



Burundian Coalition for the International Criminal Court (BC-CI)

INFORMAL translation by the CICC Secretariat

Burundian Coalition for the ICC: The legal consequences of the opening of the investigation after 27 October 2017.

1. Context

Since Nkurunziza Pierre's decision to seek a third term, in violation of the constitution and Arusha's historical peace and reconciliation agreement of April 2015, Burundi has been plunged into an unprecedented crisis during which violence has steadily escalated¹. According to the estimates of the Office of the United Nations High Commissioner for Human Rights (OHCHR), between 26 April 2015 and 30 August 2016, at least 564 cases of executions were recorded². At the end of April 2016, the OHCHR Burundi Office had documented 36 enforced disappearances; plus 3,477 arbitrary arrests or detentions; 651 cases of torture and 19 cases of

¹ Report of the International Commission of Inquiry on Burundi, Human Rights Council.

² *Ibidem*, §38.

sexual violence since the beginning of the crisis³.

Burundi has been a State Party to the Rome Statute since 1 December 2004. The International Criminal Court (hereinafter the ICC) is competent to proceed crimes against humanity, crimes of genocide and war crimes committed on Burundian territory or by Burundian nationals as from this date⁴.

Therefore, the evolution of the situation in the country has legitimately drowned the attention of the Prosecutor of the ICC, who has expressed his concern twice regarding the violence⁵ and announced, on 25 April 2016, the opening of a preliminary examination of the situation in Burundi since April 2015, including “extrajudicial executions, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances”⁶.

Preliminary examinations is the initial phase of any proceedings before the ICC, during which the ICC Office of the Prosecutor determines whether “there is a reasonable basis to proceed with an investigation”⁷.

The reaction of the Burundian state was quick and on 7 October 2016, it announced its intention to withdraw from the Rome Statute. On 12 October 2016, the two chambers of the Burundian Parliament had already passed the withdrawal bill, in an unprecedented haphazard President Nkurunziza promulgated the law on 18 October 2016⁸. On 27 October 2016, Burundi officially notified its withdrawal⁹ to the United

³ Human Rights Council, Report of the United Nations High Commissioner for Human Rights

⁴ Rome Statute, Article 12.

⁵ International Criminal Court (ICC), Statement by the ICC Prosecutor, M. Fatou Bensouda.

⁶ ICC, Statement by the ICC Prosecutor about the preliminary examination, M. Fatou Bensouda.

⁷ Rome Statute, Article 15(3).

⁸ See, KIBANGULA T., “CPI: Nkurunziza promulgue la loi portant retrait du Burundi du Statut de Rome”, 18 October 2016, Jeune Afrique. <http://www.jeuneafrique.com/366454/societe/cpi-nkurunziza-promulgue-loi-portant-retrait-burundi-statut-de-rome/> .

⁹ United Nations, Reference C.N.805.2016. TREATIES-XVIII.10 (Depositary Notification), 28 October 2016.

Nations Secretariat.

In the past, threats of such action have already been undertaken¹⁰, but so far no state has shown so clearly its desire to go through with the withdrawal. However, following the steps taken by Burundi on 21 October 2016, South Africa expressed the same desire and the same day became the first country to formally withdraw from the Rome Statute¹¹, opening the door to a "Domino effect"¹². Indeed, Gambia followed the same path when it announced its intention to withdraw on 25 October 2016¹³. Fortunately, it retracted thanks to the change of institutions that took place in the country with the overthrow of President Yahya Jammeh. The South African justice also invalidated the government's decision to withdraw from the Rome Statute, this to say that ultimately only Burundi actually withdrew.

The purpose of this paper is to explore the legal consequences of Burundi's withdrawal from the Rome Statute on the current preliminary examination and the possible continuation of the proceedings, by analysing the relevant provision of the Rome Statute (1). The key issue is to identify what are the possible futures in such a situation, including the possibility of continuing the preliminary investigation and the beginning of the investigation itself, despite the expiration of the one-year period after the notification of withdrawal from the Rome Statute. It will finally question the future of the international justice system based on the ICC, knowing that the ICC is currently not using its prerogatives to prosecute the perpetrators of serious crimes committed in Burundi since April 2015.

¹⁰ See. ORENGA, E., RAMBOLAMANANA, V., "*Retour sur les travaux de la 14e Assemblée des Etats parties de la Cour pénale internationale : Qui sont les grands gagnants ?*"

¹¹ ICC, President of the Assembly regrets South Africa's withdrawal from Rome Statute

¹² Jeangène Vilmer, J., See *supra*. note 10.

¹³ "*La Gambie veut à son tour sortir de la CPI*", in LE MONDE, 26 octobre 2016. Available at: http://www.lemonde.fr/afrique/article/2016/10/26/le-gambie-veut-a-son-tour-sortir-de-la-cpi_5020376_3212.html

2. Burundi's ability to withdraw from the Rome Statute

The Rome Statute explicitly states the possibility for a State to withdraw from the treaty and precise the modalities and limits of such withdrawal. According to the article 127(1), "a State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute".

Burundi's withdrawal from the International Criminal Court follows a wish of the African Union which see the Court as biased. But the withdrawal cannot be collective, as each state ratified the treaty individually. Therefore, the withdrawal must also be done individually.

The article 127(1) goes on précising that "the withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date". Thus, the one-year period before the withdrawal enters into force starts from the moment of the reception of the withdrawal instrument. For Burundi, the withdrawal will be effective on 27 October 2017. Until the one-year deadline is not expired, Burundi fully remains a state party to the Rome Statute, with every rights and obligations implied by this status.

Having found that Burundi, like any other state party to the Rome Statute, has the right to withdraw from it, it is essential to analyse the consequences following this withdrawal.

3. The consequences of the withdrawal of Burundi from the Rome Statute

According to Art. 127 (2), "a State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued, (...) [and] its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and

which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective”.

From this provision, we can identify many consequences, in particular the obligations incumbent upon the withdrawing State, including the financial obligations incurred (1), the obligation of cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective (2) and, finally, the obligation not to prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective (3).

the last two obligations are apparently those most relevant to the case of Burundi.

The obligation of cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective.

Article 127(2) of the Statute provides that withdrawal does not affect the State's cooperation obligations arising from investigations and criminal proceedings commenced before the one-year period has expired.

It is obvious that the preliminary examination already begun in Burundi is part of the investigation to which Burundi is obliged to cooperate with, from beginning to end.

From this obligation of cooperation one can deduce the possibility of continuing the investigation despite the lapse of the one-year period after the notification.

❖ Prolongation of the preliminary examination

It would seem that the only way that the ICC could undoubtedly continue to exercise its jurisdiction once the withdrawal takes effect is if an investigation is opened before the expiry of that period, that is to say before the 27 October 2017¹⁴.

However, crimes are still being perpetrated in Burundi and the Government has refused to cooperate with anyone who would like to shed light on this matter.

Hence the importance of continuing the investigation despite the expiration of the one-year period after the notification of withdrawal.

It should be recalled that according to the Office of the Prosecutor, a preliminary examination is composed of four phases and there is no time limit to complete an examination¹⁵. The length of the examination can vary widely i.e. from less than a week, as it was the case in Libya, to 12 years, as it was the case in Colombia, where the prosecutor is still at the preliminary examination stage when this paper was published.

It is interesting to note that there is a fairly clear trend emerging from the practice of the Office of the Prosecutor in this regard: preliminary examinations starting after a referral by the United Nations Security Council or by the State itself are a lot shorter compared to examinations initiated by the Prosecutor following the communications received under Art. 15 of the Rome Statute. However, the ongoing preliminary examination regarding the situation in Burundi was started following the communications under Art. 15. One could argue that this review would

¹⁴ See. WHITING A., *infra* note 17.

¹⁵ Office of the Prosecutor, General Policy document, *infra* note 16, §78 and following.

probably last more than a year, without the pressure of a delay falling on the Prosecutor. In this sense, R. Kolb spoke of a probable deterrent effect of the withdrawal of the Statute¹⁶.

Thus, it would seem that the official notification of the withdrawal by Burundi could have an unexpected "boomerang effect". While Burundi expresses a desire to withdraw from the international justice system, it could find itself facing it anyway and having to do it well before normal circumstances would have allowed it.

This means that if a preliminary examination was opened before the one-year deadline after the notification of the withdrawal, Burundi would have to cooperate from the preliminary phase until the closure of the case, that is to say until a sentence is issued, whether a condemnation or an acquittal of the alleged perpetrators of crimes of international law.

The obligation not to prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

The second paragraph of Art. 127 provides that the withdrawal shall not "prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective". The doctrine seems to agree on one point: what the drafters of the Statute wanted to express with this sentence remains unclear¹⁷. The preparatory work does not seem to help in this respect¹⁸.

¹⁶ KOLB, R., « Article 127 », *supra* note 18, p. 2220.

¹⁷ CLARK, R. S., « Article 127 », in TRIFFTERER, O.

¹⁸ Preparatory Committee on the establishment of an International Criminal Court, A/ A C.249/1998/CRP.4/Rev.

First of all, although doubts have been expressed¹⁹, one could quite easily consider that when Art. 127 (2) refers to the "Court", the expression includes the Office of the Prosecutor²⁰, in particular because of how the term "Court" is used throughout the Rome Statute.

It could also be said that a preliminary examination is indeed an examination of a "case". Indeed, although the English version of this provision uses the term "matter", creating some confusion²¹, the term "case" is used in many provisions of the Statute to indicate either a specific case or a broader situation²².

Thus, in principle, there is nothing preventing this sentence from legitimizing the continuation of the preliminary examination of the situation in Burundi, which started before its withdrawal from the Statute became effective. Such an interpretation would result from the "ordinary meaning to be given to the terms of the treaty" and would be most consistent with its object and purpose.

However, this might be nothing more than a simple academic exercise. Indeed, as Whiting correctly noted, as soon as the one-year period expires without a "criminal investigation or procedure", as the second paragraph describes, having begun, Burundi would no longer have the "duty to cooperate" under Chapter IX

Would it be different if an application to authorise the opening of an investigation by the Prosecutor acting *proprio motu*, submitted before the withdrawal took effect, i.e. on 27 October 2017, would be pending before the Pre-Trial Chamber?

¹⁹ See. SCHABAS, W. A., *supra* note 15, p. 1207.

²⁰ See. WHITING, A., *supra* note 17.

²¹ See. SCHABAS, W. A., *supra* note 15, p. 1207

²² VCLT Art. 33: "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail".

An unequivocal answer cannot be given. It can certainly be maintained that under the last sentence of Art. 127 (2), the withdrawal cannot affect the continuation of the Pre-Trial Chamber's review of the application to authorise the initiation an investigation. But if a positive decision of the Pre-Trial Chamber does not intervene before the withdrawal of Burundi is effective, the fate of the investigation remains uncertain. According to R. Kolb, “a State that has freed itself from its treaty obligations can no longer be required to co-operate with an investigation or proceeding initiated after the date on which its withdrawal took effect”²³.

4. General international law: a path of support for the Court to open the investigation despite the one-year term after notification of the withdrawal of Burundi to the Rome Statute

In support of the second paragraph of Art. 127, one might be tempted to use to general international law²⁴, including relevant customary law, as codified by the 1969 Vienna Convention on the Law of Treaties (hereinafter CVDT²⁵).

Art. 70 of the CVDT provides that “Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: [...] (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”.

According to Clark, under this general rule, the ICC would not lose jurisdiction over crimes committed before the withdrawal took effect, regardless of whether an investigation was initiated or not²⁶. This argument is based on the fact that the mere commission of a crime under the jurisdiction of the ICC creates “a legal situation of the parties” to

²³ KOLB, R., « Article 127 », *supra* note 18, p. 2218

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²⁶ CLARK, R. S., *supra* note 17.

which the withdrawal can not infringe²⁷. Clark seems to suggest that the withdrawal would not affect the jurisdiction of the ICC with respect to crimes referred to in Art. 5 of the Statute, crimes that were allegedly committed on Burundian territory or by Burundians before the expiration of the one-year period, namely on 27 October 2017²⁸.

5. Possible sanctions against other states parties – especially against the African Union – in case of non-cooperation

Article 86 of the Rome Statute states that “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”.

Therefore, States Parties to the Rome Statute have an obligation to cooperate fully with the court during the investigation and prosecution of the perpetrators of crimes within its jurisdiction. As a result, countries that do not respect this provision would be subject to sanctions, as it was the case in countries like Chad and Malawi, which were sanctioned by the Court for violating their legal obligation to arrest and surrender El Bechir to the Court.

6. Towards the collapse of the international justice system

Potentially, the case of Burundi could set a very dangerous precedent within the international justice system based on the Rome Statute. Beyond the issue of a mass withdrawal of African States from the Statute, a very debatable issue that is outside the scope of this paper²⁹, the Burundian case might lead other states that face (or will face) a preliminary examination to withdraw immediately from the Rome

²⁷ KOLB, R., « Article 127 », *supra* note 18, p. 2219

²⁸ CLARK, R. S., *supra* note 17.

²⁹ See. MARK KERSTEN, “*Ten African States Who Will Stick with the International Criminal Court*”, October 27, 2016

Statute so they can avoid the opening of an investigation.

As stated above, for the Prosecutor to open an investigation, once found that there is a reasonable basis for proceeding, “he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation”³⁰. This request will probably not be sufficient for the Court to establish its jurisdiction: a decision authorizing the initiation of the investigation would seem necessary.

But the Prosecutor would not need such authorization from the Pre-Trial Chamber if other actors of the international community, such as other States Parties to the Rome Statute or the United Nations Security Council, intervened by assuming responsibility for the fight against impunity in recalcitrant countries.

Although until now States Parties to the Statute have only referred situations directly affecting them, under Art. 14 of the Statute, a State Party may refer to the Prosecutor a situation such as the one prevailing in Burundi. Once determined that there would be a reasonable basis to initiate an investigation, the Prosecutor could proceed without the need for prior judicial review by the Pre-Trial Chamber.

Alternatively, the responsibility could be assumed by the United Nations Security Council. Acting under Chapter VII of the United Nations Charter, the Security Council can also refer a situation to the ICC and no authorization would be required for the initiation of an investigation³¹. Today, this approach has been initiated only for the situation in Darfur (Sudan) in 2005 and for the situation in Libya in 2011.

³⁰ Art. 15(3) of the Rome Statute.

³¹ Art. 15(3) of the Rome Statute.