with its obligations under international law. This is related to diplomatic immunity of persons or wealth of a third country. In this case, ICC abolishes immunity for international crime perpetrators from any official – governmental and non-governmental – position.

This Article 98 Rome Statutes-resulted obscurity became a rationale for South Afrika not to arrest Omar Al-Bashir. Besides, the submission of Omar Al-Bashir to ICC would be considered breach of their obligation towards African Union. South Africa is bound by obligation to provide diplomatic immunity as the host country of 25<sup>th</sup> AU Summit. This obligation is regulated under the law of African Union. Also, they is bound by the agreement of *the Host Agreement and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 (Section C Article V Representatives of Member States)*.

South Africa as the host of regular meeting for AU members also took into consideration AU integration and consistency in the appropriate implementation of rule of law. During its existence, AU respect immunity and privilege granted to head of state and government which has been practice of international law. Sudan was not the party of ICC. ICC has also yet to obtain cooperation agreement with Sudan as the third country regarding the abolishment of immunity and privilege for Omar Al-Bashir. ICC investigation towards Sudan was proposed by UN Security Council with a resolution turned down by Sudan (ICC, 2015). The order of arrest for Omar Al-Bashir was also confronted by AU with a decision in Assembly/AU/Dec.296 (XV), considering ICC intervention could be peace threatening action in Sudan.

As the member of AU, South Africa was contrary to ICC since the beginning of ICC investigation in Darfur, Sudan, following UN Security Council resolution. They assumed that the legitimation of UN Security Council directive was controversial. UN Security Council holds the right to commence an investigation under Chapter VII UN Charter and postpone ICC investigation for 12 months by means of resolution as per Article 16 Rome Statutes. Nevertheless, three permanent members of UN Security Council, i.e. United States, Russia, and China, did not ratify Rome Statutes which was the fundamental of ICC establishment. South Africa regarded ICC will not attain its credibility in so far as these three permanent members of UN Security Council have not ratified Rome Statutes. In the other words, ICC credibility will be put into question in case the three status quo countries refuse to accept ICC jurisdiction but given particular right in ICC investigation.

South Africa is doubtful that the permanent members of UN Security Council do not have vested interest beyond a resolution referring certain circumstances as threat for peace and security. They are major countries in international relations which can compromise the principle of universality and equality before ICC's rule of law. They are capable of obstructing court which incurs disadvantages for their countries. Political circumstances in

Africa have been showing that “Western intervention” could not result in reconciliation, but merely leave behind colonialism culture, such as apartheid in South Africa, conflict in Libya, and chaos in Sahel. On the contrary, George Bush and Tony Blair who were the leader of status quo countries were not investigated by ICC until cessation of Iraq invasion. This revealed bias of ICC trial and selective implementation of justice (Opara, 2016).

The bias perception of ICC on Africa has inflicted a typical perspective for countries opposed to ICC. Contention and misunderstanding among AU members in respect of ICC are able to threaten African integration. The obligatory submission of the accused by the parties to ICC – up to 2016 all charges only addressed to African people – will force the parties to act against AU law. According to Miyandazi *et.al.* (2016), tension between AU and ICC has affected South Africa’s foreign practices. It was due to the fact that ICC has accused several head of state in Africa. This accusation may disrupt the ongoing peace resolution to tackle down conflicts in Africa.

ICC discrimination to Africa compelled South Africa to recall membership of ICC. There are injustice and inequality practices since ICC solely focus on investigation over African people alone. South Africa virtually expect ICC to be credible and universally accepted court institution. However, the aspiration to ICC for ensuring ideal universality and equality before the law has yet to achieve. In anarchical international system, with no central authority, state relationships are insinuated by distrust. Consequently, every state needs to make decision rationally conforming its national interest.

#### IV. CONCLUSION

South Africa decided to recall membership of ICC on October 19<sup>th</sup>, 2016 in consequence of discriminative practice of ICC towards Africa. Eventhough they applied the first consultation mechanism as the party, this consultation process initially considered a diplomatic attempt turned out to be a court process. Meanwhile, the other parties which had refused to cooperate with ICC in regard to the arrest and submission of Omar Al-Bashir were not through court process as South Africa was.

To date, ICC has undertaken a lot of official investigations and most of them were only focused on criminal incidents in Africa. The obligatory arrest and submission of the accused from Africa to ICC contradicted South Africa’s interest in promoting peace resolution in Africa. They considered ICC practice discriminative and unequal for Africa before the law. ICC has yet to be a fair-independent international court institution as it was expected.

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