

Breaching Treaty Obligations of the Rome Statute of the International Criminal Court: The Case of South Africa

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Abstract : In October 2016 South Africa deposited its 'instrument of withdrawal' from the Rome Statute of the International Criminal Court, with the Secretary-General of the United Nations. The Rome Statute is the founding document of the treaty-based International Criminal Court (ICC). The ICC has jurisdiction to hear cases where crimes against humanity, war crimes and genocide have been committed, on the basis of individual criminal responsibility. It is therefore not surprising that one of the ICC's mandates is to ensure that the sufferings, due to gross human rights violations towards the civilian population is, in principle, brought to an end by punishing those individuals responsible, thus providing justice to the victims. The ICC is unable to effectively fulfill its mandate and thus depends, in part on the willingness of states to assist the Court in its functions. This requires states to ratify the Statute and to domesticate its provisions, depending on whether it is a monist or dualist state. South Africa ratified the Statute in November 2000, and domesticated the Statute in 2002 by virtue of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. South Africa thus remains under an obligation to cooperate with the ICC until the final date of withdrawal, which is October 2017. An AU Summit was hosted by South Africa during June 2015. Omar Al-Bashir, whom the prosecutor of the ICC has indicted on two separate occasions, was invited to the summit. South Africa made an agreement with the AU that it will honour its obligations in terms of its Diplomatic and Immunities Privileges Act of 2001, by granting immunity to all heads of state, including that of Sudan. This decision by South Africa has raised a plethora of questions regarding the status and hierarchy of international laws versus regional laws versus domestic laws. In particular, this paper explores whether a state's international law treaty obligations may be suspended in favour of, firstly, regional peace (thus safeguarding the security of the civilian population against further atrocities and other gross violations of human rights), and secondly, head of state immunity. This paper also reflects on the effectiveness of the trias politica in South Africa in relation the manner in which South African courts have confirmed South Africa's failure in fulfilling its obligations in terms of the Rome Statute. A secondary question which will also be explored, is whether the Rome Statute is currently an effective tool in dealing with gross violations of human rights, particularly in a regional African context, given the desire by a number of African states currently party to the Statute, to engage in a mass exodus from the Statute. Finally, the paper concludes with a proposal that there can be no justice for victims of gross human rights violations unless states are serious in playing an instrumental role in bringing an end to impunity in Africa, and that withdrawing from the ICC without an alternative, effective system in place, will simply perpetuate impunity.

Keywords : African Union, diplomatic immunity, impunity, international criminal court, South Africa

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