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Kronika konstytucyjna

The High Court of South Africa Decision on the Constitutionality of the ICC Withdrawal (Taras Leshkovych)

 redakcja on 23 kwietnia 2017

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Źródło: Wikipedia

The last several months have been complicated and troublesome for the International Criminal Court. The ICC has been heavily criticized for years and accused of being biased against Africans. While it is true that only Africans have been prosecuted so far, and 9 out of 10 situations currently under investigation come from Africa, the existence of an “anti-African bias” is not that evident. Five “African” situations were referred to the ICC by the governments of the respected states (Central African Republic I and II, Mali, Uganda, and Democratic Republic of Congo) and another two were referred by the United Nations Security Council (Libya and Darfur, Sudan). Also, only 4 out of 10 ongoing preliminary examinations concern African states.

Additionally, Smeulers, Weerdesteijn and Hola conducted an empirical research of the selection of situations by the ICC^[1]. They analyzed which situations should have been investigated by the ICC based on the data provided by the Uppsala Conflict Database, Political Terror Scale and Failed State Index. In order to determine the gravity of the alleged crimes and human rights violations, they designed an aggregate seriousness index (ASI) using four indicators: 1) the number of civilian deaths in one-sided violence inflicted by the government recorded in the Uppsala Conflict Database; 2) the number of civilian deaths in one-sided violence inflicted by a formally organized group recorded in the Uppsala Conflict Database; 3) the ranking of each country by the Political Terror Scale; 4) the ranking of each country by the Failed State Index. After the evaluation, the authors discovered that

“of the eight countries qualified [by the authors] as representing the gravest situations only three ratified the Statute. The ICC is conducting investigations into two of them (DRC and Cote d’Ivoire) and preliminary investigations in one (Afghanistan). For five situations which can be considered to be amongst the gravest the ICC does not have jurisdiction unless the situation would be referred to it by the UNSC” (p. 35).

Moreover, if only the top ten list of the gravest situations in the state parties to the Rome Statute is taken into consideration, the ICC is conducting investigations in four out of ten countries (DRC, Cote d’Ivoire, Uganda and CAR) and preliminary examinations in four more (Afghanistan, Burundi, Colombia and Guinea). The authors came to the conclusion that the ICC’s situations selection policy is adequate and based on objective criteria (situational gravity and jurisdictional limitations).

Despite all of the above, many African leaders have criticized the ICC on numerous occasions. For instance, in 2009, the President of Sudan Omar al-Bashir, for whom the arrest warrant had been issued by the ICC Prosecutor, called the ICC a “colonial court”^[2]. In 2013, during his speech at the African Union summit, Kenya’s president Uhuru Kenyatta declared that “Western powers are the key drivers of the ICC process” and that “African sovereignty means nothing to the ICC and its patrons”^[3].

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issued by the Court. It resulted in a formal non-cooperation proceeding at the ICC and a public hearing has taken place on 7 April 2017[4]. The government of South Africa had faced conflicting obligations in this situation. On the one hand, it should comply with the Court's order to arrest al-Bashir (an obligation under the Rome Statute); on the other hand, there is a diplomatic immunity of a head of state (an obligation under customary international law) [5]. This situation was subject to South Africa's High Court[6] and Supreme Court of Appeal[7] decisions claiming that the government's failure to arrest al-Bashir was unconstitutional. Shortly after, the government announced that it may withdraw from the Rome Statute due to these conflicting obligations that may undermine the South Africa's peace building efforts and its status as mediator on the continent.

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In 2016, the ICC vs. Africa conflict escalated when South Africa, Burundi and Gambia according to article 127 (1) of the Rome Statute notified the UN Secretary General of their decisions to withdraw from the Rome Statute on 19 October, 27 October, and 10 November 2016 respectively. African

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