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The ICC Burexit: Free at last?

Burundi on its way out of the Rome Statute.

On 12 October 2016, parliament endorsed the Burundian government's decision to withdraw from the Rome Statute on the International Criminal Court (ICC).[1] The withdrawal is not final until a written notification is addressed to the UN Secretary-General, and, in accordance with article 127 of the Rome Statute, it shall take effect one year later. It is likely that Burundi will soon make history as the first state ever to withdraw from the Rome Statute.

This *Brief* is an attempt at understanding what might explain and motivate this withdrawal. After a short look at the historical context of Burundi's ratification and withdrawal, attention is paid to the costs and benefits of what, presumably, is a rational decision and not – as has been suggested by some observers – a panic-driven reaction.

Timetable	
17 July 1998	Adoption of the Rome Statute on the ICC
13 January 1999	Burundi signs the Rome Statute.
1 July 2002	Entry into force of the Rome Statute
22 April 2003	Burundi's transitional parliament adopts a law to ratify the Rome Statute.
8 May 2003	Burundi incorporates genocide, crimes against humanity and war crimes in its national criminal law.
30 August 2003	President Ndayizeye promulgates the law on the ratification of the Rome Statute.
21 September 2004	Burundi deposits its instrument of ratification with the UN Secretary-General.
1 December 2004	Entry into force of the Rome Statute for Burundi
25 April 2016	ICC Prosecutor Bensouda announces the opening of a preliminary examination on Burundi.
6 October 2016	The Burundian government adopts a draft law to withdraw from the Rome Statute.
12 October 2016	Burundi's parliament adopts law to withdraw from the Rome Statute.

1. Although a potential turning point in the history of the ICC when looked at from an international perspective, the withdrawal is not a radical break with the past when looked at from a domestic perspective. Burundi is a party to the ICC statute, but never was a frontrunner in promoting accountability for serious human rights crimes.

Burundi's Rome Statute ratification process was (i) slow, (ii) opaque and (iii) only partially implemented. (i) As the timetable shows, after the ratification voted in parliament in April 2003, it took seventeen months before the instrument of ratification was deposited. (ii) A government attempt at

[1] In the national assembly, of the 110 votes cast, 94 were in favour, 2 against and 14 abstentions. In the senate, the decision was unanimous.

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Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi.

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sneaking in a seven-year opt-out declaration as permitted under article 124 of the ICC Statute was countered by an alert civil society campaign.[2] (iii) Apart from the incorporation of the three core crimes in its domestic criminal law in May 2003, no other implementing legislation on cooperation with the ICC was ever adopted.

Before its national justice system, despite the vast number of serious human rights crimes committed on its territory, no Burundian has ever been charged with genocide, crimes against humanity or war crimes, neither before, during or after the peace negotiations process. International partners, primarily concerned with negotiating peace and sustaining stability, never gave any priority to prosecuting Burundian war criminals.[3]

In other words, despite the Rome Statute ratification – which may well have been motivated primarily by presumed international reputational benefits (see also below) - the very idea that those most responsible for the most serious crimes ought to be finger-pointed and punished never really became part of Burundi's political and judicial governance.

2. The withdrawal also needs to be seen against the background of the crisis that erupted after President Nkurunziza's nomination for a third term on 25 April 2015. The fall-out of that nomination has been enormous, both at the domestic political level, endangering Burundi's institutional stability and security but, indirectly, also for its international relations. The international response to the crisis - including the sanctions that were imposed on a number of individuals by the European Union (EU), the United States and Switzerland as well as the aid sanctions imposed under article 96 of the Cotonou partnership agreement between the EU and the ACP countries - is largely due to the enduring political stalemate and to the human rights violations that continue to be committed since the start of the crisis. In the eyes of the Burundian government, however, the undisclosed intention of the West is a regime change in Burundi and the ICC preliminary examination is part of that international conspiracy.[4] Parliament's decision came shortly after a resolution was adopted on Burundi in the UN Human Rights Council.[5] For the Burundian government, this resolution was totally unacceptable.[6] The experts who drafted the report[7] that gave rise to the resolution were declared *persona non grata* and collaboration with the UN Office of the High Commissioner for Human Rights was suspended.

Seen from that angle, the withdrawal from the ICC Statute is one next step in a process of escalating tensions and diplomatic arm-wrestling between Burundi and its traditional international aid partners.

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[2] Human Rights Watch, *Everyday Victims. Civilians in the Burundian War*, New York, 2003, pp. 56-57.
[3] See more in Stef Vandeginste, *Stones Left Unturned. Law and transitional justice in Burundi*, Antwerp, Intersentia, 2010.
[4] See also the intervention of Gabriel Ntisezerana, a former vice-president of the republic, during the national assembly debate on 12 October 2016. After the cabinet meeting on 6 October 2016, Gaston Sindimwo, first vice-president of the republic, explained that the withdrawal was needed for Burundi to be really free.
[5] United Nations, Human Rights Council, *Resolution*, UN Doc A/HRC/33/L.31, 27 September 2016.
[6] Government of Burundi, *Communiqué following the adoption of the Resolution A/HRC/33/2016*, 3 October 2016.
[7] United Nations, Human Rights Council, Report of the UN Independent Investigation on Burundi, UN Doc A/HRC/33/37, 20 September 2016. See also the Reaction of the Government of Burundi over findings of the investigation conducted by the UNIIB (April 2015-June 2016).

"The Burexit has reputational costs ánd benefits."

3. One may assume that the Burundian government rationally[8] assessed costs and benefits before tabling the bill at the national assembly. At first sight, the costs are very limited. At the level of Burundi's international relations, there surely is a reputational cost vis-à-vis some important development partners (like the EU). But this cost does not necessarily add much to the huge reputational cost already incurred in those circles. And it may not outweigh the reputational benefits referred to below. In addition, however, there may well be a financial cost. At the international level, diplomats and civil servants have largely run out of inspiration on how to convince, be it through carrots or through sticks, the Nkurunziza government that it must engage in a genuine and inclusive political dialogue and cease the oppression of dissidence. Opinions clearly are divided on the way forward. Within those foreign administrations, the position of advocates of a return to more 'normal' (business as usual) bilateral relations with Burundi is likely to be weakened by the ICC withdrawal. Did the Burundian government underestimate this cost? Or, finding inspiration in the situation of donor darling Rwanda that never even ratified the Rome Statute, does the government not expect its withdrawal to have any impact on the resumption of foreign aid?

4. Although this may be somewhat counterintuitive, non-compliance with international human rights norms and institutions does not necessarily come with reputational costs. As Jones rightly argues[9], the reputational cost of not collaborating with the ICC is logically tied to the international reputation of the ICC itself. The more legitimate and fair the ICC is perceived to be, the greater the reputation cost that states suffer in case of refusal to cooperate, *a fortiori* in case of withdrawal. However, this is not (or no longer) the reputation the ICC has in many African countries. Since early 2009, following the indictment of President Al-Bashir of Sudan, the African Union has been increasingly critical of the ICC. Seen from that angle, Burundi's ICC withdrawal has reputational benefits vis-à-vis other African governments that insist on self-reliance and freedom from intervention by what is perceived as a neo-colonial political instrument.[10] Might it be an icebreaker for additional African withdrawals? The reputational benefit may even reach beyond the African continent. Burundi's withdrawal may well be viewed with sympathy (and, perhaps, financially rewarded?) by those new international allies that prioritize sovereignty over globalization of human rights protection and criminal justice.[11]

5. International - diplomatic, financial or, in the case of the ICC preliminary examination, judicial - sanctions have a potential rally-round-the-flag effect, as Burundi's recent history convincingly shows. After the coup d'Etat which brought Pierre Buyoya back to power in July 1996, Burundi's neighbouring countries imposed an embargo on Burundi. The consequences were mostly felt by the Burundian people[12], not by political elites. In addition, the sanctions

[8] During the national assembly debate, one member of parliament referred to the withdrawal as god's will. While that may be a very rational use of a divine argument, it is a different kind of rationality than the one taken into consideration here.
[9] Annika Jones, "Non-cooperation and the efficiency of the International Criminal Court", in Olympia Bekou and Daley Birkett, *Cooperation and the International Criminal Court. Perspectives from Theory and Practice*, Brill Nijhoff, Leiden/Boston, 2016, pp. 185-209.
[10] During the national assembly debate, the minister of justice argued that parliament must vote in favour of the proposed withdrawal in order to preserve Burundi's independence.
[11] China and Russia voted against UN Human Rights Council resolution A/HRC/33/L.31.
[12] UN Commission on Human Rights, *The adverse consequences of economic sanctions on the enjoyment of human rights. Working paper prepared by Mr. Marc Bossuyt*, UN Doc E/CN.4/Sub.2/2000/33, 21 June 2000.

"Should the Burundian government wish to obstruct the work of the ICC, it does not necessarily need to withdraw from the Rome Statute."

were instrumental in the government's largely successful buck-passing strategy. For instance, detainees in Mpimba central prison, one of the most vulnerable groups in society, blamed food shortages on the embargo, not on the government.[13] Other examples as well show how governments sometimes skillfully incorporate international sanctions in their legitimation strategy at the domestic level.[14] Seen from this perspective, the withdrawal has a domestic political benefit. By finger-pointing the international community, here represented by the ICC, the government seeks to safeguard its own legitimacy in case the strained international relations have increasingly adverse consequences on people's income and well-being.

6. Does the withdrawal enable the government to obstruct the work of the ICC? If so, that would constitute an important additional benefit of the withdrawal. There is a legal dimension to this question, which we deal with below. There is, however, more importantly, convincing empirical evidence that a withdrawal is not necessary for obstructing ICC investigations. The recent Kenyan case, in which an incumbent head of state was indicted, shows that even without withdrawal a government can *de facto* refuse to cooperate with the ICC – and do so without any international sanctions. In December 2014, facing a lack of evidence mainly as a result of orchestrated obstruction, the ICC prosecutor withdrew the charges against President Kenyatta and in March 2015, the trial chamber terminated the proceedings.[15] In other words, should the Burundian government wish to obstruct the work of the ICC, it does not necessarily need to withdraw from the Rome Statute. The Burundian government's desire to insulate itself from ICC investigations therefore is not a convincing argument to explain a Burexit.

7. A final[16] possible benefit of the withdrawal relates to its legal consequences. Does parliament's vote in favour of withdrawal end Burundi's obligations under the ICC Statute?

Withdrawals are the subject of article 127 of the Rome Statute. They take effect one year after the date of receipt of the state's notification (paragraph 1). The second paragraph reflects general international treaty law, namely that a withdrawal does not discharge the state from the obligations arising while it was a party to the Rome Statute. At first sight, Burundi's withdrawal therefore does not alter its existing obligations. If this supposed benefit motivated the government's decision, it seems to have been ill-advised by its legal experts – which renders this hypothesis highly unlikely.

More specifically, however, article 127 states that a 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 question that arises here is what is meant by "*under consideration*" by the court? Does "*consideration*" refer to the *investigation* stage only or should it be interpreted more broadly so as to also include the

[13] Personal field observation, Mpimba central prison, Bujumbura, June 1998. For a much more scientific analysis of the various effects of the sanctions, see Julia Grauvogel, "Regional sanctions against Burundi: the regime's argumentative self-entrapment", *Journal of Modern African Studies*, Vol. 53, N° 2, 2015, pp. 169-191.
[14] Julia Grauvogel and Christian von Soest, "Claims to legitimacy count: why sanctions fail to instigate democratisation in authoritarian regimes", *European Journal of Political Research*, Vol. 53, N° 4, 2014, pp. 635-653.
[15] Susanne Mueller, "Kenya and the International Criminal Court: politics, the election and the law", *Journal of Eastern African Studies*, Vol. 8, N° 1, 2014, pp. 25-42.
[16] This *Brief* is by no means meant to be exhaustive. The author welcomes additional arguments that may help to understand the Burexit at stef.vandeginste@uantwerpen.be.

Rome Statute

Article 127 Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

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. 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.

preliminary examination stage?[17] The ICC Prosecutor stressed the important difference between these two stages when announcing the opening of a preliminary examination on Burundi on 25 April 2016.[18] If after the preliminary examination she concludes that there is a reasonable basis to proceed with an investigation, she shall submit to the pre-trial chamber a request for authorization of an investigation, together with any supporting material collected. In accordance with article 15 of the Rome Statute, the pre-trial chamber may then authorize or refuse the commencement of an investigation. As noted by the Prosecutor herself, there is no timeline for a decision following a preliminary examination.[19] In case the pre-trial chamber authorizes the commencement of an investigation before the end of the year following the notification of Burundi's withdrawal, there is no doubt that the investigation can continue and that Burundi's obligation to cooperate is not affected by the withdrawal. If, however, the investigation is not authorized before the end of that one-year period, the impact of the withdrawal is less clear. For obvious reasons, there is no case-law on the interpretation of article 127 yet and scholarly opinion on its interpretation seems to be divided.[20] A timely decision by the pre-trial chamber would avoid the ambiguity. There are, however, two alternative scenario's in which a pre-trial chamber authorization of a commencement of investigations is not necessary: a referral of the Burundi situation either by the UN Security Council acting under Chapter VII of the UN Charter (politically unlikely at this moment) or a referral by another state party to the ICC Statute, in accordance with article 14 of the Statute. In those cases, contrary to the current scenario of the Prosecutor acting *proprio motu* (at her own initiative), she must not request an authorization of an investigation.

From a cost-benefit analysis perspective, the Burundi government might speculate on the possibility that the ICC Prosecutor does not obtain a timely authorization of the commencement of an investigation by the pre-trial chamber and on the possibility that neither the UN Security Council nor any other state party to the Rome Statute refers the Burundi situation to the ICC before the expiry of the one-year period after the notification of its withdrawal. In that case, a legal battle is likely to take place around the interpretation of article 127. Unlike previous legal loopholes[21], however, this one will be filled by an international court, not by Burundi's own institutions.

[17] The French, equally authentic version of the Rome Statute is somewhat less ambiguous. The "consideration" of a case is equivalent to the "*examen*" in the French version, which suggests that the opening of an "*examen préliminaire*" (the equivalent of a "preliminary examination") is sufficient for a matter to be "under consideration".

[18] "*A preliminary examination is not an investigation but a process of examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute*" (ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, 25 April 2016).

[19] *Ibidem*.

[20] Compare Antonio Cassese, *The Rome Statute of the International Criminal Court. A Commentary*, Oxford University Press, 2002, p. 171-173 and Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Munchen/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, article 127. Both authors, however, refer to a scenario that is different than the one at stake here, namely that of crimes committed only after the notification of the withdrawal.

[21] Stef Vandeginste, "Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi", *Africa Spectrum*, Vol. 51, N° 2, 2016, pp. 39-63.